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VOLUME 184

PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE

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

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

AND

TABLE OF STATUTES CONSTRUED

MARCH—APRIL, 1911

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(184 FED.)

JUDGES

OF THE

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

FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. LE BARON B. COLT, Circuit Judge.....Providence, R. I.
Hon. WILLIAM L. PUTNAM, Circuit Judge.....Portland, Me.
Hon. FRANCIS C. LOWELL, Circuit Judge[1].....Boston, Mass.
Hon. CLARENCE HALE, District Judge, Maine.....Portland, Me.
Hon. FREDERIC DODGE, District Judge, Massachusetts.....Boston, Mass.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

SECOND CIRCUIT

Hon. CHARLES E. HUGHES, Circuit Justice.....Washington, D. C.
Hon. E. HENRY LACOMBE, Circuit Judge.....New York, N. Y.
Hon. ALFRED C. COXE, Circuit Judge.....Utica, N. Y.
Hon. HENRY G. WARD, Circuit Judge.....New York, N. Y.
Hon. WALTER C. NOYES, Circuit Judge.....New London, Conn.
Hon. MARTIN A. KNAPP, Circuit Judge[2].....Washington, D. C.
Hon. JAMES P. PLATT, District Judge, Connecticut.....Hartford, Conn.
Hon. THOMAS I. CHATFIELD, District Judge, E. D. New York.....Brooklyn, N. Y.
Hon. VAN VECHTEN VEEDER, District Judge, E. D. New York[3].....Brooklyn, N. Y.
Hon. GEORGE W. RAY, District Judge, N. D. New York.....Norwich, N. Y.
Hon. GEORGE B. ADAMS, District Judge, S. D. New York.....New York, N. Y.
Hon. GEORGE C. HOLT, District Judge, S. D. New York.....New York, N. Y.
Hon. CHARLES M. HOUGH, District Judge, S. D. New York.....New York, N. Y.
Hon. LEARNED HAND, District Judge, S. D. New York.....New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York.....Buffalo, N. Y.
Hon. JAMES L. MARTIN, District Judge, Vermont.....Brattleboro, Vt.

THIRD CIRCUIT

Hon. HORACE H. LURTON, Circuit Justice.....Washington, D. C.
Hon. WILLIAM M. LANNING, Circuit Judge, New Jersey.....Trenton, N. J.
Hon. GEORGE GRAY, Circuit Judge.....Wilmington, Del.
Hon. JOSEPH BUFFINGTON, Circuit Judge.....Pittsburg, Pa.
Hon. ROBERT WODROW ARCHBALD, Circuit Judge[4].....Washington, D. C.

[1] Died March 6, 1911.
[2] Appointed December 20, 1910. Designated to serve five years in Commerce Court.
[3] Appointed January 26, 1911.
[4] Appointed January 31, 1911. Designated to serve four years in Commerce Court.

Hon. EDWARD G. BRADFORD, District Judge, Delaware.....Wilmington, Del.
Hon. JOHN RELLSTAB, District Judge, New Jersey.....Trenton, N. J.
Hon. JOSEPH CROSS, District Judge, New Jersey.....Elizabeth, N. J.
Hon. JOHN B. McPHERSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. JAMES B. HOLLAND, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. CHAS. B. WITMER, District Judge, M. D. Pennsylvania[5].....Sunbury, Pa.
Hon. JAMES S. YOUNG, District Judge, W. D. Pennsylvania.....Pittsburg, Pa.
Hon. CHARLES P. ORR, District Judge, W. D. Pennsylvania.....Pittsburg, Pa.

FOURTH CIRCUIT

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
Hon. NATHAN GOFF, Circuit Judge.....Clarksburg, W. Va.
Hon. JETER C. PRITCHARD, Circuit Judge.....Asheville, N. C.
Hon. THOMAS J. MORRIS, District Judge, Maryland.....Baltimore, Md.
Hon. JOHN C. ROSE, District Judge, Maryland.....Baltimore, Md.
Hon. HENRY G. CONNOR, District Judge, E. D. North Carolina.....Wilson, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
Hon. WILLIAM H. BRAWLEY, District Judge, E. and W. D. South Car...Charleston, S. C.
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....Richmond, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
Hon. ALSTON G. DAYTON, District Judge, N. D. West Virginia.....Philippi, W. Va.
Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia.....Charleston, W. Va.

FIFTH CIRCUIT

Hon. JOSEPH R. LAMAR, Circuit Justice.....Washington, D. C.
Hon. DON A. PARDEE, Circuit Judge.....Atlanta, Ga.
Hon. A. P. McCORMICK, Circuit Judge.....Dallas, Tex.
Hon. DAVID D. SHELBY, Circuit Judge.....Huntsville, Ala.
Hon. THOMAS G. JONES, District Judge, N. and M. D. Alabama.....Montgomery, Ala.
Hon. WM. I. GRUBB, District Judge, N. D. Alabama.....Birmingham, Ala.
Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama.....Mobile, Ala.
Hon. WM. B. SHEPPARD, District Judge, N. D. Florida.....Pensacola, Fla.
Hon. JAMES W. LOCKE, District Judge, S. D. Florida.....Jacksonville, Fla.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....Atlanta, Ga.
Hon. EMORY SPEER, District Judge, S. D. Georgia.....Macon, Ga.
Hon. RUFUS E. FOSTER, District Judge, E. D. Louisiana.....New Orleans, La.
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....Shreveport, La.
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.....Kosciusko, Miss.
Hon. GORDON RUSSELL, District Judge, E. D. Texas.....Sherman, Tex.
Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....Dallas, Tex.
Hon. WALLER T. BURNS, District Judge, S. D. Texas.....Houston, Tex.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....Austin, Tex.

SIXTH CIRCUIT

Hon. JOHN M. HARLAN, Circuit Justice.....Washington, D. C.
Hon. HENRY F. SEVERENS, Circuit Judge[6].....Kalamazoo, Mich.
Hon. ARTHUR C. DENISON, Circuit Judge[7].....Kalamazoo, Mich.
Hon. JOHN W. WARRINGTON, Circuit Judge.....Cincinnati, Ohio.
Hon. LOYAL E. KNAPPEN, Circuit Judge.....Grand Rapids, Mich.
Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....Maysville, Ky.

[5] Appointed March 2, 1911, in place of Robert Wodrow Archbald, Circuit Judge.
[6] Resigned to take effect October 3, 1911.
[7] Appointed Circuit Judge to take effect October 3, 1911, in place of Henry F. Severens, Circuit Judge.

Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
Hon. HENRY H. SWAN, District Judge, E. D. Michigan[8].....Detroit, Mich.
Hon. ALEXIS C. ANGELL, District Judge, E. D. Michigan[9].....Detroit Mich.
Hon. ARTHUR C. DENISON, District Judge, W. D. Michigan[7].....Grand Rapids, Mich.
Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan[10]...Grand Rapids, Mich.
Hon. JOHN M. KILLITS, District Judge, N. D. Ohio ..... Toledo, Ohio.
Hon. HOWARD C. HOLLISTER, District Judge, S. D. Ohio.....Cincinnati, Ohio.
Hon. JOHN E. SATER, District Judge, S. D. Ohio.....Columbus, Ohio.
Hon. EDWARD T. SANFORD, District Judge, E. and M. D. Tennessee....Knoxville, Tenn.
Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....Memphis, Tenn.

SEVENTH CIRCUIT

Hon. WILLIAM R. DAY, Circuit Justice.....Washington, D. C.
Hon. PETER S. GROSSCUP, Circuit Judge.....Chicago, Ill.
Hon. FRANCIS E. BAKER, Circuit Judge.....Indianapolis, Ind.
Hon. WILLIAM H. SEAMAN, Circuit Judge.....Sheboygan, Wis.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.
Hon. JULIAN W. MACK, Circuit Judge[11].....Washington, D. C.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. FRANCIS M. WRIGHT, District Judge, E. D. Illinois.....Urbana, Ill.
Hon. J. OTIS HUMPHREY, District Judge, S. D. Illinois.....Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana.....Indianapolis, Ind.
Hon. JOSEPH V. QUARLES, District Judge, E. D. Wisconsin.....Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin.....Madison, Wis.

EIGHTH CIRCUIT

Hon. WILLIS VAN DEVANTER, Circuit Justice.....Washington, D. C.
Hon. WALTER H. SANBORN, Circuit Judge.....St. Paul, Minn.
Hon. WILLIAM C. HOOK, Circuit Judge.....Leavenworth, Kan.
Hon. ELMER B. ADAMS, Circuit Judge.....St. Louis, Mo.
Hon. WALTER I. SMITH, Circuit Judge[12].....Council Bluffs, Iowa.
Hon. JOHN E. CARLAND, Circuit Judge[13].....Washington, D. C.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....Little Rock, Ark.
Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas[14].....Ft. Smith, Ark.
Hon. ROBERT E. LEWIS, District Judge, Colorado.....Denver, Colo.
Hon. HENRY THOMAS REED, District Judge, N. D. Iowa.....Cresco, Iowa.
Hon. SMITH McPHERSON, District Judge, S. D. Iowa.....Red Oak, Iowa.
Hon. JOHN C. POLLOCK, District Judge, Kansas.....Topeka, Kan.
Hon. CHAS. A. WILLARD, District Judge, Minnesota.....Minneapolis, Minn.
Hon. PAGE MORRIS, District Judge, Minnesota.....Duluth, Minn.
Hon. DAVID P. DYER, District Judge, E. D. Missouri.....St. Louis, Mo.
Hon. ARBA S. VAN VALKENBURGH, District Judge, W. D. Missouri ..Kansas City, Mo.
Hon. W. H. MUNGER, District Judge, Nebraska.....Omaha, Neb.
Hon. THOMAS C. MUNGER, District Judge, Nebraska.....Lincoln, Neb.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....Fargo, N. D.
Hon. RALPH E. CAMPBELL, District Judge, E. Oklahoma..... ....Muskogee, Okl.
Hon. JOHN H. COTTERAL, District Judge, W. Oklahoma.....Guthrie, Okl.
Hon. JOHN A. MARSHALL, District Judge, Utah..... .....Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....Cheyenne, Wyo.

[7] Appointed Circuit Judge to take effect October 3, 1911, in place of Henry F. Severens, Circuit Judge.
[8] Resigned to take effect July 1, 1911.
[9] Appointment effective July 1, 1911, in place of Henry H. Swan, District Judge.
[10] Appointment effective October 3, 1911, in place of Arthur C. Denison, District Judge.
[11] Appointed January 31, 1911. Designated to serve one year in Commerce Court.
[12] Appointed January 31, 1911.
[13] Appointed January 31, 1911. Designated to serve two years in Commerce Court.
[14] Died April 17, 1911.

NINTH CIRCUIT

Hon. JOSEPH McKENNA, Circuit Justice.....Washington, **D. C.**
Hon. WILLIAM B. GILBERT, Circuit Judge.....Portland, **Or.**
Hon. ERSKINE M. ROSS, Circuit Judge.....Los Angeles, **Cal.**
Hon. WM. W. MORROW, Circuit Judge.....San Francisco, **Cal.**
Hon. WILLIAM H. HUNT, Circuit Judge[15].....Washington, D. C.
Hon. CORNELIUS H. HANFORD, District Judge, W. D. Washington.....Seattle, **Wash.**
Hon. OLIN WELLBORN, District Judge, S. D. California.....Los Angeles, **Cal.**
Hon. JOHN J. DE HAVEN, District Judge, N. D. California.....San Francisco, **Cal.**
Hon. FRANK H. RUDKIN, District Judge, E. D. Washington[16].....Spokane, Wash.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....Portland, **Or.**
Hon. EDWARD S. FARRINGTON, District Judge, Nevada.....Carson City, **Nev.**
Hon. FRANK S. DIETRICH, District Judge, Idaho.....Boise, **Idaho.**
Hon. WM. C. VAN FLEET, District Judge, N. D. California.....San Francisco, **Cal.**
Hon. ROBERT S. BEAN, District Judge, Oregon.....Portland, **Or.**
Hon. GEORGE DONWORTH, District Judge, W. D. Washington.....Seattle, **Wash.**
Hon. CARL RASCH, District Judge, Montana.....Helena, **Mont.**

[15] Appointed January 31, 1911. Designated to serve three years in Commerce Court.
[16] Appointed January 31, 1911.

CASES REPORTED

CASES ON REHEARING

CASES IN THE UNITED STATES CIRCUIT COURTS OF APPEALS IN WHICH REHEARINGS HAVE BEEN GRANTED OR DENIED

CASES

ARGUED AND DETERMINED

IN THE

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

MUTUAL LIFE INS. CO. OF NEW YORK v. SMITH.

(Circuit Court of Appeals, First Circuit. January 13, 1911.)

No. 877.

1. ANNUITIES (§ 1*)—NATURE OF POLICY—PUBLIC POLICY.

A deferred annuity contract issued by an insurance company, by which it contracted to pay the annuitant $1,000 yearly commencing at a fixed period in the future, provided the annuitant should be then alive, the payments to continue thereafter as long as he lived, was not invalid as contrary to public policy.

[Ed. Note.—For other cases, see Annuities, Cent. Dig. §§ 1–6; Dec. Dig. § 1.*]

2. BANKRUPTCY (§ 178*)—TRUSTEES—PROPERTY FRAUDULENTLY CONVEYED—ANNUITY—CANCELLATION—RECOVERY OF CONSIDERATION.

A bankrupt, having obtained money by a fraudulent transaction with others, purchased therewith certain deferred annuity contracts from defendant insurance company, by which the company obligated itself to pay the bankrupt $1,000 yearly under each contract, commencing at a future date, provided the bankrupt was then alive, payments thereafter to continue as long as the bankrupt lived; the insurance company having no notice that these contracts were purchased with money which the bankrupt had fraudulently obtained. *Held*, that since the insurance company was entitled to the benefit of the contracts so far as they were advantageous to it, and could not be placed in statu quo by cancellation thereof, the bankrupt's trustee was not entitled to recover the money so fraudulently paid therefor and to have the contracts canceled, but was only entitled to the benefit of whatever sum he might realize on a sale of the bankrupt's contingent interest therein.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 264–274; Dec. Dig. § 178.*]

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

Suit by Jeremiah Smith, Jr., as trustee in bankruptcy of one Dunning, against the Mutual Life Insurance Company of New York and others, to recover, as assets disposed of in fraud of creditors, premiums paid by the bankrupt for deferred annuity contracts. From a decree

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

for complainant (178 Fed. 510), the insurance company appeals. Reversed.

William D. Turner (Reginald Foster and Stephen S. Fitz Gerald, on the brief), for appellant.

Stanley R. Miller (Fish, Richardson, Herrick & Neave, on the brief), for appellee.

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

ALDRICH, District Judge. This is a bill in equity by a trustee in bankruptcy, who offers to surrender certain insurance contracts entered into between the bankrupt and an insurance company, and asks that the company be ordered to pay to the trustee upon their surrender all sums which the company received from the bankrupt.

The case is a novel one in the sense that it involves a kind of insurance or indemnity which has not been in general use, if in use at all.

One Edwin J. Dunning, who was insolvent at the time, secured from the Mutual Life Insurance Company of New York three policies, which are designated by the appellee, and perhaps correctly, as "deferred annuity contracts," whereby the company obligated itself to pay to Dunning $1,000 yearly under each contract or policy, commencing in 1916, 1921, and 1926, respectively, provided Dunning was then alive, and the payments were to continue as long as Dunning should live.

The total amount paid by Dunning for these policies or contracts was $4,920. There were three payments—one in January, another in February, and another in July, 1901.

There is no substantial argument against the general proposition that Dunning was insolvent, and that he was acting in general bad faith with respect to his creditors, and that he was scheming to get money by fraudulent means from the Brooks family, and perhaps others, which he never intended to pay; and we think the record discloses a condition of things from which it should be assumed that at a time at least as early as the date of the policies Dunning was engaged in transactions of a hazardous and fraudulent character, whereby he was to secure financial advantages and securities for which he never intended to pay; but we are not aware that the proofs establish any precise fact connecting any particular fraudulent transaction under which he was to receive money with the particular transaction of securing the deferred annuities or insurance. It is, however, probably quite true that the policies were paid for with money which he fraudulently obtained.

It is neither alleged nor argued that the insurance company had any knowledge of Dunning's fraudulent career, and it is admitted that the company acted in good faith and without having any ground to suspect the existence of any fraudulent intent on Dunning's part.

The position of the trustee in bankruptcy is that Dunning's payments were transfers in fraud of creditors, and that the insurance company, though acting bona fide, is not a purchaser for value, because it has not paid the purchase money, or secured it in such a manner that it cannot be relieved against payment.

In support of this position counsel rely upon that class of cases which are concerned with transactions between seller and purchaser, and transactions between grantors and grantees with respect to which it has sometimes, and perhaps generally, been held that the execution and delivery of nonnegotiable notes and bonds, and other things done by the purchaser or grantee less than actual payment before notice, do not constitute one a bona fide purchaser or grantee, and therefore that the creditors may have property restored to them where the purchaser or grantee may be placed in statu quo.

There is, of course, some diversity of authority in respect to the particular circumstances under which rescission and restoration is justifiable; but in our view we are not called upon to consider the large number of cases relating to such situations, because they have no direct application to the question involved in this case, and have very little bearing, if any, by way of analogy.

If we are right in this position, it is because the relations here are not those of seller and buyer, and because the insurance company was in no sense a purchaser. The fundamental idea of the remedy for restoration is that it directs itself against the purchaser, and if either of the parties to the insurance contract in question could be considered a purchaser it would be Dunning, while the remedy is sought against the insurance company.

The courts are, of course, reluctant to give any aid whatever to parties tainted with fraud; but this is not a case between the trustee in bankruptcy and Dunning, but between the trustee and the insurance company, against whom there is no suggestion of fraud, and is therefore a case where the rights between these particular parties do not depend so much upon the bad faith and the wrongful intent of Dunning, who is one of the parties to the contract, as upon the good faith and innocent intent of the insurance company, who is the other party to the contract.

As stated at the outset, the contract between the insurance company and Dunning, or the policy of insurance from the company to Dunning, if it may properly be called that, is novel in kind; but that is no reason why it should be rescinded by the parties or repudiated by the law, provided it does not offend the law or general considerations of public policy.

All insurance was once new, and insurance in its early stages covered few contingencies; but the business under the law has grown until the idea of insurance now spreads itself broadly over many subjects and many contingencies.

Generally speaking the contingency, so far as contingency is concerned, in life insurance, is death, with, of course, endowment plans, under which there is payment of a certain sum at a particular age.

The policies in question provide for payments of annuities beginning in 1916, if the insured is alive at that time, and for the continuance of annuities during his life.

Aside from what is urged in respect to the fraudulent purpose of Dunning to secure this insurance and pay for it by funds which were realized out of fraudulent transactions, and which, if used for such a purpose, would divert funds which equitably belonged to creditors,

we see very little to be urged against insurance of the nature in question, and, indeed, that does not go to the merit of the insurance itself. It is not unnatural that one should act upon the idea that, in the days when he is handling money, it is the part of wisdom to safeguard the period of old age, in which business and earning capacity will have become a thing of the past. Under modern conditions in the various industries, as well as in business and in official life, men are influenced to enter upon a particular work by various old age safeguards which become operative at the end of a specified period of service.

We see nothing, therefore, in the contract itself, disassociated from the general fraudulent purpose of Dunning, which offends public policy or any particular principle of law. The question whether the contract of insurance is one which should be repudiated upon principles of law, or as something offending public policy, is a very pertinent one, because, if the contract is a lawful and proper one in kind, the insurance company, acting in good faith, as it did, acquired certain rights and advantages upon which it is entitled to stand.

It is urged by the company that the nature of the contract and the business acts in pursuance of it by the insurance company put it in a situation where it is not possible to place it in statu quo.

It is suggested that brokers' commissions were paid, that the costs of doing business are an element, that the fund had been classified and entered upon its books, and had assumed a certain status with respect to other contingencies, and that there is no offer in the bill to place the insurance company in statu quo in these respects. But, however that may be, we think the other ground, that it has acquired rights and advantages upon which it is entitled to stand, involves weightier considerations.

The business of a mutual insurance company is in a degree for profit as well as for security, and the enterprise involves large expenditures; and whether the margin is one way or the other depends upon whether the contingencies are well or ill-advised; and if there is nothing in the contract itself which offends the law, there is no reason apparent why the company, if it has acquired advantages or rights under a particular transaction, should be deprived of its advantages obtained in good faith.

If there were no question of creditors, and if Dunning had died a week after the contract and before bankruptcy, the contingency upon which the insurance was to become effective would have ceased to exist, or if he should die any time before 1916 such would be the case. That was the insurer's side of the contract, and the right, being created in good faith and without any purpose to defraud, it is difficult to find any principle upon which the advantage can be wrested from the insurance company by Dunning's creditors. Whatever advantage Dunning is to receive under the contract would doubtless go to the creditors.

The plaintiff, as trustee in bankruptcy, in his bill, offers to surrender the contract to the insurance company; but the insurance company says it is entitled to stand upon the contract entered into on its part in good faith, and under which it has acquired certain rights, and that it is willing that the trustee shall succeed to all the rights of the insured,

and take all the benefits which may result under the contingencies and terms of the contract.

The trustee's position in this respect is that a right which is only partially operative in 1916, and not wholly operative until 1926, is not an available and efficient beneficial right in the bankruptcy sense, because the law contemplates that matters concerning bankruptcy estates must be speedily adjusted and closed.

We do not perceive that to be a justifiable legal or equitable ground for dispossessing the insurance company of its legitimate contractual rights and advantages.

The contingent right of the insured, like the statutory right to seize and hold and sell remainder and contingent interests in real estate, is doubtless something that the trustee may seize and hold for the benefit of the creditors, or doubtless he may waive it altogether under circumstances which justify it.

The decree of the Circuit Court is reversed, and that court is directed to dismiss the bill without prejudice to any right the trustee may have to claim whatever beneficial interest the bankrupt has, or may hereafter have, under the insurance contracts described in the bill; and the respondent, now the appellant, recovers its costs of this court, and of the Circuit Court, so far as the same can be paid from the estate in bankruptcy.

In re GOODRICH.

(Circuit Court of Appeals, First Circuit. December 2, 1910.)

No. 884 (original).

1. BANKRUPTCY (§ 229*)—PROCEEDINGS FOR CONTEMPT—PLEADING.
   In proceedings for contempt before a court of bankruptcy, the pleadings pro and con may be of a summary character, yet while perhaps no pleading on the part of the respondent is necessary, it is often advantageous to set out the defense in a definite manner with a view of bringing the issues clearly before the appellate tribunal.
   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 229.*]

2. BANKRUPTCY (§ 229*)—PROCEEDINGS FOR CONTEMPT—EVIDENCE.
   In proceedings against a bankrupt for contempt for refusal to comply with an order of the referee, whether, and the extent to which, the court will consider the prior proceedings in the bankruptcy matter, rests largely in its discretion, provided only that it gives the parties concerned notice of what it regards as evidence.
   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 229.*]

3. BANKRUPTCY (§ 229*)—PROCEEDINGS FOR CONTEMPT—EVIDENCE.
   In proceedings against a bankrupt for contempt for failure to obey an order of the referee, such order and whatever occurred before the referee may be referred to as having some weight pro and con, but the court should receive all material evidence relating to what preceded as well as what followed the referee's report, although it may show that the order was not justified.
   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 229.*]

Petition for Revision of Proceedings of the District Court of the United States for the District of Massachusetts.

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

In the matter of William H. Goodrich, bankrupt. On petition by the bankrupt to revise an order of the District Court. Order reopened, and case remanded.

J. Butler Studley (Brandeis, Dunbar & Nutter, on the brief), for petitioner.

Ephraim Fred Aldrich, for respondent.

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

PUTNAM, Circuit Judge. This is a petition to revise an order of the District Court, in Bankruptcy, as follows:

"At Boston, in said district, on the twenty-sixth day of May, A. D. 1910, upon the motion of E. Fred Aldrich, Esq., trustee, that the bankrupt be adjudged in contempt for failure to comply with the order of the referee, made on the 18th day of January, 1910, that the bankrupt forthwith turn over to the trustee the last ledger of the Goodrich Polish Company, meaning by that the ledger which contains the transactions of the Goodrich Polish Company from the close of ledger B, now in the hands of the trustee, up to and after the fire:

"Now, therefore, upon a full hearing had, and after hearing arguments of J. Butler Studley, Esq., of counsel for the bankrupt, and E. Fred Aldrich, Esq., trustee, and, after due consideration of the same,

"It is hereby ordered and decreed that the bankrupt is hereby adjudged in contempt of this court, and he is hereby ordered to turn over to the trustee in bankruptcy the book described in the referee's order within 15 days.

"And it is further ordered that in case of his failure so to do he stand committed to the marshal of this district, to be imprisoned until he obeys the order of this court, or is otherwise discharged by the process of law, or until the further order of this court."

This order followed an order by the referee as follows:

"It is therefore ordered that the bankrupt forthwith turn over to E. F. Aldrich, Esq., his trustee in bankruptcy, the last ledger of the Goodrich Polish Company, meaning by that the ledger which contains the transactions of the Goodrich Polish Company from the close of ledger B, now in the hands of the trustee, up to and after the fire."

Intervening was the following order, entered April 27, 1910, and which was duly served:

"Upon consideration of the certificate of George W. Stetson, referee in bankruptcy in the above-entitled case, dated February 23, A. D. 1910, bearing upon the contempt of the bankrupt in failing to comply with one of the orders of the referee aforesaid, to wit, to turn over to his trustee in bankruptcy the last ledger of the Goodrich Polish Company, meaning by that the ledger which contains the transactions of the Goodrich Polish Company from the close of ledger B (now in the hands of the trustee) up to and after a fire which was mentioned in the order of the referee, and on motion made in open court of E. F. Aldrich, trustee in bankruptcy in the above-entitled case,

"It is ordered that the said William H. Goodrich appear at this court as a court of bankruptcy to be holden at Boston, in the district aforesaid, on the twenty-seventh day of April, A. D. 1910, at 10 o'clock in the forenoon, and show cause, if any there be, why he, the bankrupt, should not be adjudged in contempt of this court, and

"It is further ordered that a copy of this order of notice be served on said William H. Goodrich by delivering the same to him personally, or by leaving the same at his last and usual place of abode in Campello, a part of Brockton, in said district, on or before the twenty-sixth day of April, 1910."

Whether the proceeding before us should have been by a writ of error, as in the ordinary course of a proceeding for criminal contempt, or whether by a revisory petition, was left by us in Re Cole, 163 Fed. 180, 183, 90 C. C. A. 50, 53 (23 L. R. A. [N. S.] 255), in an opinion passed down February 5, 1908, an open question. In reference thereto we used the following language:

"On the whole, we accept for this case the position that the proceeding in the District Court was by virtue of the statutory provision expressly authorizing it to compel obedience to its orders; that the way for any party dissatisfied with the conclusion of that court to reach us was by a petition for review; that on such petition we can revise any question of law as to which we may justly infer that the District Court reached a conclusion, whether formally expressed or not, and whether or not formally presented; and that, to that end, we may search, not only the record in that court, but also its opinions."

This seems to be consonant with the language of section 41b of the act of July 1, 1898 (chapter 541, 30 Stat. 556 [U. S. Comp. St. 1901, p. 3437]), referring to subject-matters like that now before us:

"The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court."

This question of the method of procedure we reserve, however, for further consideration on some future occasion if it becomes necessary, as no point in reference thereto is now made. Whichever the method, our holding that the order of the referee is of purely a civil character, and is governed by the rules as to evidence in civil proceedings, while an order like that entered here is of a criminal nature and is governed in large part by the rules relating to criminal proceedings, still stands.

A careful examination of the record shows that the learned judge of the District Court faithfully followed all the rules laid down by us in Re Cole, according to our opinions passed down on February 16, 1906 (144 Fed. 392, 75 C. C. A. 330), and on February 5, 1908 (163 Fed. 180, 90 C. C. A. 50, 23 L. R. A. [N. S.] 255). If the provision of the statute we have quoted has any effect here, it has effect only on the question whether this proceeding before us should be on a writ of error or a petition to revise. It leaves the rules of the common law applicable to a proceeding for this contempt in whatever way it arises. In Re Cole, as the case stood on February 16, 1906, there had been no preliminary order as in the case at bar; and here the notice and the order thereof for service which we have quoted, entered on April 27, 1910, form a sufficient pleading on the part of the promoter, according to the general practice pointed out in Re Cole. Perhaps with the respondent no pleading was necessary; but it is often advantageous to set out the defense in a definite manner, so that the court may pass on it intelligently with a view of bringing the issues clearly before the appellate tribunal. This, of course, should not be allowed to permit unnecessarily one set of pleadings after another, or in any way to cause

protracted delay. No complaint can be made in the present case of the pleadings on either side; and, in all respects, everything required in Re Cole has been fully satisfied. We find, therefore, only two errors suggested in the record, neither of which was especially anticipated by In re Cole, one of which needs only to be noticed, and the other will require further proceedings.

The first is the objection made on account of the learned judge of the District Court making use of the prior proceedings in the bankruptcy litigation. We understand that this included the full referee's report and order, the bankrupt's petition and schedules, and various other matters of record, and especially proceedings upon a claim offered by Walter E. Goodrich. The learned judge stated that he had referred to these matters; and it appears from the record that he informed the counsel for the bankrupt of that fact at the final hearing. The reference to the proof offered by Walter E. Goodrich seems to have been for the purpose of establishing the materiality of the ledger in question; and probably in the mind of the learned judge it was admissible for that purpose, although we do not understand that it rested on the trustee, in proceedings of this character, to show that the book was material, because the trustee was entitled by statute to all the account books of the bankrupt. That account books stand in the same category with any "document," and are covered by that word, is determined by the first section of the act of July, 1898. In Re Cole we give a very broad margin for an examination of the prior proceedings in the same case for the reasons there pointed out. Of course, there is always a probability of some limitation; but we have not examined this here, because it is very plain that no consideration which the court might have given to prior proceedings was prejudicial to the bankrupt with reference to this appeal.

Precisely how and at what time the court should receive information of the character objected to is ordinarily for the court itself to determine, provided only that it gives parties concerned a notice of what it regards as evidence, as was done in the present case. Although the notice was given at the close of the proceedings, it must be assumed that the District Court would have reopened the hearing on that particular point if reason therefor had appeared; while, of course, it also contributes to orderly proceedings in litigation, and to enabling the appellate tribunal to understand the rights of the parties, if all evidence is formally offered in such a way that its materiality may be ascertained and ruled on at the time it is offered.

There is much in the record in regard to the other objection, and much presented by counsel in reference to it; but we think we are at liberty to state what it all amounts to by reference to the opinion of the learned judge of the District Court. He says, in substance, that the bankrupt made no attempt to have the referee's order reviewed, and that, having declined the opportunity to have the order reviewed, he had no right to try on the present issue anything already determined by the referee. Therefore the court substantially ruled out all evidence which might have been produced before the referee, and apparently all which related to the issue tried by the referee, and ruled

that he would hear only evidence concerning what might have occurred after January 18, 1910, the time at which the referee's report was dated. The practical objections to these rulings upon the matter of this order in bankruptcy are especially insistent. The bankrupt is supposed to be stripped of his assets by the adjudication against him, and left, therefore, unable to furnish the funds for very thorough litigations; and especially for anticipating and neutralizing results which may be turned against him for subsequent purposes, more or less remote and distant from what was immediately under consideration. The referee's order was, of course, essential, because it was the basis of any proceedings against the bankrupt. Nevertheless it lacks all the careful provisions which surround a master's report in chancery to give it effect and weight. In the present case it covered a non sequitur. The referee made distinct findings to the effect that the ledger in question was in the custody of the bankrupt a few weeks before the proceedings, and that it was his duty to care for it; but he expressly stated that he was not certain as to anything further. He made no findings based either on inferences or on explicit proofs, that the ledger was in the possession of the bankrupt even as late as the beginning of the proceedings in bankruptcy. No specific finding made by him, therefore, sustained the order on which these present proceedings were based.

But all these incidental considerations are not necessary for the disposal of this petition. It is sufficient that we apply the principle that a judgment against a person in a civil case sustains none of the issues against the same person in criminal proceedings. In the present instance the order reported by the referee, and whatever occurred before him, may, under the liberal rules we have stated in Re Cole, be referred to as having some weight pro and con; but this cannot be accepted as justifying the District Court from failing to revise, on a proceeding like this, the question involved with an open mind. That court was holden to receive all material proofs relating to what preceded the referee's report, as well as to what followed it. Therefore, for this reason alone, the case must be recommitted for further proceedings in that court.

We have discovered nothing in any decision stated by either party which requires us to modify the views expressed in Re Cole.

The decree of the District Court appealed from is reopened, and the case remanded to that court for further proceedings in accordance with the opinion passed down on December 2, 1910; and the appellant recovers his costs of appeal so far as they can be paid from the estate in bankruptcy.

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

DODGE, District Judge. In July, 1907, the trustee of this estate filed a petition in which he asked the referee to order the bankrupt to turn over to him certain books of account and other books and papers alleged to be in the bankrupt's possession. After repeated hearings, involving delay which, unexplained, would seem exceptional, the referee ordered, on January 18, 1910, "that the bankrupt forthwith turn over to the trustee the last ledger of the Goodrich Polish Company, meaning by that the ledger which contains the

transactions of the Goodrich Polish Company from the close of ledger B. now in the hands of the trustee, up to and after the fire." The bankrupt made no attempt to have this order reviewed by the court, and the 10 days allowed by rule 15 of this court for doing so have expired. On February 28, 1910, the referee filed in court his certificate, dated February 23, 1910, from which it appears that the order to turn over the book referred to was duly served upon the bankrupt February 7, 1910, and that the bankrupt had never complied with it. On April 25, 1910, the trustee moved orally that the bankrupt be adjudged in contempt and punished accordingly, for willful failure to comply with the order. Upon order of notice to the bankrupt, returnable April 27th, to show cause why he should not be adjudged in contempt, there has now been a hearing, at which the bankrupt appeared and testified and was represented by counsel.

The bankrupt filed on April 27, 1910, a motion to dismiss the order to show cause and a demurrer thereto. I ruled that neither of these papers is properly applicable. An order to show cause, issued by the court, is not a pleading, and the party on whom it is served has nothing to do but appear and show cause according to it. The trustee filed a written motion on April 27th to the same effect as his oral motion, and this was filed without objection as of April 25th. Even if the motion to dismiss and demurrer be regarded as applying to the trustee's written motion, they still seem to me unnecessary. The proceedings are under section 41b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 556 [U. S. Comp. St. 1901, p. 3437]), which provides that the judge shall "in a summary manner hear the evidence as to the acts complained of." No pleadings of any kind on the bankrupt's part seem to be required or contemplated, still less dilatory pleadings like these. They may, however, be regarded, together with an "answer," sworn to by the bankrupt, also filed on April 27th, as putting on record a statement of the causes relied on by him why he should not be adjudged in contempt, and permitted for that purpose, whether strictly admissible or not.

In order to warrant the court in adjudging the bankrupt in contempt and punishing him accordingly, it is not enough to show that the referee's order has not been obeyed. It must be made to appear affirmatively that when the order was made the bankrupt had power to obey it and that the failure to obey was willful. This is settled, so far as this court is concerned, by the decision of the Court of Appeals for this Circuit in Re Cole, 163 Fed. 180, 90 C. C. A. 50, 23 L. R. A. (N. S.) 255, and the same decision affords an illustration of the amount of proof necessary for the purpose. In that case, after the referee had certified to the District Court his finding that the bankrupt was withholding and concealing $2,425 from the trustee, and his order, made upon that finding, that she pay over that sum to the trustee on or before a certain date, and after the District Court had sustained the referee's finding and order, and after a separate hearing had before the court upon a petition by the trustee to adjudge her in contempt and punish her for noncompliance with the order, which separate hearing was had as directed by the Court of Appeals (144 Fed. 392, 75 C. C. A. 330), and after the District Court, as the result of that hearing, had adjudged the bankrupt in contempt and ordered her imprisonment, the Court of Appeals reversed the judgment and order, on the ground that "there was in fact not sufficient evidence of the kind which the law requires on the exact issue pending here; that is to say, whether Mrs. Cole willfully refused to pay over moneys which it was necessary to show that she could pay over at the specific date to which the order of the court properly related." 163 Fed. 188, 90 C. C. A. 58, 23 L. R. A. (N. S.) 255.

The trustee's petition in Re Cole did not raise the exact issue defined as above by the Court of Appeals. It showed "only that Mrs. Cole had been ordered to pay and had not." It contained "no allegation that her failure to pay was willful, nor anything to show that it was not caused by mere inability." The Court of Appeals said that in strictness "this would be sufficient to put her on the defensive." It nevertheless proceeded to consider the evidence, because no objection had been raised on that account, and both parties had gone to trial on the merits, with no misunderstanding as to the fundamental questions involved. 163 Fed. 186, 90 C. C. A. 56, 23 L. R. A. (N. S.) 255.

The trustee's motion in the present case is that the bankrupt be adjudged in contempt and punished "for willfully having failed to comply with the order of the referee," but it contains no direct allegation that the failure was in fact willful, nor any allegation that it was not caused by mere inability to comply. It may be doubted whether in strictness this is enough to put the bankrupt on the defensive, and the objection is raised by him in his demurrer that there is no petition or motion stating the facts constituting the alleged contempt with sufficient clearness and accuracy. I do not think, however, that the case should be disposed of upon the question whether or not the motion is specific enough, because here, as in Re Cole, the case has been submitted upon its merits and with no misunderstanding as to the fundamental questions involved.

The evidence I have considered consists in the first place of an attested copy of the referee's order, made January 18, 1910, which accompanies and is referred to in his certificate of noncompliance with the order, filed here February 28, 1910. The referee has set forth, together with his order, the substance of the evidence before him and his findings, and upon the order and findings is the marshal's return of service of the paper upon the bankrupt.

I have also considered as evidence for the purposes of this hearing the bankrupt's petition and schedules and so much of the proceedings on record in the case as is referred to in my opinion dated August 11, 1906, upon a petition by certain creditors for a review of orders by the referee allowing a claim offered for proof against this estate by Walter E. Goodrich, who is further referred to below, appointing a trustee, and allowing the bankrupt's attorney to represent certain other creditors at the first meeting.

The bankrupt urged and requested me to rule that no part of the referee's report and order, and no findings of fact or rulings of law contained in it, could be considered as evidence against him in the present proceeding; also that the only evidence to be considered was the oral testimony heard by me, being all of it testimony introduced by the bankrupt. I ruled, not only that the referee's order and whatever else is contained in his certificate accompanying it is proper to be considered for the purposes of this hearing, but, further, that the bankrupt, having declined his opportunity to have the order reviewed by the court, had no right to retry at this hearing issues already determined by the referee. I further ruled that at least so much of the proceedings on record in the case as I have indicated above is evidence proper to be considered at this hearing. In re Cole, above referred to, 163 Fed. 188, 90 C. C. A. 58, 23 L. R. A. (N. S.) 255.

The referee found in making his order, among other things, that the bankrupt, whose own petition, filed April 1, 1905, began these proceedings, had formerly carried on business, either alone or in company with Walter E. Goodrich, as the Goodrich Polish Manufacturing Company in Campello; that, after a fire in the factory occupied by him for that purpose, he sold the business in August 1903, to two persons who continued the same business in the same factory until about December, 1903, and then removed it to Maine; and that with the business were transferred the books of account, papers, and everything relating to it. He found, also, however, that between June, 1903, and December, 1904, the bankrupt produced the books of account before referees who held hearings in Brockton and in Boston to determine the amount of his loss by fire, that the same books were in the bankrupt's possession or control after the hearings from December, 1904, to February, 1905, that in the latter month they were sent by Walter E. Goodrich to Maine, to the persons who had purchased the business, but that one of the books, being the ledger ordered to be surrendered to the trustee, was returned in March, 1905, by express, and received at the factory referred to in Campello, directed to Walter E. Goodrich. Walter E. Goodrich is the bankrupt's brother, and he had supervised the keeping of the Polish Company's books while its business was being carried on there, if he had no other connection with it. Lester O. Goodrich, another brother of the bankrupt, had a desk in the same factory at the time, and on his desk the book in question was last seen, according to the evidence before the referee.

The factory referred to was operated after December, 1903, when the Polish Company business was removed from it, by the Campello Box Company, of which the bankrupt was treasurer, until the spring of 1904; then by the bankrupt, who bought the Box Company's business, until July, 1904; then by Walter E. Goodrich, to whom the bankrupt sold out; then by Morton T. Goodrich, still another brother, to whom Walter E. Goodrich sold out; and Morton T. Goodrich was in control of it when the book arrived and was placed on Lester O. Goodrich's desk. The referee's conclusion from the evidence was: "In this case I am satisfied that the last ledger of the Goodrich Polish Company, described in the petition, was in the possession, or at least control, of the bankrupt, or those in his employ or with whom he was interested, within a few weeks prior to the bankruptcy, and that it was his duty to care for this in such a manner that it might be available for the settlement of his estate."

The book here in question is one of the books referred to in the bankrupt's schedule B6 by the words there inserted, "Columbia Shoe Dressing Company, books of the Trilby business, which were bought by them, Bath, Maine." It is, therefore, a book which, by his own showing, was material for the purposes of that examination for which section 7a9 of the bankruptcy act provides, and to which that section made it his duty to submit. It appears from the referee's report that it was within his power to obtain it and use it, when it was for his own interest to do so, in proving the amount of the loss by fire. It further appears that it was within his power to get it back from Maine in March, 1905. His petition and schedules are dated March 31, 1905, and the inference that it must have been sent for to be used in preparing them, or at least to be used in the bankruptcy proceedings, if thought best, is so strong that convincing proof to the contrary is required to overcome it. No other reason for getting it back from Maine at that particular time appears.

The evidence recited by the referee leaves the book, after its return from Maine, on the desk of one of the bankrupt's brothers in a factory under the control of another brother, and directed to Walter E. Goodrich, above referred to. In the opinion dated August 11, 1906. I have had occasion to find that in an attempt made before the referee by this same Walter E. Goodrich to prove a claim of more than $15,000 against this estate, based in great part upon alleged transactions relating to the Polish Company business, no books were produced to support the claim, there was strong reason to believe that he was in fact a partner in the polish business with the bankrupt, and the bankrupt under no liability to him whatever in respect of that business; also that his evidence, as well as that of the bankrupt, given in support of his claim, was characterized by want of candor and frankness. The evidence dealt with in that opinion further shows that, on the strength of his alleged claim of over $15,000, out of a total indebtedness of $39,631, Walter E. Goodrich had been active in opposing the election of the present trustee, and had co-operated to that end with one member of a firm of lawyers, counsel for the bankrupt before his petition was filed, while the other member of the firm was acting as the bankrupt's attorney in these proceedings.

The conduct of the bankrupt and his brother, Walter E. Goodrich, heretofore brought to my attention as above, in connection with their testimony heretofore given before the referee, as stated in the opinion dated August 11, 1906, seems to me not only to warrant, but to require, the conclusion that each of them is under a strong motive to keep the books of the Polish Company, not already surrendered, away from the present trustee, now charged with the duty of investigating the doings of that so-called company, or of the bankrupt under that name. Nor can I doubt, now that the bankrupt has made no attempt to appeal from the referee's findings and order of January 18, 1910, that I am justified in treating him as then in control of the book in question, and, therefore, as able to produce it and surrender it to the trustee, unless he shows affirmatively, by evidence not already passed upon, something which has happened to the book since it was returned to the factory in March, 1905, which makes its production impossible. If he intended to deal honestly with his creditors in the bankruptcy proceedings he was then about to institute, he cannot have mistaken the importance for that purpose of the

production by him of this and all the other Polish Company books—aside from the fact that the bankruptcy act made its production his duty. The circumstances shown I regard as fully warranting the conclusion that, if the book was in Walter E. Goodrich's control, it was in the bankrupt's control. To credit him with an honest purpose regarding the book is to exclude the supposition that he has merely forgotten or lost sight of it, as if it had been something of no significance or importance so far as his creditors or his duty were concerned. No ordinary excuse for not producing it could be accepted, still less an excuse which tends only toward a suspicion of his good faith.

The referee has not, it is true, made an express affirmative finding that the book was in the bankrupt's possession or control on January 18, 1910. But he has made an order which so plainly involves that conclusion from the evidence before him as to leave no room for doubt that such a finding is implied, especially now that the bankrupt has allowed the opportunity to pass for the correction of any such informality. I next consider what is offered by the bankrupt to oppose that conclusion.

The only evidence on his behalf at this hearing is his own testimony, that of his brother, Morton T. Goodrich, that of a Mr. Poole, and an agreement as to the testimony which would be given by his original attorney in the bankruptcy proceedings, if present in person.

The bankrupt himself testified that since January 18, 1910, he had made diligent search for the book all over his brother's place, in his own barn, stable, and basement, and in his brother's stable; that he had inquired of his brother, Walter E. Goodrich; that the book was not in the office of the Regal Shoe Company in Whitman, where he has been employed since April 30, 1905; that he knows of no place near his own house in Campello, or any other place, where the book is; that he has omitted nothing he could do, so far as he knows, to get the book since January 18, 1910; that it has not been in his possession at any time since that date; that he does not know where it is now, and cannot recall when he last saw it; that so far as he recalled he had not seen it since the insurance hearings; that he is now unable to produce it; that he knows of no reason why he should not produce it, if able; and that he knows of no person likely to know its whereabouts, of whom he has not inquired, since January 18, 1910. Evidence from him was offered to show that the book was not used in making up his bankruptcy schedules, that he had then no connection with the premises occupied by Morton Goodrich and had no control over them, and that at some time after March or April, 1905, and before 1910, those premises were cleaned out and all old papers there destroyed. I excluded this evidence, both on the ground that the bankrupt could not now retry questions settled by the findings of the referee from which he had never appealed, and also because, as was stated and not disputed, the same evidence was heard by the referee. He further testified that Lester O. Goodrich was in the South and Walter E. Goodrich in Salt Lake City at the time of this hearing; the latter having permanently given up his residence in Brockton and sold out his property at auction. It appeared that both these brothers had testified before the referee. Neither gave any evidence at this hearing. The factory referred to was, according to the bankrupt, about 100 feet from the house in which he was living at the time the book was received. It has since burned down, and no member of the bankrupt's family had anything to do with it for a year or more before it was burned.

Morton T. Goodrich testified that he did not know where the book in question was, and that he had not seen it since January 18, 1910; but he also testified that he had never made any effort to find it, and that he never knew it was in the factory referred to. Poole's evidence tended only to show that the bankrupt's reputation was good so far as he knew. The testimony which it was agreed would have been given by the bankrupt's former attorney was that he had known the bankrupt since 1882, had been counsel for him in many matters, that he never had the book referred to in his possession, that he never used it in making out the bankruptcy schedules, that he does not know where it is, and has never seen it since the insurance hearings.

The Court of Appeals said in Re Cole, above referred to, page 184 of 163

Fed., page 54 of 90 C. C. A. (23 L. R. A. [N. S.] 255): "It seems to be conceded on all sides that before committing for contempt the court should be satisfied beyond reasonable doubt of a willful refusal or a willful act on the part of the person proceeded against"—and on page 189 of 163 Fed., page 59 of 90 C. C. A. (23 L. R. A. [N. S.] 255), it approves language used by the Court of Appeals for the Fifth Circuit in Samel v. Dodd, 142 Fed. 68, to the effect that it must appear clearly and affirmatively from the record, notwithstanding the bankrupt's sworn denials, that he has the power to comply with the order made. This is the rule to be followed here, whether or not support for a rule less strict can be found elsewhere. See Re Marks (D. C.) 176 Fed. 1018. But its application, of course, depends on the particular facts of each case. The court said in Re Cole, page 189 of 163 Fed., page 59 of 90 C. C. A. (23 L. R. A. [N. S.] 255), that its conclusion could hardly become a precedent for any future case, and the decision nowhere indicates that a court may not be satisfied beyond a reasonable doubt, or find the bankrupt's ability to comply clearly and affirmatively shown from the record, when a sufficiently strong presumption of such ability appears, and he fails to meet and overcome it by reasonable explanation. In such a case a judgment in contempt has been recently sustained by the Court of Appeals for the Second Circuit. Re Stavrahn, 174 Fed. 330, 98 C. C. A. 202. Re Cole is there cited, without suggestion of dissent as to any rule laid down in it. The bankrupt had been ordered to pay over a sum of money to the trustee. Without appealing from the order, he had not obeyed it. The presumption that he could do so, created by the order and his failure to take any steps to review the order, was held not overcome by averments that he had no such sum in his possession or control, directly or indirectly, or any means of obtaining it, and therefore sufficient to warrant the court in finding that his failure to obey was willful.

When the question is whether the bankrupt had or not money enough on a given day wherewith to make a specified payment, it seems to me that the presumption against him might well be overcome by evidence of inability less complete in some aspects than would constitute a reasonable explanation in a case like this. The book here in question, important as it is in the administration of this estate, does not appear to have been required for any other purpose since the bankrupt filed his petition within a few days after the book arrived at his brother's factory. If it had become the property of the purchasers of the Polish Company business, as was somewhat urged, there is no evidence to show that it was ever sent back to them in Maine, or even that they wanted it sent back. To suppose that they attached importance to it as part of their property tends only to discredit the theory that the bankrupt and Walter E. Goodrich may have honestly lost it. The bankrupt's evidence before me, above set forth, might be accepted as a reasonable explanation, if it related to something with regard to which he was under no special responsibility. But the book in question is a book of account relating to his own estate, which he ought to have surrendered as soon as possible to the trustee. The trustee has long been trying in vain to get it. The evidence affords strong reason to believe it especially important as regards the large claim asserted by Walter E. Goodrich, and strong reason to suspect a motive on the bankrupt's part and that of Walter E. Goodrich to prevent its production, if possible. In view of all this, the finding seems to me justified that he has not overcome the presumption of his ability to produce the book and of his willful failure to do so, which arises from the circumstances of the case, the referee's order and findings, and his own failure to seek any review of that order.

I must, therefore, adjudge the bankrupt to be in contempt of this court, and order him to turn over to the trustee in bankruptcy the book described in the referee's order within 15 days; and I also order that in case of his failure so to do he stand committed to the marshal of this district, to be imprisoned until he obeys the order of this court, or is otherwise discharged by due process of law, or until the further order of this court.

CHICAGO, B. & Q. RY. CO. v. FRYE-BRUHN CO.

(Circuit Court of Appeals, Eighth Circuit. October 11, 1910. On Petition for Rehearing, January 17, 1911.)

No. 2,965.

1. APPEAL AND ERROR (§ 248*)—RECORD—NECESSITY OF EXCEPTIONS.
In the federal courts an exception, taken immediately on a ruling being made, is indispensable to a review of the ruling by an appellate court.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1432, 1435; Dec. Dig. § 248.*]

2. CARRIERS (§ 223*)—CONTRACT FOR CARRIAGE OF LIVE STOCK—ACTION FOR BREACH—DEFENSES.
Where a railroad company contracted to carry cattle, to be shipped from a quarantined district in Texas, from Kansas City to Seattle, at a stated rate per car, it cannot avoid liability for the damages caused by its breach of the contract, by its refusal to receive the cattle at Kansas City, on the ground that it was without facilities for transporting them under the conditions required by law with respect to cattle from a quarantined district.
[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 223.*]

3. COMMERCE (§ 52*)—INTERSTATE COMMERCE—POWER OF CONGRESS TO REGULATE—SHIPMENT OF CATTLE FROM QUARANTINE DISTRICT.
The provisions of Orders Nos. 106 and 107 of the Secretary of Agriculture, promulgated March 10 and 13, 1903, respectively, under authority of Act Feb. 2, 1903, c. 349, §§ 1, 2, 32 Stat. 791, 792 (U. S. Comp. St. Supp. 1909, pp. 1183, 1184), establishing quarantine districts for cattle and regulations to be observed by carriers in the shipment of cattle from such districts, and which provide (Order No. 107, § 4) that "cattle from said area may be transported by boat or rail for immediate slaughter" subject to such regulations, have the force of law and are paramount with respect to interstate shipments; and Code Wash. 1896, §§ 3216, 6431, which prohibit the introduction of Texas cattle into the state, so far as they conflict with such federal regulations, are void.
[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 48–52; Dec. Dig. § 52.*]

4. APPEAL AND ERROR (§ 1008*)—MATTERS REVIEWABLE—ACTION TRIED TO COURT.
Where a jury is waived in an action at law in a federal court, the findings of fact made by the trial court are not reviewable on error by the Circuit Court of Appeals.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3969; Dec. Dig. § 1008.*]

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

Action by the Frye-Bruhn Company against the Chicago, Burlington & Quincy Railway Company. Judgment for the plaintiff, and defendant brings error. Affirmed.

Edward S. Robert (James E. Kelby, on the brief, and Robert & Robert and William L. Becktold, of counsel) for plaintiff in error.

Arthur B. Shepley (Daniel N. Kirby, on the brief, and Nagel & Kirby, of counsel), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and REED, District Judge.

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

REED, District Judge. The Frye-Bruhn Company, a Washington corporation (which will be called the "plaintiff"), sued the Chicago, Burlington & Quincy Railway Company, an Iowa corporation (which will be called the "defendant"), to recover from it as a common carrier and forwarder of freight and property from Kansas City, Mo., destined to Seattle, Wash., damages because of its refusal to receive from the Missouri, Kansas & Texas Railway Company (which will be called the "M., K. & T. Co."), at said Kansas City, 21 carloads of cattle, aggregating 508 head, owned by the plaintiff and shipped by it from points near Lorena, Tex., over the M., K. & T. Co., consigned to itself at Seattle. For answer the defendant alleged, among other things, that when the cattle were offered to it by the M., K. & T. Co. at Kansas City they were infested with cattle "tick," which communicates splenetic or Texas fever to cattle not immune from such disease, and were brought to Kansas City by the M., K. & T. Co. from points in Texas within a quarantined district or area established by the Board of Animal Industry of the Department of Agriculture of the United States as authorized by a law of Congress, and in violation of that law and of the regulations of said Board of Animal Industry made pursuant thereto; that defendant had no separate pens or facilities for handling or caring for cattle so infested to be transported to Washington points, as required by the laws of the United States, and was not a common carrier of such cattle from Kansas City to points in Washington, or other far Western points; and that it refused for such reasons to receive or transport such cattle. It further answered that its alleged agreement to carry the cattle at $240 per car was less than its published rate, required by the acts of Congress, for carrying cattle in interstate commerce, and was, therefore, void. A jury was waived in writing, and the cause tried to the court, which resulted in a judgment for the plaintiff, and the defendant brings error.

The court made special findings of facts, upon which it based its judgment against the defendant, which in substance are:

That plaintiff in 1903 was engaged in the business of buying and slaughtering cattle and packing meat at Seattle, in the state of Washington; that the defendant was at such time a common carrier of cattle and other property from Kansas City, Mo., through connecting lines, to points in the state of Washington, and that its lines connected with the M., K. & T. Co., at Kansas City, Mo.; that in the latter part of April, 1903, the plaintiff sent its cattle buyer, one Kennedy, to Lorena, Tex., with instructions to purchase for it a lot of cattle at that and nearby places, provided he could get a rate of $240 per car for transporting them to Seattle; that, upon his arrival at Lorena, Kennedy took up the question of shipping the cattle with the M., K. & T. Co., which operated its line of road from that vicinity to Kansas City; that telegraphic communications then ensued between the proper officers of the defendant company and the M., K. & T. Co., whereby it was finally arranged that a rate of $240 per 36-foot car was given by the defendant to the plaintiff for the transportation of some 22 carloads of cattle from Lorena, Tex., by the M., K. & T. Co. to Kansas City, where they were to be delivered to the defendant, and it was to transport them through its connecting lines to Seattle;

that the M., K. & T. Co. was to have $55 of the agreed rate per car for transporting the cattle to Kansas City, and the defendant the remainder for transporting them to Seattle; that pursuant to such arrangement Kennedy on May 6th delivered to the M., K. & T. Co., at stations on its line near Lorena, 21 carloads of cattle consigned to plaintiff at Seattle at a through rate of $240 per 36-foot car, upon bills of lading which provided that the M., K. & T. Co. should carry the cattle to Kansas City and there deliver them to the defendant as its connecting carrier, and across the face of each was stamped the words "Southern Cattle, Subject to Quarantine Regulations." The cattle were intended for immediate slaughter at Seattle, their destination, were shipped as such by plaintiff, and the M., K. & T. Co. was advised to that effect. The cattle arrived at Kansas City on May 8th, were unloaded by the M., K. & T. Co. into quarantine pens, and on the following day tendered to the defendant for forwarding, and their transportation demanded by the M., K. & T. Co. and by plaintiff's agent Kennedy; but defendant refused to receive or transport them. As the result of defendant's refusal, the cattle remained in the quarantine pens in Kansas City until May 15th, when they were sold for plaintiff's account, and at a loss to it of the amount for which the judgment was rendered.

Upon the arrival of the cattle in Kansas City, more than half of them were actually infested with the Texas cattle tick; that the disease known as Texas fever is communicated solely by the bite of such tick, which, however, can travel but a few feet; that cattle from an infected area are immune from the disease, and their meat is healthy; but the disease, if contracted by Northern cattle which have never had it, is almost always fatal; that the fact that these cattle were actually infested with ticks was learned by defendant through an examination made by the United States inspector on May 11th; that defendant had no separate quarantine pens at Kansas City, in which to unload the cattle for food, water, and rest; that at and prior to the date in question defendant regularly received at, and transported from, Kansas City cattle which had been shipped to that place from the quarantine area, consigned to Chicago, Omaha, and St. Louis, but did not so receive or transport them if consigned to Seattle or other Western points. Order No. 107 of the Board of Animal Industry is set out in the findings, from which it appears that Lorena and nearby stations in Texas are within the quarantine district or area described in said order, and that cattle are not to be shipped by any railroad company from such quarantine district, except under certain conditions, which the court found were not complied with by plaintiff's agent, Kennedy, nor by the M., K. & T. Co., in the shipment of these cattle from Texas to Kansas City.

The eighth paragraph of the court's findings reads as follows:

"(8) Lorena, Temple, and Taylor, Tex., from where the cattle were shipped, are south of the quarantine line described in order No. 107 of the Board of Animal Industry of the United States and amendments thereto, and within the area designated by said order in which cattle were infected with the disease known as splenetic or Texas fever. This fact was known to defendant at the time it solicited this shipment from the M., K. & T. Co. There was no

provision made by the government authorities for inspection of cattle coming from these points, and no government inspection could have been had."

The defendant contends in argument that paragraph 8 and others of the findings of fact are without any support in the testimony; also that the court erred in all of its findings of fact, and in refusing to find certain facts, and declare the law as requested by it. But we are precluded from considering or determining any of these questions, for the record before us fails to show that any exceptions were taken to any of the findings, or to the refusal to find the facts, or declare the law, as the defendant claims to have requested. The judgment was rendered June 16, 1908, and the findings of fact filed on that date. On September 18th following the defendant filed its petition for a writ of error, together with an assignment of errors, as required by the rules of this court. In the assignment of errors then filed the defendant states that it excepted to paragraph No. 8 of the findings of fact as being without any support in the testimony, and that other findings were contrary to the testimony of the plaintiff; that defendant requested the court to find certain facts and make certain declarations of law, which it refused to do; and that it duly excepted to such refusal at the time thereof. These statements so made are without support in the record; for, aside from the assignment of errors, it nowhere appears that defendant requested the court to find any fact, make any declaration of law, that it refused to do so, or that defendant excepted to any such refusal. The office of an exception, in practice, is to challenge the correctness of any ruling made by the trial court during the progress of the trial, to the end that it may be corrected by the court itself, if, upon its attention being called thereto, it deems it to be erroneous, and to lay the foundation for its review, if necessary, by the proper appellate tribunal. In the courts of the United States such an exception, taken immediately upon the ruling being made, is indispensable to a review of the ruling by the appellate court. Railway Co. v. Heck, 102 U. S. 120, 26 L. Ed. 58; Newport News, etc., Ry. Co. v. Pace, 158 U. S. 36, 37, 15 Sup. Ct. 743, 39 L. Ed. 887; Potter v. United States, 58 C. C. A. 231, 122 Fed. 49, 55. There might be difficulty in finding in the bill of exceptions sufficient evidence to support the eighth paragraph, and perhaps others, of the findings of fact, if we were at liberty to review the evidence upon which they are based; but for the reasons stated we are precluded from so doing.

It is not disputed that the facts as found warrant a judgment against the defendant; but it is contended that it should have been allowed to offset against the damages found for plaintiff the full amount of its published rate of $240 per car for transporting cattle from Kansas City to Seattle, instead of $185, for which it had agreed to transport them, and which the trial court found was the reasonable cost of such transportation. This contention is upon the theory that defendant's agreement to transport the cattle for $185 per car was in effect an agreement for a rebate, therefore a violation of the interstate commerce law, and void, and that, notwithstanding such agreement, it is entitled to recover the full published rate for transporting the cattle. The difficulty with this contention is that defendant did

not transport the cattle, but refused to do so. It is not, therefore, entitled to recover anything for their transportation, and no question of an unlawful rebate is involved. The court, in finding the value of the cattle in Seattle, fixed $185 per car as the reasonable cost of transporting them from Kansas City. There is no evidence that this was not the reasonable cost of their transportation; nor is there any evidence or finding as to what defendant's published rate per car, or otherwise, was for the transportation of cattle from Kansas City to Seattle, or the joint rate from Texas common points to Seattle. There is testimony tending to show that the rate at which defendant agreed to carry the cattle would have gone into effect in three days, if it had been filed with the Interstate Commerce Commission, and would have been a legal rate. If defendant had filed such rate, or caused it to be filed by the M., K. & T. Co., it would have been one for which the plaintiff could have legally procured the transportation of its cattle from Kansas City to Seattle, and therefore the reasonable cost of the transportation.

It is further contended that the laws of Montana, Wyoming, and Washington, through which it would be necessary for the defendant to carry the cattle to their destination, forbade under heavy penalties the transportation through such states of cattle from a quarantined area, except upon certain conditions with which it was unable to comply, and that it was, therefore, justified in refusing to receive them. But if defendant solicited their shipment, knowing the cattle were from the quarantined area, as found by the court, and agreed to transport them to Seattle through said states, it was its duty to be prepared to comply with the conditions upon which it might lawfully carry them, and it cannot justify its refusal to accept them for such carriage upon the ground that it was not prepared to comply with such conditions.

The conclusion therefore is that the judgment must be affirmed; and it is accordingly so ordered.

Affirmed.

On Petition for Rehearing.

The defendant has presented a petition for rehearing in which it is alleged, among other things, that the court has mistakenly assumed in the opinion filed that the law of Washington permitted the importation of the cattle in question into that state upon certain conditions with which the defendant might have complied. The part of the opinion in which the alleged mistake occurs reads in this way:

"But if it [the defendant] solicited their shipment, knowing the cattle were from the quarantined area, as found by the court, and agreed to transport them to Seattle through said states, it was its duty to be prepared to comply with the conditions upon which it might lawfully carry them, and it cannot justify its refusal to accept them for such carriage upon the ground that it was not prepared to comply with such conditions."

In their original brief counsel for defendant say:

"The states through which the Burlington and Northern Pacific Railroads ran forbade the carriage of cattle when unaccompanied by a bill of health, and when the road had no quarantine pens."

And sections of the statutes of Missouri, Nebraska, Wyoming, Montana, and sections 3216–3219 and 6431 of the Washington Code (1896) are cited in support of the statement. This impliedly admits that if a "bill of health" so-called, had accompanied the cattle, or if the roads had had the requisite quarantine pens in which to unload the cattle during transit, they might under the state laws have lawfully carried them to their destination, and the state statutes cited were not specifically noticed in the opinion. It is still admitted, as we understand counsel for defendant, that the laws of each of these states, except Washington, conform substantially to the rules and regulations of the Department of Agriculture, made pursuant to the laws of Congress concerning the interstate transportation of Southern cattle, and that the cattle in question might lawfully have been carried into or through those states upon complying with such laws and regulations. In the petition for rehearing section 6431 of the Code of Washington (1896) is set out for the first time, as follows:

"Any person or persons introducing or bringing into said state any Texas cattle, or cattle infected with the Texas cattle disease, or Spanish fever, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be imprisoned in the county jail for a term not exceeding 12 months, or fined in a sum not less than $5,000, or be both fined and imprisoned, in the discretion of the Court."

And section 3216 reads:

"The introduction of Texas cattle or cattle infected with what is known as the Texas cattle disease or splenetic fever, into the state of Washington is hereby prohibited."

It is the contention of the defendant that these sections do not conflict with any law of the United States and forbade, under the penalty prescribed, its carriage of them into the state of Washington and justified its refusal to receive them; and Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108, is cited in support thereof. We are unable to assent to this. The sections quoted from the Washington Code are in no sense an inspection law, or other proper police regulation, but by their terms exclude absolutely from the state of Washington all Texas cattle, though they may be entirely free from disease of any kind. The sections were enacted in 1869, and are so broad as to fall, apparently, within the class of legislation condemned by the Supreme Court in Hannibal & St. J. Ry. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527, and later cases in which the rule there announced is reaffirmed. Whether or not these sections might be upheld in part, as suggested by counsel for defendant, we need not stop to inquire; for, if not repealed or modified by later acts, they must, upon the enactment by Congress of laws within its rightful power to enact, and with which they conflict, yield to the congressional act.

In 1895 the Legislature of Washington passed an act creating the office of State Veterinarian, and empowered him to establish quarantine against contagious and infectious diseases, and, with the concurrence of the Governor of the state, make the necessary rules and regulations with respect thereto, and for this purpose he and the Governor were authorized to co-operate with the government of the United States in enforcing any law of Congress for the prevention

and spread of such diseases in that state. Chapter 167, Laws Wash. 1895, incorporated as sections 4653–4657 in the Code of Washington (Pierce's Code 1905 [sections 3050–3054, Ballinger's Ann. Codes & St.]). It is quite probable that this act was passed in response to an invitation extended by the Secretary of Agriculture to the executive authority of the state of Washington, pursuant to section 3, c. 60, of the act of Congress of May 29, 1884 (23 Stat. 32); and presumably the State Veterinarian and Governor of Washington have performed the duties required of them by this law, established the quarantine, and promulgated the requisite rules and regulations necessary for their co-operation with the Department of Agriculture of the United States in the enforcement of proper quarantine regulations for the prevention and spread of such diseases in the state of Washington. Counsel have not seen fit to furnish us with a copy of such quarantine order and the rules promulgated by the state officers pursuant to that act, if any. We are justified in assuming that, if any were adopted, they do not conflict with the law of Congress and the rules and regulations established by the Secretary of Agriculture pursuant thereto. But however this may be, we are of the opinion that chapter 60 of the act of Congress of May 29, 1884, above authorizes the interstate shipment of cattle to market for slaughter, though they may be infected with the disease known as splenetic or Texas fever. Section 6 of that act contains a proviso as follows:

"Provided that the so-called splenetic or Texas fever shall not be considered a contagious, infectious or communicable disease within the meaning of this act, as to cattle being transported by rail to market for slaughter when the same are unloaded only to be fed and watered in lots on the way thereto."

After the decision in the case of Reid v. Colorado, and obviously in view of that decision, Congress by its act of February 2, 1903 (32 Stat. 791 [U. S. Comp. St. Supp. 1909, p. 1183]), conferred upon the Secretary of Agriculture larger power, to be exercised exclusively by him, over the interstate movement of cattle infected with, or which have been exposed to, contagious, infectious, or communicable diseases. By sections 1 and 2, c. 349, of that act the Secretary of Agriculture is authorized and directed to establish from time to time such rules and regulations as he shall deem necessary concerning the interstate shipment of live stock, from any place within the United States into or through any other state or territory, which he may have reason to believe are infected with any infectious, contagious, or communicable diseases, and to take such measures as he may deem proper to prevent the introduction or dissemination of such diseases from one state or territory to another, whenever in his judgment such action is advisable, to guard against the spread of such contagion; and all such rules and regulations shall have the force of law. It is also provided that whenever an inspector of the Bureau of Animal Industry shall issue a certificate stating that he has inspected any cattle or other live stock which are about to be driven or transported from one state or territory to another, and has found them free from splenetic or Texas fever infection, or any other infectious, contagious, or communicable disease, such animals so inspected and cer-

tified may be driven or transported from such place into or through any other state or territory without further inspection, except such as may be at any time ordered by the Secretary of Agriculture; and all such animals shall at all times be under the control and supervision of the Bureau of Animal Industry for the purpose of such inspection.

Pursuant to this authority the Secretary of Agriculture on March 10 and 13, 1903, promulgated Orders Nos. 106 and 107, respectively, establishing a quarantine line and regulations to be observed by the carrier in the interstate shipment of cattle from an infected state or area, and gave public notice thereof, as directed by the act, to transportation companies, stockmen, and others, and that the disease known as splenetic, Southern, or Texas fever existed among cattle in a designated area, which included the state of Texas. Section 4 of Order No. 107 provides "that cattle from said area may be transported by rail or boat for immediate slaughter," and when so transported certain regulations must be observed, among which are that when any cattle in course of transportation from said area are unloaded above —north, east, or west of—the line so established, for food or water, or for other purposes, said cattle shall be placed in yards or pens set apart for infected cattle, and no other cattle shall be admitted thereto. The kind of pens into which the cattle shall be unloaded during transit and upon arrival at their destination is designated, and the observance is directed of all local applicable sanitary regulations prescribed by the proper officer of the state where they are unloaded.

It is true that Order No. 107 as amended March 14, 1903, so far as it adopted a quarantine line established by a state which was wholly within such state and not along its borders, was held invalid by the Supreme Court as to the portion of such line wholly within such state, because it was applicable to intrastate as well as the interstate shipments of cattle. Railroad Co. v. McKendree, 203 U. S. 514, 27 Sup. Ct. 153, 51 L. Ed. 298. But it is not claimed that this affects the regulations to be observed during the transportation from one state to another and upon the arrival of the cattle at their destination.

The cattle in question were shipped from Texas for immediate slaughter upon their arrival at Seattle, and the Missouri, Kansas & Texas Company was so advised at the time of their shipment. The laws of Congress and the orders of the Secretary of Agriculture made pursuant thereto are controlling, and sections 3216 and 6431 of the Code of Washington (1896), as above quoted, if in force at the time of that shipment, are in direct conflict therewith, and must yield to them. Gulf, etc., Ry. Co. v. Hefley, 158 U. S. 98–102, 103, 15 Sup. Ct. 802, 39 L. Ed. 910; Asbell v. Kansas, 209 U. S. 251–257, 258, 28 Sup. Ct. 485, 52 L. Ed. 778.

Whether or not the defendant might rightly have refused to receive the cattle, if it had not joined with the Missouri, Kansas & Texas Company in the agreement with plaintiff for their transportation to Seattle, we need not determine, for it joined in that agreement prior to their shipment from Texas. After it so agreed and the Missouri, Kansas & Texas Company had performed its part of the agree-

ment by carrying the cattle to Kansas City, the defendant could not then refuse to receive them "because it had no separate pens in which to unload them during transit," the sole ground of its refusal to receive them, without incurring a legal liability for such refusal. We are therefore of the opinion that the defendant cannot escape legal responsibility for refusing to transport the cattle because it did not have the requisite pens "in which it could unload them during transit."

It is also alleged that the opinion mistakenly says, "Nor is there any *evidence* or finding as to what defendant's published rate per car or otherwise was for the transportation of cattle from Kansas City to Seattle, or the joint rate from Texas common points to Seattle;" for, it is said, there is such evidence. Whether so or not the facts as found by the trial court are what control. Rev. St. U. S. §§ 649, 700 (U. S. Comp. St. 1901, pp. 525, 570); Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; The City of New York, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84; Lehnen v. Dickson, 148 U. S. 71–72, 13 Sup. Ct. 481, 37 L. Ed. 373; U. S. Fidelity & Guaranty Co. v. Board of Com'rs, 145 Fed. 144–151, 76 C. C. A. 114. The trial court found that:

"Prior to May 10, 1903, the defendant had in effect a filed and published rate from Lorena and other Texas points to Seattle."

The rate is not stated, but the finding obviously refers to the joint rate agreed upon between the defendant and the Missouri, Kansas & Texas Company, which was filed with the Interstate Commerce Commission, to cover the shipment of plaintiff's cattle to Seattle. The cattle were tendered to the defendant in Kansas City on May 9th. On that date the rate, according to the finding, was in effect, and the cost to plaintiff for transporting them from Kansas City to Seattle would then have been $185 per car, the defendant's share of the agreed rate, as the court found.

The petition for rehearing is denied.

HATCHER v. NORTHWESTERN NAT. INS. CO. OF MILWAUKEE, WIS.

(Circuit Court of Appeals, Eighth Circuit. October 19, 1910.)

No. 3,282.

1. APPEAL AND ERROR (§ 171*)—PRESENTATION IN LOWER COURT OF GROUNDS OF REVIEW—ISSUES AND THEORY OF CAUSE.

In the federal courts, in actions at law, only questions presented to and determined by the trial court will be reviewed by an appellate court; and when a cause is tried upon an issue or theory presented by one of the parties in the trial court, that party will not be permitted in the appellate court to present a different issue or theory for its consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053–1055; Dec. Dig. § 171.*]

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

2. APPEAL AND ERROR (§ 270*)—EXCEPTIONS—NECESSITY—RULING SUSTAINING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT.

Where no exception was taken to the ruling of a federal court sustaining a motion for judgment notwithstanding the verdict, the grounds of such ruling are not reviewable in an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1609; Dec. Dig. § 270.*]

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

Action by the Northwestern National Insurance Company of Milwaukee, Wis., against R. E. Hatcher. Judgment for plaintiff, and defendant brings error. Affirmed.

John A. Sorley (A. W. Fowler, on the brief), for plaintiff in error.
Charles F. Fawsett, for defendant in error.

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

REED, District Judge. The Northwestern National Insurance Company of Milwaukee, a Wisconsin corporation, which will be called the plaintiff, sued R. E. Hatcher the plaintiff in error, who will be called the defendant, to recover of him damages for issuing, as agent of the plaintiff, its policy of insurance upon an alleged prohibited risk. There was a judgment for the plaintiff, and the defendant brings error.

The petition alleges, in substance: That on January 15, 1907, the defendant was plaintiff's agent at Fargo, N. D., duly authorized to issue its policies, under its rules and the instructions given to him by plaintiff, insuring real and personal property against loss or damage by fire. That on that date the defendant issued the plaintiff's policy insuring the Bristol & Sweet Company in the sum of $2,500 for one year against loss or damage by fire on their "stock in trade, consisting principally of harness, saddlery hardware, whips," and other specified articles of personal property while contained in a two-story brick building in the city of Fargo, N. D. That the policy contained a provision indorsed thereon as follows:

"Permission is hereby given assured to manufacture horse collars (by hand) in building herein described."

That Bristol & Sweet Company were then engaged in manufacturing by hand horse collars in said building, and plaintiff had instructed defendant by written and printed instructions not to write any insurance or issue any policy on its behalf upon any property or building in which horse collars were manufactured; that such a risk was an absolutely prohibited risk by this plaintiff, which was well known and understood by defendant. That defendant, in direct violation of such instructions, willfully disregarded his duty as agent of the plaintiff, and wrongfully issued and delivered said policy to the assured as aforesaid. That said property was destroyed by fire on January 16, 1907, and before plaintiff knew of the issuance of its policy. That afterwards it was obliged to and did adjust and pay said loss to the

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

assured; and it asks judgment against the defendant for the amount so paid.

The defendant answered, admitting that he was agent of plaintiff, and issued its policy to the Bristol & Sweet Company January 15, 1907, and that the property was destroyed by fire on January 16th, as alleged. He further answered that said policy was issued upon the condition, indorsed thereon, that the assured was permitted to manufacture horse collars by hand only in a portion of the building covered by said policy, and alleged that when said policy was issued, and at the time of the fire, the assured was making horse collars in said building by machinery, which increased the hazard, and by the express terms of the policy rendered the same void; that all of said facts were well known to the plaintiff at the time said loss was adjusted and paid by it; that plaintiff, in so paying said loss, assumed an obligation not included within the terms of the policy, without the knowledge or consent of this defendant; that, notwithstanding the fact that horse collars were made in said building, defendant denies that the premises or any part thereof was a "horse collar," or "horse collar and blanket, factory."

Upon the issues so joined the cause was tried to a jury, which returned a verdict in favor of the defendant. The plaintiff thereupon moved that the verdict be set aside, and that judgment be rendered in its favor notwithstanding such verdict—a practice permitted by a statute of North Dakota. The court set aside the verdict and rendered judgment for the plaintiff for the amount paid by it in settlement of the loss. Defendant thereupon sued out this writ of error, and assigns as error:

"(1) That the court erred in setting aside the verdict, and in rendering judgment in favor of the plaintiff notwithstanding the verdict. (2) The court erred in granting plaintiff's motion to set aside the verdict and rendering judgment in its favor. (3) The court erred in rendering judgment in favor of the plaintiff."

The granting or refusal to grant a motion for new trial is not, in the federal courts, a sufficient basis for a writ of error. Railway Co. v. Heck, 102 U. S. 120, 26 L. Ed. 58. The only question, therefore, presented by the assignment of errors, is: Did the court err in rendering judgment in favor of the plaintiff notwithstanding the verdict? The defendant contends in argument that the judgment was rendered against him upon the ground that the property insured was a forbidden risk, upon which he was not authorized to issue a policy for the plaintiff, when in fact the property insured was personal property, and not within the prohibited class, and that he was authorized to issue the policy thereon. No such question was presented to or determined by the trial court, nor was any exception taken to the ruling of the court granting plaintiff's motion for judgment notwithstanding the verdict, and this question is presented for the first time in this court. The rule is firmly settled in the national courts that in actions at law only questions presented to and determined by the trial court will be reviewed by an appellate court; for the trial court cannot rightly be held to have erred in a ruling it never made, upon a question not in

issue, or to which its attention was never called. Railway Co. v. Heck, 102 U. S. 120, 26 L. Ed. 58; Railway Co. v. Henson, 7 C. C. A. 349, 58 Fed. 531; Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 52 C. C. A. 95, 114 Fed. 133–140. And when a cause is tried upon an issue or theory presented by one of the parties in the trial court, that party will not be permitted in the appellate court to present a different issue or theory for its consideration. Marine Bank v. Fulton Bank, 2 Wall. 252, 17 L. Ed. 785; Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 Fed. 133, 52 C. C. A. 95–102.

Included within the prohibited risks upon which the defendant was forbidden to issue a policy for the plaintiff is the following: "Horse collar and blanket factories." This, unexplained, would seem to be only the factory or place where "horse collars and blankets" are made, and would not include the collars and blankets themselves when made. The property described in the policy as insured is a "stock in trade consisting of harness, saddlery hardware," and other specified articles of personal property, in which no reference is made to horse collars; the only reference to them being that indorsed upon the policy which is as follows:

"Permission is granted to manufacture horse collars (by hand) in the building herein described"—viz., the building in which the stock was situated.

The building itself was not covered by the policy. Upon the trial, the defendant contended that the words "horse collar and blanket factories," included in the prohibited risk, had a technical and well-understood meaning in the insurance trade, and did not include the business in which the Bristol & Sweet Company was engaged, and offered the testimony of a number of insurance men acquainted with the meaning of such terms in support of this defense, which was admitted over the objections of the plaintiff. The court, however, upon plaintiff's motion for judgment notwithstanding the verdict, held that this testimony was insufficient to alter or change the plain terms of the policy, and rendered judgment for the plaintiff for the amount of the loss paid by it with interest. Whether or not the court was right in so holding we need not determine, for its ruilng was in no manner challenged, and no exceptions were taken to it by the defendant. C., B. & Q. Ry. Co. v. Frye-Bruhn Co. (decided at this term) 184 Fed. 15.

There is no ground, therefore, upon which the writ of error can be sustained; and the judgment of the Circuit Court must be, and is, affirmed.

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

AMIDON, District Judge. This cause came on to be heard upon the alternative motion of the plaintiff either for a new trial or for a judgment in its favor notwithstanding the verdict returned in favor of the defendant. The cause has been twice tried in this court. The first trial was before Judge Munger. He then excluded all parol evidence offered by the defendant tending to show that the term "collar factory," contained in the plaintiff's prohibited list, had a different meaning in the insurance business from what the words fairly import upon their face, and directed a verdict in favor of the plaintiff. Upon a motion for a new trial, Judge Munger reached the con-

clusion that such evidence was competent, and set aside the verdict. The second trial was had before me. The defendant was given a full opportunity to present his defense, based upon the alleged trade significance of the term "collar factory." There is grave doubt as to whether the greater part of the evidence offered is admissible, the witnesses being asked to state whether the collar factory maintained by Bristol & Sweet was a collar factory within the meaning of the term as used in the prohibited list. I waive this objection, however, and treat the evidence as properly before the court; and, giving to it the full weight to which it is entitled, I am of the opinion that it wholly failed to establish the defense in support of which it was offered.

1. The evidence fails to attain the probative force and directness required to modify the plain and ordinary meaning of a written instrument by parol testimony. The evidence rests wholly on opinions, and those opinions rest upon no concrete experience in the insurance business, touching the question involved. To give such opinions weight as evidence, the source of the opinions should be disclosed, and as a rule the opinions must rest upon the actual transaction of business in the trade. If that is not shown, the ground of the opinion resting in the statement of those in the course of business familiar with the meaning of the term should be given.

2. The interpretation of the term "collar factory," given by these alleged experts, is so at variance with the natural and probable meaning of the term, when we consider the insurance business, as to make the evidence wholly untrustworthy. There are some risks so great that all insurance companies refuse to insure them. Other companies have what is known in the trade as a prohibited list, being risks which their agents having power to issue policies are expressly prohibited to insure. In the case of the plaintiff company, collar factories were embraced in the prohibited risks. Some of defendant's experts stated, while under examination, that if the collar factory maintained by Bristol & Sweet had existed in a separate building, or had constituted the major part of the business carried on in a building, that it would have fallen within the meaning of the term as used in the prohibited list. No attempt was made to show why that factory, when immediately associated with other property under the same roof, would not likewise fall within the prohibited list. The risk was prohibited because it was dangerous. It was equally dangerous, whether it constituted a minor or a major part of the business. It was conceded by all that such a factory, though constituting a minor part of the businesses, would fix the premium for all of the insurance upon the property embraced in the establishment. The danger of fire in a collar factory is in no way affected by the fact that it constitutes a subordinate part of a large establishment. It is the kind of business, and the inflammable property, such as straw, which it is necessary to use in carrying it on, that caused the plaintiff to prohibit its agents from insuring such risks. No reason is given by defendant's witnesses why the fact that a collar factory is a subordinate part of a business enterprise should make it cease to be a collar factory, when the same establishment would be a collar factory if it constituted the whole or the greater part of the business enterprise.

Upon both trials all the other defenses have failed, and I think this defense likewise fails upon a fair consideration of the evidence. Under the statute of this state, the court is permitted to enter judgment in favor of the party who is entitled to the judgment as a matter of law. Acting upon that statute, and upon a consideration of the evidence in this case:

It is ordered that the judgment entered herein in favor of the defendant on the 2d day of December, 1908, pursuant to the verdict, be and the same is hereby vacated and set aside.

It is further ordered that judgment be entered herein in favor of the plaintiff and against the defendant, notwithstanding the verdict, for the sum of $2,381.88, being the amount claimed in the complaint, with interest thereon at the rate of 7 per cent. per annum, from and since the 9th day of February, 1907, together with the costs of this action, to be taxed by the clerk, making the total sum of $———.

UNITED STATES v. ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS.†

(Circuit Court of Appeals, Fifth Circuit. December 13, 1910.)

No. 1,895.

1. RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—CONSTRUCTION.

The first count of the petition alleged that defendant hauled a car used in interstate traffic when the car was not equipped with automatic couplers; the second count alleged that defendant in like manner used another car on the ends of which the grab irons were missing; and the third count alleged that defendant hauled one caboose car not equipped with automatic couplers. It appeared that the hauling or use of the three defective cars was on the same day, in the same train, and at the same time. *Held*, that the hauling or use of each of such cars constitutes a separate offense or violation of the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, pp. 3174]), for which the penalty may be inflicted, and that the court below ruled incorrectly in assessing only one penalty for the three violations

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

2. RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—CONSTRUCTION.

In view of the purpose of the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), to protect life and limb by the enforced equipment of every car, and its being made unlawful to haul or use any car not equipped as required, it seems that the construction contended for by defendant is so narrow as to defeat the intention of Congress. If the three defective cars had been hauled or used by the same engine, but only one moved at a time at intervals of one minute or less, it is not denied by defendant that three penalties could be recovered, for the reason that the statute makes unlawful the hauling or use of "any car," or each car, not equipped as required. It seems strained to say that the statute requires for its complete application an interval, and that the condemnation or penalty is not the same if the three cars are hauled or used at the same time.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

3. RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—CONSTRUCTION.

"Hauling" a defective car is not necessary to complete the offense against the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), as both "hauling" and "using" are forbidden, and it seems that such a car may be "used," within the statutory meaning, otherwise than by being "hauled."

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

4. RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—NATURE OF SUIT TO RECOVER PENALTIES.

The criminal cases referred to by defendant do not involve the construction of civil statutes imposing penalties, and the suit at bar is not a criminal case, but a civil suit.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

5. RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—CONSTRUCTION.

The safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) provides, in section 2, that it shall be unlawful for any common carrier engaged in interstate commerce by railroad "to haul or permit to be hauled or used on its line any car used in moving interstate traffic" not equipped with couplers coupling automatically, and in section 4 that it shall be unlawful for any railroad company "to use any car in interstate commerce" that is not provided with secure grab-irons or handholds in the ends and sides of each car. Section 6 provides that any such common carrier "running any train or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act shall be liable to a penalty of $100, for each and

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

† Rehearing denied January 10, 1911.

every such violation, to be recovered in a suit or suits to be brought by the United States district attorney." *Held*, that the unit of the offense under either section 2 or 4 was the hauling or use of a defective car, and that each such car so hauled or used, whether at different times or at the same time and in the same train, constituted a separate offense, which might be charged in different counts of the same petition under section 6.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*

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

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

Action by the United States against the St. Louis Southwestern Railway Company of Texas. From the judgment, the United States bring error. Reversed.

J. W. Ownby, U. S. Atty., J. B. Dailey, Asst. U. S. Atty., and J. J. Doherty (Wade H. Ellis, Asst. to Atty. Gen., and Roscoe F. Walter, Special Asst. U. S. Atty., on the brief), for the United States.

Hiram Glass, W. L. Estes, and J. J. King (E. B. Perkins and D. Upthegrove, on the brief), for defendant in error.

Before PARDEE and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is an action to recover penalties under the safety appliance act (Act March 2, 1893, c. 196, § 6, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3175]), as amended by Act April 1, 1896, c. 87, 29 Stat. 85. After providing in the first section of the act that it shall be unlawful for any common carrier engaged in interstate commerce to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system, the following requirements are made as to the equipment of cars:

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

"Sec. 4. That * * * it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

The penalty for the failure to comply with these requirements and the mode of enforcing payment is prescribed in section 6:

"Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed. * * *"

The petition contains three counts, each for the sum of $100. The first count is for a violation of section 2, alleging that the defendant

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

hauled a car (describing it) used in the movement of interstate traffic when the car was not equipped with couplers coupling automatically by impact. The second count is for a violation of section 4, and alleges that the defendant in like manner used another car on the ends of which the grabirons or handholds were missing. The third count, like the first, is for a violation of section 2, alleging that the defendant hauled on its line one caboose car (describing it) which was out of repair and not equipped with couplers coupling automatically by impact. Each count contained the necessary averments showing use of the respective cars in interstate commerce. The averments and proof showed the hauling or use of the three defective cars on the same day in the same train, and at the same time. The plaintiff asked for a recovery on each of the three counts. The defendant asked the court to instruct the jury:

"That it could not find in favor of the plaintiff on more than one count, on the ground that the uncontradicted testimony showed that there was only one movement of the train, and that said movement embraced the three cars testified about by plaintiff's witnesses."

The court sustained the defendant's contention, and directed a verdict for the plaintiff on the first count and for the defendant on the second and third counts. It is assigned here that the District Court erred in holding that the plaintiff could recover on only one count.

The statute is penal, and must, of course, be construed strictly; but this only means that acts must not be brought within the scope of punishment which are not within the terms of the statute; that the courts must not create offenses by mere construction. The intention of Congress, shown chiefly by the words used, must govern in the construction of penal as well as other statutes. A construction which would defeat the obvious intention of the Legislature should be avoided.

The first section of the act requires the engine used in interstate commerce to be equipped with driving wheel and train brakes. The second section requires the cars to be equipped with automatic couplers, and the fourth section requires the cars to be equipped with grabirons or handholds. The second and fourth sections made it "unlawful" to haul or use "any car" not equipped as required. It is plain that to use in interstate traffic an engine not equipped with driving wheel and train brakes would be a violation of the first section; that to haul or use any car not equipped with automatic couplers would be a violation of the second section; and that to use any car not equipped with grabirons or handholds would violate the fourth section.

Now we come to the sixth section, which prescribes the penalty, and its language must be construed in connection with the foregoing. This section, by its words, is made to apply to "any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act." To see what is a violation of the act as to the equipment of the engine, we have only to refer to the first section; and, as to the equipment of the cars, to the second and fourth sections. The use of an engine or the hauling or use of "any

car" not equipped as required is a violation of the act. After making it clear that the penalty is to be applied for a violation of "any of the provisions of this act," it is provided that the defendant who violates the provisions of the act "shall be liable to a penalty of one hundred dollars for each and every such violation." It seems clear that "each and every violation" refers to the requirements of the preceding sections, and that a penalty of $100 should be assessed for each—for the use of an engine not equipped as required; and for the hauling or use of any car not equipped as required.

The defendant contends that there has been but one violation of the act, and that, therefore, the court ruled correctly in assessing only one penalty. The contention is that the defendant "has committed only one act; that it, by one act, hauled three cars, in one movement, not equipped with safety appliances as required by law." If this contention is well founded, a defendant who used on the same trip a defectively equipped engine and a defectively equipped car could be made to pay one penalty only, although the use of the engine is made unlawful by section 1 and the use of the car by section 2 or 4. It would also follow that a defendant who hauled or used 20 defective cars could not be made to suffer a larger penalty than a defendant who hauled or used only one defective car. It is difficult to believe that such was the intention of Congress. The words of the sections—2 and 4—designating the unlawful act, point, it seems to us, at the car, and not at the train. It is made unlawful to haul or use "any car." If it had been made unlawful to haul any train containing a car or cars not equipped as required, it is easy to see that the number of defective cars would not increase the penalty. But the act makes the hauling or use of the defective car the unit of the offense, and prescribes the penalty "for each and every such violation." The hauling or use of each car is, it is admitted, a violation, for which the penalty may be inflicted. But the contention is that the hauling or use of each car must be separate, or there is but one offense. In view of the purpose of the act to protect life and limb by the enforced equipment of every car, and its being made unlawful to haul or use any car not equipped as required, it seems to us that the construction contended for by the defendant is so narrow as to defeat the intention of Congress. If the three defective cars had been hauled or used by the same engine, but only one moved at a time at intervals of one minute or less, it is not denied by defendant's contention that three penalties could be recovered. The three penalties would have been recovered, for the reason that the statute makes unlawful the hauling or use of "any car," or each car not equipped as required. It seems strained to say that the statute requires for its complete application an interval, and that the condemnation and penalty is not the same if the three cars are hauled or used at the same time.

To show that only one offense could be committed by one hauling of the three cars, it is urged that the movement or hauling of a defective car is necessary to complete the offense. But is that clearly true? In section 2 it is the hauling or using of the car that is condemned. In section 4 it is the using alone that is condemned. The former sec-

tion reads: "It shall be unlawful * * * *to haul or permit to be hauled or used,*" etc. The latter reads: "It shall be unlawful for any railroad company *to use any car,*" etc. The penalty is imposed by section 6 when the car is "hauled or used." Is the defendant's contention true, that a hauling is absolutely necessary to complete the offense? The statute forbids hauling and using. Why were both words used? If the car was fully loaded and on the track ready to be started as a part of an interstate train, with engine attached and fired, and requiring only the touch of the engineer to start, would not the car be "used" or in use, within the statute, before it was hauled? If it was without the automatic coupler, so that the brakeman would have to go between the cars to couple them, it would clearly be within the mischief the statute was intended to prevent. "Used" has other meanings than "hauled." It is a broader word. To haul is to use, but may not a car be used within the statutory meaning otherwise than by being hauled? This question is not necessarily involved so as to require its decision, and is only relevant as bearing on the soundness of the defendant's contention, for in the instant case all three of the defective cars were, in fact, hauled.

The learned counsel for the defendant calls our attention to precedents in criminal cases—to larceny cases, where it is held that the defendant being charged with the larceny of several articles, if indicted and convicted or acquitted of stealing one of the articles, it bars a prosecution for the larceny of the others, all of the articles having been stolen at the same time; and to cases of murder, where two persons were killed at the same time by a single act, and it is held to constitute but one crime, and, if the defendant is convicted or acquitted as to one of the homicides, he cannot be tried for the other. These cases are dependent on familiar principles applicable to criminal law and procedure. The state is not permitted to split up one crime and prosecute it in parts, and there are rules against duplicity in indictments that are peculiar to criminal cases. And the constitutional provision against putting one in jeopardy twice for the same offense is sometimes controlling. The criminal cases referred to are inapplicable here. They do not involve the construction of civil statutes imposing penalties. The suit at bar is not a criminal case. It is a civil suit. Hepner v. United States, 213 U. S. 103, 29 Sup. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739. It is, in effect, an action of debt to recover penalties. Section 6 of the act makes it the duty of the district attorney to bring such suits. If it were a criminal case, provision would have been made for its prosecution by information or indictment. Being in effect an action of debt to recover penalties, the petition may, of course, properly contain several counts. The question of the right of recovery on each of the counts depends on the proper construction of the statute. The statute in question, on the point raised, has not been construed, so far as we are advised, but we are not without precedents construing analogous statutes.

An English statute was enacted to protect copyrights of paintings, drawings, and photographs. It was made unlawful to copy them without the consent of the proprietor. It was also provided that if any

person, knowing that such copy or imitation had been unlawfully made, "shall sell any copy of the work, or of the design thereof, such person, for every such offense, shall forfeit a sum not exceeding £10." The question arose as to whether an offender, under this statute, is liable to a penalty for every copy sold, or only on each contract of sale. In point of fact, 26 copies were sold, but they were sold in two parcels, each containing 13 copies, and it was contended that there were but two offenses. The court called attention to the words, "such person, for every such offense," shall forfeit to the proprietor of the copyright for the time being a sum not exceeding £10, and held that it was quite clear that this imposes a penalty for every copy sold. Ex parte Beal, 3 Q. B. (L. R.) 387, 394.

In the case of Commonwealth v. Jay Cooke et al., 50 Pa. 201, 207, it was said:

"The provision is that every 'banker or broker who shall neglect or refuse to make the return and report required by the first and second sections of this act, shall, for every such neglect or refusal, be subject to a penalty of one thousand dollars.' Adhering, then, to the words of the law, to what did the Legislature refer when it said, 'shall, for every such neglect or refusal, be subject to a penalty?' * * * Had the word 'every' been omitted, the language might have been dubious, but with it before us, as a part of the very letter of the act, we are admonished by the reference to resort to separate sections to ascertain the neglect or refusal referred to, and thus compelled to give the distributive word 'every' a reference to each: reddendum singula singulis."

See, also, Railway Company v. Moore, 33 Ohio St. 384, 31 Am. Rep. 543; Sturgis v. Spofford, 45 N. Y. 446, 452; Fisher v. N. Y. C., etc., R. R., 46 N. Y. 644, 658; Suydam v. Smith, 52 N. Y. 383, 388; Parks v. Railroad Company, 13 Lea (Tenn.) 1, 49 Am. Rep. 655.

We are of opinion that the District Court erred in holding that recovery could be had on only one count of the petition.

Judgment reversed and cause remanded.

NOTE.

[a] (U. S. 1887) An act provided that for each day from and after a certain specified day the delinquent should forfeit and pay the sum of $25. *Held*, that the Legislature intended an accumulation of penalties, and the defendant could not atone for its delinquencies by the payment of a single penalty.—State v. Kansas City, Ft. S. & G. R. Co. (C. C.) 32 Fed. 722.

[b] (Ill. 1899) In order to support a recovery under Starr & C. Ann. St. c. 114, § 14, par. 83, imposing a penalty on a railroad company stopping any train or leaving any car or engine standing on its track when the same intersects a highway exceeding ten minutes, it is not necessary to show that there were persons present desiring to use the highway, but only that the train or cars obstructed the crossing.—Chicago & A. R. Co. v. People, 82 Ill. App. 679.

[c] (Ind. 1904) Burns' Ann. St. 1901, § 5187, providing that for each violation of the preceding section by a railroad company, in failing to report the time of the arrival of a train at a station, etc., the corporation shall forfeit and pay the sum of $25, authorizes the recovery of a cumulative penalty.—Southern Ry. Co. v. State, 72 N. E. 174.

[d] (Ind. 1905) Under Burns' Ann. St. § 5187, providing a penalty of $25 for each violation by a railroad company of section 5186, requiring every cor-

poration operating a railroad within the state to bulletin trains, the state is not limited to a single penalty, but is entitled to recover a separate penalty for each violation proved.—Southern Ry. Co. v. State, 165 Ind. 613, 75 N. E. 272.

[e] (Iowa, 1903) Code, § 2073, was not unconstitutional as imposing a penalty on a railroad for the offense of its engineer, as it merely exacted a duty of the corporation of seeing that its employé acted in obedience to the statute.—State v. Chicago, M. & St. P. Ry. Co., 122 Iowa, 22, 96 N. W. 904, 101 Am. St. Rep. 254.

[f] (Iowa, 1903) Code, § 2073, declares that any engineer who fails to bring his train to a full stop before crossing an intersecting railroad on the same level shall forfeit $100, and that the railroad shall forfeit the sum of $200. *Held* that, where the train failed to stop because the brakes were defective, so that the engineer was not guilty of the offense, the railroad was not liable. —State v. Chicago, M. & St. P. Ry. Co., 122 Iowa, 22, 96 N. W. 904, 101 Am. St. Rep. 254.

[g] (Iowa, 1903) The offense was not committed if the engineer attempted to stop the train, but was unable to do so.—State v. Chicago, M. & St. P. Ry. Co., 122 Iowa, 22, 96 N. W. 904, 101 Am. St. Rep. 254.

[h] (Kan. 1901) Leavenworth City Ordinance No. 1755, § 13, requires all railroad companies within the city to place flagmen at all crossings of graded streets, and provides for gates on certain streets when required by resolution of the council, and the punishment of any employé assisting in running any engine or train across such streets where no gates have been erected as required by such resolution. Section 21 prescribes a penalty for any person, company, or corporation violating any of the provisions of the ordinance. *Held*, that an engineer and fireman operating an engine across a graded street where no flagman was stationed could not be punished therefor; section 13, regarding flagmen, not being directed against any one but railroad companies, and the penalty therein provided referring only to the streets whereon gates have been ordered to be erected.—City of Leavenworth v. Hurdle, 63 Kan. 886, 66 Pac. 238; Same v. Islip, Id.

[i] (Ky. 1896) St. §§ 795–797, require every railroad company to furnish separate cars, of equal quality and conveniences, for white and colored passengers, and make a violation of such requirement a penal offense. Sections 799 and 800 make it the duty of the conductor to assign white and colored passengers to their respective cars, and impose a penalty for the violation of such duty. A special train, chartered by individuals, but in charge of a conductor and crew of employés of the railroad company, was furnished with separate cars, as required by statute, but colored passengers were refused permission by those chartering the train to occupy the cars designated for their use, and were required to ride in a baggage or tool car. *Held*, that the railroad company could not legally be convicted of a violation of the statute.—Louisville & N. R. Co. v. Commonwealth, 99 Ky. 663, 37 S. W. 79, 18 Ky. Law Rep. 491.

[j] (La. 1908) It was within the power of the General Assembly to require street car companies to provide separate, but equal, accommodations for white and colored passengers using their cars, and to enforce the same by penalties imposed upon the officers of such companies in case of their neglect of this legal duty.—State v. Pearson, 110 La. 387, 34 South. 575.

[k] (Mo. 1885) Evidence of a road crossing near a depot does not show that the crossing was a public one, within the meaning of the statute requiring railroads to ring a bell or sound a whistle when approaching public crossings, and attaching a penalty for its violation.—State, to Use of Clinton County, v. Chicago, R. I. & P. Ry. Co., 19 Mo. App. 104.

[l] (Mo. 1885) The statute requiring railroads to ring the bell or sound the whistle when approaching public crossings is penal, and should be strictly construed, so as not to enlarge the liability imposed, nor allow the recovery unless the party seeking it brings his case strictly within the terms of the statute.—State, to Use of Clinton County, v. Chicago, R. I. & P. Ry. Co., 19 Mo. App. 104.

[m] (Mo. 1899) Rev. St. 1889, § 2608, providing for penalties against a railroad company for failure to give signals at crossings, is not in violation of Const. art. 11, § 8, providing that the "clear proceeds" of penalties and fines shall be paid into the school fund; the statute providing that one half thereof shall go to the informer and the other half to the county.—State ex rel. Cass County v. Missouri Pac. Ry. Co., 149 Mo. 104, 50 S. W. 278.

[n] (Mo. 1899) Rev. St. 1889, § 2608, providing a penalty against a railroad company for failing to ring a bell or sound a whistle at a highway crossing, is within the power of the Legislature.—State ex rel. Cass County v. Missouri Pac. Ry. Co., 149 Mo. 104, 50 S. W. 278.

[o] (Mo. 1899) A railroad company operating a road, though not an owner thereof, is liable for penalty provided by Rev. St. 1889, § 2608, for failing to give signals at a highway crossing.—State ex rel. Cass County v. Missouri Pac. Ry. Co., 149 Mo. 104, 50 S. W. 278.

[p] (Mo. 1899) A railroad company is liable for failure to give statutory signals at crossings, though its engines were supplied with bells and whistles, and though, if the signals were not given, it was the fault of the servants of defendant, who had no notice of the failure before institution of suit.—State ex rel. Cass County v. Missouri Pac. Ry. Co., 149 Mo. 104, 50 S. W. 278.

[q] (Mo. 1903) If there are a number of persons damaged by reason of the failure of a company to comply with Rev. St. 1889, § 2614, the penalty, all told, cannot exceed the sum indicated for the same neglect of duty.—McFarland v. Mississippi River & B. T. Ry. Co., 175 Mo. 422, 75 S. W. 152.

[r] (Mo. 1903) Under Rev. St. 1889, § 2614, the plaintiff who first brings his case to judgment and recovers judgment for part or all of the penalty will be entitled to preference over all others, and so on, till judgments are recovered for the full amount.—McFarland v. Mississippi River & B. T. Ry. Co., 175 Mo. 422, 75 S. W. 152.

[s] (Mo. 1904) Rev. St. 1899, § 1075, requiring railroads to stop all trains carrying passengers at a junction with other roads, and prescribing a penalty of $25 for each day for which the railroad refuses to comply, is a penal statute, and must be strictly construed, so as not to enlarge the liability imposed or allow a recovery unless the party seeking it brings his case strictly within the terms of the statute.—State ex rel. McPherson v. St. Louis & S. F. R. Co., 105 Mo. App. 207, 79 S. W. 714.

ATLANTIC COAST LINE R. CO. v. LINSTEDT.

(Circuit Court of Appeals, Fourth Circuit. November 10, 1910.)

No. 907.

1. APPEAL AND ERROR (§ 1050*)—ADMISSION OF EVIDENCE—PREJUDICE—MATERIALITY.

Where plaintiff, a switchman, alleged injury because of the use of a road tender on a switch engine, and it appeared that on the night of the injury the road tender had been placed on the switch engine in an emergency only, evidence that the tender was put out of commission the same night after the injury, and her number painted over, was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153–4160; Dec. Dig. § 1050.*]

2. APPEAL AND ERROR (§ 501*)—EXCEPTIONS.

A recital of the words "excepted to, admitted, exception noted," in the record following the answer to a question objected to, does not show a proper and timely exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2300–2305; Dec. Dig. § 501.*]

3. EXCEPTIONS, BILL OF (§ 24*)—FORM—SINGLE BILL.

It is improper to embrace all the proceedings at the trial, including objections to testimony, motion for nonsuit, and to instruct a verdict, objections to instructions offered and refused to the court's charge, and orders for extension of time to file exceptions, in a single general bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 31; Dec. Dig. § 24.*]

4. EXCEPTIONS, BILL OF (§ 8*)—CONTENTS—ADMISSION OF EVIDENCE—OBJECTIONS.

Where a bill of exceptions contained an objection to the admission of testimony, the grounds of objection should be stated.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 10; Dec. Dig. § 8.*]

5. MASTER AND SERVANT (§§ 101, 102, 205*)—INJURIES TO SERVANT—DUTY OF MASTER—CARE REQUIRED.

A master is required to furnish instrumentalities reasonably safe and suited to the business, and the employé is entitled to assume that such duty has been complied with.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 172, 180–184, 547–549; Dec. Dig. §§ 101, 102, 205.*

Assumption of risk incident to employment, see note to 38 C. C. A. 314.]

6. MASTER AND SERVANT (§ 153*)—INJURIES TO SERVANT—INEXPERIENCED SERVANT—WARNING.

Where an inexperienced servant is employed, the master is bound to warn him against special hazards or dangers in connection with the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314–317; Dec. Dig. § 153.*]

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

7. MASTER AND SERVANT (§ 150*)—INJURIES TO SERVANT—ASSUMED RISK.
As a servant is bound to assume the risks ordinarily incident to the employment, the master is entitled to assume that he will act prudently and not unnecessarily expose himself to dangers apparent or which he could avoid, and that he will do nothing heedlessly to bring about his own injury.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 299–301, 305–307; Dec. Dig. § 150.*]

8. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—ASSUMED RISK—RAILROADS—OPERATION.
Where a switchman employed by a railroad company to work in connection with a switch engine equipped with a road tender was injured, and the safety and suitableness of such appliance was in issue, as well as plaintiff's inexperience and lack of knowledge, defendant could not as a matter of law dispute plaintiff's right to recover because the danger of riding on a brake beam as plaintiff did was apparent; it being essential, also, that it conclusively appear that plaintiff not only apprehended the danger, but appreciated the particular peril or hazard incurred.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068–1088; Dec. Dig. § 288.*]

9. MASTER AND SERVANT (§§ 286, 288*)—INJURIES TO SERVANT—QUESTION FOR JURY.
In an action for injuries to a switchman while attempting to perform his duties with an engine improperly equipped with a road tender, evidence *held* to require submission of the issues of defendant's negligence and plaintiff's assumed risk to the jury.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010–1050, 1068–1088; Dec. Dig. §§ 286, 288.*]

10. APPEAL AND ERROR (§ 1005*)—REVIEW—QUESTIONS OF FACT.
Where a verdict has been returned for plaintiff based on disputed questions of fact, and has been approved by the trial judge, the Court of Appeals will not disturb the judgment entered thereon, particularly on review of an order denying a motion to withdraw the case from the jury, or to set aside the judgment rendered on the verdict of the jury, where the view of the testimony most favorable to the plaintiff must be taken.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3948–3954; Dec. Dig. § 1005.*]

In Error to the Circuit Court of the United States for the District of South Carolina, at Columbia.

Action by George W. Linstedt, an infant, by A. C. Linstedt, guardian ad litem, against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

P. A. Willcox, Moss & Lide, and Henry E. Davis (Willcox & Willcox, on the brief), for plaintiff in error.

William H. Townsend and Thomas M. Raysor (Raysor & Summers, on the brief), for defendant in error.

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

WADDILL, District Judge. This is a writ of error to a judgment of the United States Circuit Court for the District of South Carolina against the plaintiff in error in favor of the defendant in error. The

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

plaintiff, who sues by guardian ad litem, while in the service of the defendant company as a switchman on one of its yard engines at Florence, S. C., sustained injuries resulting in the loss of one of his legs, and to recover damages therefor instituted this suit in the court of common pleas for the county of Orangeburg, S. C., which was subsequently removed for trial to the United States Circuit Court for the District of South Carolina. The case was tried in the federal court at Columbia, and resulted in a verdict of the jury on the 14th of January, 1909, in favor of the plaintiff for $3,500, upon which the court on the 10th of April, 1909, entered judgment against the defendant, having two days previously overruled a motion for a new trial. The assignments of error relate solely to a ruling of the court in admitting certain testimony, and its refusal to direct a nonsuit and to instruct a verdict for the defendant at the close of all the evidence. The assignments will be considered in the order named.

First. The admission of the testimony excepted to, as far as we can judge from the record, was proper, the same was not particularly material, and clearly not prejudicial to the defendant under the facts of this case. The inquiry was as to what became of the engine, evidently meaning the tender, on which plaintiff received his injury, and the reply was that it was put out of commission that night. Excepted to, admitted, exception noted. To the next question the witness replied the tender was taken off after that, and then that the number on the tender was painted over, etc. This all might have been important, and perhaps prejudicial to the defendant, upon a different state of facts from those in this case. Here, however, the tender was a road, and not an ordinary switch tender, properly equipped as such, and was being temporarily used on yard engine 108, in an emergency arising from the necessity for some repairs to the shifter's tender. There was nothing, therefore, in the suggestion of the discontinuance of the road engine's tender, after the accident. Its continued use was not contemplated, and, as to the change in its number later, it was utterly immaterial what was done with it as a road tender, and there was no pretense that it was regularly or properly equipped as a shifting tender, so far as the portion thereof is concerned, from which this accident is alleged to have occurred. We do not observe any error in the ruling complained of; but, if such there be, it should not avail the defendant upon this record, as clearly the exception was not properly and timely taken. On the 20th of March, 1909, within the time allowed for filing bills of exception and assignments of error, the court signed one general bill of exceptions, containing the proceedings of the trial, all the testimony, objections noted during the trial, motion for nonsuit, and to instruct a verdict for the defendant, instructions offered, given and refused, the court's charge, and the two orders of extension of time to file exceptions. Clearly these should not have been included all in a single exception, and grounds for the objection to the testimony should have been stated. Boston & Albany R. R. Co. v. O'Reilly, 158 U. S. 334–335, 15 Sup. Ct. 830, 39 L. Ed. 1006, and cases cited.

Second. The remaining assignment involves the merits of the case; that is, did the court err in not taking the case from the jury,

and was there sufficient testimony to support the verdict, and the judgment of the court rendered thereon. A statement of just what the case is as stated in the pleadings, and a summary of the testimony adduced by the parties, respectively, will go far to enable us to correctly determine these questions. Plaintiff's case briefly is that he was a minor, in the service of the defendant as a switchman on a yard engine, and on the 27th of June, 1907, while so employed, it became necessary for him to board an engine and tender of the defendant company, and that by defendant's negligence, while boarding the same, he was thrown or fell under the wheels of the tender, and sustained serious injuries, resulting in the loss of one of his legs, and that the defendant company at the time was negligently "operating an improperly equipped and defective engine and tender for shifting cars; in failing to have a headlight or white lights on the end of the said tender while being so operated in shifting cars on a dark and rainy night; in operating said engine and tender without proper lights on a dark and rainy night, and without steps, foot boards, or any safe or proper means to get on and off the same, it being the duty of the said George W. Linstedt, in the line of his employment, as such switchman, to get on the said engine and tender and ride to the switch to be opened and then to get off the same and open the switch; and in requiring the said George W. Linstedt to perform the duties of a switchman on a dark and rainy night on an engine and tender which the defendant knew or ought to have known was improperly equipped and defective for shifting purposes, without proper lights and without steps, foot boards, or any safe and proper means for getting on and off the same."

The defendant, controverting the fact of the injury of the plaintiff, said:

"(4) Answering paragraphs 5, 6, on information and belief, it denies the truth of each and every allegation contained therein, except that it was using a regular engine tender, which had no headlight on the rear, with its engine; that it was the duty of the plaintiff in his employment to get on and off said engine or tender, but it was his duty to do so only when and where he could safely get on or off; and that plaintiff fell and had his foot crushed, but defendant has no knowledge or information sufficient to form a belief as to the extent of the injuries sustained, nor the result thereof. Defendant further alleges: That the plaintiff in his said employment assumed the risks incident thereto, including the danger of getting on and off the engine or tender. Second, for a second defense. That even if the defendant was guilty of any act of negligence complained of, which it expressly denies, yet, on information and belief, alleges that the injuries complained of were caused through the fault and negligence of the plaintiff himself, in that he attempted to mount the tender by means of the brake beam which was an apparently and known unsafe and dangerous thing to do, and in negligently handling the hand lantern which furnished him light so as to obscure his vision, which said acts of negligence on the part of the plaintiff contributed to and were the direct and proximate cause of the said injuries."

The case thus stated on the plaintiff's part is that he sustained his injuries by the gross negligence of the defendant, and because of its failure, in the particulars indicated, to furnish proper, safe, and suitable appliances for the business in hand, and the defendant's, that its appliances were reasonably sufficient for the work, and that the plaintiff sustained his injury by his own negligence, and by the

improper use of the same, and that the right of recovery should be denied him because of the risk necessarily incident to the business assumed by him, and also because of his own contributory negligence, resulting as a proximate cause of the accident. The facts, are, briefly: That on the 24th of June 1907, the plaintiff took service with the defendant as a switchman on one of its yard engines, at Florence, S. C. That he was on that day put to learn the yard, and instructed as to his duties. On the next day he went regularly to work, and so continued on the 26th, and on the 27th worked until 12 m., and was then relieved until the night turn, came back at 6 o'clock, and worked until about 8:30, when he sustained the injury sued for. That upon returning to work at 6 o'clock he found his engine equipped with a road tender, instead of a yard tender, which was in use temporarily because of the emergency arising from the necessity to make some repairs to the regular yard tender. That a yard tender is equipped with a foot board and white lights on it at either end, with sloping tender top, whereas the road tender does not slope, but is a square tender running straight down, has no rear step or foot board, and on its rear end is the coupling rod and only the ordinary brake beam, and the same was not lighted as a switch tender, but with only a single light, called a "marker," that did not reflect on the brake beam. That plaintiff was the rear switchman, and rode, as was the custom in moving about the yard in the discharge of his duties from switch to switch, and place to place, on the step or foot board on the rear of the tender. That switchmen using a road tender would sometimes ride on the brake beam, which was a risky thing to do, certainly for one not an experienced man. On the occasion in question, a dark rainy night, the plaintiff, with hand lantern in hand, while in the regular discharge of his duty, shifting cars, and going from one switch to another, attempted to ride on the brake beam, as he did on the step to the regular tender by catching hold of the coupling rod, and placing his foot upon the brake beam. As he did so it gave way, his foot slipped, he lost his balance, fell beneath the tender, and was injured. There is no dispute as to the use of this emergency tender, and that it was not equipped as the tender of the regular shifter. The defendant does not admit in its pleading the absence of the foot step, it is true, but the testimony showing its absence, and the presence of the brake beam is uncontroverted, as it also is, that the road tender was only used in an emergency; and the plaintiff's testimony was to the effect that it was unsafe to use it. Plaintiff's evidence showed that it was necessary for him to ride upon the tender and brake beam, whereas the defendant's testimony was that it was customary to so ride on the foot board of the regular yard tender, and that brakemen could and would sometimes ride on the brake beam, that it was a dangerous thing for one not experienced, or accustomed to it, to do, and insists that neither the step nor brake beam should have been used, except when safe and prudent to do so, and that plaintiff was warned against the danger of riding on the brake beam. Plaintiff denies that such warning was given, or that he was instructed as to the danger thereof, or of riding on the foot board. The infancy of the plaintiff being also in issue, the defendant introduced testimony to show that on en-

tering the company's service plaintiff represented himself as of age, and signed an application of employment form so stating. Plaintiff, on the other hand, testified that he was 18 years of age, and called for the employment blank that he signed some 30 days before when seeking work in the defendant's shops, which was not produced, and in its absence introduced a witness who testified that he filled it up, and his age was stated to be 18 in that blank, and plaintiff testified that he informed the company's representative when the first-named blank was signed that he was not 21, and was told it would have to so appear that he was 21, and he said, "Well, put it down so."

The law applicable to this case seems well settled. The defendant was required, and the plaintiff had the right to assume, that the instrumentalities furnished for the work in hand were safe, and reasonably suitable for the business; that, being inexperienced, he would be properly instructed as to the services required of him, and warned against special hazards, or dangers in connection therewith. The plaintiff, on the other hand, assumed the risks ordinarily incident to the employment, and the defendant had the right to assume that he would act prudently, not unnecessarily expose himself to dangers apparent, or which he could avoid, and that he would do nothing heedlessly to bring about his own injury. In a case, as here, however, where the plaintiff bases his right of recovery on the unsafe and defective appliances of the defendant, and sets up his own infancy, and the defendant relies as a defense upon the plaintiff's assumption of risk and contributory negligence, and the plaintiff's inexperience, and the defendant's failure to instruct him in his duties, or properly warn him against unusual danger or hazard incident thereto appearing, then, in such case, it at once becomes material to determine whose negligence really brought about the disaster, that of the plaintiff in not properly performing the duties required of him, or the defendant in failing to perform some duty imposed upon it, which can only be ascertained from a full consideration of all the facts and circumstances surrounding the occurrence; and the jury is the proper tribunal to settle disputed issues of fact thus arising, if any there be, as in any other case.

The defendant cannot as a matter of law defeat the right of the plaintiff to recover merely because the danger of riding on a brake beam was apparent, if the safety and suitableness of the same as an appliance was in issue, and the inexperience, lack of knowledge, and failure of warning to the plaintiff was also present. In such case, involving neglect by the master of the primary duties imposed upon him, it must be made to affirmatively appear that the servant not only apprehended danger thus arising from the master's neglect, but that the particular peril or hazard was appreciated by him. Authorities to support these views might be given almost without number. Butler v. Frazee, 211 U. S. 459, 466, 467, 29 Sup. Ct. 136, 53 L. Ed. 281, an opinion by Mr. Justice Moody, will be found to contain a particularly interesting discussion of the subject, with citation of authorities. Also, El Paso R. R. Co. v. Vizard, 211 U. S. 608, 610, 611, 29 Sup. Ct. 210, 53 L. Ed. 348; Gardner v. Michigan Central R. R. Co., 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107. The last

two cases involve injuries to railroad employés—in the first a conductor who boarded a moving freight car, and sustained injuries by the giving way of the handhold provided for his protection, and in the second, a brakeman at night in going between cars to uncouple them was injured, and the question presented was whether under the circumstances he was in the exercise of due care in so doing, and whether he was aware of a special peril arising from a defective roadbed. In the first case the Supreme Court approved a verdict in favor of the plaintiff, and in the second reversed the action of the lower court for taking the case from the jury. National Steel Co. v. Hore, 155 Fed. 62, 83 C. C. A. 578, a decision of the Circuit Court of Appeals for the Sixth Circuit, an opinion by Judge Lurton, and American Sheet & Tin Plate Co. v. Urbanski, 162 Fed. 91, 89 C. C. A. 91, a decision by Judge Gray, concurred in by Mr. Justice Moody, sitting in the Court of Appeals, will be found instructive and especially applicable to the more important features of this case.

We do not consider it necessary to enter upon a general discussion of the authorities cited by appellee's counsel, as we feel bound by those given; but such decisions have been fully considered, and do not change the views herein expressed. The argument is made with some earnestness that we should be controlled by the laws of South Carolina. This is not our understanding of the law in a case like this. In the absence of organic or statutory enactment (Gardner v. Mich. Cen. R. R., 150 U. S. 349, 358, 14 Sup. Ct. 140, 37 L. Ed 1107, supra), we follow the general law on the subject, which, however, as respects the crucial questions in controversy in this case, we do not understand to be different from the decisions of South Carolina.

Just when, and when not, issues of fact in cases of this character should be withdrawn from the jury, seems now too well settled in the federal practice to admit of serious controversy. "The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusions from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish." Gardner v. Mich. Cen. R. R. Co., 150 U. S. 349, 361, 14 Sup. Ct. 140, 144, 37 L. Ed. 1107, supra; Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249, 258, 29 Sup. Ct. 619, 53 L. Ed. 984.

In this case disputed questions of fact having arisen as to the suitableness and safety of the appliances furnished by the defendant to the plaintiff, with which to perform the services required of him, and the necessity for the use thereof by plaintiff when injured, as well as over the plaintiff's capacity properly to perform the service in hand, in the light of his youth, knowledge and experience, and whether, because thereof, and from lack of instruction and proper warning, he either did not know of the danger in which he was placed, or, if apprehended, it was not appreciated by him, and as to all of which there was considerable conflict in the testimony, it was manifestly proper for the trial court to overrule the motion for nonsuit, and to

instruct a verdict for the defendant, and to submit the same to the jury under proper instructions as to the law applicable to the case, which was done, with such degree of fairness to the defendant, that no objection thereto was made by it, though the plaintiff excepted to the rejection of sundry requests for charge to the jury asked for by him. Under these circumstances, a verdict having been returned for the plaintiff, which has met with the approval of the trial judge who saw and heard the witnesses testify, and was therefore peculiarly able to judge of the weight that should have been given by the jury to their several statements, this court would not be justified in disturbing the judgment thus entered, particularly on a motion to either withdraw the case from the jury, or to set aside a judgment rendered upon the verdict of the jury, when the view of the testimony most favorable to the plaintiff must be taken. Kreigh v. Westinghouse Co., 214 U. S. 249, 253, 29 Sup. Ct. 619, 53 L. Ed. 984, supra.

The judgment of the Circuit Court will be affirmed.

KYNER v. PORTLAND GOLD MINING CO.

(Circuit Court of Appeals, Eighth Circuit. December 29, 1910.)

No. 2,893.

1. MASTER AND SERVANT (§ 219*)—UNGUARDED MACHINERY—ASSUMED RISK.
   Where the absence of a guard about the drum and lower cable of a mine hoist was so patent as to be readily observed, and the enhanced danger arising therefrom was so obvious that its appreciation by plaintiff was unavoidable considering his years, intelligence, and experience, he assumed the risk of injury because of the absence of a guard, by voluntarily continuing to work about the drum and cable without it.

   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610–624; Dec. Dig. § 219.*

   Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

2. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—DUTY OF MASTER.
   A master is not bound to make the place in which and the machinery about which a servant is working absolutely safe, but is only required to exercise ordinary care to make them reasonably safe.

   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 178–184, 192; Dec. Dig. §§ 101, 102.*]

3. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—NEGLIGENCE—BURDEN OF PROOF.
   In an action for injuries to a servant, the burden of affirmatively proving a breach of the master's duty to use ordinary care to make the place in which the servant is required to work and the machinery about which he is employed reasonably safe is on the plaintiff.

   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908; Dec. Dig. § 265.*]

4. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—NEGLIGENCE—EVIDENCE.
   In an action for injuries to a servant by becoming caught in the cable of a mine hoist, evidence *held* insufficient to warrant a finding of negligence, in that the engineer at the time of the injury suddenly increased

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

the speed of the hoist without signal or warning to plaintiff, though knowing plaintiff at the time was in the act of stepping over the cable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954–972; Dec. Dig. § 278.*]

5. EVIDENCE (§ 123*)—RES GESTÆ—STATEMENTS OF SERVANT.

Evidence that defendant's engineer stated to plaintiff, while visiting plaintiff at a hospital about 10 hours after the injury, that it was the engineer's fault that plaintiff was injured, was inadmissible as res gestæ.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 123.*]

6. WITNESSES (§ 248*)—RESPONSIVENESS OF ANSWER.

Plaintiff, in an action for injuries, on his examination in chief stated that defendant's engineer, immediately after the accident, and at the place thereof, said that "he couldn't help it." On cross-examination defendant's counsel asked plaintiff when he first conceived the idea that the engineer was negligent, to which plaintiff answered, "He told me it was his fault down in the hospital." *Held*, that the answer was not so responsive to the question as to be allowed to stand, under the rule that one may not object to testimony which he has himself called forth.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861–863; Dec. Dig. § 248.*]

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

Action by Percy E. Kyner against the Portland Gold Mining Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Charles D. Hayt (Edward J. Boughton, Clyde C. Dawson, and Fred R. Wright, on the brief), for plaintiff in error.

William E. Hutton and Charles W. Waterman, for defendant in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and CARLAND, District Judge.

VAN DEVANTER, Circuit Judge. While employed as an engineer's helper or oiler in the engine house of a mine in Colorado, the plaintiff in error was caught, thrown, and injured by a moving cable over which he was stepping at the time, and he now complains that, upon the trial of an action brought by him against his employer, the defendant in error, to recover damages for the injuries so sustained, the Circuit Court directed a verdict against him. The only evidence relating to the circumstances surrounding the injury was that given by the plaintiff himself, and it conclusively established these facts: In the engine house were an engine and hoist used in raising and lowering the cages in a double compartment shaft which extended down into the mine 500 feet. The engine controlled a double drum about which were wound and unwound two cables; one connecting with each cage. The cables were so arranged that one wound and unwound from the top of one section of the drum and the other from the bottom of the other section, and so the drum moved the cables in opposite directions and lowered the cage in one compartment at the same time that it raised the cage in the other. The cables extended directly from the drum to a pair of pulleys above the collar of the shaft and thence vertically downward to the cages. These pulleys

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

were approximately 150 feet distant from, and about 45 feet higher than, the drum, so the direction of the cables from the drum was that of an ascending incline. Between the pulleys and the drum, some distance from the latter, the cables passed between rollers the purpose of which was to support and steady the cables. The drum was set in a pit; but 3½ feet of its diameter was above the surrounding floor. The lower cable came within 6 inches of the floor at the edge of the pit, which was 2 feet from the drum, and the upper cable was high enough at that point to permit a man to walk thereunder. No guard rail or other protecting device was about the drum or lower cable, and this was manifest. When operating the hoist the engineer stood upon an 8-inch elevation 12 feet behind the drum, and there, with his face toward the drum, manipulated the levers or appliances for starting, controlling, and stopping the hoist. The cables leading to the shaft were in front of the drum, but they were not wholly within the engine room, for the shaft was about 75 feet beyond it. In addition to the landings at the top and bottom of the shaft, there were two at intervening levels in the mine. The cages were double decked, and in loading and unloading a separate stop was made for each deck. Between the engineer and the drum were a signal bell, an electric flash signal device, and two clock-faced indicators showing the movement and position of the cages. The bell and electric flash were used according to an established code in giving to the engineer signals in obedience to which he started, controlled, and stopped the hoist; but the signals were not described in the evidence, save as it was shown that after the upper deck of a cage was loaded the bell was rung once as a signal for raising the cage sufficiently to permit the loading of the lower deck, and after that deck was loaded the bell was rung once again as a signal for raising the cage to the top. A half revolution of the drum made the requisite change in the position of the decks, and it took one minute to raise the cage to the top and then unload it. Usually a signal to lower the cage followed almost immediately after the unloading was completed.

The plaintiff was 22 years old, was of a good degree of intelligence, and had been in the defendant's service four weeks, the first two as a boiler maker's assistant and the last two as a helper or oiler in the engine room. When entering upon the latter service, he was informed by the master mechanic and the engineer that the latter would instruct him as to his duties and would look out for him. According to his instructions, it became his duty to oil the axle of the drum by screwing down two oil cups thereon, one near either end of the drum, and to wipe off the engine and clean the floor. He screwed down the oil cups every 5 or 10 minutes, and in each instance had to pass from one end of the drum to the other. There were two ways of making this passage in safety; one by going around behind the engineer, and the other by crossing directly in front of the drum pit when the hoist was at rest. By the first way, which was the longer one, the passage could be made within the time required to raise a cage to the top, and by the other it could be made during any of the customary stops. But a single stop usually was not long enough to enable the oiler to screw down both oil cups and pass from one to the

other. And, while the cups could be screwed down only when the hoist was at rest, it was not necessary that both be attended to during the same stop. One could be screwed down at one stop and the other at another. On the occasion in question the plaintiff screwed down one cup while the hoist was at rest, and then, while it was in motion, attempted to pass to the other cup by the shorter way. In doing so he in some way was caught by the lower cable, carried almost halfway around the drum, and severely injured. Mention of other facts disclosed by the evidence will be made later.

The negligence charged in the complaint as the proximate cause of the injury was as follows: First, that the defendant was negligent in failing to provide a suitable guard about the drum and lower cable; second, that through the negligence of the defendant the rollers, between which the lower cable ran, had become so worn that the cable was not held steady when running, but jerked and vibrated violently; and, third, that it was the duty of the engineer when about to change the speed of the hoist to give a warning thereof to other employés about the hoist, and that in negligent disregard of this duty, and as the plaintiff was stepping over the cable, the engineer, with knowledge of the plaintiff's position, and without any warning to him, suddenly increased the speed of the hoist, and this without having received any signal so to do. The answer denied the negligence so charged and set up the defenses of assumption of risk and contributory negligence.

With this statement of the circumstances surrounding the injury and of the issues presented by the pleadings, we come to consider whether in any reasonably admissible view of the evidence a verdict for the plaintiff lawfully could have been sustained. If so, the court erred in directing a verdict for the defendant; otherwise that ruling was right.

As respects the first specification of negligence, it conclusively appeared that the absence of a guard about the drum and lower cable was so patent as to be readily observed; that the enhanced danger arising therefrom was so obvious that its appreciation by the plaintiff was unavoidable, in view of his years, intelligence, and experience; and that under those conditions he voluntarily continued to work about the drum and cable. So, even if the absence of a guard was a negligent omission on the part of the defendant, the court was bound to rule, as matter of law, that the plaintiff assumed the risk incident thereto. Butler v. Frazee, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. 281; American Linseed Co. v. Heins, 72 C. C. A. 533, 141 Fed. 45; Missouri, Kansas & Texas Ry. Co. v. Wilhoit, 87 C. C. A. 401, 160 Fed. 440; Federal Lead Co. v. Swyers, 88 C. C. A. 547, 161 Fed. 687; United States Smelting Co. v. Parry, 92 C. C. A. 159, 166 Fed. 407; Denver & Rio Grande R. R. Co. v. Gannon, 40 Colo. 195, 200, 90 Pac. 853, 11 L. R. A. (N. S.) 216.

The second specification of negligence was, as we think, without any substantial evidence to sustain it. The plaintiff testified that immediately after his injury the "particular rollers" then in use were "in bad condition" because "they were cut," and that this permitted the cable to vibrate more than it otherwise would have done; but the extent of the cutting was not more definitely stated, and there was no

evidence indicating whether the rollers were old or new, of what material they were made, whether they were inspected at reasonable intervals, when the cutting occurred, or whether the defendant knew of it prior to the plaintiff's injury. In short, there was no evidence that the defendant failed to exercise ordinary care in selecting the rollers or in observing how they withstood the use to which they were subjected, or that it continued to use them knowing that they were cut and not suitable for use. The duty which the defendant owed to the plaintiff in respect of the place in which and the machinery about which he was to work was not that of making them absolutely safe, but of exercising ordinary care to make them reasonably safe, and the burden of affirmatively proving a breach of that duty was with the plaintiff; so, in the absence of such proof, the defendant was entitled to rest upon the usual presumption of the exercise of ordinary care. Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.

The third specification of negligence was to the effect that the engineer suddenly increased the speed of the hoist, including the cable, (a) without any signal so to do, (b) without any warning to other employes about the hoist, although it was his duty to give such a warning, and (c) without any warning to the plaintiff, although knowing that the latter was then stepping over the cable. Of this it is said in the brief for the plaintiff:

"Perhaps the most direct cause of the accident was the negligence of the engineer in starting up the hoist without proper signals, and starting it up suddenly, when he must have known what the effect of a sudden start would be upon the cable, and in starting it without warning the plaintiff, who, as the engineer saw, was in a dangerous position."

When the plaintiff attempted to step over the cable, the hoist was not at rest, but was raising to the top a loaded cage at the end of that cable and lowering a cage at the end of the other cable. Just prior thereto the hoist was moving at full speed, and the plaintiff was standing near the cable "waiting," as he stated, "for the cable to stop." Having attended to one oil cup when the hoist was last at rest, he was intending to pass to the other side and there to attend to the other cup. Presently the engineer applied the brake to the hoist, and it slowed down to such an extent that the plaintiff readily could see the strands of the moving cable. He then concluded to pass to the other side without further waiting, and as he was stepping over the moving cable the engineer materially increased the speed of the hoist. This produced a jerky or vibrating motion of the cable, and the plaintiff was thereby tripped and thrown upon the cable, and was carried partly around the drum. The evidence did not disclose the position of either cage when the speed of the hoist was slackened or when it was increased, and did not indicate that either of these movements was not in obedience to an appropriate signal. True, the plaintiff stated that he neither heard nor saw any signal to the engineer after the hoist was started; but he also stated that the electric flash device was used by the cager according to an established code in giving signals to the engineer, and that he (the plaintiff) was not at the time in a position to observe, and did not know, whether any such signals

were given after the hoist was started. Moreover, the conditions before recited, such as the depth of the shaft, the landings at the intermediate levels, and the simultaneous operation of the two cages, suggest that there well may have been some occasion for the changes made in the movement of the hoist. Thus the charge that the increased movement was not in response to a signal to the engineer entirely failed.

There was also a like failure of proof in respect of the charge that it was the duty of the engineer to give a warning to other employés about the hoist when he was about to change its speed. No evidence was presented which tended to show that any such general duty had been laid upon the engineer or that he usually, or in any instance, had given such a warning. But it is said that, even although no such general duty rested upon him, he was in duty bound to warn the plaintiff, because when the latter entered the service as an oiler he was told that the engineer would look out for him. The contention is without merit. Doubtless what was said amounted to an assurance that the engineer would take such precautions for the plaintiff's safety as were reasonably appropriate in view of his want of familiarity with the service and its surroundings; but it did not mean, and reasonably could not have been regarded as meaning, that the plaintiff was absolved from exercising ordinary care for his own safety, or that the engineer would treat him as a novice, or as likely to assume positions of danger unnecessarily, after he became familiar with the service and its surroundings. At the time of his injury, he had worked about the hoist for two weeks, had come fully to understand how it was operated and all its surroundings, knew of the two ways of passing in safety from one end of the drum to the other, had made frequent use of both ways, could determine easily whether the cable was moving or was at rest, and knew it was inclined at times to jerk and vibrate very perceptibly. Not only so, but his testimony disclosed that on the occasion in question, after the cage at the end of the lower cable was loaded, the bell rang once as a signal to raise the cage to the top of the shaft, that he heard and understood that signal, that he knew the hoist was started in response to it, and that while the hoist was still in motion, and therefore before the cage reached the top, he attempted to step over the cable. Thus he had the benefit of that signal and knew its object was not accomplished. As respects his conduct on prior occasions, he testified in the course of his examination in chief:

"Q. And in doing this (attending to the oil cups) did you have to go from one side of the cable or drum to the other?
"A. Yes, sir.
"Q. And when would you do this?
"A. Always when he would unload and load up.
"Q. What is that for, at the time when the cable was still and the drum still?
"A. Yes, sir.
* * * * * * * * * * * * * *
"Q. Had you at other times stepped over the cable when it was slowed down that way?
"A. I had stepped over when it was stopped.

"Q. Had you at other times stepped over when it was about to stop or slowed down?
"A. No, sir."

True, later in his examination in chief he testified that on prior occasions he had stepped over the moving cable, and this without attempting any explanation of the conflict, but he in no wise indicated that he had been instructed to pass over the cable while it was in motion or that the engineer had observed him do so. We conclude, therefore, that the claim that a special warning should have been given to him was without any support in the evidence, unless his real situation was known by the engineer.

We come then to the charge that the engineer materially increased the speed of the hoist without any warning to the plaintiff, although knowing that he was then stepping over the cable. Under the evidence, it must be accepted as true that the speed was materially increased, that no warning thereof was given, and that the plaintiff was then in the position described. And it must be conceded that, if the engineer knew the plaintiff was in that position, then ordinary care demanded that a suitable warning be given to him, even although otherwise a warning would not have been necessary; and this because the engineer knew that the change in speed was calculated to produce a jerky and vibrating motion of the cable which would make such a position one of obvious peril. So the crucial question is: Was there any evidence reasonably tending to show that the engineer knew the plaintiff was in that position? Certainly there was no direct evidence to that effect; but, as that alone is not decisive of the question, we turn to what is claimed to have been indirect proof to that effect. Principal reliance is placed upon testimony given by the plaintiff to the effect that, just before the speed was slackened, the engineer looked in his direction and "appeared to see" him, then looked at one of the indicators (the flash signals when given shone upon one of them), and then applied the brake. But as the plaintiff was then standing near the cable in a place of safety and was "waiting," as he stated, "for the cable to stop," the fact that the engineer appeared to see him then had no tendency to show that later on, when the speed was increased, the engineer knew he was attempting to step over the moving cable. It next is insisted that as the engineer stood with his face in the plaintiff's direction, and as there was no intervening obstruction to the view, it was a reasonable inference that the engineer observed what the plaintiff was doing. But the facts relied upon do not fully or fairly reflect the engineer's situation. As before indicated, he was charged with the engrossing task of closely watching the indicators and signal devices and of controlling the hoist with due regard to the position of the cages as shown upon the former and in strict obedience to the signals received through the latter, and the safety of the cager and others about the shaft, as also of the appliances connected therewith, depended upon an attentive performance of that task. In that situation, it well may be that he was so occupied, and properly occupied, with his own immediate task, that he neither did nor could observe what the plaintiff was doing; and so there was no reasonable basis for the inference suggested.

In a written notice served upon the defendant about 60 days after his injury, the plaintiff stated that it was caused by "the omission to place a guard rail or fence across the cable" and by "the defective condition of the cable," no mention being made of any act or omission of the engineer; and upon his examination in chief he stated that immediately following the injury, and at the place thereof, the engineer said "he couldn't help it." Then upon the cross-examination counsel for the defendant, evidently having in mind these statements of the plaintiff, inquired when he first conceived the idea that the engineer was negligent, and he answered, "He told me it was his fault down in the hospital," meaning that the engineer made this admission during a conversation in a hospital 10 hours after the injury. Counsel for the defendant thereupon requested that the answer be stricken out as not fairly responsive to the question and as embodying an admission which was not a part of the res gestæ and was inadmissible against the defendant. The request was denied, and the answer is relied upon now as showing negligence upon the part of the engineer. But in our opinion the answer cannot be considered. The admission attributed to the engineer was not a part of the res gestæ or in any wise binding upon the defendant. Vicksburg & Meridian R. R. Co. v. O'Brien, 119 U. S. 99, 104, 7 Sup. Ct. 118, 30 L. Ed. 299; Marande v. Texas & Pac. Ry. Co., 59 C. C. A. 562, 124 Fed. 42; National Masonic Ass'n v. Shryock, 20 C. C. A. 3, 73 Fed. 774. Nor was the answer so responsive to the question as to fall within the rule, sometimes applied, that one may not be heard to object to testimony which he himself has called forth; for the question related only to the time when the plaintiff conceived the idea that the engineer was negligent, and not to what prompted it. The answer therefore should have been stricken out, and, even although that was not done, the admission attributed to the engineer must be disregarded. Pitcairn v. Philip Hiss Co., 61 C. C. A. 657, 661, 125 Fed. 110.

We conclude that a verdict for the plaintiff could not have been sustained in any reasonably admissible view of the evidence, and therefore that no error was committed in directing a verdict for the defendant.

Complaint is made of the exclusion of two hypothetical questions put to the plaintiff; but, as they were not pertinent to the matters here discussed, their exclusion becomes immaterial.

A matter to which much attention was given by counsel is the asserted invalidity, or nonexistence as a law, of the purported statute of Colorado (Sess. Laws 1901, p. 161, c. 67), abrogating the fellow-servant rule of the common law; but that matter need not be considered, because there was no evidence of negligence on the part of the engineer, who was the only fellow servant whose conduct was in issue.

What has been said requires that the judgment be affirmed, and it is so ordered

In re KESSLER et al.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 69.

1. BANKRUPTCY (§ 336*)—PROOF OF CLAIM—AMENDMENT—DISCRETION.
A proof of claim in bankruptcy, which is defective in some formal particular, may be amended either before or after the expiration of a year after adjudication, though the effect of the amendment is that proof of claim is thereby effectively made only after the year limited by Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444).
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 523; Dec. Dig. § 336.*]

2. BANKRUPTCY (§ 336*)—CLAIMS—AMENDMENTS.
Claimants, who were Paris creditors of bankrupts, on being informed of their assignment for the benefit of creditors, promptly sent to the assignee an account of their claims, showing the details of their transactions with the bankrupts, and the balance due them. It was defective, however, as a claim provable in bankruptcy, in that it contained no reference to security, and was not verified, or in the prescribed form. On institution of bankruptcy proceedings, the assignee turned over the claim and the accompanying letter explaining it to the receiver in bankruptcy. Thereafter it remained in his possession as receiver and trustee. Shortly thereafter an attorney, at the request of claimants' representatives, called on the receiver and was informed by him that the claim was "all right." *Held*, that the claim as filed contained enough to authorize an amendment of its defects, even after the year provided for the proof of claims.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 523; Dec. Dig. § 336.*]

3. BANKRUPTCY (§ 336*)—CLAIMS—AMENDMENT—LACHES.
Claimants under such circumstances were neither negligent nor guilty of laches in not moving to amend until after the year had elapsed.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 523; Dec. Dig. § 336.*]

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

In the matter of bankruptcy proceedings of Alfred Kessler and others, composing the firm of Kessler & Co. From an order of the District Court (176 Fed. 647), affirming an order of the referee declining to allow Heine & Co., Paris creditors, to amend their proof of claim, and disallowing their claim against the estate, they appeal. Order reversed, and cause remanded with instructions to allow the amendment.

See, also, 180 Fed. 979.

Leo Oppenheimer, for appellants.

G. H. Gilman, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. On October 30, 1907, the firm of Kessler & Co. made an assignment for the benefit of creditors to William Williams, who next day sent out a printed circular to the creditors. Heine & Co., bankers in Paris, received a copy, and promptly on such receipt sent (November 12, 1907) to Williams' assignee an account in detail of their transactions with Kessler & Co. showing a balance ow-

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

ing to Heine & Co. The account was accompanied with a letter stating that it was an extract of account of the firm, showing a debit balance of 140,720 francs, and adding that Heidelbach, Ickelheimer & Co., of New York, were authorized to represent Heine & Co. in this matter. There was no verification under oath nor any statement of consideration (except, perhaps, inferentially), nor any statement whether any securities were held as collateral therefor.

On November 8, 1907, petition in bankruptcy was filed, and on November 11th a receiver was appointed, who on Decemer 30, 1907, was elected trustee. The books and records of the bankrupts, including the letter and account received from Heine & Co., were turned over by Williams to the receiver, and have since remained in his possession as receiver or as trustee. Shortly thereafter, and about November 30, 1907, Mr. Delos McCurdy, a member of the bar, at the request of Heidelbach, Ickelheimer & Co., called on the receiver and asked him if he had received from the assignee a claim of Heine & Co. in Paris against the bankrupt estate. The receiver stated that the papers that had come over were still in confusion, but that if he would come in a day or two afterwards he would tell him accurately about it. A day or two afterwards Mr. McCurdy called again and asked the receiver if that claim was received from the assignee. He said it was. Mr. McCurdy asked him if it was all right, and he said it was. The witness says:

"He asked some person there with respect to the matter, and the person made the reply, and he turned to me and said, 'It is all right.'"

It may fairly be presumed that Heidelbach, Ickelheimer & Co. communicated the result of Mr. McCurdy's interview to Heine & Co. It would seem from statements in one of their letters that subsequently they received from time to time communications emanating from the District Court, Southern District of New York. There seems no reason to doubt that they, in good faith, supposed that they had duly filed a proper claim, until they were advised by the trustee, in the summer of 1909, that no claim filed by them was found upon the list. The trustee had sent out a circular to "all creditors and parties in interest, in September, 1908, asking them to examine and see if their claims were filed with the referee."

It was held by the Supreme Court in J. B. Orcutt Company v. Green, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. Ed. 390, that presentation and delivery of claims to the trustee is sufficient:

"Having been received by the trustee, under authority of law, the proofs of debt are thereby sufficiently filed so far as creditors are concerned, and it is the duty of the trustee to deliver them to the referee. If the trustee inadvertently neglects to perform that duty, it is the neglect of an officer of the court, and the creditors are in no way responsible therefor."

The referee correctly says that:

"The question here is whether the court has the power and right to grant the creditors the relief they ask."

It would be harsh and inequitable to refuse them relief upon the statement of facts above recited, if there were power to grant it. It is not disputed that the papers sent to the assignee, and by him turned

over to the receiver, do not comply with the requirements of the statute; but it has been repeatedly held that "a proof of claim" which is defective in some substantial particular may be amended, and that such amendment may be made subsequent to the expiration of one year after adjudication, although the effect of such amendment may be that "proof of claim" is thereby effectively made only after the year limited by section 57n (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]). The great liberality of the courts in that regard is shown by an analysis of some of the decided cases. In Hutchinson v. Otis (1st Circuit) 8 Am. Bankr. Rep. 382, 115 Fed. 937, 53 C. C. A. 419, there had been filed within the year "a proof which failed, in very substantial particulars" to comply with the general orders. Subsequently, after expiration of the year, the creditors were allowed to file a substituted proof of claim. This course was approved, the court saying:

"Courts of bankruptcy, like courts of admiralty, permit amendments with a most liberal hand; and as there was enough in the original proof by which to amend, and as the District Court thought it was equitable to allow the amendment, the appeal cannot be maintained."

This decision was affirmed in the Supreme Court. Hutchinson v. Otis, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179. In a cause before this court (In re Roeber, 127 Fed. 122, 62 C. C. A. 122), the District Judge had, subsequent to the year, allowed an alleged proof of claim to be amended. It was inartificially drawn, but contained averments that there was due and owing to creditors a stated sum, for materials furnished to the bankrupt in the erection of a building, and that a certain sum of money was security therefor. It was not signed by the creditor, nor was it verified, nor did it contain any statement of payments. The amendment supplied these defects, and we affirmed the District Judge, saying:

"Bankruptcy courts have the usual powers of courts of justice, upon motion and for good cause, to allow amendments. All parties were advised of the claim within the year. There is no dispute that the amount claimed is justly owing from the bankrupt. The amendment was in furtherance of justice, and within a legitimate exercise of the power of amendment."

See, also, Bennett v. American Credit Indemnity Company, 159 Fed. 624, 86 C. C. A. 614.

We do not understand that the District Judge refused to allow the amendment as an exercise of discretion, but did so because he was not satisfied that the testimony showed that there had been filed within the year a written statement which contained "enough by which to amend." The account and letter sent by Heine & Co., showed the details of transactions with Kessler & Co., and that the result of those transactions was that the latter firm was indebted to the former in a stated sum. We do not concur with the conclusion that it did not contain in writing any indication that it is a claim against the bankrupt estate. It was not sent until after assignment, and was expressly sent, not to Kessler & Co., but to the assignee as a claim against their estate. It did not contain any statement in reference to security, nor was it verified, nor was it in the form prescribed; but it certainly notified the assignee and—when it was by him turned over to the

receiver—notified the latter that Heine & Co. claimed that the estate of Kessler & Co. owed the stated sum of money as a result of transactions therein set forth.

As to what took place at the interview between Mr. McCurdy and the receiver, we do not understand that it is contended that what took place then estops the receiver and trustee from disputing the sufficiency as a proof of claim of the original papers to which his attention was then called; but it does show that on November 30, 1907 (or thereabouts), he had in his possession a claim of some sort, inartificially drawn, to which his attention was specifically directed by a messenger from Heine & Co., and which, under J. B. Orcutt & Co. v. Green, supra, he should thereafter have transmitted to the referee to pass upon its sufficiency. Moreover in view of what took place at the interview, it cannot, we think, be contended that Heine & Co. were negligent, or guilty of any laches, in not moving to amend until after the year had elapsed.

The order is reversed, and cause remitted, with instructions to allow the amendment prayed for.

WIRT et al. v. PECK.

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

No. 3,110.

INJUNCTION (§ 244*)—ACTION AGAINST SURETY ON BOND—CONDITION PRECEDENT—AWARD OF DAMAGES AGAINST PRINCIPAL—COLORADO STATUTE.

Under the law of Colorado, where an injunction bond is conditioned, as provided by Code Civ. Proc. Colo. § 147, "to pay all such costs and damages as shall be awarded against the complainant or complainants in case the injunction shall be modified or dissolved, in whole or in part," no action can be maintained against the surety thereon prior to an award or assessment of damages against the principal, unless they are joined as defendants as permitted by section 161 of such Code.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 560–563; Dec. Dig. § 244.*]

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

Action at law by W. O. Wirt and J. M. Roseberry against Frank G. Peck. Judgment for defendant, and plaintiffs bring error. Reversed, with directions to modify.

L. J. Stark, for plaintiffs in error.

W. J. Chinn, for defendant in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. Wirt and Roseberry brought suit in the court below against Peck to recover damages on three injunction bonds. When the case was called for trial, counsel for the defendant moved the court for judgment upon the pleadings in favor of defend-

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

ant. The motion was granted, and from the judgment so entered plaintiffs sued out this writ of error. The ground of the motion for judgment, briefly stated, was that the complaint did not state facts sufficient to constitute a cause of action.

We learn from the briefs of counsel that the particular defect in the complaint was that it appeared therefrom that Peck was being sued as surety on the injunction bond without an award of damages having been first had against the principal. The complaint contained three causes of action, and each count was based upon three separate injunction bonds similar in form. A statement of the allegations contained in the first count will be sufficient for the purpose of deciding the question raised. They are substantially as follows:

In 1895, one Farris instituted an action in the district court of El Paso county, Colo., against W. O. Wirt and J. M. Roseberry, for the purpose of compelling the defendants therein to transfer to him certain stock of the Ben Hur Mining & Milling Company, then owned by Wirt and Roseberry, and in his complaint prayed that each of said defendants be restrained from selling, transferring, or otherwise disposing of any of said stock during the pendency of said action. At the commencement of said action, on motion of Farris, the court entered an order directing that a temporary writ of injunction against each of said defendants be issued as prayed for, provided that Farris should execute an undertaking with sufficient surety in the sum of $2,500 "conditioned for the payment of all costs and damages that should be awarded against plaintiff therein in case said temporary injunction should be modified or dissolved in whole or in part." Pursuant to said order, Farris, as principal, and Peck and one Kinney, as sureties, signed, executed, and filed in said action the following injunction bond:

State of Colorado, County of El Paso—ss.:

In the District Court of the County of El Paso, State of Colorado.

S. N. Farris, Plaintiff, v. W. O. Wirt and J. M. Roseberry, Defendants.

Undertaking on Injunction.

Whereas, the above-named plaintiff has commenced or is about to commence an action, in the district court of El Paso county, and state of Colorado, against the above-named defendants, and is about to apply for an injunction in said action against said defendants, enjoining and restraining them from the commission of certain acts, as in the complaint filed in the said action is more particularly set forth and described:

Now, therefore, we, the undersigned, residents of the county of El Paso, state of Colorado, in consideration of the premises and of the issuing of the said injunction, do jointly and severally undertake in the sum of twenty-five hundred dollars ($2,500) and promise to the effect that, in case said injunction shall issue, the said plaintiff will pay to the defendants all costs and damages as shall be awarded against the complainant in case said injunction shall be modified or dissolved in whole or in part.

Dated this 14th day of November, A. D. 1895.

S. N. Farris.
M. Kinney.
F. G. Peck.

Thereupon a writ of injunction as prayed was issued and served. December 3, 1906, final judgment was entered in said action in favor of the defendants therein and said writ of injunction was thereby dis-

solved. To procure a dissolution of said injunction, Wirt and Roseberry expended $500 as court costs, stenographer bills, and printing bills, and the sum of $1,500 for attorney's fees. Farris died March 21, 1901, at Los Angeles, Cal., intestate and insolvent. April 18, 1901, the probate court of El Paso county, Colo., appointed one McDonald as administrator of the estate of Farris for the sole purpose of carrying on said injunction action. May 1, 1907, said probate court discharged McDonald as administrator. The judgment in the action of Farris v. Wirt and Roseberry provided for the recovery of costs by the defendants from the plaintiff. In his complaint Farris demanded judgment for the sum of $14,500 upon his three causes of action; the injunction bonds mentioned having all been executed in the same case from time to time as the exigencies of the case seemed to demand.

It appears from these allegations that the court ordered and the defendant signed an undertaking conditioned "for the payment of all costs and damages that should be awarded against the complainant in case the injunction should be modified or dissolved in whole or in part." The court in making its order undoubtedly followed the requirement of section 147 of the Code of Civil Procedure of the state of Colorado. This section reads as follows:

"In case of granting a writ of injunction other than those to stay a suit or judgment, the court or judge granting the writ, shall make an order fixing the amount of the undertaking, which shall be in a reasonable sum; and no injunction shall be issued until the complainant or complainants, or some one for him, her or them, shall have previously executed such undertaking with sufficient surety, payable to the defendant or defendants, approved by the court or judge granting the writ, or the clerk of the court out of which the writ is to issue when the order so directs, and filed with the clerk; which undertaking shall be conditioned to pay all such costs and damages as shall be awarded against the complainant or complainants in case the injunction shall be modified or dissolved, in whole or in part."

It is possible that the court might have required an undertaking in accordance with section 156, Mills' Ann. Code. But it did not do so, and that section need not be considered. The surety, Peck, made his contract according to the terms of the bond or undertaking and he may not be held to have made any other. Bein, etc., v. Heath, 12 How. 168, 13 L. Ed. 939. Peck promised to pay all such costs and damages as should be awarded against Farris. An award of costs and damages means such costs and damages as shall have been established by some competent tribunal proceeding by due process of law against Farris. No such award appears ever to have been made. Counsel for plaintiff in error refers us to section 161, Colorado Code of Civil Procedure, which follows section 147 above quoted. The last-named section reads as follows:

"That in suing on any undertaking provided for in this act, it shall not be necessary to bring suit in the first instance against the principal on such undertaking to ascertain the amount of damages sustained or awarded by the court but the principal and surety may be sued together and at the trial damages may be assessed and awarded against principal and surety in the action."

The purpose, however, of the section last quoted was to render it unnecessary to bring two actions on an undertaking executed under

the provisions of said section 147, namely, one against the principal to have the damages and costs awarded and one against the surety to recover the award. In the case at bar, the principal has not been joined with the surety, nor has there been any award against Farris. It is urged, however, by counsel for plaintiff in error, that section 13 of Mills' Ann. Code permits the defendant Peck to be sued alone. The section referred to is as follows:

"Persons jointly or severally liable upon the same obligation or instrument including the parties to bills of exchange and promissory notes and sureties on the same or separate instruments may all or any of them be included in the same action at the option of the plaintiff."

This section, however, cannot aid plaintiffs in error, as they exercised the option of suing Peck alone; but they are not permitted to recover, because there has been no award of damages against Farris which was the condition upon which Peck's promise rested. As a general proposition there is a conflict of authority upon the proposition as to whether the surety may be sued alone on an injunction bond conditioned as the one herein mentioned prior to an award or assessment of damages against the principal. We are satisfied, however, that the law of Colorado is that, where an injunction bond is conditioned as provided in section 147 of the Code of Civil Procedure, no action can be maintained against the surety thereon prior to an award or assessment of damages against the principal, unless they are joined as defendants as provided in section 161 above quoted. We must hold that the Legislature of Colorado so understood the law; otherwise the enactment of section 161 was unnecessary. Ducket et al. v. Price, 7 Colo. 84, 1 Pac. 228. Smith v. Atkinson, 18 Colo. 255, 32 Pac. 425, Lynch v. Metcalf, 3 Colo. App. 131, 32 Pac. 183, and Wason v. Frank, 7 Colo. App. 541, 44 Pac. 378, impliedly so hold, and Thomas v. Wason, 8 Colo. App. 452, 46 Pac. 1079, expressly so holds.

It is further urged by counsel for plaintiffs in error that, even if the law is as herein stated, still it ought to be held by this court that this action is maintainable, because it is impossible to sue the personal representative of Farris, or to join him with Peck as a defendant in an action brought against them both, and that the law never requires the performance of impossible acts. In support of this contention it is alleged, as hereinbefore stated, that Farris died March 2, 1901, in California, intestate and insolvent; that McDonald, the administrator appointed in Colorado, was discharged May 1, 1907; that the judgment dismissing the case brought by Farris was entered December 3, 1906. Admitting these facts to be true, which we must do in considering the motion for judgment, it still appears that no letters of administration were ever applied for in California, and that McDonald, the Colorado administrator, was not discharged until after five months had elapsed subsequent to the time when the cause of action arose on the injunction bond. It is true that the law sometimes excuses the nonperformance of certain acts on the ground of the futility or impossibility of their performance; but we are now dealing with a written contract which prescribed a condition upon the happening of which Peck's liability would arise, and we see no way of holding him to the

performance of his contract, unless the condition upon which his liability is based is performed, or unless some way may be found to join the personal representative of Farris with Peck as a defendant.

The judgment of the trial court was against the plaintiffs on the merits; whereas the action should have been dismissed without prejudice. The judgment is therefore reversed, and the cause remanded, with direction to dismiss the action without prejudice.

EMPIRE STATE SURETY CO. v. HANSON et al.

(Circuit Court of Appeals, Eighth Circuit. January 10, 1911.)

No. 3,391.

1. PRINCIPAL AND SURETY (§ 123*)—SURETY FOR BUILDING CONTRACTOR—NOTICE OF DEFAULT—"IMMEDIATELY AFTER."

A provision of a bond given by a building contractor to secure the faithful performance of a contract for the construction of certain buildings, and which provided that they should be completed by a certain date, requiring the obligees to notify the surety "immediately after" any default by the contractor which might create liability on the bond, was complied with by service of a written notice, four days before the expiration of the time for completion of the buildings, that they would not be completed within the time, which was at that time apparent from their condition.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 304–311; Dec. Dig. § 123.*

For other definitions, see Words and Phrases, vol. 4, pp. 3403–3410.]

2. CONTRACTS (§ 237*)—MODIFICATION—CONSIDERATION.

An agreement by the owners of buildings under construction to extend the time for their completion beyond that fixed by the contract, on the promise of the contractor to have them completed within a further time stated, was without consideration, and constituted no defense to an action for breach of the contract by failure to complete them by the time provided for therein, where the agreement did not induce the default.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1119–1122; Dec. Dig. § 237.*]

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

Action at law by Elof A. Hanson and August L. Anderson against the Empire State Surety Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

W. H. Ferguson (Milton Smith and Chas. R. Brock, on the brief) for plaintiff in error.

Edwin W. Hurlbut and Harper M. Orahood, for defendants in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and CARLAND, District Judge.

VAN DEVANTER, Circuit Judge. This writ of error challenges a judgment which the obligees in a surety bond recovered against the surety company. The bond was given to secure the faithful perform-

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

ance by the obligor of his contract for the erection of four houses in Denver, Colo. His contract required that the houses be completed on the 15th day of November, 1908, and the surety bond was made subject to the condition that the obligees should give to the surety company a written notice of any act of the contractor involving a loss for which the company would be responsible, and that this notice be given "immediately after" the act came to the knowledge of the obligees. In their complaint the obligees, in addition to charging a failure to complete the houses within the time specified, alleged that they had well and truly performed each and every condition of the bond which was to be performed by them, and this latter allegation was denied in the answer, which also alleged that the obligees had failed to give notice in writing of the contractor's default immediately after it came to their knowledge. The only evidence produced upon the trial was that for the plaintiffs, and at the conclusion thereof each party moved for an instructed verdict in its favor. The defendant's motion was overruled, and that of the plaintiffs was granted. This ruling is now called in question and it is necessary to consider whether there was any substantial evidence to sustain the verdict.

The discussion of counsel relates only to whether there was any evidence that the plaintiffs complied with the condition of the bond calling for notice of the contractor's default. There was evidence tending persuasively to show that on November 11, 1908, four days before the time fixed for the completion of the contract, the houses were in such a state of incompletion as very reasonably to generate the belief that it would be impossible for the contractor to complete them within the remaining time; that the plaintiffs, who were familiar with the state of the work, reached the conclusion that it could not be completed within that time; and that they accordingly sent a written notice to that effect to the surety company, which notice was duly received. But because this notice was sent four days before, and not immediately after, the time fixed for the completion of the contract, and for no other reason, it is said that the notice was not effective and did not satisfy the terms of the bond. We are of a different opinion. It well may be that the obligees were not bound to anticipate the contractor's default, and could have waited until the 15th of November, or the day thereafter, to give the prescribed notice; but it does not follow that they were bound to wait. The words "immediately after," in the condition relating to notice, obviously were used, not for the purpose of forbidding or preventing a well-grounded anticipatory notice, such as was given, but for the purpose of insuring a prompt notice, such as would enable the surety company to take appropriate precautions for its own protection. When upon the 11th of November it became reasonably certain that there would be a default, it was in full keeping with this purpose that the obligees should give the notice then. In doing so they but gave to the surety company whatever of additional advantage was incident to their timely action. So, treating the evidence as presenting only a question of law in respect of the sufficiency of the notice given, as must be done in the presence of the concurring requests for a directed verdict, we are of opinion that no error was committed in directing a verdict for the plaintiffs.

Complaint is made of the admission in evidence of some later notices and of some verbal conversations between the obligees and the resident agent of the surety company. But of these it is enough to say, first, that this evidence in no wise detracts from the force or effect which otherwise should be given to the written notice of November 11th; and, second, that in the view which we take of that notice it is not necessary to consider whether this other evidence was rightly or erroneously admitted.

Complaint also is made of the ruling whereby a demurrer to the second defense of the answer was sustained. That defense alleged that the obligees, without the knowledge or consent of the surety company, extended the time for the completion of the contract from November 15th to January 1st, and that the consideration for this extension was a promise on the part of the contractor to complete the buildings by January 1st, if he did not complete them by November 15th. This asserted extension was not obligatory upon the obligees, because it was not supported by any lawful consideration. The contractor's agreement to do either all or less than he already was bound to do was not such a consideration. Besides, there was no allegation that the contractor relied upon the asserted extension, or that his default was in anywise induced by it. Therefore the ruling was right.

Further complaint is made of two rulings relating to the amendment of the pleadings; but there was no reversible error in this, because such matters are committed largely to the discretion of the trial court, and because there is in the record no suggestion of an abuse of discretion in this instance.

The judgment is affirmed.

SULLIVAN et al. v. MUSSEY.

(Circuit Court of Appeals, Fifth Circuit. November 22, 1910.)

No. 2,097.

BANKRUPTCY (§ 400*)—EXEMPTIONS—JURISDICTION OF COURT OVER EXEMPT PROPERTY.

Where property of a bankrupt has been properly set off to him as a homestead, the court of bankruptcy has no further jurisdiction over it, and the bankrupt's trustee has no equity therein that can be made the subject of a sale by him.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 400.*]

Petition for Revision of Proceedings of the District Court of the United States for the Western District of Texas, in Bankruptcy.

In the matter of Hart Mussey, bankrupt. Petition by D. Sullivan and others to review an order of the District Court. Denied.

Floyd McGown, for petitioners.

Earl D. Scott, for respondent.

Before PARDEE and SHELBY, Circuit Judges.

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

PER CURIAM. The petitioner's contention that the bankrupt's property, conceded to have been properly set off to him as a homestead, can be sold by the bankruptcy court, subject only to life estate of the bankrupt, or that the trustee for the creditors has any equity in the homestead exemption that can be made the subject of sale by trustee, seems to be wholly untenable under the bankruptcy law.

The questions involved appear to have been properly decided in the bankruptcy court (In re Mussey, 179 Fed. 1007), and the petition for revision is denied.

TORREY et al. v. HANCOCK.

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

No. 3,311.

1. PATENTS (§§ 58, 62*)—ANTICIPATION—BURDEN AND MEASURE OF PROOF TO CARRY BACK DATE OF INVENTION.

Where an anticipatory device is shown to have been in use prior to the application for a patent, the burden rests upon the patentee to carry the date of his invention back to a time antedating such use by satisfactory and convincing proof, and oral testimony, given many years after the event, unsupported by physical exhibits, and which is in itself somewhat contradictory, is not sufficient.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 75, 78; Dec. Dig. §§ 58, 62.*]

2. PATENTS (§ 58*)—EVIDENCE AS TO ORIGINALITY AND PRIORITY—PRESUMPTION OF PATENTEE'S KNOWLEDGE OF PRIOR ART.

A patentee is conclusively presumed to have been entirely familiar with all the prior art as disclosed either by patents or prior devices.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 75; Dec. Dig. § 58.*]

3. PATENTS (§ 45*)—EVIDENCE OF INVENTION—EXTENSIVE USE.

General public acceptance and use of a patented device is only a fact to be considered with all the other facts in the case on the issue of patentable novelty, and is most appropriately resorted to where that issue is in grave doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 51–53; Dec. Dig. § 45.*]

4. PATENTS (§ 327*)—SUITS FOR INFRINGEMENT—PRIOR DECISIONS.

While the rule of comity, and the desirability of uniformity of decision, must incline a court to follow the decision of another court of coordinate jurisdiction sustaining a patent, such rule is not imperative, and does not apply where there is a substantial difference in the proofs.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620–625; Dec. Dig. § 327.*]

5. PATENTS (§ 16*)—INVENTION—CHANGES IN PROPORTION OR DEGREE.

Changes in degree, proportion, or symmetry in a machine, where it does the same thing in the same way and by substantially the same means, although it may produce better results, does not amount to patentable invention.

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

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

6. PATENTS (§ 328*)—INVENTION—ROTARY DISK PLOWS.

The Hardy patent, No. 556,972, for a rotary disk plow, which covers a combination of elements, all of which except the inclination out of the vertical plane of the plowing disk were present in prior patented combinations, is void for lack of patentable novelty and invention in view of the fact that such inclination was suggested in prior patents, and that plows had previously been actually adjusted, at first by temporary wedges, and later by a casting supplied by the manufacturer and quite extensively used, to give the disk such inclination.

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

Suit in equity by Nina Little Hancock, Administratrix, against George H. Torrey and others. Decree for complainant (170 Fed. 600), and defendants appeal. Reversed.

See, also, 128 Fed. 424, 63 C. C. A. 166.

This was a suit to restrain infringement of United States patent No. 556,972, issued March 24, 1896, upon the application of Clement A. Hardy, filed July 31, 1895, to his assignee C. A. Keating for alleged new and useful improvements in rotary disk plows. The suit was originally brought by Milton T. Hancock as assignee of the rights of Keating in some designated territory, and was subsequently after his death revived in the name of Nina L. Hancock, his administratrix, the present appellee and complainant. It was originally brought against George Torrey, a user of the alleged infringing device, but subsequently, it is claimed, manufacturers of the device so adopted the defense of the case as to make them parties to the suit and liable for whatever decree might be rendered. That the patent was invalid for want of novelty was the main defense. The trial below resulted in a decree enjoining the defendant user and the manufacturers from further infringement and awarding an accounting for damages and profits.

Thomas A. Banning and H. H. Bliss (John H. Atwood, on the brief), for appellants.

Chester Bradford and Charles C. Linthicum (S. B. Cantey, Houston & Brooks, Sluss & Wall, Offield, Towle & Linthicum, and Bradford & Hood, on the brief), for appellee.

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

ADAMS, Circuit Judge. The second claim of the patent in suit is the only one in controversy. It reads as follows:

"In a rotary plow, the combination with a plow-beam, of a box-bearing arranged on the plow-beam, an axle rotatable in the box-bearing, a plowing-disk secured to the said axle, rotated solely by the natural draft thereof and the friction of the soil, set diagonally to the line of draft and inclined out of a vertical plane for cutting the furrow and turning the soil therefrom, a furrow-wheel mounted on an axle at the same side of the plow-beam as the plowing-disk and arranged in advance thereof, an arm pivoted to the rear portion of the plow-beam and provided with a caster-wheel arranged in rear of the plowing-disk, and a stop device for limiting the swinging motion in one direction of the arm carrying the caster-wheel, said furrow-wheel and caster-wheel being inclined for resisting the side pressure of the plowing-disk, substantially as described."

The description of the invention in the specification discloses that, while the claim is for a combination of many elements, the patentable novelty, if any, resides in certain specified means by which the disk of a well-known class of plows, in the operation of plowing works it-

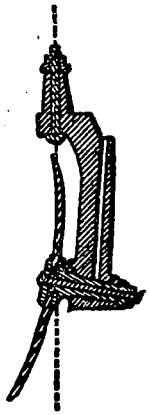
*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

self by suction, and without much weighting, into the ground, thereby cutting a wider furrow and doing more satisfactory work, especially in hard, wet, and sticky ground. The means for accomplishing this result which alone are patentable, are stated in the specification to be a concave disk or disks "arranged diagonally to the line of draft and having an adjustable inclination to the vertical whereby said disk or disks are inclined rearwardly and across the line of draft at such an angle as will effect," etc., and these means are specified broadly in the claim just quoted, as disks "set diagonally to the line of draft and inclined out of the vertical plane." The arangement of the disk diagonally across the line of draft necessarily determines the width of the furrow. The more acute the angle the narrower the furrow; the more obtuse the wider. The nearer the disk crosses the line of draft at right angles so as to cut a wide furrow the greater the resistance and the more it operates like a scraper rather than a plow. From this necessary operation of the elements sprung the desirability of some device to produce a suction of the operating disk into the ground, less scraping, more cutting, and correspondingly wider furrows. If we except the one element of the inclination of the disk out of a vertical plane, the other elements of the second claim of the patent, including the disk itself and its diagonal arrangement across the line of draft, had been combined together in single organized structures, notably the Harcourt and Bartlett plows manufactured and sold by the Hancock Rotary Plow Company of Indianapolis, Ind. Plows of their type had been in practical daily use long before Hardy's invention. Whether the introduction of this excepted element constitutes patentable novelty for the combination as a whole, or, limiting our inquiry to the necessities of the present case, whether Hardy "invented" a "new" machine or a "new" improvement of an old machine, within the meaning of section 4886 of the Revised Statutes (U. S. Comp. St. 1901, p. 3382), is the important and controlling question for decision. In other words, conceding, without admitting, the original patentability of the combination, the question is whether Hardy invented it, or whether he was anticipated in that respect by others. No novel question of law or intricate question of fact is presented. While the record, consisting of patents, patented and unpatented structures, oral testimony of users, manufacturers, dealers, and experts, is voluminous, the controlling question of fact is in a narrow compass and the law applicable to it is not difficult.

It may be admitted that the disk of the Harcourt and Bartlett type of plow stood in a vertical position, but with fairness to the art, and as a possible explanation of the degree of efficiency attained, it should be said that it had a concave anterior side so dished as to form a curvilinear backwardly inclined part for doing the actual cutting into the ground in the process of plowing.

The Goembel patent, No. 453,183, issued June 2, 1891, was for improvements in rotary disk cultivators, in which disks similar to those of the patent in suit were employed, to perform similar service. The specification of that patent contains directions how to position the disk so it "can readily be set at any angle," and so it "when placed in position will have the upper half of its concave face in line with the

standard-bearing, while the lower half will be thrown out as shown in figure 10," thus:



The testimony shows without contradiction that this arrangement would give an inclination on a 24-inch disk of a little over 4½ inches from the vertical.

The Brown patent, No. 496,850, issued May 9, 1893, also discloses means for setting the disks in cultivators at an angle inclining backwardly from the vertical.

The Lane patent, No. 208,246, issued September 24, 1878, for improvements in rotary plows discloses disks with wide rims at all times inclined out of a vertical plane. These disks were unlike those of the Hardy patent in this, that their rims instead of being integral with the body of the disks were connected with the hubs by spokes. These rims were so flared or bent backwardly and upwardly as to have a constant inclination from the vertical plane. They produced the suction and performed the cutting in lieu of the scraping action claimed for the Hardy patent; and although they stood, speaking of them as an entirety, in a vertical plane, their operating part—that which performed the work—had a constant position of considerable inclination away from the vertical.

The Rolph patent, No. 531,566, issued December 25, 1894, for improvement in cultivators, shows disks inclining backwardly from the vertical, and describes their advantages. In his specification, after referring to the different provisions for adjusting the inclination and movement of the disks, Rolph said by reason of the adjustable bearings, the disks "may be given a greater or less diagonal inclination * * * or they may be given more or less of a vertical pitch inward or outward by simply adjusting the bearings upon the sleeves. * * * The difficulty ordinarily experienced in ordinary disk cultivators—that of running them to proper depth in hard ground—is overcome by reason of the adjustable connection between the bearings of the disks, their sleeves and the crank arms of the arch, whereby the disks may be brought more or less directly under the weight of the driver, and given more or less of a forward inclination; that is to say, the lower edge of the disk can be set forward, making a light draft, at the same time insuring the disk traveling to a proper depth even though the ground be very hard. * * * It will be observed that but little weight will be required to maintain them in the ground."

The fourth claim itself in the Rolph patent is for a combination "whereby the vertical pitch inward or outward of the said disks may likewise be varied substantially as shown and described."

This patent seems to have had for its object the accomplishment in a kindred department of the same art, the purposes of Hardy's patent and to have pointed to the advisability of adjusting the disks out of the vertical in order to more effectually accomplish those purposes. Other patents, notably the Richardson, No. 264,763, issued September 19, 1882, and the Garst, No. 273,508, issued March 6, 1883, for three wheeled sulky moldboard plows exhibiting the interchangeability in similar combinations of the disk and moldboard, as the cutting elements

of a plow, were introduced in evidence as a part of the prior art.

So much for patents and patented structures. Attention will now be given to certain unpatented structures disclosed in the prior art.

Hancock, under whose patent and direction the Hancock Rotary Plow Company of Indianapolis had manufactured plows of the Hancock and Bartlett type, in the spring of 1893 took a shipment of these plows to Dallas, Tex., with a view of working up a trade there. He soon became acquainted with C. A. Keating, president of the Keating Implement & Machine Company of Dallas, a concern which was handling plows in that city, whom he sought to interest. He exhibited his plows at the state fair in Dallas in the fall of 1893 and at the suggestion of Keating undertook to demonstrate their efficiency in a river bottom where the ground was rooty and sticky and difficult to work. He there met one Hendon who had been engaged in the implement business generally, and particularly in handling the old moldboard plows. He took an interest in the new kind, or disk plow, handled by Hancock and desired to see it operate. Hancock, unfamiliar with the peculiar ground of Texas, was naturally anxious to get all possible information which would enable him to successfully introduce his plow. These facts brought the two men together, and Hendon was ultimately employed by Hancock to co-operate with him in Texas. Before his employment, however, Hendon inspected the operation of Hancock's plow in the river bottom, and we here reproduce some of his testimony of what then occurred between them. He testified that:

"He [Hancock] told me that he was expecting to make a deal with Mr. Keating here for the plow, and he wanted to get up a nice sample of work on the plow, and asked my opinion about it—what I thought of it. Well, I looked at the plow—was standing astraddle of the disk looking down at it—and I asked him the question if that disk was not doing more pushing than cutting, pressing the dirt out, this being set up straight. Of course I did not measure—take any plumb-bob to see whether it was or not; but it appeared to be about straight up, and I said to him 'if you would loosen up the bolt and wedge your box further I believe it would do better work,' and he remarked it was probably a good suggestion and he would consider it; and there was a lot of old cedar stumps there where we were plowing, and we had turned up some good big roots, and I had a good strong knife and cut a wedge and loosened up the box and put the wedge on the underside. Well, he decided it did a whole lot better work and according to my judgment it did. * * * Well, I saw that the disk as it was going forward on the angle setting up straight, that the bottom of the disk was merely crushing it. Well, I had an idea if it was fixed to cut like a moldboard, with the edge of it running square against the dirt, it would do better; that the disk laying back could cause it to shed the dirt better."

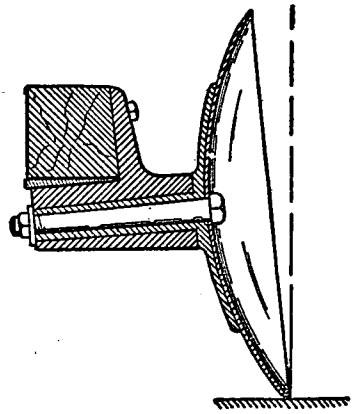
Mr. Keating was a witness on this subject. These questions and answers are found in his testimony:

"Q. Did you ever see any such devices [wedges] used to alter the positions of the disk? A. I have used them myself in experimenting with the plows. Q. And it was then a matter of knowledge amongst you that by means of such devices the positions could be changed was it? A. It was within my knowledge because I have done it in experimenting with the plow in order to do what I wanted to do with it."

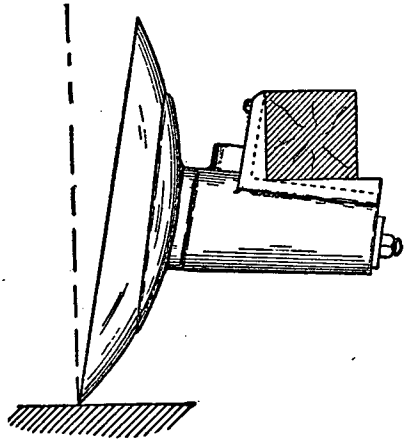
Mr. Miller, a farmer, testified to having used two of the Hancock rotary disk plows on his farm prior to January, 1894. The following questions and answers appear in his testimony:

"Q. Turning, now, to the two plows which you say that you had upon your farm in the fall of 1893, tell us what experience you had with the disk in its actions? A. Well, to make them plow properly, and to take the soil properly, we had to wedge them underneath this beam and on the left-hand side. We wedged it on the side and under the bottom. Q. What was the effect of putting the wedges in at the bottom? That gave it—set it out more at the bottom; turned the disk out more."

This and other supplementing testimony in our opinion established these facts: That the wedging process was resorted to for the purpose of producing a backward inclination of the disk; that its desirability was first perceived by Hendon and afterwards acknowledged and approved by Keating and Hancock, and that for sometime thereafter this crude device was successfully resorted to in Texas for the primary purpose of tilting the disk backward with the ultimate object of causing the plows to enter the earth by the suction of the draft and cut a wider furrow. Plows fixed up in this way became known and will hereafter be referred to as the No. 6 plow. This wedging operation had the effect, mechanically speaking, of raising the end of the spindle upon which the disk was mounted and throwing back its upper edge out of the vertical, thus:



But this crude and temporary practice, as might have been expected, soon gave way to the incorporation of the wedges into the box-bearing casting as an integral part of it, thus:



This resulted in a more pronounced and permanent slant or inclination of the spindle upon which the disk was mounted and a corresponding permanent backward dip or inclination to the disk itself. Plows made with this casting and represented by the Aldrich, Scott and Payne plows, physical exhibits of which are in evidence, afterwards became known and will hereafter be referred to as the B–6 plow They were manufactured, sold, and used in actual plowing operation as early as the spring of the year 1894, a year or more before Hardy's application for a patent was filed in the Patent Office. Between that date and the year 1900, their sales in Texas were quite extensive, and thereby their practicability and

utility were demonstrated. The proof, in our opinion, shows that this plow was the natural, obvious, and simple mechanical development and perfection of the temporary and crude wedging operation suggested by Hendon and put into practice by Hancock. Conceding, however, but not admitting, that there had been no discovery of the backwardly inclining disk and its practical utility until the B–6 plow was designed, what is the result?

We think the evidence shows that the merger or incorporation of the wedges of the No. 6 into the box-bearings themselves of the B-6 plow, and the ultimate evolution of the latter into a practical and useful machine, is attributable to Keating and Hancock. They were in the plow business, and especially interested in developing a salable and useful article. They knew of Hendon's suggestion, and had availed themselves of it to their advantage in the manufacture and sale of the No. 6 plow. This might dispense with further consideration of the matter but it can be added that if the B–6 plow was totally disconnected from the No. 6 plow in its origin and development this fact cannot aid the complainant. Hardy, under whom she claims, applied for his patent July 1, 1895, about a year and a quarter after the B–6 plow had been put into use. To avoid the defense that the latter was an anticipation of the invention of the patent, the complainant undertook to carry the Hardy invention back to May or June, 1894, and to connect Hardy with the box of the B–6 plow as its inventor. Without commenting upon the evidence produced for that purpose except to observe that Hardy himself, who was available to the complainant, was not called as a witness on this point, we content ourselves by saying that the proof is too contradictory, vague, and general to satisfy our minds. The burden was on complainant to do so by satisfactory and convincing proof. Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 11 Sup. Ct. 846, 35 L. Ed. 521; Rogers v. Fitch, 27 C. C. A. 23, 81 Fed. 959; Brooks v. Sacks, 26 C. C. A. 456, 81 Fed. 403; Eastern Paper Bag Co. v. Continental Paper Bag Co. (C. C.) 142 Fed. 479; Kraatz v. Tieman (C. C.) 79 Fed. 322 and cases cited. We do not think she succeeded. She did not produce the inventor himself, who was the best witness on the issue. On the contrary, we are asked to believe the oral testimony of witnesses somewhat contradictory in itself, given many years after the event and unsupported by physical exhibits or other substantial or imperishable monument. Such testimony is not sufficient. Cases supra.

It is conceded in argument that the Harcourt and Bartlett plows made conformably to the Hancock patent, No. 506,815, and originally introduced into Texas by Hancock embodied all the elements of the Hardy claim except the arrangement of the disk so as to incline backwardly out of the vertical. This excepted element, we think, had been broadly suggested in the several patents antedating Hardy's invention, not merely as an isolated physical part of a machine, but as an element of a combination substantially like Hardy's second claim and performing practically the same functions as his. It had been crudely realized in the same combination in the No. 6 plow, and

more perfectly realized in the B–6 plow; and all this had occurred before Hardy came upon the field. Whether he knew it in fact or not he is conclusively presumed to have been entirely familiar with all the prior art as disclosed either by patents or prior devices; and the originality of his accomplishment must be determined in the light of this presumption. Voigtmann v. Weis & Ridge Cornice Co., 78 C. C. A. 538, 148 Fed. 848, 851, and cases cited.

Counsel for complainant seek to avoid the effect of the foregoing by claiming that the wedges of the No. 6 plow and their incorporation into the box castings of the B–6 plow were devices to counteract the twisting and warping tendency of the wooden beams of those plows. We, however, are unable to give our approval to this claim. Whatever effect the wedges or the new box-bearing castings had in that direction was, in our opinion, incidental to the main purpose and object of inclining the disk backwardly. But if that was their purpose, Hendon, Hancock, and Keating builded wiser than they knew. They brought about a machine which actually had the inclining disk and performed the work of one. Accordingly, the result achieved is an item of the art prior to Hardy's invention which he is presumed to have known, and if his device is the same thing, or its fair mechanical equivalent, to have borrowed instead of discovered.

It is also claimed that the plow of the patent went into general use and superseded all other devices of its kind, and that this is indicative of patentable novelty. We doubt if this claim is sustained by the proof. Hancock in his testimony admits that the sale of the B–6 plow continued for many years after Hardy's invention. He admits that its sales during that period extended into the thousands, and there is other evidence to the same effect. Whatever be the fact in this particular, however, the rule is that general public acceptance and use of the patented device is only a fact to be considered with all the other facts in the case on the issue of patentable novelty and is most appropriately resorted to in cases where that issue is in grave doubt. Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952.

It is also claimed that the angle of inclination of the disk in the No. 6 and B–6 plows was slight in comparison with that of Hardy's second claim; but as Hardy claimed no certain inclination, and as both were intended to serve and did serve the same purpose, the degree of inclination cannot be the subject of invention. Hardy neither claimed nor described any particular angle of inclination of his disks. His expert witness testified that this could be determined by a mechanic skilled in the art of making plows without any difficulty. This taken in connection with the fact that the prior art in the same or similar combinations had shown some inclination of the cutting portion of the disk, or of the disk itself, makes pertinent the observation of Mr. Justice Hunt, speaking for the Supreme Court in Eddy v. Dennis, 95 U. S. 560, 24 L. Ed. 363, a patent case involving the moldboard plow. He said:

"We may add that he [the patentee] does not make claim for invention in using the shovel of this plow in an inclined form. He does not even give the angle of inclination at which it shall be used, whether it shall be 75 de-

grees, like the old plows, or 45 degrees, like this one. Ever since plows have been used—and there is no secular history of man in which the plow and the hoe are not recorded—we may safely believe that there has been an inclination sometimes greater and sometimes less, in the shovel and moldboard. A perfectly upright shovel would be nearly immovable, except in a light soil and to a very slight depth, while one perfectly flat would be of little value. * * * An inclined shovel moldboard, simply and alone, is not spoken of as an invention. It had long been in use in other plows."

It is further argued in support of the decree below that the patent in suit has been sustained by the Circuit Court of Appeals for the Sixth Circuit affirming a decree of the Circuit Court of the district of Tennessee. Our high respect for the learning of those courts gives to their judgment in any case a strong persuasive force and the desirability of uniformity of decisions of courts exercising coordinate jurisdiction in patent cases is so great as to strongly incline us as a matter of comity to acquiesce; but there is no rule of law requiring such acquiescence.

In Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856, it was claimed that the Circuit Court of Appeals of the Seventh Circuit should have followed the decision in a patent case theretofore rendered by the Circuit Court of Appeals of the Eighth Circuit on the same patent. Mr. Justice Brown, speaking for the Supreme Court, said:

"Comity is not a rule of law, but one of practice and convenience and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades: but it does not command. * * * It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals. Clearly it applies only to questions which have been actually decided, and which arose under the same facts. * * * Comity, however, has no application to questions not considered by the prior court, or, in patent cases, to alleged anticipating devices which were not laid before that court."

The suit in Tennessee was Sanders v. Hancock, reported in 63 C. C. A. 166, 128 Fed. 424. After that case had been disposed of, Hancock, in the year 1904, instituted several other suits in the Circuit Court of the Southern District of California against users of the rotary disk plows claiming that they were infringing the patent which had been upheld in the Tennessee courts, and, on the strength of the final decree in his favor in those courts, moved for preliminary injunctions against the defendants. In passing on these motions Wellborn, District Judge, said:

"Prior adjudication is not necessarily effectual for the purpose indicated, if, on the motion for preliminary injunction, other evidence than that adduced in the prior suit, and seriously challenging the validity of the patent, is submitted. In view of the Aldrich plow and the Lane model, together with the affidavits and other documentary proofs bearing thereon, to say nothing of various other matters now brought forward for the first time, I am of opinion, that the Sanders decree, * * * cannot be accepted as determining the validity of the patent in question for this court, because relevant and proper evidence has been here introduced, which was not there exhibited."

Thereupon the motions for preliminary injunctions were denied, and those suits were not pressed but were dismissed without a hearing on their merits. Then followed the present suit in the Circuit Court for the district of Kansas.

We have already referred to the exhaustive exploitation of the prior art in this case. The proof shows that it contains much, both in the way of patents, physical exhibits and oral testimony, which was not before the courts in Tennessee. Moreover, there is evidence strongly tending to show that that suit was collusive; not designed for a trial of the second claim of the patent upon its merits, but to secure vantage ground for future injunctive relief. In view of these things we are abundantly absolved, in any view of the rule of comity, from following the decision in the Sanders Case.

As we have already seen, the contest, in this case, is limited to the question whether the inclination of the disk away from the vertical plane gives patentability to the combination of the second claim of the patent. In the Tennessee case a wider range was taken and other questions were considered, but it cannot escape observation that the Court of Appeals after referring to a certain patent to one Niles, issued in 1882, for improvements in revolving plows, said:

"It is difficult to distinguish this from Hardy's conception. It is true it is found in a slightly different kind of machine. But they belong to the same family—a very kindred art. We think, therefore, there was no patentable novelty in Hardy's principal idea, that of the peculiar position of his disk. If it had been new, there could be no doubt it would have made his combination new and patentable."

After a patient consideration of the prior art we are brought to the same conclusion. Prior patents in the same and closely related fields had so definitely suggested the backward inclination of disks and physical unpatented structures had so actually employed them in practical and useful devices containing all the elements of the combination of the second claim that Hardy, in our opinion, could not have been the original inventor of that combination. With all these patents and physical structures before him it did not require inventive skill to follow the directions and reproduce the structures, even in his improved form. He got up a more comely and graceful plow. The beam was of iron instead of wood, and as a whole, the plow was less cumbersome and more symmetrical, and probably more salable; but like the B–6 in comparison with the No. 6 plow, it was only a natural mechanical development of pre-existing types. It introduced no new element, and made no essential rearrangement of old elements. Any changes made were in degree, proportion, or symmetry. The plow of his patent did the same thing in the same way, and by substantially the same means as before, and although it produced better results it did not rise to the dignity of invention. Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566; Belding Mfg. Co. v. Corn Planter Co., 152 U. S. 100, 14 Sup. Ct. 492, 38 L. Ed. 370.

This conclusion renders unnecessary any discussion of the much-debated question whether the manufacturers by their appearance and defense of the action against the user subjected themselves to liability. The decree below is reversed, and the cause remanded to the Circuit Court, with directions to dismiss the bill.

FOSTER HOSE SUPPORTER CO. v. TAYLOR.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 115.

PATENTS (§ 214*)—LICENSES—FORFEITURE—RELIEF AGAINST IN EQUITY.

A provision in a license to manufacture under a patent that, in case of default in the payment of royalties, the contract may be terminated by a notice, is valid and effective in so far that the licensor may forfeit the license without resort to a court of equity, but does not preclude a court of equity from relieving against a forfeiture at the instance of the licensee, and, under general equitable principles, it should do so where the default is merely in delay in payment of royalties, and their payment with interest will fully compensate the licensor.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 321-327; Dec. Dig. § 214.*

Requisites and validity of patent licenses, see note to St. Louis S. F. M. Co. v. Sanitary S. F. M. Co., 103 C. C. A. 569.]

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

Suit in equity by the Foster Hose Supporter Company against Thomas P. Taylor. Decree for defendant (180 Fed. 994), and complainant appeals. Affirmed.

J. J. Kennedy and M. B. Phillipp, for appellant.

D. S. Day, M. W. Seymour, and A. L. Shipman, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. This is a bill in equity asking for an injunction, accounting, and damages for infringement of letters patent No. 638,540, for improvements in hose supporters. The bill by way of anticipation alleged that the defendant had operated under the patent by virtue of a license which was duly terminated May 9, 1907. The answer admitted the validity of the patent, and the use of it by the defendant, but denied that the license had been duly terminated.

The defendant also filed a cross-bill, asking for affirmative relief in the form of an injunction preventing the complainant from declaring the license to be terminated, and a decree that it should stand with full force and effect. This cross-bill was on complainant's motion stricken from the files; the court being of opinion that the whole dispute could be settled upon the issues in the original cause. We shall so dispose of it, although we think that the defendant asking affirmative relief followed the better practice in filing the cross-bill.

The thirteenth article of the license agreement was as follows:

"It is agreed that if the party of the second part shall fail to keep accounts, or shall fail to make reports or pay royalties promptly as herein provided, or if during any year the royalties so paid by said party of the second part to said party of the first part shall not amount to at least $5,000, then the party of the first part may within thirty days of any such default or within a like period after the end of any such year in which the royalties shall not amount to at least $5,000, terminate this license by giving notice to the party of the

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

second part of her election so to do, but such termination shall not release the party of the second part from the payment of any royalties then due under this license."

The defendant not having made reports in or paid royalties for February, March, and April, 1907, complainant notified him in writing May 9, 1907, "of our election to terminate the license granted in and by said agreements, and do hereby terminate said license forthwith, on account of your failure to make the reports in writing, and to pay the royalties, as provided for in and by said license agreements." May 13th the defendant paid up all the royalties due, which were received by the complainant without prejudice to its notice of termination as aforesaid.

Great importance is attached by the defendant to two decisions of the Supreme Court which we think have little application to the question whether the court below could grant the defendant relief against the cancellation of the license, viz.: Wilson v. Sandford, 10 How. 99, 13 L. Ed. 344, and Hartell v. Tilghman, 99 U. S. 547, 25 L. Ed. 357. Both cases went off on the ground of lack of jurisdiction in the Circuit Court. In the Wilson Case the bill asked that the license to the defendant be set aside and an injunction and accounting awarded. The validity of the patent and the use of it by the defendant were admitted. The court held that the bill was primarily for equitable relief by way of setting aside the license and secondarily for infringement. The amount involved being less than $2,000, the Circuit Court was held to be without jurisdiction of the primary cause of action.

In the Hartell Case the bill alleged that the complainant and defendant had entered into a contract of license orally which the defendant refused to execute in writing, and prayed for an injunction and accounting. The defendant admitted the validity of the patent and the use of it, but denied the terms of the agreement as stated in the bill. The right to an injunction depending on the terms of the license, and they being in dispute and admittedly containing no provision for cancellation, the bill was primarily for the equitable relief, and not for infringement. Both parties being citizens of Pennsylvania, the Circuit Court was therefore without jurisdiction. It was indeed stated in the opinion of the court that the complainant had not the right to determine the contract of his own accord, and this was evidently true because there was no pretense that it contained any provision as to cancellation.

We think the rights of the parties as to the license in this case depend upon general equitable principles. From very early times equity relieved against the strict enforcement of the terms of mortgages by creating the doctrine of equity of redemption. This prevented the actual forfeiture of the borrower's title to land which had been conveyed to the lender as security only. Thus the subject of mortgages became a distinct head of equitable jurisprudence. Then relief was given against the landlord's right under a covenant in the lease to reenter upon the tenant's failure to pay rent when due. The right of re-entry was treated as a security for the rent, and, if the payment of rent with interest would fully compensate the landlord, equity would enjoin him from forfeiting the lease. Giles v. Austin, 62 N. Y. 486; Horton v. N. Y. C. R. R. Co., 12 Abb. N. C. (N. Y.) 30; Atkins v. Chilson, 11 Metc. (Mass.) 112. On the other hand, insurers in policies on

lives will not be enjoined from forfeiting policies when premiums have not been paid when they become due. This is on the ground that the nature of their business makes the time of payment of the essence of the contract. Klein v. Ins. Co., 104 U. S. 88, 26 L. Ed. 662. Mr. Justice Woods quoted with approval from New York Life Ins. Co. v. Statham, 93 U. S. 24, 23 L. Ed. 789:

"If the assured can neglect payment at maturity and yet suffer no loss or forfeiture, premiums will not be punctually paid. The companies must have some efficient means of enforcing punctuality. Hence their contracts usually provide for the forfeiture of the policy upon default of prompt payment of the premiums. If they are not allowed to enforce this forfeiture, they are deprived of the means which they have reserved by their contract of compelling the parties insured to meet their engagements. The provision, therefore, for the release of the company from liability on a failure of the insured to pay the premiums when due is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of the premiums, is to destroy the very substance of the contract. This a court of equity cannot do. Wheeler v. Connecticut Mutual Life Insurance Co., 82 N. Y. 543 [37 Am. Rep. 594]. See, also, the opinion of Judge Gholson in Robert v. New England Life Insurance Co., 1 Disn. (Ohio) 355."

It seems to us that payment of the royalty in licenses is, so far as the licensor is concerned, the main object of the contract, and that a court of equity ought to relieve against the forfeiture if payment with interest will fully compensate him, and this whether the provision as to forfeiture is self-executing or at the option of the licensor or in a mode prescribed, as in this case, by giving notice in writing. Mr. Bispham in his work on Equity says at section 181:

"The relief afforded in case of penalties is only an instance of a general rule; for the same species of redress will be afforded in all cases of forfeiture resulting from nonpayment of money, and in all cases where the damage incurred by nonperformance is susceptible of pecuniary measurement, and therefore of compensation. But equity will not in general, and in the absence of special circumstances calling for interference, give relief in cases of forfeiture growing out of breach of covenant for repairing, insuring, or doing any specific act. The ground of this difference is that in such cases it is unknown 'what the measure of damages shall be.' Therefore it cannot be argued that there is any right in a court of equity, or any practice of such a court, to give relief in cases of this kind by way of mercy, or by way merely of saving property from forfeiture."

The complainant contends that, the parties having agreed upon their respective rights in a precise manner, the court would be making a new contract for them if it relieved against the cancellation of the license. Reliance is placed upon authorities of which the following are the most important. Judge John Lowell in the Circuit Court for the District of Massachusetts held in the case of White v. Lee, 3 Fed. 222, that, when the agreement requires a written notice to be given, the license cannot be terminated without giving such notice. This was all that was necessary to be said in the case, but he added:

"In some few patent cases, beginning with Brooks v. Stolley, 3 McLean, 523 [Fed. Cas. No. 1,962], it has been held that a patentee enjoyed the unusual privilege of treating a breach of covenant as if it of itself worked a forfeiture. No doubt the parties may agree that such an effect shall follow; and this will account for some of the decisions. The others of this sort are overruled by Hartell v. Tilghman, 99 U. S. 547 [25 L. Ed. 357]."

This dictum was followed by the Circuit Court of the same district in Hammacher v. Wilson, 26 Fed. 239, where the court said:

"We think the evidence shows that for reasons which seemed sufficient to him at the time he deliberately determined not to make the payments required by the license. It is true that he has since offered to pay the sums due, and he strenuously contends that his license ought not to be forfeited for mere neglect to pay money, since he now offers to pay whatever may be due. Undoubtedly his argument would be very strong if this were an action to ascertain and declare a forfeiture. The question, however, which we have to decide, is not whether we shall now declare the license forfeited, but whether it has already been forfeited by the acts of the parties, pursuant to the provisions contained therein. The respondent agreed that, if he failed to perform his engagements, the license might be forfeited by a written notice served on him. We see no reason why such an agreement may not be made and enforced. White v. Lee, supra. He has failed to perform his engagements, the notice has been served on him, and we think, on the service of that notice, the license ceased to protect the respondent."

The Circuit Court of Appeals for the Third Circuit in Platt v. Fire Extinguisher Co., 59 Fed. 897, 8 C. C. A. 357, spoke of it with approval:

"The facts contained in the foregoing statement are admitted or abundantly established by the proofs. The court below was not called on to declare a forfeiture of the Platt license. The question was whether the license had already been forfeited by the acts of the parties pursuant to the terms and conditions contained therein. The defendant agreed that, if he failed to perform his covenants, the license might be forfeited by a written notice served on him, or his successor, and this was done. His subsequent tender of money in payment of royalties, and a promise to perform his covenants, could not avail to remove the forfeiture without the consent of the licensor and the other licensees. Almost identically the same question was presented in Hammacher v. Wilson [C. C.] 26 Fed. 239, in which the court held that a license which had been forfeited by the agreement of the parties would not protect an infringer, although he might offer to pay whatever was due for royalties."

We can go with these authorities so far as to hold that, when the contract provides the manner in which the licensor may forfeit the license, he need not apply for assistance to any court, but not to say that in such a case a court of equity is without power to relieve against the forfeiture at the instance of the licensee.

The action under consideration is one for infringement, pure and simple. There is no dispute about the terms of the license. The Circuit Court had jurisdiction, not only by virtue of the subject-matter, but by virtue of the citizenship of the parties. It was therefore in a position to dispose of the whole matter before it, and it was its duty to do so. Royalties having been paid in full at the time the bill was filed, though with a little delay, and the licensee being ready, willing, and able to pay punctually thereafter, the licensor was not injured, and we think the court properly dismissed the bill.

Decree affirmed, with costs.

NATIONAL PHONOGRAPH CO. v. AMERICAN GRAPHOPHONE CO.
(two cases.)

NEW JERSEY PATENT CO. v. SAME.

(Circuit Court, S. D. West Virginia. December 19, 1910.)

Nos. 166, 167, 304.

1. PATENTS (§ 328*)— INFRINGEMENT — PHONOGRAPH RECORDS — PROCESS OF MAKING DUPLICATES.
The Miller and Aylesworth patent, No. 683,615, for a method of duplicating phonographic records, which consists in immersing a mold carrying the record in relief on its bore in molten wax successively until wax to the desired thickness has chilled thereon, it being necessary that the mold be kept at a lower temperature than the wax in which it is dipped, is not infringed by the Macdonald process, which consists in filling the mold with molten wax and superheating both to expel any air bubbles therein, then chilling by immersion in cold water, the only similarity in the two processes being one of result in obtaining a casting free from defects caused by airholes.

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—APPARATUS FOR MAKING DUPLICATE PHONOGRAPHIC RECORDS.
The Aylesworth and Miller patent, No. 683,676, for an apparatus for making duplicate phonographic records, claims 6 and 7 are void for lack of patentable subject-matter as being aggregations of elements rather than true combinations. Claim 5 *held* not infringed.

3. PATENTS (§ 328*)—INFRINGEMENT—PROCESS OF DUPLICATE PHONOGRAMS.
The Joyce patent, No. 831,668, for a process of duplicating sound records, which consists in casting within a hot, seamless, tubular record mold fused wax-like material at substantially the same temperature as the mold, claims 3, 4, and 6, if valid, are limited to a process in which the mold is preheated. As so construed, *held* not infringed.

In Equity. Suits by the National Phonograph Company against the American Graphophone Company, two cases, and by the New Jersey Patent Company against the same. On final hearing. Decree for defendant in each case.

Herbert H. Dyke (Louis Hicks, of counsel), for complainants.
Philip Mauro and C. A. L. Massie, for defendant.

KELLER, District Judge. The three cases above-entitled, both in the taking of proofs (so far as could be done) and in the argument, have been consolidated, and, although nominally the third case is brought by a different plaintiff, its interest is so closely allied with that of the plaintiff in the other two suits that for practical purposes it is as though the same parties were opposed in all three suits. All three suits are brought against the defendant on the ground that a process practiced by the defendant for the production of duplicate sound records is an infringement of the several patents in suit. Letters patent Nos. 683,615 and 831,668 are process patents, and No. 683,676 is an apparatus patent, and, as to the last-named patent, it would be more accurate to say that the allegation in the bill in that case is that the apparatus used by defendant in the production of its

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

duplicate sound records constitutes an infringement of the said letters patent No. 683,676 for apparatus for duplicating phonographic records. It will thus be seen that the issues presented in these cases involve an inquiry into a branch of the art of reproducing speech, and this inquiry naturally involves a consideration of some of the difficulties that successive inventors have met with and endeavored to surmount by the exercise of their inventive genius.

At this place, while admitting the right of the plaintiffs to take the course they have seen fit to take in prosecuting these suits in this judicial district—the home district of the defendant corporation—I must say that it was a matter of some surprise to me in view of the fact that the suits on letters patent Nos. 683,615 and 683,676 were originally brought in the district of Connecticut, where the chief works of the defendant are located, and that two prior suits brought against the defendant by the National Phonograph Company involving the process practiced by the defendant were litigated to final decree in that judicial district, and hence the judge of that district would necessarily have the advantage of the familiarity with the general subject acquired in that litigation.

In considering the several patents relied on by the complainant (or complainants) in these suits, it will be necessary, in a measure, to discuss them separately, but I may be permitted at the outset to say that it is difficult to see how the same process could at once infringe the letters patent No. 683,615 to Miller and Aylesworth, and No. 831,668 to Joyce; and it is not at all surprising that the expert testimony offered to show identity in the process practiced by the defendant with the processes disclosed in the several patents referred to should have been given by different experts, as I apprehend it would be difficult to find one expert who would be able to discover that defendant's process was identical with both of these process patents.

No. 163—The Miller and Aylesworth Patent, No. 683,615.

The claims alleged to be infringed by the defendant's process are as follows:

"3. The method of duplicating phonographic records, which consists in immersing a mold or matrix carrying the record in relief on its bore in a molten wax-like coagulable material, whereby the material will accumulate on the bore of the matrix or mold and chill thereon in a layer of the desired thickness, in finishing the bore of the duplicate so secured, and in separating the duplicate from the matrix or mold, substantially as set forth.

"4. The method of duplicating phonographic records, which consists in immersing a mold or matrix carrying the record in relief on its bore in a molten wax-like coagulable material, whereby the material will accumulate on the bore of the matrix or mold and chill thereon in a layer of the desired thickness, in finishing the bore of the duplicate so secured, and in shrinking the duplicate from the matrix or mold, substantially as set forth.

"5. The method of duplicating phonographic records, which consists in immersing a mold or matrix carrying the record in relief on its bore in a molten wax-like coagulable material, whereby the material will accumulate on the bore of the matrix or mold and chill thereon in a layer of the desired thickness, in finishing the bore of the duplicate so secured before the latter has become hard, and in separating the duplicate from the matrix or mold, substantially as set forth."

The Macdonald process, used by the defendant, is thus described by Mr. Thos. H. Macdonald in his deposition given in these cases (Record, pp. 214, 215):

"Q. 5. What are the salient or essential steps which are practiced in making sound records by the defendant's process (hereafter to be understood as the process in use at defendant's factory during the period above specified)? A. The first step is to fill the mold with the liquid or molten wax. The mold and the wax are then raised to a temperature substantially above the melting point of the wax. It is allowed to remain at this temperature for a definite period of time, until all ebullition or bubbling has ceased and the wax is thoroughly limpid. It is then removed, and the mold is immersed in cold water. As the second step, chilling the mold (and consequently the wax in contact with it) from the outside. The next step is to remove the core, and after this the surplus material in the center of the wax mold is removed by a scraper, and the mold is then chilled down to normal temperature by being placed in an air blast. The molded record is removed, the ends cut off, and, when entirely cold, usually the next day, it is placed in a machine which holds it on the outside on each end. It is then reamed the size to fit the mandrel of the talking machine, and is then ready for the market.

"Q. 6. In the molding operation, as you have described it, have or have not the three steps of (1) superheating the melted material while in the mold, (2) maintaining the superheated temperature, (3) suddenly and symmetrically chilling from the outside, been always practiced in the manufacture of molded records by the American Graphophone Company? A. They have.

"Q. 7. How high above the melting point of the wax-like material is it heated? A. From 120 to 150 deg. Fahrenheit.

"Q. 8. How long on an average is this superheated temperature maintained? A. About five minutes for each mold."

Taking the process thus described in connection with the specification forming part of the patent No. 683,615, I think it must be apparent to any person of ordinary intelligence, not only that they are not identical, but they have surmounted pre-existing difficulties in the way of casting duplicate sound records by absolutely different methods, and that the only similarity in the processes is one of result. In the Miller and Aylesworth process the duplicate is secured upon the matrix by the process of progressive congealing of the material upon the bore of the matrix immersed in the molten material, and the success of the process depends upon the fact that the mold is kept at all times below the temperature of the molten material, which otherwise would not only cease to congeal, but would result in the remelting of that which had already congealed, and in the consequent failure to get a casting. As stated in the specification of the patent (page 2, line 31):

"But in no instance should the matrix or mold be immersed within the molten material for a long enough time to allow its temperature to be raised sufficiently to permit the deposited molten material thereon to become remelted. The reduced temperature of the matrix or mold relative to the temperature of the molten material causes the latter to become coagulated or chilled on the interior of the matrix and to deposit thereon to the thickness desired."

In the Macdonald process:

"The mold and wax are then raised to a temperature substantially (120 to 150 degrees) above the melting point of the wax. It is all allowed to remain at this temperature * * * until all ebullition or bubbling has ceased and the wax is thoroughly limpid."

These described steps, so radically different as to thoroughly differentiate the processes, were both devised for the purpose of obviating and overcoming a difficulty in the commercial manufacture of duplicate sound records by the process of casting, namely, the occurrence of air bubbles on the surface of the duplicate, which difficulty had for years puzzled such an experienced and resourceful inventor as Thomas A. Edison. The methods used in overcoming this difficulty by the Miller and Aylesworth process and by the defendants' process were diverse. The Miller and Aylesworth process is designed to prevent the entry of air bubbles into the molten casting, and for this purpose the mold or matrix, with an open bottom and also an open top, is immersed into the molten material, which, rising on the interior surface of the mold as it is lowered, forces the air within the mold steadily upward, and hence there is no entrapping of air bubbles within the material in the mold, as in the ordinary process of dipping or pouring. By the defendant's process air bubbles are naturally and necessarily entrapped in the step of filling the molds, and the design of superheating the material and allowing the molds to remain within the caldron and filled with the superheated material until all ebullition has ceased is to keep the material in a thoroughly molten condition sufficiently long to permit all such entrapped air bubbles to escape through the molten material to the free air, which is accomplished by means of the operation of the laws of gravitation. In other words, the process disclosed by the patent in suit prevents the entry of air bubbles. The defendant's or Macdonald process does not prevent their entry but expels them.

The Miller and Aylesworth process requires a relatively cold mold. The defendant's process is indifferent as to the temperature of the mold when introduced into the caldron, but it is necessarily heated to a high degree in the subsequent step of the process. The Miller and Aylesworth process as described in the specification (and I think with any apparatus that could be devised to carry it into effect) demands for successful operation an open bottom and the gradual lowering of the mold into the molten material or its equivalent of raising within the inner surface of the matrix molten material in some such way, as is disclosed in the patent to Edison, No. 667,662; whereas, in defendant's process, the mold necessarily has a closed bottom, and in filling it, as Mr. Macdonald says in his testimony (page 219, Q. 21):

"In my process, used by the graphophone company, the material is thrown in the mold in any convenient way. In actual practice it is filled by dropping the mold six or eight inches below the surface of the wax and allowing the material to flow over the top as rapidly as it can."

With regard to the reference to the claims in suit to the method of finishing the bore of the duplicates before removal from the mold, it is enough to say that this step is all that distinguishes the claims in suit from the broad claims 1 and 2 of the patent, as to which no infringement was alleged. The defendant does not finish the bore before removing from the mold, but does remove some of the surplus material.

It seems to me to be perfectly clear that the defense of noninfringement must prevail as to the suit upon patent No. 683,615. The whole

method pursued by defendant is essentially different from that practiced by the plaintiff, and it seems to me that this case can scarcely be differentiated from that brought by the plaintiff in the district of Connecticut upon Edison patent No. 667,662, and decided by Judge Platt in favor of the defendant. I hold that the defense of noninfringement is overwhelmingly made out by the defendant, and that this suit upon the Miller and Aylesworth patent, No. 683,615, must be dismissed.

No. 167—The Aylesworth and Miller Patent, No. 683,676.

This patent is for the apparatus used in carrying out the process of patent No. 683,615.

The claims sued upon are as follows:

"5. An improved apparatus for making duplicate phonographic records, comprising a matrix or mold carrying on its bore the representation of the record to be duplicated, a disk upon which said matrix or mold is seated, said disk carrying concentrically within the bore of the matrix or mold a designation of such record, and means for depositing molten material within the matrix or mold and upon said disk, whereby the duplicate record will be formed and its designation be simultaneously cast or impressed upon the end thereof, substantially as and for the purposes set forth.

"6. An improved apparatus for duplicating phonographic records, comprising the combination with means for securing a deposit of a wax-like coagulable material upon the bore of a matrix or mold which carries the representation of the record to be duplicated, of means for finishing the interior of the duplicate while the latter is in position within the matrix or mold, substantially as set forth.

"7. An improved apparatus for duplicating phonographic records, comprising the combination with means for securing a deposit of a wax-like coagulable material upon the bore of a matrix or mold which carries the representation of the record to be duplicated, of means for forming within the duplicate while the latter is in position in the mold, a series of concentric ribs of gradually increasing diameters from one end of the duplicate to the other, whereby the duplicate may be properly received upon a tapering mandrel, substantially as set forth."

The claims in this patent must be read in connection with the specification in which the inventors state that their invention relates to an "improved apparatus for duplicating phonographic records." They then proceed to describe the essential features of the process which is set forth in patent No. 683,615, as follows:

[Said process] "consists in immersing in a bath of molten wax-like coagulable material a matrix or mold which carries on its bore the representation in negative or relief of the record to be duplicated, whereby the molten material will fill the bore of the matrix or mold, but will be excluded from its exterior, the reduced temperature of the matrix or mold relative to the molten material causing the latter to coagulate or chill upon the bore of the matrix until a layer of the desired thickness has been secured, after which the matrix or mold is removed from the bath of molten material, and the bore of the duplicate finished by a reaming-tool, the resulting duplicate being finally removed from the matrix by shrinking."

They then add:

"The object of our present invention is to provide an improved apparatus by which the process in question may be expeditiously carried out."

The main feature of the process above described is the formation, by chilling or coagulation, of a layer of the molten material upon

the bore of the matrix while the latter is immersed in the molten material, "after which the matrix or mold is removed from the bath of molten material."

It would seem to be clear that, since I have already held that the defendant does not practice the process of the plaintiff, it cannot infringe upon its apparatus patent designed for the carrying out of that process. However, in claim 5, the plaintiff refers to the use of a disk carrying concentrically a designation of the record to be duplicated, and it is alleged that the defendant uses a similar plate or disk in making its duplicates.

There can be no contention that the defendant uses all the essential items constituting the "means" or "improved apparatus" of the plaintiff described in this patent. Indeed it manifestly could not do so, since the apparatus of the plaintiff is designed to effect congelation while the apparatus is still immersed in the bath of molten material, and the defendant's process can by no means be so accomplished. Therefore the mere fact that defendant uses a name plate for impressing the designation upon its records cannot amount to an infringement of this patent, since the use of such has been common in apparatus for casting as was illustrated by Schuberth's patent No. 359,637, cited by defendant, and others referred to in argument. The feature of the lettering disk is an immaterial detail.

Claim 6 recites as essential features the improved apparatus "comprising the combination with means for securing a deposit," etc., of "means for finishing the interior of the duplicate while the latter is in position within the matrix or mold, substantially as set forth." It is claimed by the defendant that it does not in fact finish its records until after they are removed from the molds, though admitting that it removes certain surplus material while they are yet in engagement with the molds (page 215, fol. 10); but, regardless of facts in this regard, it is apparent that, since the defendant does not employ the specified means for securing the deposit of material, it is immaterial whether or not it finishes the record while the same is yet within the mold, as there is here no patent for this feature alone. Further than that, I think claim 6 is clearly void for the lack of co-operative relation between the several recited elements. There is no true combination but an aggregation. In Pickering v. McCullough, 104 U. S. 318, 26 L. Ed. 749, the court said:

"In a patentable combination of old elements all the constituents must so enter into it as that each qualifies every other."

Admittedly the reaming knife of claim 6 is an old device. It is not seen how it in any way coacts with or qualifies the other elements in the alleged combination.

In National Cash Register Co. v. Am. Cash Register Co., 53 Fed. 371, 3 C. C. A. 564, the Circuit Court of Appeals for the Third Circuit said:

"A combination, to be patentable, must produce a new and useful result as the product of the combination, and not a mere aggregate of several results, each the complete result of one of the combined elements."

See, also, Reckendorfer v. Faber, 92 U. S. 357, 23 L. Ed. 719, wherein the court fully discusses this principle.

Tested in accordance with the principles announced in these and many other kindred cases, I come to the conclusion that claim 5 is not infringed by the defendant, and that claims 6 and 7 are void for lack of patentable subject-matter, as being aggregations of elements rather than true combinations.

It results that this suit must be dismissed, with costs.

No. 304—The Joyce Patent, No. 831,668.

This is a process patent granted September 25, 1906, to the New Jersey Patent Company, assignee by mesne assignments of Maurice Joyce, for a method of duplicating phonograms.

The claims alleged to be infringed by the defendant's process are the following:

"3. The process of duplicating sound records in wax-like material, which consists in casting within a hot, seamless, tubular record-mold, fused wax-like material at substantially the same temperature as the mold, cooling the mold and contents so as to cause the material to shrink away from the surface of the mold, and removing the hardened casting longitudinally from the mold, substantially as set forth.

"4. The process of duplicating sound-records which consists in casting within a hot, seamless, tubular record-mold, fused wax-like material at substantially the same temperature as the mold, allowing the material to set, cooling the mold and contents so as to cause the material to shrink away from the record-surface of the mold, and removing the hardened casting longitudinally from the mold, substantially as set forth."

"6. The process of duplicating sound-records in wax-like material, which consists in casting within a hot, seamless, tubular record-mold, fused wax-like material at substantially the same temperature as the mold, placing the mold in a water-bath and removing the hardened casting longitudinally from the mold, substantially as set forth."

The application which resulted in this patent had a long and arduous history in the Patent Office, the application having been filed October 13, 1897, and the patent isued to the ultimate assignee September 25, 1906, or nearly nine years after the filing of the application. This is a fact not to be forgotten or overlooked in construing the claims in suit.

So far as these claims refer to the utilization of the coefficient of contraction of the material used in molding the record as a means for longitudinally removing the casting from the mold, it is enough to say that that feature of the process, as well as all other features, except the use of a "hot" mold and material at substantially the same temperature, was embraced in litigation between the National Phonograph Company and the defendant before Judge Platt of the district of Connecticut in a suit brought upon the Edison patent, No. 667,662, which patent was held not infringed by defendant's process by Judge Platt. 135 Fed. 809. See opinion of Judge Platt in that case, with which I am fully in accord.

Narrowing the scope of this inquiry to those features as to which the present patent in suit may be distinguished from the Edison, No. 667,662, and the Miller and Aylesworth patent, No. 683,615, already

discussed, we may get some light upon what was the inventive idea of Mr. Joyce as set forth in his specification. He says:

"The mold, core and base are slightly oiled and then heated, preferably to near the temperature of melted wax. This heating expands the mold slightly." (Page 1, line 100, etc.)

This language in the specification is the only basis for the claims in suit, which were not formulated until more than eight years after the application was filed (December 22, 1905), not until the application had been assigned to the National Phonograph Company, and by the latter to its present owner, and not until after the litigation in Connecticut upon the Edison patent, No. 667,662, had been terminated. The Patent Office record of the Joyce application shows that the claims in suit were rejected January 6, 1906, in view of patents cited by the examiner. In subsequent correspondence Mr. Dyer, attorney for Joyce, presented an argument which induced the examiner to allow these claims, and in the course of which argument he said:

"A process which may be useful for pressing a record would be unsuccessful for casting a record. There is much more likelihood of entrapping air in a casting operation, and, in order to prevent this, the mold is heated to the melting point of the wax before the molten wax is introduced, so that it will not congeal instantly upon coming in contact with the mold, and there will be an opportunity of allowing air to escape which would otherwise be entrapped at the surface of the mold."

This argument was effective with the examiner and the claims were allowed, but it would be interesting to know how much of the reasoning involved in this argument was derived from Mr. Joyce's description of his process in which he declares that heating the mold "expands it slightly," and relatively how much from the Connecticut litigation and the discussion of the problem of air bubbles which occurred therein, and as to which Judge Platt in upholding the defendant's process stated that "air bubbles in the melted material drove Mr. Edison away from casting for many years."

In disposing of this case, it is not necessary for me to hold that these claims are absolutely void. An expert in the employ of plaintiff produced three duplicate records (more or less injured) which he swears were produced by means of preheating the mold in the manner prescribed by the Joyce process, and I am unable to say that the process cannot be made use of for commercial purposes, though I have very serious doubts about it. But I am clear that these claims should and must be construed as limited to a process in which the mold is preheated, and, so construed, they are not infringed by the process of defendant. The so-called "Commercial Joyce apparatus" I am convinced was never evolved from the brain of Joyce, but that its use in the establishment of the plaintiff came after a revision of the opinion held by Mr. Edison upon the subject of the effects of superheating the waxy material at the time he gave his deposition in the Connecticut suits, and in which he said, speaking of the Macdonald patent:

"Q. 78. Is the suggestion of superheating the wax contained in this patent one which is calculated to get rid of the air bubbles? A. No; our experi-

ence is that it increases them, and what is the object of superheating I can't comprehend. It only results in the corrosion of the mold." (Defendant's Paper Exhibits, p. 46.)

As I have already said, I am very doubtful whether the claims in suit can be sustained as valid for any purpose, in view of the disclosures of the application of heat to the mold, disclosed in prior patents involving the art of casting or molding, and with which art these claims are distinctly allied; but, even if they be valid, they are narrow, and should and must be construed by reference to the description of the process as contained in the specification which discloses the idea in the mind of Mr. Joyce when he adopted the hot mold. This was merely to secure the running of the fused material so as to make a closer contact with the surface of the mold, and he accomplished this result by preheating the mold to such degree as to bring it "in harmony" with the fused material prior to beginning the process of casting. There is no suggestion in his specification that he ever knew or appreciated the difficulty which had driven Mr. Edison away from the casting process for so long, viz., the development of air and gas bubbles upon the sides of the matrix or mold, but he had found that the tendency of the fused material to congeal on the surface of the matrix of a cold mold of the character used by him made the result imperfect, and his sole idea, as gathered from his description, was to overcome this difficulty. If this be invention it is certainly contained within very narrow limits in view of the disclosures of prior patents in the art of casting.

I can conceive of no fair or reasonable interpretation of the claims of the Joyce patent involved in this litigation that does not demand the preheating of the mold, or that involves the continued superheating of the mold and material. The claims are for a process of casting fused material in a hot mold, and the process as described in the specifications of the patentee and in the argument of his counsel, upon which the claims in suit were fully allowed, prescribed this preheating, its approximate degree, and the only purpose known to the inventor, for the requirement, which was that the material used in the casting might run more freely and make a sharper contact with the mold than would be the case if the mold were cold enough to congeal the material in the act of pouring the casting.

Again, the very use of the term, "casting within a hot, seamless, tubular mold," in terms limits the process to the one of casting and negatives the idea of superheating the material or mold, or continuing the heating of either after the material is introduced into the mold. Neither claim nor specification discloses any idea of overcoming difficulties or securing advantages in the process other than those supposed to be secured by preheating the mold to substantially the melting point of the wax-like material to be used.

The Macdonald process distinctly provides for superheating both mold and contents, and, after the introduction of the material continuing the superheating until the material is limpid; the purpose being, not to prevent the entrapping of air bubbles, for this cannot be done in a casting process that involves pouring or its equivalent, but to drive

them off through the limpid superheated material by the very continuance of the high degree of heat.

It results that the bill in this case must be dismissed, at the cost of the plaintiff.

SIROCCO ENGINEERING CO. et al. v. MONARCH VENTILATOR CO.

(Circuit Court, S. D. New York. September 29, 1910.)

1. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—ALLEGATIONS OF TITLE.
A bill for infringement of a patent, alleging title in complainant, based on an instrument of transfer of several patents and containing reservations, if it does not appear that such reservations apply to the patent in suit, is not demurrable for want of title in complainant.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.*]

2. PATENTS (§ 196*)—INSTRUMENT OF TRANSFER—LICENSE OR ASSIGNMENT.
An instrument granting the sole and exclusive license to manufacture, sell, and use a patented article, but reserving to the grantor the exclusive right to manufacture, sell, and use certain specific apparatus only for certain purposes, although called a license, was in legal effect an assignment, with reservation of a license to the grantor.
[Ed. Note.—For other cases, see Patents, Dec. Dig. § 196.*]

In Equity. Suit by the Sirocco Engineering Company and the American Blower Company against the Monarch Ventilator Company for infringement of patents Nos. 12,796, 12,797, and 12,798. On demurrer to bill. Overruled.

The bill alleged the grant of the original patent, and that thereafter the patentee granted to complainant Sirocco Engineering Company "the sole and exclusive license to manufacture, sell, and use" the patented invention, "except for certain reservations." Profert was made of the license agreement, from which it appeared that other patents were included in the license, and that the exclusive license granted contained the following reservations: "Provided, however, that the license hereby granted does not include apparatus for generating power (such, for example, as elastic fluid turbines or electric generators), it being understood that, if said inventions are applicable to such use, said patentee reserves to himself, his heirs and assigns, the sole and exclusive right to manufacture, use, and sell the same as part of such power generating apparatus only; and provided that this license shall not include the manufacture, sale, and use of tea machinery (being apparatus designated especially for, and used exclusively for, the preparation of tea), it being understood that said patentee reserves to himself, his heirs and assigns, the sole and exclusive right to manufacture said patented fans and other appliances, in so far only as the same are built in as an integral part of such tea machinery."

The reissued patents were granted to the Sirocco Engineering Company as assignee of Davidson. Defendant demurred upon the grounds that the above instrument was a mere license, and not an assignment, and that hence the Sirocco Engineering Company did not have title prior to the granting of the reissued patents, and that said patents were improperly granted to said company as assignee, and are therefore void.

Fraser, Turk & Myers, for complainant.
Knight Bros., for defendant.

HOLT, District Judge (after stating the facts as above). It seems to me at least doubtful whether the point argued is raised by the de-

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

murrer. It does not appear on the face of the bill that the reservations in the instrument of transfer dated November 21, 1907, were reservations of rights covered by the reissued patent. If not, the instrument, so far as the reissued patent was concerned, was undoubtedly an assignment. But, assuming the reservations to have been covered by the reissued patent, I think that the instrument, although called a license, was in legal effect an assignment. It was a grant of the patent, with the reservation of a license to the grantor. Littlefield v. Perry, 88 U. S. 205, 22 L. Ed. 577; Frankfort v. Pepper (C. C.) 26 Fed. 336; Pope v. Clark (C. C.) 46 Fed. 792.

This conclusion makes it unnecessary to pass upon the other points argued. The demurrer is overruled, with leave to answer on payment of costs within 20 days.

In re FORSE et al.

(District Court, N. D. New York. December 12, 1910.)

BANKRUPTCY (§ 309*) — LIENS — MORTGAGE GIVEN BY PARTNER TO SECURE PARTNERSHIP DEBT.

Bankrupts contracted for the purchase of a stock of goods to be paid for in installments, being named in the contract as individuals and not as partners, although they were in fact partners. One of them also contracted to give, and did give, his personal bond secured by mortgage on his individual property to secure payment of the contract debt by which he bound himself, his heirs, executors, and administrators, to pay such debt to the mortgagee, his executors, administrators, or assigns. Under the law of the state, general partners were severally liable in equity for partnership debts. *Held*, that the mortgagor was not a surety for the debt, but a principal debtor, who had given the mortgage to secure his own debt, whether as partner or otherwise; also, that the contract and bond and mortgage were assignable before any default thereunder, and the assignee was entitled to enforce the mortgage as against the individual creditors of the mortgagor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 555–564; Dec. Dig. § 309.*]

In the matter of Amos L. Forse and George W. Roseboom, individually, and as members of the firm of Forse & Roseboom, bankrupts. Controversy over the title and right to certain surplus moneys arising on the sale in foreclosure of certain lands and premises owned by Amos L. Forse at the time of the bankruptcy amounting to about $962.20, and which is claimed by Wealtha A. Neff, the alleged owner of a subsequent mortgage on the said premises, and also by A. B. Packer, the trustee in bankruptcy of said bankrupts. Order in favor of mortgagee.

See, also, 182 Fed. 212.

H. C. Stratton, for claimant Neff.

Vere H. Multer, for trustee.

RAY, District Judge. On the 8th day of October, 1908, one Leon Y. Jones, who was in the possession and apparent owner of a stock of goods and certain so-called fixtures, personal property, in a store in Guilford, N. Y., as party of the first part, entered into a contract in

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

writing with Amos L. Forse and George W. Roseboom, parties of the second part, which, so far as material here, reads as follows:

"This contract and agreement made and entered into this 8th day of October, 1908, by and between Leon Y. Jones of the town of Guilford, county of Chenango and state of New York, party of the first part, and Amos L. Forse and George Roseboom, both of the city of Binghamton, Broome county, New York, parties of the second part, in the manner following: The said party of the first part hereby agrees to sell and the said parties of the second part hereby agree to buy and purchase of the said party of the first part his stock of goods, store furnishings and fixtures formerly belonging to W. H. Neff & Son in the town of Guilford, Chenango county, New York, and they hereby agree to pay for said stock of goods the cost price, and they agree to pay for all fixtures such a sum as shall be agreed upon between the parties hereto, and if the parties hereto are unable to agree upon the price of said fixtures then the party of the first part shall pick a disinterested party and the parties of the second part shall pick a disinterested party to determine the value and price of such fixtures, and when the cost price of said stock of goods and the value of said fixtures is agreed upon then the said parties of the second part hereby agree to pay the total amount of the cost price of said stock and the agreed price of such fixtures to the said party of the first part as follows: $100.00 or more thereof on the 26th day of December, 1908, and $100.00 or more monthly thereafter until the said purchase price and interest thereon from date hereof is fully paid. * * * And the said Amos L. Forse for the purpose of securing the payment of the contract price of said goods and fixtures hereby agrees to execute, acknowledge and deliver a bond conditioned for the payment of the purchase price of said stock of goods and fixtures as herein provided, and that as a collateral security for the payment of said bond that he will execute and deliver to the said party of the first part his mortgage which shall cover all that tract or parcel of land situate in the city of Binghamton, Broome county, N. Y., * * * said mortgage to be given subject to one mortgage now a lien on said premises in the sum of $1,000 now held by Nettie R. Scott, and the other of said mortgages amounting to the sum of $300 held by Prudence A. Smith. Said bond and mortgage to be executed and delivered before possession of said stock of goods and fixtures is given by said party of the first part to the said parties of the second part."

On the same day the said Forse and his wife executed and delivered to the said Jones the bond and mortgage called for by the said agreement, and the goods and fixtures were appraised and the value agreed upon, and same were then delivered to said Amos L. Forse and George Roseboom. I find no reference to a firm or partnership in either the agreement of sale or in the bond or mortgage. On the 7th day of November, 1908, said Jones by instruments in writing assigned the said contract and agreement of sale and the title to the goods mentioned as fixtures and said bond and mortgage to the said Wealtha A. Neff for an adequate and valuable consideration. It is now said that she in fact owned said goods and fixtures, and that the sale was in fact made for her, and the agreement and bond and mortgage assigned for the reason they were in fact her property. However this may have been, Jones owed her for the goods and fixtures which he had purchased of her. The contract and bond and mortgage were assigned and turned over to her in payment of the debt if title to the goods and fixtures was in Jones.

The trustee in bankruptcy claims that on the face of the papers Forse was a mere surety for the copartnership of Forse & Roseboom; that his contract was that of a surety for that firm; that he could not

assign and convey title to the said bond and mortgage before default in payment on the contract or agreement of sale; that, as the assignment was made prior to any default in payment, Mrs. Neff took no title to the bond and mortgage and has none; and that the surplus money, proceeds of the sale of the real estate owned by Forse individually, belongs to the trustee of his estate in bankruptcy.

It is seen that, by the terms of the written contract of sale, Jones sold the goods and fixtures to Amos L. Forse and George Roseboom, who agreed to buy and purchase the same and to pay Jones therefor the sum thereafter fixed and agreed upon, viz., $2,481.25. No payment was due until December 26, 1908. There can be no doubt that this sale and delivery of the goods and fixtures created a debt for the sum of money due and owing to Jones from Amos L. Forse and George Roseboom. It is perfectly clear that the contract and agreement was assignable, as was the indebtedness created thereby. When the assignment of such contract was made and delivered, title to the contract and all sums of money agreed to be paid thereby—that is, the debt owing—passed to and vested in Wealtha A. Neff. Title to the fixtures was reserved, but care was taken in the assignment of the contract and agreement to convey title to the fixtures. So far as the passing of title to the debt is concerned, it is entirely immaterial that it was not expressed in the written agreement that the parties of the second part, said Forse and said Roseboom, would pay the purchase price to Jones and his executors, administrators, or assigns. Amos L. Forse was one of the purchasers of the stock of goods and fixtures, and he agreed as a condition of the delivery of the goods and fixtures that he would give the bond and mortgage on his own premises owned by him individually "for the purpose of securing the payment of the contract price of said goods and fixtures." He agreed to give the bond and mortgage for the purpose of securing the payment of the debt, and he did give the bond and mortgage; his wife uniting for that express purpose. There was no relation of trust or confidence existing or created by that contract and agreement between Jones and Forse, or between Jones and Roseboom, or between Jones and Amos L. Forse and George W. Roseboom.

Turning now to the bond and mortgage, we find that:

"I, Amos L. Forse, of the city of Binghamton, Broome county, New York, am held and firmly bound unto Leon Y. Jones of the town of Guilford, county of Chenango, New York, in the sum of four thousand nine hundred sixty-two 50/100 ($4,692.50) dollars to be paid to the said Leon Y. Jones or to his certain attorney, executors, administrators or assigns."

For the payment he bound himself and his heirs, executors, or administrators jointly and severally. Then followed the condition of the bond as follows:

"The condition of this obligation is such that if the above bounden Amos L. Forse, his heirs, executors or administrators, shall and do well and truly pay or cause to be paid unto the above named Leon Y. Jones, his certain attorney, executors, administrators or assigns, the sum of two thousand four hundred eighty-one and 25/100 dollars according to the terms of a certain contract dated October 8, 1908, by which the party of the first part agrees to purchase certain personal property and pay for the same as therein provided."

The condition was that he would pay to Jones or to his executors, administrators, or assigns the sum of $2,481.25 according to the terms of the contract and agreement before mentioned; that is, at the times and in the amounts mentioned. His engagement here is that he and his executors, administrators, or assigns will pay to Jones or to his executors, administrators, or assigns.

The mortgage recites that Forse and wife, in consideration of $2,481.25 duly paid, have bargained, sold, etc., and that by the said mortgage they do grant and convey to Jones, his heirs and assigns, all the real estate therein described. This is the real estate thereafter sold in foreclosure and from the sale of which the surplus moneys in question arose. The mortgage itself further recites:

"This conveyance is made as collateral to a certain contract by which the said party of the first part with another agrees to purchase certain personal property and pay for the same as therein provided, which contract is dated October 8, 1908. This instrument is subject to other mortgages aggregating to thirteen hundred dollars ($1,300)."

This is a plain declaration that the mortgage is collateral security for the payment of the sums of money agreed to be paid in and by the written contract and agreement and by which, says the mortgage:

"The said party of the first part (Amos L. Forse) with another (referring of course to Roseboom) agrees to purchase certain personal property and pay for the same as therein provided."

The mortgage further says:

"This grant is intended as a security for the payment of the sum of two thousand four hundred eighty-one 25/100 dollars according to the terms of the said contract between parties of October 8, 1908, and according to the condition of a bond this day executed and delivered by the said Amos L. Forse to the said party of the second part."

The mortgage then goes on to say that, in case of default in payment of the principal sum hereby intended to be secured or in the payment of the interest thereof, etc., it shall be lawful for the party of the second part, his executors, administrators, or assigns, at any time thereafter to sell the premises, etc.

I think this far from a contract of suretyship. Forse was one of the purchasers and one of the principal debtors. He agreed, as a condition of conveying the property delivered to himself and Roseboom, to execute and deliver the bond and mortgage covering his own property. He did execute such bond and mortgage and thereby bound himself and his executors, administrators, or assigns to pay to Jones or to his executors, administrators, or assigns the sums of money agreed to be paid in and by the said contract and agreement when due under the terms thereof; that is, $100 each month commencing December 26, 1908. In the first place, it is difficult to understand how Forse could become surety for himself, and, second, it is plain that, being one of the principal debtors, he assumed the payment of the entire indebtedness as between himself and Jones and gave the bond and mortgage as security for the payment of all the money to grow due under such contract. He explicitly agrees in both bond and mortgage to pay to Jones or to his executors, administrators, or assigns.

No copartnership is mentioned or referred to. Forse does not guarantee payment, but agrees to pay and binds himself to pay according to the terms of the contract.

In Evansville Nat. Bank v. Kaufmann et al., 93 N. Y. 273, 45 Am. Rep. 204, it was held that, until a right of action has arisen on a "special guaranty," such guaranty is not assignable. Assuming this to be the law, was this bond and mortgage a "special guaranty," assuming them to have constituted or amounted to a contract of guaranty merely? The contract promise and obligation are not restricted or limited to Leon Y. Jones. The promise and obligation of the guaranty is that Forse, his executors, administrators, or assigns, will pay to Jones, or to his executors, administrators, or assigns, all sums of money growing due on a certain contract for the sale of goods when due. Why was not this contract and obligation to pay money at a future day for goods sold and delivered assignable? It is unnecessary to say that the bond and mortgage could not be enforced by one to whom assigned unless such assignee also held the contract, or debt mentioned therein for the sale and purchase of the goods. The bond and mortgage were security for that debt or obligation and intended to be and so state. If the contract and debt evidenced thereby were assignable, then the bond and mortgage given to secure the payment of the debt were assignable also, and in all probability an assignment of the contract and agreement of sale would have carried the bond and mortgage as an incident without formal assignment inasmuch as the bond and mortgage, even if held to be a guaranty, ran to the assignee of Forse.

In Evansville, etc., v. Kaufmann, supra, Kaufmann and Blun sent Bingham Bros. a letter reading as follows:

"New York, Dec. 29, 1874.

"Messrs. Bingham Bros., Evansville, Ind.—Dear Sirs: Any drafts that you may draw on Mr. A. Feigelstock of our city, we guarantee to be paid at maturity. Truly yours, Kaufmann & Blun."

Bingham Bros. thereupon drew two drafts on said A. Feigelstock and had them discounted by the Evansville National Bank at Evansville, Ind., leaving the letter of credit with the bank and upon the security of which the bank discounted the drafts. The bank furnished the consideration. The bank thereupon forwarded such drafts to Feigelstock, the drawee, for acceptance and payment, by whom they were dishonored. The bank thereupon sued Kaufmann & Blun on the guaranty.

The Court of Appeals held this to be a special guaranty, one directed to Bingham Bros. only, and upon which they alone could act, one upon which the bank could not advance the money; that is, furnish the consideration, taking an assignment of the letter of credit as its security before the acceptance of the drafts by Feigelstock and then recover against the guarantor, Kaufmann & Blun, in case such drafts were not accepted and paid by Feigelstock. The court said:

"We have thus seen that no cause of action accrued to the plaintiff upon the guaranty for the reason that it is a special guaranty upon which the party addressed alone could act and acquire a cause of action."

The court also said:

"Of course, if the defendants (Kaufmann & Blun) have signed a guaranty, either general or special, upon a sufficient consideration, by which they have unqualifiedly promised to become liable for the payment of all such drafts as Bingham Bros. might thereafter draw on Feigelstock, their liability, however comprehensive, would not be affected by its imprudence. But such is not the contract under consideration."

The court also held there was no consideration so far as Kaufmann & Blun were concerned. The court also said:

"Guaranties are distinguished in the law as being either general or special, special guaranties being those which operate in favor of the particular persons only to whom they are addressed, while general guaranties are open for acceptance by the public generally."

Assuming the bond and mortgage executed by Forse and wife to Leon Y. Jones to be a special guaranty, it was certainly addressed to and ran to Leon Y. Jones and to his executors, administrators, and also to his assigns. It was clearly within the contemplation and agreement of the parties that Jones might and probably would sell and assign the contract and the debt evidenced thereby, and also the bond and mortgage given as security, inasmuch as those instruments themselves assert they are to secure the payment of the sums of money to become due and payable according to the terms of such contract, and the promise and agreement to pay runs not only to Jones, but to his assignee. I take it that, if Kaufmann & Blun had written Bingham Bros. that "any drafts that you or your assignee may draw on Mr. A. Feigelstock of our city we guarantee to be paid at maturity," the result would have been different. While such a guaranty would be special in that it would be addressed to a person certain and named and to any person to whom that person might assign it and to such persons only, and not to the public generally, still it could be acted on not only by the person to whom addressed by name, but by the person to whom that person should assign it.

In Evansville, etc., v. Kaufmann et al., supra, the court said:

"In the case of a special guaranty, however, the liberty of accepting its terms is confined to the persons to whom it is addressed, and no cause of action can arise thereon except by their action in complying with its conditions. Such a guaranty contemplates a trust in the person of the promisee, and from its very nature is not assignable until a right of action has arisen thereon, which may, like any other cause of action arising upon contract, be then assigned."

This is very far from holding that a contract of guaranty running to a person named and by its express terms to the assignee of such person may not be acted on by the assignee, or that a bond and mortgage given to secure the payment of the debt of a third person, which is not this case, may not be assigned with the debt before due and as an incident thereto, when made assignable by their very terms.

In Dibble, as Executor, etc., v. Richardson, as Executor, etc., 171 N. Y. 131, 63 N. E. 829, the wife gave a mortgage on her own property to secure a precedent debt of her husband, and this was well known to the mortgagee. In form she was the principal debtor. The Court of Appeals held she was liable as surety only. That is not this

case. Here, Forse was, at least, one of the principal debtors. He was personally liable for the entire debt, as we shall see. As a consideration for and as a condition of obtaining the property of Jones, he agreed to give and did give his personal bond and a mortgage on his individual property as security for the payment of the debt then presently incurred, not a precedent debt of another, or a precedent debt of his own. It is unnecessary to repeat here the conditions, provisions, and obligations of the bond and mortgage.

In Casey v. Gibbons, 136 Cal. 368, 68 Pac. 1032 (1902), it was held:

"Mortgage to Secure Debt of Another—Suretyship. Where the mortgage in suit was executed by a mother to secure the debt of her son to the plaintiff, but the mortgage shows that the mortgagor agreed to pay the amount stated in it, and the loan was made upon her faith and credit, she was herself a principal, and neither she nor the mortgage can be treated as surety for the debt of the son.

"Pleading and Proof of Suretyship. In order to charge the mortgagor as surety only, it was incumbent upon the defendants to aver and prove that the payee of the mortgage note not only knew of the fact of suretyship, but also consented to deal with her in that capacity."

It cannot be questioned that Forse is separately liable for the debt created by the contract and agreement of sale. He became liable by virtue of the contract itself and severally by virtue of the very terms of the bond. It is evident that on the faith of the liability of Forse and the obligation of his bond and the security of the mortgage given by him Jones parted with his property on credit, and that Forse assumed the position of principal debtor. Now, assume that Forse and Roseboom were partners and purchased the goods as such, and that such was the fact is shown by affidavit, and that Jones well knew that fact; still Forse and Roseboom are not only jointly but severally liable in equity for the goods purchased of Jones. Either could have been sued in equity and proceeded against before bankruptcy intervened. Partnership Law N. Y. (Consol. Laws, c. 39) § 6; Laws 1909, c. 44, § 6, formerly chapter 51, Gen. Laws (Laws 1897, c. 420, § 6, general provisions); Seligman v. Friedlander, 199 N. Y. 373, 92 N. E. 1047, reversing 138 App. Div. 784, 123 N. Y. Supp. 583, so far as it holds that partners are severally liable at law. By section 6, art. 1, of the partnership law of New York, as amended by chapter 420, Laws N. Y. 1897, which became a law May 13, 1897, a partnership, a general partnership, and a limited partnership are each defined, and section 6 provides:

"Liability of General Partner. Every general partner is liable to third persons for all the obligations of the partnership, jointly and severally with his general copartners."

While this provision is new in the partnership law, as set forth in the statutes, the Court of Appeals in Seligman v. Friedlander, 199 N. Y. 373, 92 N. E. 1047, reversing same case in 138 App. Div. 784, 123 N. Y. Supp. 583, on this point, held that the common-law rule is not changed thereby, and, as this is the construction placed on this statute of the state of New York by its highest court, the federal courts are bound by it. However, the Court of Appeals repeats and affirms the doctrine that in equity the general partners in a copartner-

ship are severally as well as jointly liable to creditors for the debts of the firm in certain cases and under certain circumstances, saying:

"At common law the liability of copartners was joint, although it was several in equity. The fundamental principle upon which the partnership relation is founded is that of a joint adventure, with joint ownership of assets and only joint liability for debts, unless the property held jointly is insufficient to pay the firm debts, or it appears that there can be no effective remedy without resort to individual property. Lawrence v. Trustees of Leake & Watts Orphan House, 2 Denio, 577; Voorhis v. Childs' Executor, 17 N. Y. 354; Richter v. Poppenhausen, 42 N. Y. 373; Pope v. Cole, 55 N. Y. 124 [14 Am. Rep. 198]."

Here the surplus money arising in the foreclosure is about $962.20; the balance of the debt due Jones and assigned to Neff about $1,900; and the partnership property only $205.10 after deducting expenses already incurred in these bankruptcy proceedings. A court of bankruptcy is a court of equity, and under all the facts of this case can it say that the trustee representing the general creditors is entitled to this surplus money, the surplus proceeds of the sale of the mortgaged real estate of Forse, one of the general partners, in the face of the bond and mortgage of Forse given to Jones and assigned to Neff with the debt they were given to secure, as against Mrs. Neff, who took same in good faith and paid a full consideration? The papers disclosed no partnership. Forse therein assumed the position and the liability of a principal debtor and bound himself as such. If he stood in the place of a guarantor, he guaranteed the payment, not the collection, of the debt due to Jones, not only to Jones, but to his assignee, Neff. His undertaking was unequivocal and unqualified, and not with Jones alone, but with his executors, administrators, or assigns. In terms he became bound to Neff as assignee of Jones. He procured the property to be delivered to himself and Roseboom on the promise to secure the payment of the debt therefor by his individual bond and to secure the payment of that bond by this mortgage on his real estate. Says Brandt on Suretyship & Guaranty, vol. 1, § 51 (3d Ed.):

"Where a surety binds himself in terms as principal in the obligation which he signs (meaning the obligation of suretyship), he will be held as principal and will be entitled to none of the rights of a surety."

However, I prefer to base the decision of this case on the propositions that the debt created by the sale of the property to Jones and evidenced by the written agreement was assignable and duly assigned to Neff; that Neff became the owner thereof; that the bond and mortgage created an individual and several obligation on the part of Forse, one of the principal debtors, to pay such debt when due; that such bond and mortgage were assignable by their terms and passed under the assignment executed by Jones to Neff with the contract itself and the debt represented thereby; and that such assignments were legally and properly made before any default in payment under the terms of the agreement of sale; also, that, assuming the bond and mortgage to have constituted a contract of guaranty, they were not limited except to Jones and his executors, administrators, and assigns, and hence the contract was general and assignable with the debt.

I think the following authorities decisive: Everson v. Gere et al., 122 N. Y. 290, 25 N. E. 492, affirming 40 Hun (N. Y.) 248; Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379; 1 Brandt, Suretyship (3d Ed.) §§ 58, 59.

In Stillman v. Northrup, supra, it was held:

"To limit a guaranty so that it shall not be transferable or assignable, its language must be express, and show clearly such to be the intent.

"Defendants assigned a bond and mortgage to N. The assignment contained a guaranty of the payment of the mortgage to N. Held, that this guaranty was not personal, and could be assigned with the bond and mortgage. Smith v. Starr, 4 Hun, 123, overruled.

"Also held, that the guaranty was not inoperative, because, by its terms, it was for payment of the mortgage, not the bond; that the intent was to guarantee the debt secured by the mortgage.

"N. executed an assignment of the bond and mortgage, which did not expressly assign the guaranty. He subsequently executed another including the guaranty. Held, that this was sufficient to vest the guaranty in the assignee.

"It seems an assignment of a bond and mortgage carries with it a guaranty of payment or collection, although not mentioned in the assignment."

In Everson v. Gere, 122 N. Y. 290, 25 N. E. 492, the syllabus is as follows:

"In an action upon a promissory note it appeared that the note was indorsed payable to J. C. & Co., 'or order,' and delivered to that firm, having attached to it a guaranty, signed by defendants, which recited that, for value received from J. C. & Co., they guaranteed to said firm payment of the note. Subsequently, and before maturity, J. C. & Co. indorsed and transferred the note to plaintiff 'without recourse,' and at the same time executed and delivered an assignment thereof, with the guaranty attached. Held, that the guaranty was general, not special and personal to J. C. & Co., and so was assignable; and that plaintiff could maintain an action thereon."

The court also said, after referring to E. N. Bank v. Kaufmann, supra:

"But in the case at bar the guaranty was attached to a promissory note previously executed and delivered. Its amount and time of payment was fixed. The defendants undertook to pay if the maker did not, and it could make no difference to them whether they paid to John Crouse & Co. or to some other person to whom they had transferred their claim."

Here the bond and mortgage accompanied the contract and agreement of sale and referred to it. The amount and time of payment were fixed and determined and the goods delivered, and Forse had them "with another." Here, as in Everson v. Gere, it was immaterial to Forse and to Forse & Roseboom whether he or they paid to Jones or to some one to whom Jones should transfer his demand.

As there is no question of fraud or preference involved here, it follows that Mrs. Neff is entitled to the surplus money in question, and the injunction will be dissolved.

UNITED STATES v. BALTIMORE & O. R. CO.

(District Court, W. D. Virginia. November 28, 1910.)

RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—CONSTRUCTION—HANDHOLDS ON THE REAR OF YARD ENGINE.

Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) § 4, provides that it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars. *Held* that, while the act was indefinite as to the number of handholds and as to the intended location thereof on the ends and sides of cars, it was not indefinite so far as it required handholds to be provided both in the ends and sides of cars, and that a yard engine used in interstate commerce was not equipped as required where no handholds were provided in the sides near the rear end of the tender though the tender was equipped with a running board and an uncoupling lever bar which ran nearly across the entire back of the tender, and was so located and of such a character that it might serve as a handhold; it not appearing that the presence of a handhold as required would not tend to greater security.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.*

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

Action by the United States against the Baltimore & Ohio Railroad Company to recover certain penalties for alleged violation of Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) § 4, requiring railroad equipment to be fitted with handholds in the sides near the rear end. A verdict having been directed for the government, defendant moved to set the verdict aside. Motion denied.

Barnes Gillespie, U. S. Atty., and Thos. J. Muncy, Asst. U. S. Atty.

R. Gray Williams, for defendant.

McDOWELL, District Judge. This is an action of debt brought for alleged violations of section 4 of the safety appliance act. Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174). The evidence for the government was to the effect that two yard engine tenders of the defendant, used in interstate commerce, had no handholds in the sides near the rear ends. This fact was not disputed, and the declaration alleged no violation of the act other than the absence of handholds in the sides near the rear ends of the tenders. The front corners of the tenders were rounded, and in these corners there were handholds. The defendant's witnesses contended that each of the tenders had across its rear end, and projecting slightly beyond its sides, a running board or low platform, and also that the uncoupling lever bar, which ran nearly across the entire end, was so located and of such character that it served as a handhold in the end of the tender. The government witnesses denied that one of the tenders was equipped with the platform, but admitted that the other one was. It was in evidence and undisputed that tenders are not uncoupled from their en-

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

gines except on rare occasions for repairs. The government witnesses denied that the equipment at the rear end above mentioned subserved the purpose of a handhold in the sides near the rear ends, while the tendency of the testimony for the defendant was to the contrary. It was also in evidence that running boards on yard engine tenders had been in use for years prior to the passage of the act. At the conclusion of the evidence a verdict for the government was directed. Desiring opportunity for further consideration of the proper construction of section 4 of the act, I suggested to counsel for defendant that he move to set aside the verdict. This motion was made and is now to be passed upon.

Section 4 of the act reads:

"* * * It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

In Denn v. Harnden, 1 Paine, 61, 9 Fed. Cas. 131, it is said:

"When the will of the Legislature is clearly expressed, it ought to be followed without regard to consequences. And a construction, derived from a consideration of its reason and spirit, should never be resorted to but where the expressions are so ambiguous as to render such mode of interpretation unavoidable."

See, also, Black, Interpretation Laws, pp. 35, 36; Yeaton v. Bank, 5 Cranch, 49, 55, 3 L. Ed. 33; Sturgess v. Crowinshield, 4 Wheat. 122, 202, 4 L. Ed. 529; U. S. v. Wiltberger, 5 Wheat. 76, 95, 96, 5 L. Ed. 37; Gardner v. Collins, 2 Pet. 58, 93, 7 L. Ed. 347; Beard v. Rowan, 9 Pet. 301, 317, 9 L. Ed. 135; Scott v. Reid, 10 Pet. 524, 527, 9 L. Ed. 519; Hadden v. Collector, 5 Wall. 107, 110, 18 L. Ed. 518; R. Co. v. Phelps, 137 U. S. 528, 536, 11 Sup. Ct. 168, 34 L. Ed. 767; Price v. Forrest, 173 U. S. 410, 427, 19 Sup. Ct. 434, 43 L. Ed. 749; Bolles v. Outing Co., 175 U. S. 262, 265, 20 Sup. Ct. 94, 44 L. Ed. 156; Knowlton v. Moore, 178 U. S. 41, 65, 20 Sup. Ct. 747, 44 L. Ed. 969.

In Hamilton v. Rathbone, 175 U. S. 414, 421, 20 Sup. Ct. 155, 158, 44 L. Ed. 219, it is said:

"Indeed, the cases are so numerous in this court to the effect that the *province of construction lies wholly within the domain of ambiguity*, that an extended review of them is quite unnecessary."

Section 4 of the act is undeniably and I think necessarily indefinite as to the number of handholds and as to the intended location of the handholds in the ends and sides of cars. But it is at least questionable if there is any indefiniteness or ambiguity in the section in so far as it requires that handholds be provided *both in the ends and sides of cars.* If the words "for greater security to men in coupling and uncoupling cars" were used to express the object in view in enacting this section, possibly the section is open to construction. But it was unnecessary to expressly state the object in view in enacting the section. That was perfectly obvious without using the above quoted language. Congress must have supposed railroad managers densely ignorant of the uses of handholds, if it was thought necessary to ex-

plicitly state the object in view in enacting this section of the law. To my mind the language above quoted was most probably used merely to make as definite as the subject permitted the number and location of the handholds intended to be required by the section. Thus read, the statute absolutely requires handholds in the ends and sides of every car, but only in such number and so located as may further the security of men engaged in coupling and uncoupling cars. While thus read the statute is susceptible of construction as to the number of handholds and as to their location in the ends and sides of the cars, it is, as has been said, doubtful if it is open to construction in so far as it requires some handholds in both the ends and sides of each car. Of the handholds in the front corners of the tenders it should be said that there was no contention that they complied with the statute. They should therefore be disregarded. We have therefore before us a case in which it was undisputed that there were no handholds in the sides of the tenders. If, in this respect, the statute is not open to construction, it is manifest that a directed verdict for the government was proper. However, for the sake of argument, let us go further and assume that section 4 of the act as a whole is subject to construction.

It is argued that the use of the words "for the greater security," etc., show that Congress did not intend to require handholds if they would be useless. This argument can be made only if the clause of the section in question were used to express the object in view in enacting the section. I have already advanced a reason for a doubt as to the propriety of making such assumption, and it is to be noted that we must ignore such doubt in order to even consider the argument.

The statement that Congress did not intend the performance of a useless act is but the premise for a conclusion, which is that the failure to provide handholds in the sides of the tenders was not a violation of the statute. This premise seems to me to contain an ambiguity. Is it an assertion that Congress did not intend to require the performance of an act which *some railroad experts* consider useless, or that Congress did not intend to require the performance of an act which *all men* agree would be useless? If the first reading is what is intended, it is to my mind a satisfactory answer to say that Congress may very readily be supposed to have intended to require the performance of an act which not only some but many railroad experts regard as useless. But if the premise is intended to assert that Congress did not intend to require the performance of an act which all men, or all competent railroad experts, agree would be useless, the first and most natural inquiry is whether or not such an assertion can with any sort of propriety be made concerning this section of the statute. A premise which assumes the truth of an untruth is certain to lead to an unsound conclusion, and a premise which assumes the truth of a disputable proposition leads us only to an equally disputable conclusion. And I am unable to agree that any case can exist as to which all men, or all competent experts, do or could agree that handholds in the ends and sides of cars, in addition to other appliances, would be under all circumstances entirely useless. Let us test this: If a box car had a ladder fastened to its side near the rear end, one rung of which (supposed to be iron, of the best size and securely fastened) is at the best

possible location for a handhold in the side of the car, it might be contended that all would agree that a handhold in addition thereto would be utterly useless. To this I cannot assent. The ladder rung might perfectly subserve the purpose of a horizontal handhold. But under some circumstances an upright handhold placed at one or the other side of the ladder could afford additional security. The rung of the ladder might be well adapted to the needs of a man of average height running along the side of a moving car, while it might be of no use under some circumstances to a taller or a shorter man. A perpendicular handhold in addition thereto might easily mean the difference between life or death to some employé under some circumstances. Again take the case at bar in regard to the equipment of the rear end of the tender having the platform and uncoupling lever. It cannot be properly asserted, as it seems to me, that handholds in the ends of such a tender (placed below the uncoupling lever, for instance, or set in perpendicularly below the uncoupling lever and near to and on either side of the coupler head) would never be of any service. Assume that an employé is uncoupling a passenger car from such a tender —and this may imply uncoupling air hose, signal hose and possibly steam hose, to do which he would crouch or kneel on the platform. If it be assumed that the uncoupling lever is in all such tenders of such size and set far enough from the end of the tender (possibly a violent assumption) to serve as a handhold for men of average height, it seems to me impossible to contend that a properly placed handhold in addition to the uncoupling lever might not, under some circumstances, be of decided use to some brakeman not of average height or length of arm. So far as I can recall there has never come under my observation any type of tender, or freight car, or passenger coach, of which it can properly be said that handholds in the sides and ends, in addition to any and all other appliances, could not under some circumstances be of service to some employé while engaged in the work of coupling or uncoupling cars. And I believe it impossible to find such a car. While, therefore, it is admitted that Congress did not intend to require the performance of an act which all men agree would be under all circumstances entirely useless, still this truism does not seem to be applicable to section 4 of the act. The premise seems to me to assume to be true that which cannot be assented to as true; but if not it certainly assumes to be true a proposition of fact concerning which there is room for much difference of opinion. As it is not possible to properly assert that in enacting section 4 Congress was requiring the performance of an act which all men will agree would be entirely useless, it must be admitted that Congress may itself have passed judgment on the utility of handholds, in addition to other appliances, in both the ends and sides of all cars. If so, it is certain that neither judges nor juries have any power to review the judgment of Congress; and, if so, it would have been submitting to the jury the wisdom or want of it displayed by Congress to have submitted the case at bar to the jury. From the instructions tendered by the defendant I quote:

"If you believe from the evidence that secure grabirons or handholds placed in the sides near the rear ends in the said tenders, equipped with grabirons

across their rear ends and with projecting platforms as shown in the diagrams introduced by defendant, would not provide greater security to men in coupling and uncoupling cars, then you must find for the defendant."

This instruction could properly have been given only in the event that the statute should be construed as if it had been written "grab-irons shall be provided in the ends and sides of cars *if* they afford greater security to men in coupling and uncoupling cars."

To construe the statute as defendant contends we must read into the language chosen by the lawmakers a condition which is certainly not plainly implied, and we must assume that Congress intended to leave an important question of public policy to the possibly varying decisions of juries. And in construing the statute it must be borne in mind that Congress enacted the law to remedy a great evil. The loss of life and limb among railroad employés prior to the passage of the act was appalling. In view of this fact it must be admitted that Congress would more probably have intended an absolute compliance with the requirements of the act than a conditional compliance. Where the language of a statute, enacted to remedy a great evil, does not at least clearly imply that only a conditional compliance therewith was intended, and where the language chosen by the lawmakers is readily susceptible of a construction requiring an unconditional compliance with the requirements of the statute, it seems to me that the courts should adopt the construction which has the greater tendency to remedy the evil intended to be abated, where, as here, neither an absurd nor a mischievous consequence results.

In the case at bar there was an additional reason for refusing to leave any question to the jury. It was an undisputed fact (Record, p. 90) that footboards at the rear ends of yard engine tenders had been in use for years prior to the passage of the original act in 1893, and I know of no warrant for assuming ignorance on the part of Congress of this fact. Even if it could be assumed that the uncoupling lever bars in the rear ends of the tenders served the purposes of handholds in the rear ends, the defendant's contention in essence is that the use of an appliance known and used before the passage of the act made handholds in the sides of the tenders unnecessary and therefore not within the intent of the statute. Beyond cavil, the purpose Congress had in view was to promote, to further, to advance, to add to, the safety of employés. If the statute be construed as contended for by defendant, the safety of employés has been "promoted" by leaving the matter just as it stood prior to the passage of the statute. And even if the words "for greater security," etc., must be read solely as a statement of the object in view in enacting the fourth section of the act, it is difficult to perceive how the use of appliances which were used and known prior to the passage of the statute affords any *greater security* than was afforded when the statute was enacted.

As I construe the statute, it indicates that Congress has itself passed judgment on the utility of handholds in the ends *and sides* of cars, and it must be read as an absolute requirement. In a case, therefore, where it is admitted that there were no handholds in the sides of the cars, I am unable to perceive that there was any question of fact to be left to the jury.

For the purposes of the case at bar it may be admitted, for the sake of argument, that the intent of the statute is to require handholds in the sides of cars only if useful, and still there was good reason for directing a verdict for the government. It is doubtful if any of the witnesses for the defendant intended advisedly to say that handholds in the sides of the tenders and near the rear ends could under no circumstances be of some use. But if they intended to testify that a handhold in the side near the rear end would be under all circumstances of absolutely no use to an employé running along at night beside the moving tender and near its rear end, preparatory to uncoupling for instance, the testimony is, to my mind, simply unbelievable. A verdict for the defendant supported only by such evidence must have been set aside. R. Co. v. Moore, 121 U. S. 558, 570, 7 Sup. Ct. 1334, 30 L. Ed. 1022; Penna. Co. v. Whitney, 169 Fed. 572, 576, 95 C. C. A. 70; N. & W. v. Crowe, 110 Va. 798, 67 S. E. 518.

It follows that the motion to set aside the verdict should be overruled, and judgment entered in accordance with the verdict.

Since writing the foregoing, I have written an opinion in U. S. v. N. & W. R. Co., infra, which also deals with the construction of section 4 of the safety appliance act, and a copy thereof will be filed herewith.

UNITED STATES v. NORFOLK & W. RY. CO.

(District Court, W. D. Virginia. November 28, 1910.)

RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—CONSTRUCTION—GRABIRONS—"CAR."

The requirement of the safety appliance act of March 2, 1893, c. 196, § 4, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, § 1, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), that it shall be unlawful for any railroad company to use "any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car, for greater security to men in coupling and uncoupling cars" applies to passenger cars, and a failure to comply therewith is not excused by the fact that the cars in question were equipped with air hose, steam hose or other appliances affording some measure of protection to employés.

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

For other definitions, see Words and Phrases, vol. 1, pp. 969, 970; vol. 8, p. 7596.

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

Action by the United States against the Norfolk & Western Railway Company. On motion by defendant to set aside verdict. Overruled.

Barnes Gillespie, U. S. Atty., and Thos. J. Muncy, Asst. U. S. Atty. Roy B. Smith and G. A. Wingfield, for defendant.

McDOWELL, District Judge. In September, 1910, a retrial of this action of debt under the safety appliance act (Act March 2, 1893,

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

c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) was held. Counts 3 to 9, both inclusive, of the declaration were based on the absence of handholds in the ends of certain vestibuled passenger coaches used in 1908 in interstate commerce. At the conclusion of the evidence for the government the defendant moved the court to direct a verdict for the defendant as to these counts, on the theory that section 4 of the act does not apply to passenger coaches. This motion was overruled. The defendant thereupon sought to introduce before the jury evidence tending to prove that the presence of air hose, signal hose, steam hose, uncoupling chains, break shaft, dummy coupling chains, hand break shafts, and operating rods of the steam hose rendered handholds in the ends of the coaches unnecessary. Being of opinion that such contention could not properly be left to the decision of the jury, the court excluded the jury and then heard a part of the testimony. The purport of the remainder was merely avowed by counsel. At the conclusion of the testimony both sides moved for a directed verdict as to the counts now in question, and the court directed a verdict for the government as to the said counts. A motion by defendant to set aside the verdict has been made and must be now considered.

Having just concluded an opinion in the case of U. S. v. B. & O. R. Co., 184 Fed. 94, which deals with the meaning of section 4 of the safety appliance act, I shall file herewith a copy thereof, and thus avoid unnecessary labor.

For the purposes of this case it will be assumed that section 4 of the act as a whole is properly a subject of judicial construction. As I read the evidence (Taylor, p. 103, Kearney, pp. 136, 139, 141, 142), it was admitted that the various appliances relied upon as excusing the presence of handholds, while not all in general use, were *not unknown* in 1893, when the safety appliance act was first passed. This statute as appears from its title was enacted "to promote the safety of employés and travelers. * * *" So far as I am aware we have no warrant for assuming that Congress was in 1893 ignorant of the use theretofore made of air hose, etc., and of the measure of protection afforded employés by these appliances. It seems to me therefore a disregard of the plain intent of this statute to hold that the presence of appliances not unknown in 1893 could in any way be considered as excusing compliance with section 4 of the act. As we cannot properly assume that Congress did not know of the use of air hose, steam hose, etc., and as the act plainly intended to promote, to forward, to increase, the safety of employés, a fair interpretation of the Act seems to demand that we construe it as intending to require *protection in addition* to that afforded by the appliances in use to some extent at least prior to the passage of the act. The concluding words of section 4 are, "for greater security to men in coupling and uncoupling cars." I am, to say the least of it, highly doubtful if the reason for using this language was to explain the object in view in enacting section 4. But counsel for defendant necessarily contend that such was the chief, if not the sole, reason for using the language above quoted. If this view be at all sound, it seems to me that the words "greater security" may reasonably be construed

to imply greater security than was afforded by appliances—other than handholds—in use to some extent and not unknown prior to the passage of the act.

An argument made in behalf of the government, which I did not at the trial regard as of great force, and which does not now seem to me to be at all conclusive, is as follows: The appliances in question, except the operating rod of the steam hose, are not strictly *in* the ends of the cars but are *under* the ends of the cars. It is very true that in construing a statute intended to remedy a great evil the courts should be very cautious in taking liberties with the language chosen by the lawmakers. And there is some liberty taken with the language "in the ends of cars" by holding that appliances under the ends of cars might be considered as a compliance with the statute. However, I prefer not to base a decision of the question before me on the somewhat technical point thus presented, which does not in any event apply to the operating rod of the steam hose.

The contention that section 4 of the safety appliance act was never intended to apply to passenger cars deserves some consideration. The original act of 1893 (27 Stat. 531) in terms applied to "any car." In passing the amendment of 1896 (Act April 1, 1896, c. 87, 29 Stat. 85) Congress did not see fit to make any exception as to passenger cars, and the amendment of 1903 (Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1909, p. 1143]) not only does not in the slightest indicate any intention to except passenger cars from the operation of section 4, but it emphasizes the point that the requirements as to couplers, *grabirons,* etc., apply to "all cars" used in interstate commerce.

I think it must be admitted that passenger coaches cannot be uncoupled until the air hose, steam hose, etc., have been uncoupled; and that passenger coaches are not fully coupled until at least the air hose and signal hose have been coupled. In coupling and uncoupling passenger cars therefore it is necessary, notwithstanding the presence of operative automatic couplers, that the men go in between the ends of the passenger coaches. It is also indisputable that after going in between the ends of the cars, just before the employé crouches or kneels down to manipulate the hose pipes, or just after performing such duty, and while the employé is standing up, the cars may suddenly move. To illustrate the point in mind I quote from the cross-examination of the defendant's witness Taylor (page 106, Record):

"Q. Now, I understood you to say that these grabirons as indicated on the end of the coach could not afford any additional security, to the appliances which you have named? A. I did. Q. Suppose that a man was to start in to make this coupling of this hose you have spoken of; that just as he entered the side of the car, the car should move, when he was right at the grabiron, what would prevent him from grabbing the grabiron? A. Nothing. Q. Wouldn't that be a protection to him? A. Undoubtedly so. Q. Then, you mean, if he is in one position alone, bent over down in the center of the car, and the car would move so quickly so he couldn't spring up, that it would afford no protection to him? A. It would not afford any protection to him in that position. Q. But there may be many positions in which he would be inside the wheels, that it would afford him protection, isn't that true? A. Yes, sir."

Now we cannot assume that Congress was wholly ignorant of the fact that men had to go between the ends of passenger cars to completely couple and uncouple. And whether the witness above quoted is indisputably right or not (and I think he is) in stating that handholds in the ends of passenger coaches would at least at one stage of the proceeding be of assistance, the possibility that he may be right seems to be a sufficient reason for refusing to construe such language as "any car" and "all cars" as not embracing passenger cars.

It is argued that passenger cars are not within the intent of section 4 because, as it is said, there is no place on the sides of passenger cars where handholds would be of use. The answer is that the fact is far from being indisputable. Taylor said the statement was true (page 102), but he must have meant *in addition* to the handholds at the sides of the platform steps. If there is such a thing as a passenger coach which has no handholds in the sides near the ends of the car I cannot recall ever having seen one.

The conclusion I reach is that the motion to set aside the verdict must be overruled and judgment entered in accordance with the verdict.

SUSSWEIN v. PENNSYLVANIA STEEL CO.

(Circuit Court, S. D. New York. December 17, 1910.)

1. LANDLORD AND TENANT (§ 157*)—CONSTRUCTION—GRADING LEASED PROPERTY.

Where defendant leased certain property from plaintiff and as a part of the lease agreed to make a necessary fill inside the crib of a dock to be built on certain riparian land from the upland, and to grade the remainder of the land from V. avenue to the dock, defendant was bound to "uniformly grade" such land from V. avenue to the dock.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 157.*]

2. LANDLORD AND TENANT (§ 157*)— LEASE — CONSTRUCTION — INDEPENDENT COVENANT.

A lease provided that the lessee should build and construct a certain crib dock on the leased land and on adjoining premises belonging to the lessor; that the lessor should pay the lessee a further consideration of $3,500 in cash on the completion of the dock; and that the lessee should make the necessary fill inside the crib from the upland, and should grade the remainder of the land from V. avenue to the dock. *Held*, that the lessor's covenant to pay $3,500, and the lessee's covenant to grade, were independent, and since performance of the lessor's covenant was but a small proportion of the consideration for the lease, the lessor's failure to perform the same was no defense to the lessee's failure to grade.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 157.*]

3. LANDLORD AND TENANT (§ 157*)—LEASES—COVENANTS—RELEASE.

Dismissal of a lessor's counterclaim for breach of the lessee's covenant to do certain grading, as premature, did not release the lessee from the covenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 157.*]

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

4. ELECTION OF REMEDIES (§ 7*)—WHAT CONSTITUTES DISMISSAL OF COUNTERCLAIM.

Dismissal of a landlord's counterclaim for a tenant's failure to grade certain of the leased premises, in a suit by the tenant to recover money from the landlord, on the ground that the counterclaim was premature, did not constitute an election of remedies affecting the landlord's subsequent right to sue for breach of such covenant.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 12; Dec. Dig. § 7.*]

5. LANDLORD AND TENANT (§ 157*)—CONSTRUCTION—LEASE—EXTENT OF WORK.

Where a lease of certain land required defendant to construct a dock on the premises leased "and adjoining premises" and to make the necessary fill inside the crib from the upland, and to grade the remainder of the land from V. avenue to the dock, the contract required defendant to fill not only the land inside the crib, but the "adjoining premises" as well.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 157.*]

6. LANDLORD AND TENANT (§ 159*)—BREACH—MEASURE OF DAMAGES.

In an action for breach of a lessee's covenant to fill the crib of a dock and adjoining premises, the measure of damages is the cost of the work.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 159.*]

7. LANDLORD AND TENANT (§ 159*)—CONTRACT—BREACH—DATE.

Where a lease provided that a lessee should build a dock on the leased premises, and make the necessary fill inside the crib from the upland, and grade the remainder of the land from V. avenue to the dock, and to surrender the premises on the lessee's completion of its work on a certain bridge, and the lessee failed to do the grading required, the lessor's damages dated from the lessee's actual removal from the property and not from the lessor's notice of breach.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 159.*]

8. WORK AND LABOR (§ 14*)—PERFORMANCE—CONDITION PRECEDENT—QUANTUM MERUIT.

The rule that where one party has performed an obligation and without excuse refuses to complete the performance which as a whole is a condition precedent, he may not sue on a quantum meruit for what he has done, does not apply where the performance is not a condition precedent to the express obligation arising under the contract.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 31–33; Dec. Dig. § 14.*]

At Law. Action by Henry M. Susswein against the Pennsylvania Steel Company. Judgment for plaintiff.

Plaintiff sued at law to recover damages for breach of defendant's covenant contained in a lease to grade certain property. In a former action in the state court (117 N. Y. S. 436) this covenant had formed the basis of a counterclaim which was disallowed on the ground that it was premature, and in that action the Pennsylvania Steel Company recovered for breach of plaintiff's covenant to pay $3,500 on completion of the dock referred to in the lease. On the filing of the counterclaim in such suit, the steel company discontinued performance of its covenant to grade, and when its own business was completed on the premises leased moved off prior to the time specified for the expiration of the lease. The following is a copy of the lease:

"This agreement entered into this ninth day of October nineteen hundred and six, between Henry M. Susswein, of the city and county of New York, and the Pennsylvania Steel Company, a corporation of the state of Pennsylvania;

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

"Witnesseth: That the said Henry M. Susswein hereby leases to the said Pennsylvania Steel Company a tract or parcel of land, described and bounded as follows:

"Commencing at a point where the northeasterly line of land recently acquired by the city of New York, for the building of Blackwell's Island Bridge intersects the pier and bulk head line, approved by the Secretary of War June 1st, 1893. Thence running northeasterly along the said bulk head line a distance of one hundred and fourteen (114) feet; thence southeasterly and parallel with the northeasterly line of the property so acquired by the city of New York a distance of ninety feet (90); thence southwesterly and parallel with said bulk head line a distance of fifty-nine (59) feet; thence southeasterly and parallel with the line of the property of the city of New York to a point on the northwesterly side of Vernon avenue, at a distance of sixty-five (65) feet northeasterly from the point where the line of said Vernon avenue intersects the northeasterly line of land recently acquired by the city of New York for the Blackwell's Island Bridge; thence southwesterly along the line of Vernon avenue, a distance of sixty-five (65) feet to the land of the city of New York; thence along the boundary line of the said land of the city of New York, to the point or place of beginning, upon the said bulk head line.

"Such property being shown upon a blue print drawing entitled 'Property Plot' to be leased from Henry M. Susswein dated September 27th, 1906, initialed by the parties hereto.

"To have and to hold the said above mentioned property for a period of two years from the date of the completion of the dock to be erected, and hereinafter mentioned, together with the right of free and absolute enjoyment of said property and all that portion of the dock to be erected included herein. The building of said dock, however, not to take more than three months and to commence promptly upon the granting of a clear title to land under water, by the land board of the state of New York.

"In consideration of the aforesaid lease, the Pennsylvania Steel Company agrees as follows:

"To build and complete and furnish all necessary material for a crib dock upon the said premises and adjoining premises belonging to the said H. M. Susswein, in accordance with the plans and specifications annexed hereto, the said dock to belong to the said Susswein.

"The said Henry M. Susswein agrees on his part to pay to the Pennsylvania Steel Company in further consideration, the sum of thirty-five hundred (3,500) dollars in cash upon the completion of said dock.

"The said Pennsylvania Steel Company further agrees to make the necessary fill inside of said crib from the upland and to grade the remainder of said land from Vernon avenue to said dock.

"The said Pennsylvania Steel Company further agrees that if it finishes its work upon the Blackwell's Island Bridge before the period of this lease expires, it will vacate and surrender the said property to the said Henry M. Susswein, when it completes said work, and it further agrees that when it surrenders the said property to the said Henry M. Susswein, it will put said dock in the condition called for in the plans and specifications, reasonable wear and tear excepted, and that it will remove all structures and materials placed upon said property by it within the period covered by this lease.

"In witness whereof the parties hereto have hereunto placed their hands and seals the day and year first above written.

"[Corporate Seal of The Pennsylvania Steel Company is here affixed.]

"The Pennsylvania Steel Co.,
"By E. C. Felton, Pres.

"Attest: [Signature unintelligible] Secretary.

"Witness as to Henry M. Susswein: Henry M. Susswein. [Seal.]
"Walter Coles Cabell."

Roger Lewis (Bronson Winthrop and George Roberts, of counsel), for plaintiff.

Battle & Marshall (H. Snowden Marshall, of counsel), for defendant.

HAND, District Judge. The phrase "grade the remainder of said land from Vernon avenue to said dock" means "uniformly grade" such land, and therefore the defendant has from any point of view never performed its obligation, because it has never uniformly graded the leased portion of the land from Vernon avenue to the dock. It will be more orderly to consider under the question of damages whether it was also obliged to grade the unleased portion. At present I consider merely the question of breach.

The question is whether the obligation to grade was conditional upon the performance of the promise to pay $3,500. It is undoubtedly the general rule to construe promises as dependent in cases of any doubt, nor do I think that there is a difference in principle in the case of leases, though usually in application covenants in leases are construed as independent. Surplice v. Farnsworth, 7 Man. & Gr. 576; Thompson E. L. Co. v. Durant L. I. Co., 144 N. Y. 34, 39 N. E. 7. In this case, however, I am satisfied that the promise to grade was independent of the promise to pay. By the grant the lessee had obtained the absolute right of possession for the whole term. There being no condition subsequent in the lease, no default of his could deprive him of his quiet enjoyment. For this term he promised to build the dock and to grade the land. Thrown in parenthetically after the promise to build the dock and before the promise to grade was the promise to pay $3,000 "upon completion of the dock." Its position in the contract indicates that this covenant relates to the building of the dock, and the time of payment strongly corroborates this conclusion. Indeed no person looking impartially at the contract could doubt that the sum was to pay for the dock pro tanto, and was not to pay in advance for any part of the grading. If so, the case is within one of the tests of Lord Mansfield in Boone v. Eyre, 1 H. Bl. 273, because the payment does not go to the whole of the consideration of the contract, but is apportioned to the promise to build the dock. Ellen v. Topp, 6 Ex. 441; Howe v. Howe & Owen Ball Bearing Co., 154 Fed. 820, 83 C. C. A. 536; Kauffman v. Raeder, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; Palmer v. Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247. However, that may not always be conclusive. Thus the failure to pay for a past installment of work already performed or of goods delivered would excuse further work or deliveries. Phillips & Colby Construction Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341; Graf v. Cunningham, 109 N. Y. 369, 16 N. E. 551; Wharton v. Winch, 140 N. Y. 287, 35 N. E. 589. It is not, therefore, always enough that the default should be in performance of a part of the contract which is clearly apportioned to a stipulation on the other side already performed. One is not necessarily required to go on indefinitely performing a contract for another who remains persistently in default, even in respect of a covenant of the contract which is apportionable to a part of the performance. It is not enough, therefore, in the case at bar, that the payment was clearly intended to be applied upon the dock. Nevertheless, the facts here still warrant construing the covenants as independent. The promise to grade was of much more moment than the promise to pay $3,500, as the

proof on this trial shows. Suppose that the lessor was unable to get the money to make the payment at the time when it was due, should that absolve the lessee from an obligation of nearly ten times the amount? The question is always one of implied intention, and no one can doubt that if such a contingency had been brought to the parties' attention, they would not have said that so small a default should entirely excuse so important an obligation. The lessor, having given all but this, and having got as yet only the dock, would lose the grading, a result quite clearly a forfeiture, which of course the parties must not be presumed to have intended. There was no escape from this if the lessor's performance is a condition, and it is on that account that lessor's covenants to repair are regarded as independent. Indeed the case is much stronger than the usual lease, because in those there are conditions subsequent forfeiting the estate which are not present here. Thus the lessor might protect himself for the lessee's failure to grade by re-entering, at least at the time when it became apparent that the lessee could not do the work within the term. That situation would be similar to those arising under contracts for the delivery of merchandise in installments. In those cases the buyer's default in paying for a past installment excuses further delivery by the seller, because he has not already received the whole remainder of the purchase price. If such contract started with a payment of all but a small part of the purchase price delivery would not be conditional upon payment of the balance unless the goods were obviously apportionable to it. While the matter is always treated as though it concerned the parties' intention, it would be more literally accurate to acknowledge that the parties thought nothing about it, and that the court implies the conditions from reasons of equity. From that aspect, it is obvious that the performance should not be a condition precedent. I shall therefore construe the promises as independent, following the opinion of the Appellate Division, whether that part be strictly obiter or not.

The defendant urges that the result is inequitable, especially because of the prior action in the state court. So far as concerns that action, it is true that the lessor's counterclaim for damages was premature, but that did not release the lessee; nor was it an election which excused the lessee, though the action remained pending till the lease expired. It was no more than a mistake by the lessor of his rights, and that is not an election. Bierce v. Hutchins, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. Ed. 828. It is also true that the action on the counterclaim put the lessee in an embarrassing position. To continue to grade meant to take the chance of a judgment on the counterclaim, and to stop meant a suit for damages. The difficulty, though very real, only arose, however, from the uncertainty of the result in the courts, which after all, the courts cannot make a ground for the release of an obligation. Besides, the only alternative which was open, i. e., that the lessee shall have free enjoyment of the lease, was more unjust than the lessee's own plight, for it would mean that the lessor's mistake forfeited the rent. In fact, the lessee followed a course which makes him pay but once, though it is true that he must lose costs in this court. More-

over, he has received his whole consideration, though it took time to get it. Had he been punctilious to avoid any default his only course was to be confident of his own construction as to the time within which he might grade, which proved correct, and to contest, as he did successfully, the lessor's premature counterclaim. While the lessor's positions were not commendable, they did not amount to a forfeiture of his contract rights, nor did they put the lessee to any perilous course, as the event here shows.

There being a breach, the remaining question is of damages. First, in respect of what part of the land the lessee was to grade, I agree with the construction of the Appellate Division, which was that the covenant included both the leased and the unleased parts. The dock is to be built on both portions, "premises and adjoining premises," and "the necessary fill inside of said crib," necessarily includes a fill upon the "adjoining premises." It would be a forced construction to interpret, as one must, "fill from the upland," as referring to both leased and unleased parts, but yet interpret, "remainder of said land," as meaning only the leased part. The limits of both pieces were fixed in the second of the three contracts so that they were known. Moreover, that contract says that the lessee is to "commence the building of the said dock and to fill in the land and grade the upland," and it does not distinguish between the land to be graded and the land to be filled. Besides, there could have been no purpose in taking rock out from the unleased part, as the lessee did, while earth still remained, unless the lessee supposed itself under obligation to grade both pieces. It was apparently cheaper to bring in earth from elsewhere than to blast rock; and in any case there now remain nearly 3,000 yards of earth on the unleased portion which were equally available as a fill instead of the rock actually used. This must have been a practical construction of the contract by the lessee.

The next question is whether the true rule of damages is the cost of the repairs, or the difference in value of the premises before and after the repairs. If the plaintiff wishes, I will reopen the case to let in proof of the difference in value, but I think the true rule is that of the cost of the repairs, and not the value. By far the great weight of authority is in favor of the rule that the cost governs. In New York the authoritative decision is Appleton v. Marx, 191 N. Y. 81, 83 N. E. 563, 16 L. R. A. (N. S.) 210, and while, even in the case of a covenant for repairs in a lease, damages is a matter of the lex fori, still the decision is persuasive, especially as the discussion of the authorities is very full. That case certainly overrules anything in Kidd v. McCormick, 83 N. Y. 391, though I hardly think a careful reading of that case would justify the supposition that the rule of cost was repudiated. It is true that a referee's report based on difference in value was sustained in that case, but the court in speaking of the three ways of reaching that difference mention as two of them the cost to repair, either prospective or actual.

In Massachusetts the rule may fairly be said to be in some doubt, for while Moulton v. McOwen, 103 Mass. 587, looks in the defendant's direction, and White v. McLaren, 151 Mass. 553, 24 N. E. 911, seems squarely in point, Watriss v. Cambridge National Bank, 130 Mass.

343, is equally squarely to the contrary. Even if the last case govern in that jurisdiction its authority is somewhat weakened. The rule in England is undoubted. Upon principle it must be confessed that there is some question whether the rule ought not to be the difference in value, but there is equally no question in my judgment that prima facie the cost of the repairs represents the difference in value and that the obligee having shown cost, may safely rest in the absence of proof that the repairs would not add the cost to the value of the property. In any event the authority I deem to be conclusive upon me.

The next question is of the cost. The testimony was divergent and it was hard to tell which of the witnesses was correct for all seemed truthful enough. The fact undoubtedly is that there was no certainly fixed rate for the work. I am disposed to take for the figures in the summer of 1908, for rock, $2.25, for earth carried off, $.75, for earth used in the fill, $.55. The same figures for October, 1908, will be $2.35, $.85, $.65. The proof as to the use of the rock is somewhat uncertain, but there seems to have been a market for the stone in 1908 which reduced the cost to the contractors. Whether that affected the figures which they would bid for the work is very doubtful. The only witness who swore to that fact says the saving was a perquisite which the contractor kept. I am on the whole not disposed to think that it was more than an accidental profit, though substantial, which would not have made much difference to either party here when he came to do the work.

The last question is of the date of the damages. I think the date of the lessee's actual removal should govern, and not the date of the lessor's notice. The lessee's occupation and removal were open and apparent; the lease especially gave them the right to withdraw before the term was up. Such a withdrawal certainly affected a surrender and put the lessor back into possession in law. In the absence of a provision requiring it, I do not think that notice was necessary, but that the lessor was chargeable with learning when he came into legal possession of the land. The cases requiring notice are all those where the person entitled to it had no reasonable means of knowing when the event occurred or whether it would occur. Smith v. Goff, 2 Salkeld, 457; Vyse v. Wakefield, 6 Mees. & Welsby, 442; Drew v. Goodhue, 74 Vt. 436, 52 Atl. 971; Humphreys v. Gardner, 11 Johns. (N. Y.) 61. If Susswein failed in fact to learn until some months afterwards that the defendant had left, it was his own fault. It was easy enough to learn it within a few days of its occurrence with a minimum of trouble and expense.

One question raised by the defendant requires further notice. It urges that where a party has deliberately and willfully broken a contract, he may not thereafter sue on it. Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442. The rule of law there established is quite generally followed, and is this: That where one party has performed a part of an obligation and without excuse refuses to complete the performance which as a whole is a condition precedent, he may not sue in the common counts on a quantum meruit for what he has done. The rule has absolutely no application where the performance is not a condition precedent to the express obligation arising under the contract, and it

merely decides that the party who has received the performance may in good conscience keep it, in view of the other party's willful default. It has no application to this case.

In re MORGANTOWN TIN PLATE CO.

(District Court, N. D. West Virginia. January 4, 1911.)

1. BANKRUPTCY (§ 318*)—CLAIMS—VALIDITY.

Claimant and a railroad company, in order to induce the bankrupt to remove its rolling mill location, agreed to convey to it 15 acres of land on which to erect a new plant, to operate a railroad switch along the front and rear of the buildings, to take $50,000 of the mill company's bonds at par, to convey to it at $50 an acre 150 acres of coal, one-third of the proceeds to be credited on the $20,000 bonus later to be provided for, to pay the company's taxes for the first five years, and to transport materials at reduced rates, etc., in consideration of which the bankrupt agreed without unavoidable delay to locate, conduct, and put into operation on the new site a rolling mill, and to continue to operate the same, strikes and unavoidable hindrances and delays excepted, for five years, etc. The mill removed its plant, and claimant conveyed 15 acres, applied for and paid for the bonds, paid $17,450 of the $20,000 bonus, but did not convey the 150 acres of coal land, nor did he pay the company's taxes as agreed. *Held* that, the mill company having been prevented from continuing operations because of financial embarrassment and bankruptcy, claimant and the railroad company were not entitled to rescind the contract, they being also in default, and recover against the corporation's estate in bankruptcy a portion of the bonus paid and the difference in freight charges.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 479; Dec. Dig. § 318.*]

2. CONTRACTS (§ 261*)—RESCISSION—PERFORMANCE—BREACH.

Where a contract has been partially executed, and one of the parties has derived substantial benefit therefrom, or has imposed material losses on the other through partial performance, the first party cannot rescind on account of the second party's failure to complete his performance, but the agreement must stand; the first party performing his part of it recovering compensation in damages for the second party's breach.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1174, 1175; Dec. Dig. § 261.*]

3. CONTRACTS (§ 265*)—RESCISSION—STATU QUO.

A contract cannot be rescinded because of the failure of one of the parties to perform, where both parties cannot be restored to statu quo.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1187; Dec. Dig. § 265.*]

In the matter of bankruptcy proceedings of the Morgantown Tin Plate Company. On petition to review a referee's order allowing claims of George C. Sturgiss and Morgantown & Kingwood Railroad Company and by Sturgiss as assignee of George J. Humbird. Reversed as to claims of Sturgiss and the railroad company, and affirmed as to Humbird.

B. M. Ambler, for claimants.

Reese Blizzard, for contestants.

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

DAYTON, District Judge. The litigation, involving the affairs of this bankrupt, commenced before I assumed the bench, in this bankruptcy proceeding and in the equity cause of the Canton Roll & Machine Company v. Rolling Mill Company of America, has already been the subject of one opinion by myself and of two by the Circuit Court of Appeals for this circuit, from which the material facts can be obtained. Sturgiss v. Corbin, 141 Fed. 1, 72 C. C. A. 179; Canton Roll & Mach. Co. v. Rolling Mill Co. (C. C.) 155 Fed. 321; Canton Roll & Mach. Co. v. Rolling Mill Co., 168 Fed. 465, 93 C. C. A. 621. The matters now in controversy are three claims of George C. Sturgiss for $17,450, of the Morgantown & Kingwood Railroad Company for $1,741.40, and of George C. Sturgiss, assignee of George J. Humbird, for $3,746.47, upon all three of which interest is claimed from October 2, 1903. It is to be remembered that the proceedings in this bankruptcy case have been out of the usual order. My predecessor, by decree entered in it in 1904, directed a sale of the plant and property of the tin plate company to be made at once, free and acquit from liens, by commissioners appointed and not by the trustee. Such sale was made by the commissioners first to one Fisher at $154,000; but, Sturgiss offering to bid $160,000 for the property, bidding was reopened, and it was sold a second time to Sturgiss for $200,200; but, when this sale in turn came up for confirmation, Fisher securing a bid of $208,000, again bidding was reopened, and it was then sold to Fisher for $220,000, to whom the sale was confirmed. Sturgiss appealed, and the Circuit Court of Appeals sustained this appeal and directed this last sale to Fisher to be set aside and the sale of the property to be confirmed to Sturgiss at $200,200.

In this decision (141 Fed. 1, 72 C. C. A. 179) the action of the court in taking charge directly of the sale and decreeing the property to be sold by commissioners appointed by it, instead of allowing the referee to decree the sale by the trustee, was expressly affirmed; the court there saying:

"The order of the court below directing a sale of the property clear of all liens, claims, and incumbrances was, under all the circumstances, a wise exercise of judicial discretion, being such action as the bankrupt act contemplates and provides for in those instances when the nature and location of the property makes it desirable, in the interest of the creditors, that the same be sold as soon as practicable. The act does not require that such sales be made by the trustee in bankruptcy, and, while ordinarily it will likely be best and more convenient that such official conduct such sales, still there are doubtless many cases in bankruptcy where it is entirely proper for the court to exercise right to designate the officer it wishes to conduct the sale it is authorizing; such designation being other than the trustee."

The proceeds of sale having been paid in cash to the commissioners, and they having paid them into court, the same were deposited with the court's registrar, and, after paying under decrees from time to time, certain debts as their validity was determined, he has retained the fund subject to the direct order of the court, and not under the orders and administration of the referee.

The litigation referred to has delayed necessarily a final distribution of this fund, but on June 17, 1909, the referee was, by decree entered by the court, directed to ascertain and report "the general and lien

creditors of said bankrupt, and who are the stockholders thereof, respectively, with the amounts of debts and stock respectively and who are entitled to be paid on account thereof, in order to a final distribution." Under this order the referee has reported that every debt against the bankrupt, except the three in controversy, and one due the sheriff of Monongalia county for taxes, have been paid, leaving a balance of $51,174.07 in the registrar's hands, from which, if said three claims and their interest be paid, a balance of $17,935.93 would remain to be distributed to stockholders. To the allowance of these claims exceptions are made, and the matters are brought to my attention by such exceptions to this report.

This explanation has been made, in order that it may be made apparent that this fund was taken charge of and has been administered by the court and not under the orders and directions of the referee as in ordinary cases, that the referee in effect has acted in the capacity of a special master rather than as a referee, and that therefore it becomes unnecessary to consider the technical objections taken to the pleadings had before and the rulings made by the referee in his conduct of the proceedings before him. It seems to me, disregarding all these technicalities, it is my duty under the peculiar conditions to determine from the actual facts existing as shown by the records and the reports of the referee whether these three claims are valid or not. Two of them, the one claimed by Sturgiss for $17,450 and the other by the Morgantown & Kingwood Railroad Company, which, as shown by the evidence of Sturgiss, is now owned by him, have substantially the same basis. It appears that in May, 1902, the Rolling Mill Company of America, a New Jersey corporation, now defunct, with a cash capital of $100,000, owned by New York parties, commenced building its plant at Connellsville, Pa., and had expended something like $17,000 thereon when applied to by Sturgiss to change its location to a point at the then terminus of the Morgantown & Kingwood Railroad, running something like four miles up Deckers Creek from Morgantown. Sturgiss was at the time the substantial owner of this railroad and owned real estate at the point where he sought to have the plant located. The negotiations resulted in a contract between the Morgantown & Kingwood Railroad Company and Sturgiss, jointly, of the first part, and this Rolling Mill Company of America of the second part, under date of May 9, 1902, whereby the railroad company and Sturgiss agreed: (a) To convey or cause to be conveyed by deed within 10 days to the Rolling Mill Company 15 acres upon which to erect its plant; (b) to operate a railroad switch along the front and rear of the buildings to be erected; (c) to take or cause to be taken $50,000 of first mortgage bonds of the mill company at par; (d) to convey to the mill company at a fixed price of $50 per acre 150 acres of coal, one-third of the proceeds to be credited upon the $20,000 bonus later provided for, and the residue payable within one, two, and three years; (e) to transport the coal from this 150 acres to the mill company's plant for five cents per ton; (f) to pay the mill company a $20,000 bonus; (g) to pay its taxes for the first five years; (h) to make a switching charge between the company's plant and the Baltimore & Ohio Railroad Company's con-

nection at Morgantown of one dollar per car until agreed freight rates were arranged; (i) in case the Baltimore & Ohio Railroad Company refused to allow usual reductions in freight rates on construction materials employed in building the plant, to pay the difference between rates charged and such usual reduced rates. In consideration of these things to be done by Sturgiss and the railroad, the Rolling Mill Company agreed, without avoidable delay: (1) To locate, construct, and put into operation on this site a rolling mill, and to continue to operate the same, strikes and unavoidable hindrances and delays excepted, for a term of five years, giving employment to about five hundred people; (2) after expending $100,000 upon all of its property in buildings, machinery, and equipments, to secure $150,000 of first mortgage bonds.

The Rolling Mill Company proceeded to move its plant. Sturgiss became a stockholder of it and its legal adviser. He conveyed the 15 acres, subscribed and paid for $50,000 of its bonds which have long since been paid to him under decree in this cause, paid $17,450 of the $20,000 bonus agreed upon, but did not convey the 150 acres of coal, title to which he did not then have, but subsequently procured and sold to others, nor did he pay the company's taxes. Upon his advice a new corporation was almost immediately formed under the laws of West Virginia, known as the Morgantown Tin Plate Company, which took over the Rolling Mill Company's property, assumed its obligations, and the latter was permitted to become defunct. This tin plate company erected its plant upon the 15 acres, installed its machinery, expended near $200,000 in doing so, could not float the remainder of its bonds, became embarrassed, and on the 2d day of April, 1904, was declared by this court bankrupt. Sturgiss now claims that the consideration for the bonus or part thereof paid by him to secure the removal of the plant has failed, and that he is now entitled to recover back the $17,450 so paid with its interest out of the proceeds of the sale, and upon the same theory that the consideration has failed for this contract, which provided that the railroad company was to be paid for transporting the mill company's material from Morgantown to the plant $1 per car, the claim for $1,741.40 for full freight charges is now brought forward by the railroad company. The referee reports favorably upon both these claims, and exceptions are taken.

It is well settled that in construing a contract courts have right to consider not only the language employed, but the subject-matter and surrounding circumstances, not for the purpose of changing the contract, but to furnish light by which to ascertain its actual significance. Merriam v. United States, 107 U. S. 437, 2 Sup. Ct. 536, 27 L. Ed. 531; Walker v. Brown, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865; Runkle v. Burnham, 153 U. S. 216, 224, 14 Sup. Ct. 837, 38 L. Ed. 694. It is also well settled that, when a contract has been partially executed, and one of the parties has derived substantial benefits, or has imposed upon the other material losses through the latter's partial performance of the agreement, then the first party cannot rescind the contract on account of the failure of the second party to complete his performance; but the agreement must stand, the first party must perform his part of it, and his only remedy for the failure of the second party

to completely perform is compensation in damages for the breach. Howe v. Howe & O. B. B. Co., 154 Fed. 820, 826, 83 C. C. A. 536, 542; Kauffman v. Raeder, 108 Fed. 171, 179, 47 C. C. A. 278, 286, 54 L. R. A. 247. It is only when the parties to the agreement can be placed in statu quo that one may rescind or repudiate the entire contract for the failure of the other to perform it. Kauffman v. Raeder, supra, where more than 20 cases from the Supreme Court, the Circuit Court of Appeals, and state courts of last resort are cited to support these principles. See, also, Lake S. & M. S. Ry. Co. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33, and the elaborate note appended, wherein the whole subject is exhaustively considered.

That the contract was partially performed there can be no denial. By reason of it the Rolling Mill Company abandoned its plant at Connellsville upon which had been expended, as stated, something like $17,000. It came with the balance of its cash capital and located this plant on the land provided by the contract, through its successor, the tin plate company, was erected a mill larger than contemplated, which was equipped with the necessary machinery, involving in all an expenditure of near $200,000, and it executed the $150,000 mortgage provided by the contract. In short, it would seem the only thing required by the contract of it, which was not fully performed, was a five years' operation of the mill at a capacity to employ about 500 people. It was prevented from doing this because of financial embarrassment and bankruptcy. As a legal proposition insolvency or bankruptcy alone does not, in a contract of this kind, constitute either breach or authorize its rescission or abandonment, for it may be finally and fully performed by others who may be acting, for instance, as trustee or as successors or purchasers of the bankrupt's property and rights involved therein or affected thereby. Lester v. Webb, 5 Allen, 569; Carey v. Nagle, Fed. Cas. No. 2,403; Vandegrift v. Cowles Eng. Co., 161 N. Y. 435, 444, 55 N. E. 941, 48 L. R. A. 685; Loveland, Bankruptcy (3d Ed.) 509.

And this requirement of the contract has now been practically complied with by the successors through purchase of the property and rights of the Morgantown Tin Plate Company, successor of this Rolling Mill Company by whom the contract was made. The records of this litigation disclose that, after the bankruptcy sale of the property was ordered, Sturgiss took his own course to save himself from loss by entering into a contract with the American Tin Plate Company, whereby he undertook to purchase the property at the judicial sale and then sell it to this company upon terms agreed upon; that the New York stockholders secured Fisher to become a bidder for it; that Fisher became, twice, the purchaser thereof; that his first purchase at $154,000 was set aside at Sturgiss' instance; that his second purchase at $220,000 was likewise set aside at Sturgiss' instance, so that Sturgiss himself could secure the property at $200,200; that Sturgiss conveyed it at once to the American Tin Plate Company; and that this company has been operating it satisfactorily since. If it was not complied with by the original parties in interest, apparently it was because Sturgiss insisted upon purchasing and having it carried out by those of his own choosing. But it is suggested in argument of counsel that Sturgiss in-

curred a loss of $80,000 in all this. Suppose this be true, how does it affect this matter? If he saw fit to enter into a contract of hazard with the American Tin Plate Company, whereby he undertook to buy at a future public sale the property and then to convey it to this latter company at a fixed price, and at the sale found another bidder prepared to give a much larger sum than he had expected the property to sell for, whereby he was compelled to buy at such advance price as caused him, when he came to fulfilling his contract with the American Company, to undergo this loss, whose misfortune was it but his own? It is clear, too, that he is as much in default, in my judgment, in complying with the original contract with the Rolling Mill Company as the latter was. He was to give a bonus of $20,000, and he was to secure title and convey 150 acres of coal to the company at $50 per acre, one-third of which purchase price was to be credit on this bonus. He took credit for the one-third purchase money, but never conveyed the coal. In fact, he secured title to it and sold it to another and appropriated the proceeds.

How could it be possible, under such circumstances, to rescind the contract partially performed on both sides and restore the statu quo as the law requires? Yet a rescission of the contract because "of failure of consideration," and a restoration to the railroad company of its full freight charges and to Sturgiss of all the bonus paid by him with interest, is exactly what is asked here; no less, no more. It is impossible for me to perceive how this can be done under any principle of law, equity or good conscience, and the exceptions to these two claims will be sustained, and they will be disallowed.

As to the Humbird claim, it stands on a different footing. It is based upon services and money claimed to be advanced by him. It is true the records disclose that Humbird is entitled to little sympathy, that his management as superintendent was bad, his reports to the New York stockholders were misleading, and his promises were wholly unreliable. Nevertheless it seems the company permitted him to remain in charge and did not dismiss him.

Therefore I think this claim will have to be paid, and exceptions to it will be overruled.

Ex parte ANDERSON.

Ex parte RYNNING.

(District Court, D. Maine. November 25, 1910.)

Nos. 169, 170.

AMBASSADORS AND CONSULS (§ 6*)—POWERS OF CONSULAR OFFICERS—CONTROVERSIES BETWEEN MASTERS AND CREWS OF VESSELS—TREATY WITH NORWAY.

The treaty of July 4, 1827,† between the kingdom of Norway and the United States provides that "the consuls, vice consuls or commercial agents * * * shall have the right as such to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities,

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

† 8 Stat. 352, art. 13.

unless the conduct of the crews or of the captain should disturb the order or tranquillity of the country." *Held* that, giving such provision the liberal construction required in case of treaties, it governs in all matters of difference between the captain of a Norwegian vessel lying in a port of the United States, or the officer then in command of the vessel, and members of the crew relating to a matter of the ship's discipline whether the occurrences complained of took place on the vessel or on the wharf at which she lay, and that where all parties concerned were citizens of Norway, and the affair was not of such seriousness as to disturb the public peace, the local courts were without jurisdiction to arrest and detain officers of the ship on warrants issued at the instance of a seaman whether before or after his discharge from the vessel.

[Ed. Note.—For other cases, see Ambassadors and Consuls, Cent. Dig. §§ 16–20; Dec. Dig. § 6.*]

Petitions for writs of habeas corpus by Anders Herman Anderson and Olaf Rynning. Petitioners discharged.

In several petitions, Anders Herman Anderson and Olaf Rynning pray for release from the custody of one John W. Morrill, a deputy sheriff. The facts on which their applications rest are alleged to be substantially as follows:

First. Petitioners are citizens of the kingdom of Norway. Rynning is master, Anderson is second mate, of the Norwegian steamship Skogstad, lying in Portland Harbor in this district.

Second. On November 23, 1910, petitioners were severally imprisoned and restrained of their liberty, and detained in the custody of John W. Morrill, deputy sheriff, acting for the sheriff of the county of Cumberland, and state of Maine.

Third. The said Morrill, as such deputy sheriff, claims to act under the authority of certain writs dated November 22, 1910, commenced by Otto Peterson, commorant at said Portland, and returnable at the superior court, Cumberland county, state of Maine, at the term of said court to be holden on the first Tuesday of December, 1910. The first writ against Rynning alleges an assault committed by him upon Peterson on the 18th day of July, 1910; the second writ against Rynning alleges an unlawful arrest and imprisonment, as well as assault committed by Rynning upon Peterson while Peterson was acting as a seaman on board the steamer Skogstad. The first writ against Anderson alleges an assault committed by him upon Peterson July 18, 1910; the second writ against Anderson alleges an assault upon said Peterson on the same day, together with the arrest and imprisonment of said Peterson at Portland.

Fourth. The steamer Skogstad is alleged to be a vessel, duly registered under the laws of the kingdom of Norway, hailing from Christiana, Norway, owned by citizens of Norway. Otto Peterson shipped on the steamer at Copenhagen, Denmark, on a voyage to the United States, and further if required. He signed shipping articles for a period of 12 months, and not exceeding 15 months. Peterson went aboard the ship in said capacity, and continued in the service until the 1st day of August, 1910, during which time Rynning was master, and Anderson second mate of the steamer. Under the laws of Norway, Anderson, as officer in command, while in command, was in charge of the steamer, and was duly authorized to use such force for preserving discipline on the ship as circumstances required.

Fifth. On the 18th day of July, 1910, the time of the alleged assault and imprisonment of said Otto Peterson, as set forth in the writs, the contract of shipment was in full force; and said Peterson was, at the time of his shipment, and up to and including the commencement of the suits, a citizen of Norway.

Sixth. By virtue of the treaty relations between the government of the United States and the kingdom of Norway adopted on the 4th day of July, 1827, it is provided: "The consuls, vice consuls or commercial agents, or the persons duly authorized to supply their places, shall have the right, as such

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

to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities unless the conduct of the crews, or of the captain should disturb the order or tranquillity of the country; or the said consuls, vice consuls or commercial agents should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country."

Seventh. The arrest and detention of the petitioners by the said Morrill as said deputy sheriff was unlawful, and contrary to the provisions of the said treaty in that by virtue of the treaty and the laws of the kingdom of Norway, the several causes of action set out in the writ, if any existed, were within the jurisdiction of the vice consul of the kingdom of Norway, residing at Portland in the district of Maine, without the interference of the courts of Maine, or of any other local authorities. And, further, there was, in fact, no assault made by either Rynning or Anderson upon Peterson, and no wrongful or improper imprisonment of Peterson. Whatever did take place on the 18th day of July related wholly to the discipline of the steamship, and those on board of her, and in no way disturbed the order or tranquillity of the United States, or of the state of Maine.

Eighth. The steamer Skogstad is ready to sail from Portland on a voyage to Nova Scotia; where she is under charter to take on a cargo of rails to be carried to British Columbia; and both petitioners are obliged to sail on the steamer, and their detention causes great loss to the owners of the ship; and their restraint is contrary to law and in violation of the treaty.

Upon the filing of the petitions on the morning of November 25, 1910, the court issued a summons to show cause returnable at 11:30 o'clock a. m. the same day, when the respondent, Morrill, appeared, and filed answers to the several petitions, making a substantial denial of everything set up in the petitions, and in matters where explicit denial is not made insisting upon proof, and praying that the writ be refused. In order that the case might be promptly heard the court ordered the writ to issue at once, returnable at three o'clock in the afternoon of the same day, to wit: November 25, 1910; at which time the respondent, Morrill, appeared, bringing with him both Rynning and Anderson, the petitioners in the case. Upon a hearing occupying the afternoon and evening of November 25th, the witnesses in behalf of both parties were heard. After hearing arguments of counsel, the court announced his decision at once.

Benjamin Thompson, for petitioners.
William H. Gulliver, for John W. Morrill.

HALE, District Judge (orally, after stating the facts as above). In view of the circumstances of this case I clearly ought to announce my conclusion at once. By section 753 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 592), the federal courts have power to issue writs of habeas corpus in favor of prisoners, "in custody in violation of the Constitution or a law or treaty of the United States." Are these prisoners, now before me, held in violation of the provisions of the treaty of 1827, between the United States and the kingdom of Norway? They are now in the custody of the sheriff of this county, or one of his deputies, upon writs issued out of the superior court of Cumberland county.

In The Exchange, 7 Cranch, 116, 144, 3 L. Ed. 287, Chief Justice Marshall has pointed out that it would be dangerous to society if the shipowner who sends his ship to the port of another country, for the purposes of trade, did not, as a rule, owe temporary and local alle-

giance to the jurisdiction of the country to which he has sent his vessel; but in the Wildenhus Case, 120 U. S. 1, 7 Sup. Ct. 383, 30 L. Ed. 565, the leading case upon this subject, Chief Justice Waite remarks that it was long ago found to be beneficial to commerce for the local government to abstain from interfering with the internal discipline of a foreign ship, where there are treaty relations between this country and the country in which the ship is owned, and so "by comity it has come to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel, or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require."

The treaty of 1827 between Norway and the United States is a part of the law of the United States. I am bound to recognize it as I am bound to recognize any federal law. The captain, Rynning, and the second mate, Anderson, are officers of the Norwegian ship Skogstad. Peterson, the seaman, is a citizen of the kingdom of Norway. Did the master and the second mate deal with Peterson in a manner justifiable, under the discipline of the ship, or did their conduct involve the peace and dignity of the country, and the tranquillity of this port? After a full hearing of the case, in which all the parties in interest have testified and the consul has given his testimony, stating fully his position in the premises, I have no hesitation in deciding that the conduct of the captain with Peterson was such as related simply to the discipline of the ship, and to the maintenance of order on board the ship, as in the case of the Sally and the Newton, cited in the Wildenhus Case from Wheaton's Elements of International Law (3d Ed.) 154.

In the case of Anderson, the second mate, the transactions complained of in the writs upon which these officers were arrested took place largely upon the wharf to which the Skogstad was made fast. Without entering into a discussion of all that took place upon the wharf, I find that whatever the mate did upon the wharf in relation to the seaman was justifiable under his duties as the officer in charge of the ship at the time, in the proper discipline of the ship. Whatever was done upon the wharf did not attain to the gravity which affects the public welfare or requires that the case be taken from the jurisdiction of the ship authorities. It did not, within the meaning of the law, affect the order or tranquillity of the port. Whether it came to the attention of some of the citizens of Portland, or not, it is not material to inquire. It did not relate to matters passing beyond the obvious jurisdiction of the officers of the ship in the maintenance of ship discipline. Tellefsen v. Fee, 168 Mass. 188, 190, 46 N. E. 562, 45 L. R. A. 481, 60 Am. St. Rep. 379; The Welhaven (D. C.) 55 Fed. 80; The Marie (D. C.) 49 Fed. 286; Tucker v. Alexandroff, 183 U. S. 424, 445, 22 Sup. Ct. 195, 46 L. Ed. 264.

The learned counsel for the respondent takes the position that, under the treaty, consuls and vice consuls have the right to sit as judges

and arbitrators only "in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge," and that, in the case of Anderson, the difference did not arise between the captain and any member of the crew. In the case before me Anderson was, in fact, acting as the captain of the vessel. He had charge of the vessel at the time. He represented the order and dignity of the vessel in what he did on the wharf, as well as upon the deck of the vessel, on the evening in question, when Peterson was arrested; so that, in fact, the difference did arise literally between the officer in command of the ship and a member of the crew. But I do not take so narrow a view of the treaty as to hold that it is intended to apply to differences which arise between the captain of a vessel, on one side, and the crew, or some member of the crew, upon the other. It clearly refers to such differences as may arise inter sese between the captain and the crew of the vessel; for treaties are to have a liberal construction. Tucker v. Alexandroff, 183 U. S. 424, 437, 22 Sup. Ct. 195, 46 L. Ed. 264.

The counsel for the respondent also urges that at the time the suits were brought, Peterson had been discharged from the ship. But the decisions of the federal courts clearly hold that it makes no difference that, at the time of bringing the actions in the state courts, the seamen had been discharged from the ship; nor is it material that some of the acts complained of were not wholly confined to the ship, but took place on the wharf to which the ship was made fast.

The whole question involved in this controversy is of such importance that I shall be glad to have it receive the attention of the appellate court; and with that in view I shall order that, upon the discharge of the petitioners, bonds shall be given by them. I conclude that this case is governed by the treaty between the United States and the kingdom of Norway; that the matters in controversy are wholly subject to the jurisdiction of the representative of that government, or the courts of that country, and are not within the jurisdiction of the courts of this state.

I order, then, that Olaf Rynning, the master of the steamship Skogstad, and Anders Herman Anderson, the second mate, be discharged from arrest, upon their filing bonds containing the usual provisions, with surety to be approved by the court, in the sum of $700 in each case.

LOUISVILLE & N. R. CO. v. INTERSTATE COMMERCE COMMISSION.

(Circuit Court, W. D. Kentucky. April 9, 1910.)

1. CONSTITUTIONAL LAW (§ 62*)—INTERSTATE COMMERCE COMMISSION—POWER TO FIX RATES—CONSTITUTIONALITY OF DELEGATION.

The power delegated by Congress to the Interstate Commerce Commission to prescribe railroad rates for the future is legislative in its nature, and, since it concerns the administrative affairs of the government which by reason of variable conditions cannot be covered in detail by direct legislation, its delegation is not in violation of the Constitution, and it

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

may be as fully exercised by the commission, as Congress might have exercised it, subject to any limitations imposed by Congress itself.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 62.*]

2. COMMERCE (§ 1*)—INTERSTATE COMMERCE—CONSTITUTIONAL POWER OF CONGRESS TO REGULATE.

The provision of Const. U. S. art. 1, § 9, that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another," does not prevent the exercise of the power of Congress by delegated authority to regulate commerce between ports of different states merely because such regulation may incidentally affect the commerce of a port in still another state.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 1.*]

3. COMMERCE (§ 85*)—INTERSTATE COMMERCE COMMISSION—POWERS IN FIXING RATES.

Section 15 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1909, p. 1158), which authorizes and empowers the Interstate Commerce Commission "whenever, after full hearing upon a complaint, * * * it shall be of the opinion" that the prescribed conditions exist, to determine and prescribe maximum rates to be charged by a carrier, places no restrictions on the commission in respect to the matters which it may take into consideration, or the weight it shall give to every of such matters in informing itself what opinion it ought to give, except that it shall not abuse its authority and proceed arbitrarily without regard to the justice of the case, or give a judgment not fairly within its power.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 85.*]

4. COMMERCE (§ 96*)—INTERSTATE COMMERCE COMMISSION—REVIEW OF ORDERS BY COURT.

A Circuit Court in a suit to enjoin the enforcement of a rate prescribed by the Interstate Commerce Commission does not act as an appellate rate making commission, but its office is to see that the commission does not exceed its powers, and not to determine whether it erred in the exercise of them. While the court has power to determine whether a rate prescribed is reasonable or not, the power may be limited by circumstances which do not admit of its exercise until the proper conditions exist; and the rule by which it is exercised is that the court will not interfere with the action of the commission, unless it clearly appears that it is beyond its authority and injuriously affects some substantial right of the complainant—is confiscatory, to use that term in its broad sense. Whether it is so or not is the test of reasonableness in such a controversy.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 96.*]

5. COMMERCE (§ 92*)—INTERSTATE COMMERCE COMMISSION—REVIEW OF ORDERS BY COURT.

Congress did not undertake by the interstate commerce act and its amendments to confer any new judicial power upon the courts, but assumed that their ordinary powers would continue and might be invoked by parties complaining of injuries, past or apprehended, from some abuse of its power by the commission resulting in a trespass upon vested rights.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 92.*]

6. COMMERCE (§ 85*)—INTERSTATE COMMERCE COMMISSION—FIXING RATES OF CARRIERS—LIMITATION OF POWER.

The interstate commerce act (Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1909, p. 1158), conferring power on the Interstate Commerce Commission to determine and prescribe "just and reasonable maximum rates," does not intend to pre-

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

scribe any closer definition of the quality of an act done by the commission which will defeat its validity than that it is prohibited by the Constitution, or by legislation clearly or by necessary implication forbidding it.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 85.*]

7. COMMERCE (§ 88*)—INTERSTATE COMMERCE COMMISSION—ORDER PRESCRIBING RATES—VALIDITY.

It is no objection to the validity of an order of the Interstate Commerce Commission determining and prescribing rates to be charged by a carrier that it would derange the schedule of rates on other routes.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 88.*]

8. COMMERCE (§ 88*)—INTERSTATE COMMERCE COMMISSION—HEARING OF COMPLAINTS—PROCEDURE.

The procedure prescribed by the interstate commerce act (Act Feb. 4, 1887, c. 104, § 13, 24 Stat. 383 [U. S. Comp. St. 1901, p. 3164]), requiring a statement of charges against a carrier filed with the Interstate Commerce Commission to be forwarded "to such common carrier" who shall be required to answer the same, which procedure is required to be followed in case of hearings for the prescribing of rates under section 15 as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1909, p. 1158), is analogous to that in all legal controversies and sufficient, and it is no objection to the validity of an order of the commission prescribing rates to be charged by a carrier between certain localities that it will affect the rates of other carriers not before the commission who may be in the succession of all or any interstate transportation which includes that in question.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 88.*]

9. COMMERCE (§ 88*)—INTERSTATE COMMERCE COMMISSION—REVIEW OF ORDERS BY COURT.

On complaint made by shippers in New Orleans to complainant railroad company that certain through rates on certain classes of goods were unreasonably high and amounted to more than the sum of the local rates, which had been in force for 20 years, and asking for a reduction, complainant changed its schedule by raising the local rates so that their sum should equal the through rates which it had been charging. Thereafter the New Orleans Board of Trade filed a complaint with the Interstate Commerce Commission, which, after notice to complainant and a full hearing, found that the rates charged were unjust and unreasonable and entered an order requiring a reduction of the local rates to the old schedule, and the reduction of the through rates to the sum of the locals so reduced. Complainant then brought suit to enjoin the enforcement of such order. There was no claim that the rates fixed thereby were confiscatory or unremunerative. *Held*, that on the facts appearing the order was within the scope of the powers of the commission, and that there was no ground upon which the court was authorized to interfere with its enforcement.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 88.*]

In Equity. Suit by the Louisville & Nashville Railroad Company against the Interstate Commerce Commission. Decree for defendant.

Ed. Baxter, Perkins Baxter, and W. G. Dearing, for complainant.

George Du Relle, U. S. Atty., and William E. Lamb, Special Asst. U. S. Atty., for defendant.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

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

SEVERENS, Circuit Judge. Three several complaints were made to the commission concerning certain freight rates charged by this complainant upon traffic between New Orleans, La., and Mobile, Ala., between New Orleans and Pensacola, Fla., and between New Orleans and Montgomery, Selma, and Prattville; each of which last three mentioned places being in Alabama and within the same zone of official classification. The complaint in each case was that the rates were unreasonable and unjust per se, and were unduly prejudicial to the commercial interests of New Orleans. The complaints were made by the board of trade of the last-named city. The commission gave notice thereof to the complainant and fixed a time and place for hearing. The complainant appeared and answered. Proofs were submitted by the respective parties and considered by the commission. Whereupon the commission, being of opinion that the rates which were charged were too high, reduced them in respect to several classes of freight, and fixed them at specified new rates, which it ordered the complainant to observe. By its order the date upon which it should become effective was stated. No further statement in detail of these proceedings is necessary, as their regularity is not contested.

A brief history of the matter of rates on the routes above mentioned is necessary to a full understanding of the action of the commission and the effect of its order. A schedule of rates on these routes was fixed by the railroad company in 1887, and adhered to until 1907, when, upon complaint made by shippers at New Orleans that the through rates were unreasonably high, and amounted to more than the sum of the local rates, and asking for a reduction of through rates to rates not greater than the sum of the local rates between the termini of the through routes and intermediate points, the railroad company changed its schedule by raising the local rates so that their sum should equal the through rates which it had been charging. The through rates were left undisturbed. These conditions continued until the autumn of 1909, when the New Orleans Board of Trade made complaints of the existing rates to the Interstate Commerce Commission, urging that they were unreasonable and asking for an order requiring the reduction of the local rates to the old schedule, and the reduction of the through rates to the sum of the locals so reduced. The commission was of opinion that the known circumstances and the proofs supported the complaints, and on November 26, 1909, made the order in question. It is to be understood that what is here said relates to certain classes of freights and not to entire schedules. The object of this bill is to obtain a decree enjoining the commission from enforcing its order. The complaint made against it is that it is in excess of the authority conferred by the acts of Congress creating the commission and defining its powers, and that the order is in violation of the constitutional rights of the complainant. And it is further urged that the order is based upon manifest errors of law and fact, that the rates prescribed by it are unreasonably low and in violation of section 1 of the act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), and that it violates section 3, in that it creates undue and unreasonable preferences. From these premises it is seen that the subject of the controversy is an order prescribing

the maximum rates on interstate traffic. That the order concerns a subject within the scope of the powers of the commission cannot be doubted; and the first question is whether the order transcends the due limitation of the powers which are undoubtedly possessed by the commission.

In pursuing this inquiry it is of prime importance that we apprehend clearly the nature of the power on which the order rests; and for greater clearness it is well to emphasize the fact that the particular power in question is one which relates to the prescription of rules and regulations for future conduct, and it is not a power for affording remedies for past misconduct or other violations of legal rights. As has been pointed out in the opinions of the Supreme Court, the power thus defined is legislative in its nature; and it is well settled upon a long series of decisions by that court in the development of this subject that, when this legislative power concerns the administrative affairs of the government, it may be delegated to an officer, or a board already existing or created for the purpose, and, when so delegated, the power may be as fully exercised as the Legislature might have exercised it, subject to any limitations imposed by the Legislature itself. When a subject requires legislation for the regulation of future conduct, but the objects of it are so diffuse and variable that they cannot be distinctly apprehended and comprised in the ordinary terms of legislative classification, it is not unusual to prescribe general rules, if such do not already exist, and delegate the power to apply those rules to the varying circumstances which may arise and give occasion for control. The necessity of legislation in such form justifies its adoption; and it is not obnoxious to the Constitution, in that it delegates legislative power. Wayman v. Southard, 10 Wheat. 1, 6 L. Ed. 253; Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; Buttfield v. Stranahan, 192 U. S. 476, 24 Sup. Ct. 349, 48 L. Ed. 425; Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523.

And it would be difficult to instance an occasion in the history of federal legislation so plainly subject to the application of this exceptional rule as the enactment of the interstate commerce law and the carrying forward of its scheme by subsequent amendments. It is manifest that some such scheme as this must have been adopted or the purpose to control carriers engaged in interstate commerce must fail. It would have been impossible for Congress to have foreseen the multitude of questions depending upon the special facts presented sometimes in one complication and sometimes in another, and declare a single rule applicable to each. The most that it could do would be to declare the general rules to indicate its purpose and to serve as guides in the determination of questions which would arise, and delegate the power of applying them to some competent public agency always in the field and ready to entertain and dispose of controversies. And it is indispensable to this power that the commission should have the right to exercise its judgment and to form conclusions upon the facts. To enable it to do this, the statute provides that notice shall be given to interested parties, that a hearing shall be had and proofs

taken. We think there is no valid constitutional objection to the law, in that legislative powers are improperly delegated.

Nor can we think that the power of the commission has been in this instance exercised in a way to violate any constitutional right of the railroad company. The fifth amendment to the Constitution, whereby the taking of private property for public use without just compensation is forbidden, is invoked. In other words, it is contended in argument that the order of the commission is confiscatory. But, as we have elsewhere stated, we do not think that the facts alleged in the bill are sufficient to support that conclusion. Reference is also made to the provision of the sixth clause of section 9 of article 1 of the Constitution, which is that: "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." But this does not prevent the exercise of the power of Congress by delegated authority to regulate commerce between ports of different states simply because such regulation may incidentally affect the commerce of a port in a still other state. If such an incidental consequence were admitted to be an insurmountable obstruction, the power of Congress to regulate commerce between the states would be seriously impaired. The provisions of the Constitution must be construed to be reciprocal and to operate harmoniously. Pennsylvania v. Wheeling, etc., Bridge Co., 18 How. 421, 15 L. Ed. 435; South Carolina v. Georgia, 93 U. S. 4, 23 L. Ed. 782; Armour Packing Co. v. United States, 209 U. S. 56, 79, 80, 28 Sup. Ct. 428, 52 L. Ed. 681.

But the constituting act may contain restrictions, which may be either in respect to the power itself or to the manner of its exercise. With respect to this particular power, on turning to the fifteenth section of the act as amended by the act of June 29, 1907, it is found that in such an emergency as this the commission is authorized and empowered, and it shall be its duty, whenever, "after a hearing upon the complaint," it shall be of the opinion that any of the rates or charges "are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in each case as the maximum to be charged." It is to be observed that the words are "whenever it shall be of opinion" that the conditions require it the commission is "authorized and empowered * * * to determine and prescribe what will be the just and reasonable rate," etc., to be thereafter observed. There is no restriction upon the commission in respect to the matters which it will take into consideration or the weight it shall give to every of such matters in informing itself what opinion it ought to give, except that it shall not abuse its authority and proceed arbitrarily without regard to the justice of the case or to give a judgment not fairly within its power.

It is not contended here that the commission acted willfully or otherwise improperly, except that it failed to give weight, or not sufficient weight, to this or that consideration, specifying some of those which the complainant thinks ought to have been weighed, and, if

weighed, should have produced a different opinion. And the affidavits of many expert and competent witnesses are produced, and state facts which might have been useful to the commission in forming its opinion. And they might be sufficient to induce us to think that the commission had erred in its conclusion. But they are not to any point which we are to consider. They do not rise to the issue here. The court is not an appellate rate-making commission. Its office is to see to it that the commission does not exceed its powers, and not to determine whether it erred in the exercise of them. As said by Mr. Justice White in delivering the opinion of the Supreme Court in Interstate Commerce Commission v. Illinois Central R. R., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280:

"Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised. Power to make the order, and not the mere expediency or wisdom of having made it, is the question."

If the order were so unreasonable or so manifestly unjust as to induce the belief that the fundamental principles of rational justice had been disregarded, or that some right secured by the Constitution had been violated, it would be our duty to prevent such a consequence by awarding an injunction.

It is scarcely credible that Congress should have intended that the courts should go into the details which the commission had assembled and considered in its inquiry, or supposed that the judges would be better qualified than a commission of experts, having experience in such matters, would be expected to have. Such duties are not judicial. Whether they could properly be imposed upon the judiciary it is not necessary to inquire. As to this, it is enough to refer to the decision of the Supreme Court of the United States in the case of United States v. Yale Todd, reported by Chief Justice Taney, and ordered by the court to be inserted in its reports, at the foot of United States v. Ferreira, 13 How. 40, 52, 14 L. Ed. 42, and the discussion of this subject in Interstate Commerce Commission v. Brimson, 154 U. S. 447, at pages 481, 482, 155 U. S. 3, 14 Sup. Ct. 1125, 15 Sup. Ct. 19, 38 L. Ed. 1047, 39 L. Ed. 49. And see, also, the case of Norwalk Street Railway Company's Appeal, 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794, for a valuable opinion.

It may be observed in passing that in the mother country the limits of the respective departments of government are not so distinctly marked as they are by the Constitution of the United States, and hence we may not safely rely upon judicial utterances made in that country upon this subject. To say the least, the consideration just adverted to is very persuasive to the conclusion that Congress did not contemplate such a result as the vesting of administrative authority in the courts, in the absence of a clear indication that it was so intended. On the contrary, Congress has committed the power and

imposed the duty to ascertain facts and determine what is reasonable in regard to rates and charges in view of such facts on the commission.

It is contended and many authorities are cited to show, that the court has power to determine whether a rate is reasonable or not. This is admitted. But the proposition states only a part of the rule. The power may be limited by circumstances which do not admit of its exercise until the proper conditions exist. The court does not take the initiative in determining rates. That is for the commission. And, for the purpose of its inquiry and determination, a wide range is given it, limited only by the circumstances which it thinks relevant. When it has made its order, the court is open to complaint, and will consider whether the rate fixed by the commission is reasonable or not. It is at this point that the judicial power over the subject may be invoked. And the rule by which it is exercised is that it will not interfere with the action of the commission unless it clearly appears that it is beyond its authority, and injuriously affects some substantial right of the complainant—is confiscatory, to use that term in its broad sense. Whether it is so or not is the test of reasonableness in such a controversy.

That this is the relation of the functions of the commission and of the court, and of the order in which their functions shall be exercised, seems to have been the conception of the Supreme Court in the cases of Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 190 U. S. 273, 23 Sup. Ct. 687, 47 L. Ed. 1047, Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, and Prentis v. Atlantic Coast Line, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150. Upon determining the controversy, the court does not proceed to declare what shall be the proper rate to prescribe. That would be to decide a legislative question. Moreover, Congress did not undertake to confer by this act any new judicial power upon the courts. It assumed that their ordinary powers would continue and might be invoked by parties complaining of injuries, past or apprehended, from some abuse of its power by the commission, resulting in a trespass upon vested rights. Upon this hypothesis the whole scheme of the act in this regard becomes harmonious with all related principles of law, and the respective provinces of the commission and of the courts become clearly defined.

The term "reasonable" is very elastic in its meaning. It lacks the quality of certainty that is desirable in a statute. One man may give it a definition of a very broad, and another man a very narrow, significance. In this instance of its use we think it must be interpreted by its context, the purview of all the related words in the statute, and especially by the nature of the duty which is being exercised, in determining the quality of the act or thing presented for judgment. A dictionary meaning is "not exceeding the bounds of reason or common sense" (Cent. Dic.), and an eminent author there quoted says that the word "denotes a character in which reason (taking it in its largest acceptation) possesses a decided ascendant over the temper and passions." In view of several recent decisions of the Su-

preme Court of the United States, it is doubtful whether this statute intends any closer definition of the quality of an act done by the commission which will defeat its validity than that it is prohibited by the Constitution, or by legislation clearly, or by necessary implication, forbidding it. We are impressed that this is what that court intended to hold as the limitation of the power of the commission. We are not required by the exigencies of this case to do more than say that in our opinion the allegations of actual facts contained in the bill do not show that the commission exceeded its powers or prescribed rates so unreasonable as to justify the interposition of the court. If the statement of general conclusions were sufficient, perhaps a case is made, for there are plenty of such. But these, supported only by mere opinions, cannot be accepted as sufficient for the purpose of invoking our jurisdiction to interfere.

It is not alleged in the bill that the rates that the commission prescribed are confiscatory. It appears that for 20 years the rates which the complainant charged were the same as the schedule now complained of, and it is not claimed that they were not remunerative. But it is said that the old rates were required to be as low as they were because of the competition engendered by transportation by sea and rivers, and that the complainant some two years ago raised the rates to their present standard because that competition had measurably, if not altogether, ceased. And this is the gist of the matter. But it seems to us that all it amounts to is that it was one of the elements to be considered by the commission. The other elements which the commission considered may have persuaded it that the rates proposed were not unreasonable.

It appears that some two years before the present complaints were made the New Orleans Board of Trade or some mercantile association of that city had complained of the through rates as being unreasonable and excessive because those rates amounted to more than the sum of the local rates on parts of the through transportation. A practice had grown up whereby shippers sent their goods on the local rate to the intermediate point where it was reshipped to its destination on another local rate. This practice was in some degree counteracted by the irregular device of giving special rates to shippers, or some of them. In response to the complaint last mentioned, the railroad company took a unique way of removing the grounds of it by raising the local rates so that their sum should equal the through rate. This was not at all the consummation which the merchants were seeking. They had only served the interests of the railroad company. Finally they lodged these complaints.

The commission in its report, in the course of the discussion, makes a pertinent reference to the rates prevailing in other cities on the Mississippi and Ohio rivers which compete with New Orleans for the trade in the localities affected by the rates to and from New Orleans. And it is shown that the latter is put to a disadvantage by the comparison. We quote (Rep. of Com. 236):

"With respect to the through rates from New Orleans to Montgomery, Selma, and Prattville, and to the southeastern territory, it was shown that the merchants of New Orleans have heretofore made ineffectual efforts to se-

cure better rates to this territory, as higher rates were in effect from New Orleans to this territory than existed from distributing centers at greater distances west and north of said territory, the situation being such that New Orleans was cut off from the trade of this section as to many products, and greatly restricted and burdened as to many others on account of the high rates of transportation."

Other grounds are stated on which the commission founded its opinion, and they seem germane to the inquiry. The difference of circumstances which will in one case justify an interference by the court, and in another case will not justify it, is illustrated by the decisions of the Supreme Court quite clearly, as we think, in the cases of Interstate Commerce Commission v. Northern Pacific Railway Company, 216 U. S. 538, 30 Sup. Ct. 417, 54 L. Ed. 608, and Interstate Commerce Commission v. Delaware, Lackawanna & Western Railroad Company, 216 U. S. 531, 30 Sup. Ct. 415, 54 L. Ed. 605, both decided March 7, 1910, on the one hand, and the case of Interstate Commerce Commission v. Illinois Central Railroad Company, supra, decided January 10, 1910, on the other. In the former cases questions of law were presented and decided, and the orders of the commission were overruled. In the latter questions of fact committed to the judgment of the commission were presented for review, and the order of the commission was sustained. But it is unnecessary to pursue the subject further if we have correctly interpreted the scope of the power of the commission.

It is further urged that the alteration proposed would derange the schedule of rates on other routes, and that this would present difficulties of great moment. But these difficulties, if they exist, would be likely to attend any change of rates between any localities, and the result of the argument would be that, when once a general scheme of rates had been settled, they must remain for an unlimited time unchangeable in any part of the territory, a result which would be wholly inadmissible. Besides, we conceive that, when the complainant raised its rates, it encountered like difficulties, and it does not appear they were then insurmountable, at least that they were not so much so as to deter it from changing its rates. If any such difficulty arises, it will be a matter for the commission to adjust when it is made to appear.

In this connection we may refer to another objection to the order which the complainant makes. It is that:

"The report and order of the commission in this case affects rates of numerous carriers from and to numerous points, none of which had any opportunity to be heard before the defendant herein in support of their present rates, and it is also respectfully submitted that in that respect the complainant and other carriers affected by the report and order of the commission, if enforced, will be deprived of their property without due process of law, in violation of the Constitution of the United States, and more particularly the fifth amendment thereto."

By the thirteenth section of the act, the commission is required, when a complaint stating the facts is made, to forward the same "to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the commission." It is obvious that the purpose was

to require that notice should be given to the party immediately interested, and not to those remotely concerned. It is a novel and unreasonable proposition that, when rates in a given locality are drawn in controversy, notice must be given to every carrier who may be in the sucession of all or any interstate transportation which includes that in question. The procedure prescribed is analogous to that in all legal controversies, and must be deemed sufficient. The objection must be overruled.

If such an order as is here contested were to be held to be beyond the power of the commission, and that precedent were to be followed, its functions would be frittered away, piecemeal, and the result must be that the power to regulate rates through the means provided by the statute would be so absurdly inadequate as to furnish no reason for its existence.

In conclusion we are of opinion that, the conditions for the exercise of the power and duty existing, the commission was bound to prescribe some rates for the future transportation of freight by the railroad company. What those rates should be, whether they should remain as fixed by the railroad company or whether they should be other rates, was a matter committed by the statute to the commission, and was a matter to be settled by its opinion as to what was just and reasonable, and that, when so settled, its determination is binding, and is not subject to judicial review, unless it is made to appear that the commission in making it has not merely erred in the exercise of its power, or has proceeded upon grounds and reasons which to a court might seem unsatisfactory, but has violated some distinct paramount right secured by the Constitution or otherwise vested in the carrier, or in the public. And we are unanimously agreed that in the case presented such conditions do not appear, and that there is no legal reason why the order of the commission should be disturbed.

The motion for an injunction must therefore be denied.

LA CLAIR et al. v. UNITED STATES.

(Circuit Court, E. D. Washington, Southern Division. June 18, 1910.)

No. 35.

1. PUBLIC LANDS (§ 114*)—PATENTS—PRESUMPTION OF VERITY.

Patents for lands issued by the United States carry the presumption of verity, and can only be set aside on the most clear and convincing proof; and the rule applies, although they are attacked by the United States in defense of a suit to restrain their cancellation by the department.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 314–322; Dec. Dig. § 114.*]

2. INDIANS (§ 13*)—RIGHT TO ALLOTMENTS OF LAND—ADOPTION INTO TRIBE.

Plaintiffs, who were formerly members of the Puyallup Tribe of Indians, but were of Yakima half blood, were invited by the Yakimas to become members of that tribe for the purpose of sharing in the allot-

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

ment of the lands of their reservation in severalty, which they did, having been formally adopted by the tribe in accordance with its customs. The Indian agent and the allotting agent were fully advised of such action which was taken with their approval and with full knowledge of the facts recommended plaintiffs for allotments, and their recommendation was approved by the Secretary of the Interior, and patents were issued to plaintiffs, which recited that they were Indians "residing on the Yakima Indian reservation," who had been allotted land therein. None of plaintiffs had received allotments elsewhere. The lands have since been for the most part resided upon and improved by the allottees, and have become valuable. *Held*, that the things done were all that were required to make plaintiffs members of the Yakima Tribes, and that, even if official ratification of the adoption was required, the action of the department amounted to such ratification.

[Ed. Note.—for other cases, see Indians, Dec. Dig. § 13.*]

3. INDIANS (§ 13*)—RIGHT TO ALLOTMENT OF LANDS.

Plaintiffs were not debarred from the right to receive allotments on the Yakima reservation by the fact that their parents had received allotments on the Puyallup reservation as heads of families, and that plaintiffs were named in the patents as members of such families.

[Ed. Note.—for other cases, see Indians, Dec. Dig. § 13.*]

4. EQUITY (§ 85*)—LIMITATION OF ACTIONS (§ 11*)—ACTIONS BY—DEFENSES—LACHES AND LIMITATION.

The rule that laches or limitation cannot be invoked against the United States does not apply where the government is not the real party in interest, but, if successful, the litigation must inure to the benefit of private individuals.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 221; Dec. Dig. § 85;* Limitation of Actions, Cent. Dig. §§ 35–39; Dec. Dig. § 11.*]

5. INDIANS (§ 13*)—SUITS BY UNITED STATES TO CANCEL PATENTS TO ALLOTTEES—LIMITATION.

Act April 23, 1904, c. 1489, 33 Stat. 297, which authorizes the Secretary of the Interior to rectify mistakes and cancel patents to Indian allottees during the whole of the trust period for defects therein expressly mentioned, was not intended to render the general statute of limitations inapplicable by retaining jurisdiction over the lands during the whole of the trust period, except in the cases specified, and a suit by the United States to cancel such patents on other grounds is subject to the limitation of six years from the date of their issuance imposed by Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 (U. S. Comp. St. 1901, p. 1521), on suits generally to cancel patents.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 13.*]

6. INDIANS (§ 13*)—PATENTS TO ALLOTTEES OF LAND—CANCELLATION—AUTHORITY OF INTERIOR DEPARTMENT.

Where the Interior Department by its officers and agents has recognized the right of Indians to allotments of land as members of a tribe, after full investigation, with full knowledge of the facts and without fraud, and allotments have been made and patents issued to the allottees, the department is without authority to subsequently cancel such patents because of a change in its interpretation of the law; nor is there any equity which warrants a court in canceling the patents at suit of the government, the allotments being satisfactory to the tribe from whose lands they were made.

[Ed. Note.—for other cases, see Indians, Dec. Dig. § 13.*]

Suits by Edward La Clair and 16 others against the United States Decrees for plaintiffs.

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

Arthur E. Griffin, for plaintiffs.
Joseph B. Lindsley, U. S. Atty.
Charles A. MacMillan, Asst. U. S. Atty.

WHITSON, District Judge. These 17 suits have been brought in reliance upon the provisions of Amendatory Act Feb. 6, 1901, c. 217, 31 Stat. 760. Plaintiffs were allotted lands on the Yakima Indian reservation, and trust patents were issued under the acts of Congress which provide for the taking of lands in severalty. Act Feb. 8, 1887, c. 119, 24 Stat. 388. Inquiry having been instituted in the department and cancellation of such patents threatened upon the authority conferred upon the Secretary of the Interior by the act approved January 26, 1895 (Act Jan. 26, 1895, c. 50, 28 Stat. 641), as amended by Act April 23, 1904, c. 1489, 33 Stat. 297, the plaintiffs as they may under the first-mentioned statute are seeking relief against the proposed action, and since the causes involve the same principles of law and depend upon the same facts, differing only in detail as to the persons interested, they have been submitted together, and will be so considered.

Three Indian families are concerned, the members of which are each entitled to relief or none are so entitled, hence the following grouping. Causes Nos. 35, 36, 37, 38, 39, 40, and 41 embrace the La Clair family. Causes Nos. 42, 43, 46, 48, 51, 52, 53, 54, and 57 embrace the Ashue family. Cause No. 49 relates to the Winnier family, one member only of which is seeking relief. A part of the plaintiffs sue in their own right as patentees, while others claim as heirs at law of deceased patentees, but beyond this it will not be necessary for present purposes to follow the evidence relating to individuals. It need only be noted that the patents are each dated July 10, 1897, with the exception of that to Effie Ashue, which bears date June 23, 1900.

The bills proceed upon the theory that plaintiffs, while formerly of the Puyallup Tribe, are now Yakima Indians in virtue of their adoption by the latter; that the relation by consanguinity to the degree of the half blood both induced and justified this action; that, after adoption, they selected lands for allotment, which selections were duly approved and afterwards identified by the trust patents over which the present controversy arises; that this was done with the full knowledge and consent of the Indian agent and the allotting officers of the defendant, and was subsequently approved by the Secretary of the Interior, from all of which it is contended that the allotments were rightfully made, and, if not so made, that the defendant is now estopped by laches, as well as by the conduct of its officers, to assert to the contrary; and that the statute of limitations also stands as a bar to the disturbance of the existing status. No issue is raised concerning the relationship of the complaining parties but it is denied that they were legally accepted or adopted by the Yakimas. The legality of the allotments is denied on the ground that they are double, but the proceedings looking to cancellation are admitted. The defendant also interposes the defense of fraud, in that imposition was practiced by the plaintiffs who falsely represented themselves to be Yak-

ima Indians, and concealed the acquisition of lands theretofore awarded them upon the Puyallup reservation, whereby its officers were deceived, and led to make allotments and to subsequently issue patents for the selected and designated lands. There is practically no dispute as to the facts. The plaintiffs have brought forward witnesses to establish the essential averments of their petitions, while the defendant has not by testimony on its behalf put anything material in substantial contradiction. A summary of my conclusions will be generally applicable to each cause.

The Yakima Indian reservation was set apart by the treaty of 1855 (2 Kappler's Indian Treaties, p. 698, 12 Stat. 951). Fourteen confederated tribes participated in the negotiations and consented to the treaty provisions; these being designated as the Yakima Nation of Indians. They were originally opposed to the disturbance of rights guaranteed by the treaty. Up to the time that they were invited to segregate their interests they had held the reservation in common. When the taking of lands in severalty was proposed, they foresaw, clearly enough, that it meant the breaking up of tribal relations. The allotment of lands having become a vital issue, a council of all the tribes was held in 1893 under the supervision of the reservation agent and of Col. Rankin, an allotting agent. Just how the Indians were induced, if induced at all, to consent to this invasion of their domain which was to finally destroy the territorial integrity of the reservation, is not fully disclosed. It does appear that they eventually gave consent; but, in order to fully occupy the country reserved for their sole use and benefit and thereby avoid as far as possible intrusion by the whites, they concluded at this council to invite in from the surrounding tribes Indians of the Yakima half blood who had not theretofore received allotments on other reservations. This council was generally participated in by the Indians and particularly by the chiefs and head men. A committee was appointed said to consist of eight members. Lumley, a member himself, enumerated the following: Chief White Swan, Capt. Æneas, also a chief, Stick Joe, Capt. Simpson, Weyallup, Louis Simpson, Alec Wesley, and George Meninock. Jim Goudy and Weyallup gave slightly different enumerations. While there is a slight discrepancy as to the number and personnel of the committee, the witnesses all agree that White Swan, Stick Joe, Capt. Æneas, and Capt. Simpson, known as leading men, were members. These are all dead, while Lumley and Weyallup only of the survivors have testified. This committee was empowered to go to the various tribes, each to the locality of the people from whence he sprung, and to invite the unallotted Indians of the Yakima blood into the reservation to take allotments. The Yakimas and Puyallups had for many years intermarried, and it is through this commingling of the tribes that the plaintiffs trace their ancestry back to the Yakima stock. Tom Cree of the Indian police force and a relative of the Puyallups was sent to that tribe in pursuance of the agreement, and Capt. Æneas, related to them by marriage, subsequently went to Puyallup, having the same purpose in view. Relatives of the degree referred to were invited to take up their abode on the reservation, and to participate in the allotment of lands about to be made. That

this committee was authorized to adopt those of their kinsmen who should avail themselves of the invitation thus extended, did adopt them according to Indian custom, and that this action was subsequently ratified in general council, is overwhelmingly established. Jay Lynch, formerly agent, could only say that he could not recall it, and naturally, not knowing the Indian language, he would not have fully understood the discussions. Besides, he was not the agent when the most important work of the committee was going on. The Indians relate with too much particularity of detail the fact that there was a council, that the Yakima-Puyallups were invited in, and that it was all understood and approved by Indians and officers alike, to justify harboring the least doubt concerning it. It is related that the committee held sessions and made inquiry as to the ancestry of applicants, and admitted them by vote regularly taken. The language of these people is not one which facilitates accurate speech. The Indian witnesses when not laboring under the disadvantage of having their words translated into English were under that of testifying through their own imperfect knowledge of it; but, when attention was specifically directed to the point whether there was an adoption, they invariably used the word "Yan-wah," which means "forever," and no more apt or appropriate word could be found to describe the action looking to that end. The following by John Lumley is explanatory of what they understood by the use of the word: "He says adoption means that, when he is adopted into the tribe, nobody will put him out."

It is significant that Allotting Agent Rankin, said to be a very careful, observing, and conscientious man, was not called as a witness, nor was his report produced, and that Agent Eels was not called to testify. Col. Rankin expressly advised the Yakimas that the half blood Puyallups were entitled to allotments on the Yakima reservation. He attended the councils and made investigation before he consented to the assignment of lands. We have this from Wannassey, the council interpreter, who says that 29 days were required to obtain the necessary identification of the applicants from Agent Eels before final action was taken; and it is undisputed that the latter sent a list of the names of the Puyallups for allotment on the Yakima reservation, besides, this was advised and concurred in by Commissioners Alexander, Anderson, and Renfrow of the Puyallup reserve, one of whom is still living, but was not called as a witness.

Speaking of this matter, Louis La Clair (who claims only as an heir) testified as follows:

"Q. Did they say anything as to whether or not you would be legally entitled to land over here? A. Yes; they said my children would be entitled to land over here because there was no more land to be taken up over there."

"Q. Did you believe them? A. Yes, sir.

"Q. Did you rely upon those statements? A. Yes; they were government men, and I thought that they were telling the truth."

It is asserted, and not denied, that this petitioner, in consideration of the surrender of his patent to lands on the Yakima reservation on account of having had a prior allotment on the Puyallup reservation, was thereafter to be immune from attack against the patents

issued to his children and now contested. "Nobody will touch these houses and lands" was the language by which he was thus assured. Castles, an allotting agent after Col. Rankin with whom he had the conversation, was not called to deny it. This witness on cross-examination answered as to why he gave up his allotment as follows:

"A. Just to save my childrens' land.
"Q. You hadn't made any misrepresentations, had you? A. No.
"Q. Notwithstanding that you surrendered your patent, did you? A. Yes; I say he told me if I would give up my patent the rest of the lands would be safe, and nobody would touch it, so I believed him, and I give up my patent to save the rest of the land."

This was about the time that the matter took form in the department in 1908. Thus we see that not only did the Indians act in this behalf, but those to whom was delegated the power to make segregation of community lands expressly concurred in their purposes, and actively aided in what they desired. The Indian agent and the allotting agent were fully advised of the circumstances and conditions, and having knowledge of exactly what was intended, who these people were, the right by which they claimed, they were recommended for allotment, the recommendation was approved by the Secretary of the Interior (the record so shows and the patents so recite), and thereupon patents were issued. Of themselves they bear witness to these conclusions in the most significant way. The form prescribed by the department reads:

"* * * Whereby it appears that under the provisions of the Act of Congress approved February 8, 1887 (24 Stat. 388), ——— or, ——— an Indian of the ——— tribe or band, has been allotted," etc.

The patents in all these cases, taking that in cause No. 42 as an illustration, read as follows:

"* * * Whereby it appears that under the provisions of the Act of Congress approved February 8, 1887 (24 Stat. 388), ——— Charley Ashue, an Indian residing on the Yakima Indian Reservation, has been allotted," etc.

It will be observed that the blank was prepared with the view of describing a patentee as of a certain tribe or band. This clearly shows the intention to distinguish these Indians from those of the Yakimas who had theretofore resided on the reservation. While the report of Col. Rankin has not been produced, two certificates made by him, namely, those of Samuel Ashus in his own behalf and on behalf of John Ashus, his son, dated February 24, 1894, are in evidence. They recite that the applicants for allotments therein mentioned are of the Yakima tribe, which tends, it is said, to show concealment. This is meager at best. If competent at all, it does not overcome the effect of this change in phraseology and the positive proof regarding what was done, particularly in the absence of official records or evidence contradicting the Indian witnesses.

The cases of Samuel and Charles Ashue are even stronger. On account of the death of their mother, they were brought by their uncle, Chief Æneas, to his own home in 1877, and made members of his family, and so continued until allotted lands themselves. These orphan boys thus returned to the land which by every tie of blood

and kinship they were entitled to call their own. Here their father and grandfather were born, lived, and were buried. The father was taken by the government as a prisoner to Puget Sound after the Indian War of 1855–56, which probably accounts for his connection with a tribe of that region. If his children were brought back and received with open arms, recognized as of common ancestry, and treated as members of the Yakima Nation of Indians, what stronger evidence of adoption could ingenuity invent or equity require? It was under these circumstances that plaintiffs acquired their evidences of title. Since that time many of the allottees have devoted years of toil to the improvement of the lands so set aside for their benefit. Some of them have expended large sums of money thereon. The allotments have been mostly improved, a part, it is true, through leasing. The lands were cleared of sage brush, leveled, sown to alfalfa, cultivated, resided upon, and have the customary houses, outhouses, etc. The holdings are shown to be of a present value, varying from $10,000 to $14,000 each. Where lands were leased, the leases were approved and the rental paid over to the allottees. It was not until June, 1908, that any attempt was made to disturb the plaintiffs in the enjoyment of their possessions, although Agent Lynch advised the department in 1898 of facts either expressly communicated or such as would put the reasonably vigilant upon inquiry. As to the facts, the only contentions now relied upon to justify the attempt at this late day to deprive the plaintiffs of their lands are that they were not formally adopted, and that the department did not approve of the adoption, and that it was not known that they were Puyallups. We have seen that the latter is not justified by the proofs, and the former will be presently adverted to. The thought spontaneously presses that the equities of these dependent people demand acquiescence in what they have acquiesced in unless the proposed action looking to the disturbance of their rights is required by the imperative mandate of some statute or inflexible rule of law, for it cannot be contended that an individual seeking relief under such circumstances could for a moment be heard to complain.

Whether the court is so limited we proceed to inquire.

1. The patents carry the presumption of verity. That they can only be set aside upon the most clear and convincing proof is the established doctrine of the Supreme Court. United States v. Winona & C. R. Ry., 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789; St. Louis Smelting & Refining Co. v. Kemp, 104 U. S. 666, 26 L. Ed. 313; United States v. Budd, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384; Bank of United States v. Danbridge, 12 Wheat. 69, 6 L. Ed. 552; United States v. Maxwell Land Grant Co., 121 U. S. 379, 7 Sup. Ct. 1271, 30 L. Ed. 1211; Colorado Coal & Iron Co. v. United States, 123 U. S. 316, 8 Sup. Ct. 131, 31 L. Ed. 182. By interposing its defense, the defendant is strictly within this rule as to the degree of proof required. It is in the same situation as though it were a complainant seeking the relief which it incidentally asks by attacking those proceedings which led up to the final action taken by its officers. It is with this principle in view that an examination

will be made of the points suggested for and against the validity of the patents.

2. We thus come to consider the contention that there was no legal adoption for want of departmental approval. We have seen that there was such an adoption as the custom of the tribe recognized. No statute has been cited nor departmental rule or regulation adverted to which requires affirmative action in that behalf. It was vaguely hinted at by the testimony of Agents Lynch and Young, all of which was incompetent to establish it, even if the testimony was sufficiently definite to justify the inference. That the things done were all that was required to make the petitioners members of the Yakima Tribes the following cases attest: Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. Ed. 1039; Bonifer et al. v. Smith et al., 166 Fed. 846, 92 C. C. A. 604. But, if it be assumed that official ratification was essential before adoption could become effective, it must be held that the department did ratify by acting with full knowledge of the facts; that is, knowing that these petitioners were of the Yakima blood, that they might claim allegiance with the Puyallups but were selected by the Yakimas to take allotments, and that the tribe in so far as it could had authorized the same, and had according to custom adopted them, the action taken was a ratification by the department of what the Indians had undertaken to accomplish.

3. Reliance is had upon the fact, not disputed, that the parents of these patentees were given allotments upon the Puyallup reservation. It was admitted upon the argument that no person who had there received an allotment is a plaintiff here. The claim that the allowance of the allotments under discussion was double rests upon a treaty provision with the Puyallup Indians, which reads as follows:

"The President may * * * at his discretion, cause the land, or any portion of the lands hereby reserved, or of such other lands as may be selected in lieu thereof, to be surveyed into lots and assign the same to such individuals or families as are willing to avail themselves of the privileges," etc. 2 Kappler's Indian Treaties, p. 661, 10 Stat. 1133, art. 6.

The patents issued in pursuance of this treaty, taking that of Louis La Clair as an illustration, read as follows:

"Louis Le Claire, the head of a family consisting of himself, Martha, Ellen, Louisa, Louis and Edward," etc.

The contention now renewed that because the plaintiffs were named in the Puyallup patents as members of the families whose heads received them they are not entitled to allotments on the Yakima reservation was passed upon adversely to the defendant in the early stages of these causes as one of first impression. Since that time attention has been called to authorities, noted below, which fully justify the view then taken. Wilson v. Wall, 73 U. S. 83, 18 L. Ed. 727; Meeker v. Kaelin et al. (C. C.) 173 Fed. 216, and the many cases there cited.

4. Laches, estoppel by conduct, and the statute of limitations have been forcibly urged as barring any affirmative action by way of assailing plaintiffs' patents. In bringing forward this contention, the general rules that the government cannot ordinarily be estopped, and

that to invoke a limitation against it there must be express consent, have not been overlooked. This distinction has been pointed out: Where the United States cannot become the beneficiary of litigation, but the result must inure to the benefit of private individuals, the rule does not apply. Thus:

"While it is undoubtedly true that when the government is the real party in interest, and is proceeding simply to assert its own rights and recover its own property, there can be no defense on the ground of laches or limitation (United States v. Nashville, Chattanooga, etc., Railway, 118 U. S. 120, 125 [6 Sup. Ct. 1006, 30 L. Ed. 81]; United States v. Insley, 130 U. S. 263 [9 Sup. Ct. 485, 32 L. Ed. 968]), yet it has also been decided that where the United States is only a formal party, and the suit is brought in its name to enforce the rights of individuals, and no interest of the government is involved, the defense of laches and limitation will be sustained as though the government was out of the case, and the litigation was carried on in name, as in fact, for the benefit of private parties." United States v. Des Moines Navigation & Ry. Co., 142 U. S. 510, 12 Sup. Ct. 308, 35 L. Ed. 1099.

Again:

"When, in a suit in equity brought by the United States to set aside and cancel patents of public land issued by the Land Department, no fraud being charged, it appears that the suit is brought for the benefit of private persons and that the government has no interest in the result, the United States are barred from bringing the suit if the persons for whose benefit the suit is brought would be barred." Curtner v. United States, 149 U. S. 671, 13 Sup. Ct. 985, 1041, 37 L. Ed. 890.

It is disclosed that the Yakima Indians are making no objection to sharing their lands with the plaintiffs. Since they expressly invited participation in the division of their reservation, it would be highly inequitable to permit them to dispute the rights of their kinsmen. The defendant is not concerned with protecting their interests. If the government should succeed in canceling the patents, it would only inure to the benefit of the Yakima Tribes and not to the United States. Leavenworth, etc., R. R. Co. v. United States, 92 U. S. 733, 23 L. Ed. 634. The Supreme Court has given effect to the allotment statute by holding that the issuance of the preliminary patents conferred citizenship upon the patentees and terminated the relation of guardian and ward theretofore existing. Matter of Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848.

Until the final patent issues, the United States holds such lands as trustee, and the right to institute suits during that period may sufficiently rest upon its proprietary interest, in that it may protect the lands ultimately to be conveyed against intrusion, spoliation, or clouded title. Whether the right may rest upon any other ground need not be discussed. But the defendant is not here prosecuting a suit in protection of the lands nor claiming as guardian, but is pursuing a strictly adversary proceeding against its own citizens. Therefore it is that the provision "that suits by the United States to vacate and annul any patent 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 patents" (Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 [U. S. Comp. St. 1901, p. 1521]), must be

held to apply because the United States is not "proceeding simply to assert its own rights and recover its own property." The amendatory act of April 23, 1904, supra, authorizes the Secretary of the Interior to rectify and correct mistakes and cancel patents during the whole of the trust period for the defects therein expressly mentioned; that is, where a double allotment has been made to an Indian, by an assumed name or otherwise, or where a mistake has been made in the description of the land, neither of which is present in the cases at bar. It must be held that it was not intended to render the general statute of limitations inapplicable by retaining jurisdiction over the lands during the whole of the trust period except in so far as it applies to the express authority there conferred; and this even if the proviso, which reads as follows: "That no conditional patent that shall have heretofore or that may hereafter be executed in favor of any Indian allottee, excepting in cases hereinbefore authorized, and excepting in cases where the conditional patent is relinquished by the patentee or his heirs to take another allotment, shall be subject to cancellation without authority of Congress"—does not altogether exclude the power of the Secretary of the Interior to act upon patents issued prior to the adoption of the act. In this view, the contest being adversary, the parties at arms' length, so to speak, the relation of guardian and ward having been transformed into that of sovereign and citizen and there being no express authority of law which authorizes the Secretary to deal with such cases, in its cross-bill the United States is in the attitude of prosecuting suits against citizens for cancellation of patents beyond the time when it may wage controversies in that behalf.

Counsel has called attention to the recent holding of this court in United States v. Northern Pacific Railway Company et al.[1] that the limitations statute does not apply where the government is suing on behalf of Indian wards, but, to put it most strongly for the defendant, the cross-bills seek relief against its wards, or, if there can be any ground to contend under the recent decisions of United States v. Sutton (D. C.) 165 Fed. 253, and United States v. Celestine, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. ——, that the rule laid down in the Matter of Heff, supra, has been modified, then it is against citizens of the United States, and in either view a different rule must prevail.

5. The contentions here made are in their nature equitable and the answers pray for cancellation, a remedy also of equitable cognizance. At the time these transactions occurred the defendant was guardian of the plaintiffs. That relation requires the exercise of good faith. We have seen that the charge that plaintiffs were guilty of fraud in concealing the facts has wholly failed of proof. The minors, not even shown to have made any representation, were too young to conceive the perpetration of fraud or to have appreciated the resulting consequences of misrepresentation. They are therefore asked to answer, as counsel for plaintiffs has said, for the sins of the fathers. But the fathers practiced no machinations. They

[1] Pending on appeal in Circuit Court of Appeals.

sinned not. The slight differences in the spelling of names, pointed out as evidence of concealment, are not substantial variances. They are within the rule of idem sonans. It is common knowledge that mistakes often occur in the spelling of proper names. They would more frequently occur with the whites if, not knowing how to spell their own names, they were compelled to rely upon the uncertainties of communication through word of mouth and the unaccountable caprices of those who, being fancy free, carelessly wander through the alphabet. Referring to this, one of the Ashues testified as follows:

"A. It may be some educated fellows wanted to put it the other way.
"Q. You put your name first as Ashus, didn't you? A. A-s-h-u-e, that is the way my school teacher spelled it, and ever since I spelled it that way."

Under this head it has been suggested that executive action ought not to be interfered with. Certainly when within the scope of delegated powers this is the rule. The courts ought to uphold, indeed, are compelled to uphold, such action whenever brought in review. Giving full effect to the rule, we find that all these questions of fact were passed upon when the assurances of title were given out. They cannot now be disturbed by the same or other officers with no greater authority. There ought to be a time somewhere in the course of allotment proceedings when a trustful and ignorant people could find repose from further interference. We have seen that there was no mistake of fact, that at best there was only a mistake of law, and, giving the answer its broadest scope and accepting it as one presenting this issue, it is to be observed that courts do not ordinarily relieve against mistakes of law (16 Cyc. p. 73, note 36), although under peculiar circumstances relief will sometimes be granted against such a mistake. Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 999, 35 L. Ed. 678. But there was not even a mistake of law. When the officers upon whom devolved the duty of allotting lands exercised their discretion, in the absence of fraud or excess of jurisdiction, the executive branch was thereafter concluded from disturbing its own action unless by express statutory authority; and acts attempted without authority, as here, are proper subjects of inquiry in the courts. Garfield v. United States, 211 U. S. 249, 29 Sup. Ct. 67, 53 L. Ed. 176.

Thus it will be seen that, if every other consideration be laid aside, equities which demand enforcement under strict rules of the law command the court to uphold proceedings the validity of which the patents imply. What could be more natural—more human—than for this primitive people—this dependent and fast decaying race—to take its last stand against encroachment which began upon the Atlantic and will finally end upon the Pacific with their extinction to retain as far as possible a community of their own, uncontaminated by association with the whites? We find the motive in their affection and hospitality. This was quaintly expressed by Weyallup as follows:

"A. Yes; we get together some place, us Indians all the time; that is, we feed each other, and don't charge them a cent."

There is no proof here to justify a court of equity in moving against patents issued by the department with complete jurisdiction and after due consideration. A quotation from the Supreme Court is a fitting conclusion of this opinion.

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws." Choctaw Nation v. United States, 119 U. S. 1, 7 Sup. Ct. 75, 30 L. Ed. 315.

The plaintiffs must prevail, but not to the extent prayed for in their petitions. The statute from which the court derives its authority does not seem to contemplate an injunction against the United States, and, indeed, if it did, it is difficult to see how a decree of that character could be enforced, particularly in the absence of its officers as parties defendant.

Decrees will be entered in accordance with the views herein expressed. Objections for incompetency to the admission of correspondence offered in evidence and to the testimony of witnesses Lynch and Young concerning rules of the department in regard to adoption, interposed by plaintiffs' counsel, will be sustained, but all other objections made by either side will be overruled, nothing prejudicial having been elicited.

BERNITT et al. v. SMITH-POWERS LOGGING CO. et al.

(Circuit Court, D. Oregon. January 9, 1911.)

No. 3,646.

1. JOINT ADVENTURES (§ 8*) — ACCOUNTING — RECOVERY OF INDEBTEDNESS AGAINST THIRD PERSON.

   Two out of three joint owners of property involved in a joint adventure could not sue a third party for a debt due to the joint enterprise.

   [Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 9; Dec. Dig. § 8.*]

2. ACTION (§ 53*)—SPLITTING DEMAND.

   Where defendant owed a claim to the persons interested in a joint adventure, he was entitled to have the entire claim prosecuted against him at once; and hence no number of the members of the joint adventure, less than all, could recover their undivided interest in the debt against defendant, unless the interest of the remaining member or members was released.

   [Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549–623; Dec. Dig. § 53.*]

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

3. JOINT ADVENTURES (§ 5*)—DISSOLUTION—ACCOUNTING—RECEIVERS.
Where, in a suit for dissolution of a joint adventure and for an accounting, there was a sharp contest between the parties as to the nature of the agreement, and the question of copartnership or joint adventure was contested, the business being such that the court could not carry it on under a receivership, and defendants being solvent and able to respond in damages, an application for a receiver would be denied.
[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 7; Dec. Dig. § 5.*]

In Equity. Suit by E. W. Bernitt and another against the Smith-Powers Logging Company and others for an accounting growing out of an alleged joint adventure. On demurrer to the bill, and on complainants' application for a receiver. Demurrer sustained, and motion for receiver denied.

W. U. Douglas, John F. Hall, James T. Hall, and Watson & Beekman, for plaintiffs.
John D. Goss, for defendants.

WOLVERTON, District Judge. This is a suit for an accounting growing out of alleged copartnership or joint relations. It is shown, in effect, by the bill of complaint, that about the year 1882 E. B. Dean, David Wilcox, and C. H. Merchant were copartners, under the firm name of E. B. Dean & Co.; that said copartnership and E. W. Bernitt, William Klahn, George Wullf, and David Young entered into a partnership agreement in substance as follows: That E. B. Dean & Co., being the owners of certain lands abutting upon tide waters and of the tide lands adjacent, agreed with the said Bernitt, Klahn, Wullf, and Young that they together would build, construct, and operate, upon the lands owned by E. B. Dean & Co., and in the channel of Coos river, log booms and dolphins for the purpose of catching and storing therein sawlogs, piles, and other timbers, and making up rafts thereof, and rafting and transporting the same to the different mills and other places upon Coos Bay; that Bernitt, Klahn, Wullf, and Young were to engage in capturing the logs and timbers and storing them in the booms, and were to do the rafting of the logs, timbers, and piles, for which a charge, not to be participated in by E. B. Dean & Co., was agreed to be exacted in addition to the boomage charge; that in pursuance of such agreement the parties to such copartnership entered into the possession of the lands described, and also into the possession of another tract of land in the possession and under the control of E. B. Dean & Co., and constructed thereon log booms, by driving poles and dolphins and attaching sticks thereto, and improving the same in accordance with the agreement; that E. B. Dean & Co. were to have one-half interest in the boomage charge, after paying one-half of the costs of maintenance, and each of the other four parties was to receive one-eighth interest therein and the profits thereof, after each contributing one-eighth to the cost of maintenance. It is further alleged that, by reason of the death of one of the members of the firm of E. B. Dean & Co., about July 17, 1897, the firm was dissolved, and that thereafter the property of the firm was sold to

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

Dean Lumber Company, a corporation; that later the Dean Lumber Company sold and transferred its interest in the copartnership or joint property to Charles A. Smith, and later Smith sold and transferred his interest to the defendant Smith-Powers Logging Company; that each of the succeeding parties, namely, Dean Lumber Company, Charles A. Smith, and Smith-Powers Logging Company, continued to act in the name and place of E. B. Dean & Co., and carried on the business jointly with the said Bernitt, Klahn, Wullf, and Young, and their successors in interest, up to about the ——— day of June, 1909, at which time the Smith-Powers Logging Company, it is alleged, entered into the exclusive possession of the booms, and has excluded the plaintiffs therefrom. It is further alleged that the customary charge imposed by the copartnership or joint enterprise for the catching and storing of logs and timber in the booms was the sum of 25 cents per 1,000 feet, and one-fourth of 1 cent per foot for piling. It is further alleged that E. W. Bernitt subsequently succeeded to an additional one-eighth interest in the copartnership or joint business, which, together with his own, gave him a one-fourth interest; that the plaintiff Victor Wittick has, by mesne transfers, succeeded to a one-fourth interest in the said business; and that the present ownership of the entire business consists of the Smith-Powers Logging Company, being entitled to one-half interest therein, and E. W. Bernitt and Victor Wittick, being each entitled to one-fourth interest. In addition to this the plaintiffs, it is alleged, were permitted to and did charge to customers employing them the further sum of 35 cents per 1,000 feet for rafting the sawlogs, and one-half of 1 cent per foot for rafting the piling, and conveying them from the booms to the parties desiring the service. But these last charges are no part of the compensation to be received by the copartnership for rafting the logs and booming them within their lodgment prepared by the parties. It is further alleged that C. A. Smith and Smith-Powers Logging Company and C. A. Smith Lumbering & Manufacturing Company have recognized the rights of the plaintiffs in and to said boomage business, and have participated with them in the operation thereof. By further allegation it is shown that the plaintiffs caught and stored in the booms for the defendant Simpson Lumber Company certain sawlogs and piles, for which service said company agreed to pay the sum of 25 cents per 1,000 upon the sawlogs and one-fourth of 1 cent per foot upon the piling, and thereafter that the plaintiffs rafted the larger portion of said sawlogs and piling, and conveyed and delivered the same to said company, for which they were entitled to charge 35 cents per 1,000 for the rafting and conveyance of the logs and one-half of 1 cent per foot for rafting the piling. It is further alleged that the defendants have combined, by some secret agreement, for the purpose of ousting the plaintiffs from their joint possession with defendants in said booming privileges and rights; that through the agency of the defendant Smith-Powers Logging Company they have in fact so ousted plaintiffs; and that by virtue of the partnership or joint ownership agreement between the plaintiffs and defendants the plaintiffs are each entitled to one-fourth of any and all boom charges or

earnings made for catching, storing, or booming logs, timbers, and piles, in addition to their charge for individual labor in rafting the same to their place of destination. The value of the property alleged to be owned and in the occupancy of the alleged joint enterprise is fixed at $18,000. The prayer of the complaint is for an accounting, and for the appointment of a receiver to take charge of and maintain and operate the booms and property during the pendency of the litigation. A judgment is also sought by plaintiffs against the defendant Simpson Lumber Company for the sum of $2,503.83. Virtually the proceeding is also for the winding out of the business of the enterprise and a final adjustment of the proceeds among the several parties entitled thereto.

To this bill of complaint the defendant Simpson Lumber Company has filed a demurrer, and the other defendants have answered. By the answer it is denied that there was any copartnership agreement entered into by and between the alleged original parties, or that such agreement was continued, or that there now exists any joint ownership by or between the parties to this suit. The theory of defendants, as disclosed, is that E. B. Dean & Co., being the owners of these tide lands, constructed the booms described in the complaint, and thereafter that the plaintiffs and their predecessors in interest contributed their work and labor to the maintenance of the booms, and were charged with the duty of catching and gathering the logs in the booms, and that by understanding between the parties E. B. Dean & Co. were to receive 12½ cents per 1,000 for the sawlogs which were secured and placed in the booms, and one-eighth of 1 cent per foot for the piling, and that the plaintiffs and their predecessors in interest were to receive a like sum for their services in the premises; that, while there was a joint arrangement to this effect, there was never any copartnership agreement entered into or subsisting between the parties; but it is admitted, in effect, that the defendants C. A. Smith and the Smith-Powers Logging Company did for awhile operate said booms, with the assistance and by aid of the labor of the said plaintiffs, and so continued up to about the month of October, 1907.

The plaintiffs have, in connection with the suit, moved for the appointment of a receiver pendente lite, and in support of their motion filed numerous affidavits, which tend in their proofs to establish the facts alleged in the complaint. The defendants have also filed numerous affidavits in opposition to the motion, but have developed nothing of substance in addition to their answer. The questions for consideration arise, first, upon the defendant Simpson Lumber Company's demurrer to the complaint; and, second, upon the motion for the appointment of a receiver.

It is clear that the demurrer to the complaint must be sustained. The theory of the plaintiffs' cause is that there exists between the plaintiffs and the defendants a joint enterprise, at least, if not a copartnership, and the primary object of the proceeding is to have an accounting between the copartners or joint owners. The Simpson Lumber Company is not a member of the copartnership or a participant in the joint enterprise, whatever it may be termed. The case,

therefore, is one where two out of three joint owners are suing a third party for a debt due the partnership or joint enterprise. I say this because a part of the claim is upon a joint demand, while it is true a part is for the individual demand of the plaintiffs. The law does not tolerate the splitting up of demands in bringing suit thereon. A defendant is entitled to have the entire claim prosecuted against him, or none, unless relinquished in part, and one or more members of a copartnership, less than the whole, cannot proceed to recover their undivided interest in a debt against any debtor of the firm. This is so elementary that it needs no authorities to sustain it. The demurrer must therefore be sustained.

As it pertains to the motion for the appointment of a receiver, there is, perhaps, but slight difference between a copartnership, as it may affect the question, and a joint enterprise, and if it appears that one member of the firm or enterprise has, without right, entered into the possession of the property, and has ousted the other members and taken charge of the management and control of the business, sufficient cause is presented for the appointment of a receiver. But, on the other hand, if the copartnership or joint enterprise is denied, and a question is raised as to the existence of such an arrangement or understanding, and that remains an issue in the case, the court will not interpose to take charge of the property of the concern, whatever it may be, lest it may interfere with the property or business of some person not concerned in the affair. In the present case there is a sharp contest between the parties as to the nature of the agreement under which the parties operated; and especially is the question of a copartnership or joint enterprise stoutly contested. Further than this, the business must needs be closed out, as the court cannot properly carry it on under a receivership. The property interests are not large, and the defendants are solvent and able to respond, or at least there is no charge of insolvency; so that, under the conditions obtaining, it is plain the court ought not to exercise its discretion by appointing a receiver.

The foregoing propositions are borne out by the following authorities: King et al. v. Barnes et al., 109 N. Y. 267, 16 N. E. 332; Wilcox et al. v. Pratt, 125 N. Y. 688, 25 N. E. 1091; High on Receivers (2d. Ed.) § 476; Irwin v. Everson, 95 Ala. 64, 10 South. 320.

The motion will therefore be denied.

In re NEYLAND & McKEITHEN.

(District Court, S. D. Mississippi, Jackson Division. September, 1910.)

1. BANKRUPTCY (§ 407*)—PARTNERSHIP—DISCHARGE—FALSE STATEMENT.
Where a member of a firm, as an inducement to obtaining credit from an objecting creditor, made a materially false statement of the firm's assets, and liabilities, and the creditor extended credit to the firm on the faith of such statement for goods subsequently sold, the firm was not entitled to a discharge in bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

2. BANKRUPTCY (§ 407*)—MATERIALLY FALSE STATEMENT—TRUTHFULNESS—INVESTIGATION.
An objecting creditor, extending credit to the bankrupt on the faith of a materially false statement in writing, made to obtain credit, is not required to investigate the truthfulness of the statement, especially when it declares on its face that it is true and is given to establish credit.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

3. BANKRUPTCY (§ 407*)—PARTNERSHIP.
Where one member of a firm made a materially false statement in writing to an objecting creditor to obtain credit, and it appeared from the statement that the firm was then in existence, the creditor was not required to investigate the partnership contract so as to determine when one of the partners entered the firm.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

4. BANKRUPTCY (§ 404*)—PRIOR DISCHARGE—CONSTRUCTION.
Where, in a prior bankruptcy proceeding against a partnership, the firm only, as distinguished from the firm and individual partners, was adjudged a bankrupt, an order of discharge, though purporting to discharge the individual partners as well, would be construed as a discharge of the firm only.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 404.*]

5. BANKRUPTCY (§ 404*)—PARTNERSHIP—DISCHARGE—EFFECT.
Under the entity doctrine of the ownership of partnership and individual property, a discharge of a firm in former bankruptcy proceedings was no bar to a subsequent discharge of another firm within the six-year period of which one of the partners of the former firm was a member.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 404.*]

6. BANKRUPTCY (§ 404*)—DISCHARGE—PARTNERS.
The discharge in bankruptcy of a firm from firm debts would not relieve the individual members of the firm from liability for firm debts as a matter of law, where no individual adjudication was had.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 404.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Neyland & McKeithen. On objections to discharge. Objections sustained on the opinion and findings of F. M. West, special master and referee, which are as follows:

To the Court:

On September 10, 1909, by proper order of this court, the undersigned was appointed as special master to find the facts and report my conclusions thereon upon certain objections filed by creditors to the discharge of the above-named bankrupts.

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

I find the facts as follows:

On June 7, 1909, C. H. Neyland and C. W. McKeithen, composing the partnership of Neyland & McKeithen, filed their petition in bankruptcy and prayed that the said firm be adjudged bankrupt accordingly.

On the same date the matter was referred to your special master, a referee of this court, for further administration, the judge being absent from the district; and on said date the said firm was properly adjudged a bankrupt as prayed in said petition, the individuals not being adjudicated. The prayer of the petition is in the following words: "Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts."

On August 2, 1909, said bankrupts filed their petition praying that "they and the firm of Neyland & McKeithen may be decreed by the court to have a full discharge from all debts provable against the estate of Neyland & McKeithen under the said bankruptcy acts, except such debts as are excepted by law from discharge."

If the bankrupts intended to pray for an individual discharge, it would appear that they are asking for something not contemplated in the adjudication, since only the firm, and not the individual members, was adjudged a bankrupt.

The notices to creditors upon the motion for discharge show that a partnership discharge only was prayed.

On August 30, 1909, the following objections were specified by the B. Lowenstein & Bros. Dry Goods Company, a creditor of the bankrupts:

"The B. Lowenstein & Bros. Dry Goods Company, a corporation duly chartered, organized, and existing under and by virtue of the laws of the state of Delaware, a party interested in the estate of said Neyland & McKeithen, bankrupts, do oppose the granting of a discharge from said debts, and for grounds of opposition do file the following specifications:

"(1) Upon August 25, 1908, this objector, being ignorant of the financial condition of said bankrupts, did exact and require that, for the purpose of obtaining credit with it, it execute in writing and deliver to this objector a statement in writing showing their true financial condition and net worth, and that said bankrupts, well knowing such facts, and for the purpose of so complying with said action, did, upon said date, by C. W. McKeithen, a partner, make, execute, and deliver to said objector a certain statement in writing, a copy of which is hereunto annexed and marked 'Exhibit A,' and made a party hereof as fully as if copied herein, whereunder and whereby said bankrupts did then and there represent unto this objector that upon said date the total amount then and there owing by said firm was the sum of $4,000, which statement this objector then and there believed, and which statement was then and there materially untrue and false, in that said bankrupts then and there owed debts in excess of $7,000. That said firm then and there represented that the property owned by said firm applicable to its debts was the sum of $20,000, and that the net worth of said firm was then and there the sum of $16,000, which said statement was then and there made for the purpose of obtaining credit with this objector, and which statement was then and there wholly false, as said firm was then and there, as well as the several members thereof, wholly insolvent and having no net worth. That, in pursuance of said statement, this objector, believing it to be true and correct, in reliance thereon, did extend to said firm credit, and did sell to said firm divers goods, wares, and merchandise of great value, at the special instance and request of said firm, and the purchase money whereof is still owing and unpaid, and that upon said materially false statement said firm of bankrupts did then and there obtain said property from said objector upon said statement which was then and there wholly false and untrue, and that by reason of this your objector prays that a discharge be refused to said bankrupts, but that they be allowed so to continue and for proper reference.

"(2) And as to said Neyland, both individually and as a member of said firm, and said firm, that he was in voluntary proceeding as a member of Schwartz & Neyland, within six years, to wit, February 10, 1906, granted a discharge from his said indebtedness therein, and that said petitioner is not therefore entitled to said discharge."

The said specifications appear to be in proper form. The statement filed as exhibit to the specifications is as follows:

"Credit Department.

"Office of B. Lowenstein & Bros. Dry Goods Co., Memphis, Tenn.

"Memphis, Tenn. Aug. 25th, 1908.

"Style of firm: Neyland & McKeithen. P. O.: Woodville, Miss.

"B. Lowenstein & Bros. Dry Goods Co., Memphis, Tenn.

"Gentlemen: Below we give you a full and correct statement of our affairs for the purpose of establishing a credit with you:

"Assets.

1.	Actual value of stock on hand	$ 8,000 00
2.	Notes and accounts good and collectible	1,000 00
3.	Cash in hand and in bank	000 00
4.	Real estate at present cash value, excluding homestead, C. H. Neyland	10,500 00
	C. H. Neyland, stocks	900 00
5.	Other assets, consisting of	000 00
	Total assets	$20,400 00

"Liabilities.

6.	For Mdse. on open account, not due }	
7.	For Mdse. on open account, past due }	$ 4,000 00
8.	For Mdse. closed by note or acceptance	000 00
9.	For borrowed money to bank	000 00
10.	For borrowed money to friends	000 00
11.	For borrowed money to relatives	000 00
12.	For advances from your comm'n merchant	000 00
13.	Mortgage or deed of trust on real estate	000 00
14.	Endorsers or security for other parties	000 00
	Total liabilities	$ 4,000 00

15. Do you, or any member of your firm, owe any private or confidential debts? None
16. How much do you consider yourself worth, net? $16,400 00
17. Former location.....How long in business? Succeeded C. W. McKeithen.
18. Former occupation?.....Amount of annual sales.....
19. Building insured for $..... Don't know.
20. Stock of goods insured for $ 4,000 00
21. What bank do you do business with? Bank of Woodville, Citizens' Bank.

Give names of houses of whom you buy principally and amount you owe each.

Names.	Amount.	Names.	Amount.
Dry Goods. B. L. & Bros.		Hats. Pioneer Hat Works.	
" "		Furnishing Goods. United S. & C. Co.	
" "		Groceries.	
Shoes. Geo. D. Witt Shoe Co.		"	
"		Comm'n Mcht.	
"		Others.	
Clothing. Bray Clo. Co.		.....	

"Individual names of partners: C. W. McKeithen. C. H. Neyland.

"By whom signed: C. W. McKeithen.

"[Sign here full name of firm.]

"[Signed] Neyland & McKeithen."

For convenience I have numbered the items of the statement.

The bankrupts filed sworn answer to these specifications, as follows: "Defendant admits that in August of 1908 C. W. McKeithen did, for the firm of Neyland & McKeithen, make a statement in writing to the said B. Lowenstein Bros. Dry Goods Company, showing the then condition of the firm and of the partners, and their net worth, which statement is exhibited in the objection of the B. Lowenstein Company aforesaid and marked 'Exhibit A'; but defendant denies that there is anything materially false in the aforesaid statement, and avers that the financial condition of the firm of Neyland & McKeithen and the partners is therein set forth with truth and as much particularity as could possibly be, without any shadow of falsehood or any intention to defraud, and the same he stands ready to verify on proper hearing before this honorable court. Denies that Neyland & McKeithen were bankrupts at the time of giving aforesaid statement; denies that they were indebted in the sum of $7,000. Wherefore defendant prays that the objection of the said B. Lowenstein & Bros. Dry Goods Company be dismissed for want of sufficiency and particularity of his allegations, and that Neyland & McKeithen be granted proper discharge."

The objector was a creditor of bankrupts with proven claim of $837.93. represented by several promissory notes.

I find that the said statement is materially false and untrue. Item 4 is as follows: "Real estate at present cash value excluding homestead, C. H. Neyland, $10,500.00; C. H. Neyland, stocks, $900.00."

The only real estate owned by C. H. Neyland at the time of said statement was a lot somewhere in Oklahoma, the exact location not being shown, which cost him $800, and valued by McKeithen at about $500, and a house and lot in Jackson, Miss., worth about $3,000, and under mortgage to a building and loan association. The amount of the mortgage was about $500. The answer of bankrupt Neyland, supra, admits the execution of the statement, vouches for its correctness, and expresses a willingness to verify said correctness. The proof does not so verify it. Mr. Neyland endeavored to show that the estimate of $10,500 of real estate was correct by testifying that he had sold one Robinson some real estate with reservation of vendor's lien, for the payment of which land he (Neyland) had accepted Robinson's promissory note. I do not consider this as "land" by any means. He also included in the figures the value of a homestead worth about $5,000 and worth about $2,000 over and above the legal exemption. This homestead was not Neyland's, but was the property of his wife; the title being in her name. The homestead was assessed to Neyland, but that is not conclusive, and Neyland testified that the title was in his wife. He also figured a one-half interest in a certain delinter, owned several years ago by himself and one Lewis; yet he testified that his half interest was transferred in 1903 to his wife.

Item 14 is also untrue. That item is as follows: "Mortgage or deed of trust on real estate, 000,00."

The testimony is that there was a mortgage of about $500 on the property in Jackson, Miss.

I have not deemed it necessary to a proper conclusion herein to ascertain the facts as to the other grounds raised by objector in specification No. 1, since the above findings are sufficient, in my judgment, to sustain the allegation of untruth.

McKeithen was the son-in-law of Neyland, and the statement and proof shows that the firm succeeded said McKeithen in the business.

Objector affirms, in its specifications, that goods were sold to the bankrupts upon the faith and truthfulness of the said statement. This is not denied by the bankrupts. On the contrary, the statement shows on its face that it was made for the purpose of establishing a credit with the objector; and McKeithen testified that goods were bought of objector after the rendition of said statement. Neyland, although admitting the truthfulness, in his answer, of the statement prepared by McKeithen, his partner, testified that he knew nothing of the statement until after the bankruptcy proceedings were had; and testified that he was not a partner at the time of the preparation of the said statement; that the arrangement with McKeithen was that he (Neyland) was to put $2,000 into the business, in installments of

$500, beginning in the early part of the year 1908, and that he was to become a partner in the business after October 1, 1908. The testimony of the "Woodville Republican," a newspaper published in Woodville, Miss., the place of business of said bankrupts, shows that the first notice of the partnership was published in that paper on September 12, 1908, or 19 days after the execution of the statement to objector.

I am of opinion that Neyland is now estopped to set up, for the first time, that he was not a partner in the business at the time of the execution of the said statement.

I find the law to be that if a statement is materially false, and made for the purpose of obtaining property, and such property was sold upon the truth and faith of such statement, that credit was obtained because of the said statement, and that the said statement was made by the bankrupt, a discharge will be denied the bankrupt.

It will be borne in mind that McKeithen was the son-in-law of Neyland. He had no property except above exemptions, the stock of goods and accounts, and owed, according to his own testimony, about $4,000. The statement shows it was made for the purpose of obtaining credit; and McKeithen, even if he did not know the exact status of his father-in-law's financial affairs, could have ascertained such with little exertion, and could have rendered a thoroughly truthful and correct statement with a little investigation. These kind of statements are requested by creditors for the purpose of ascertaining the true condition of a customer's affairs, and if McKeithen found out, or could have found out, that his statement was not true, he should have advised the objector so that it would have been correctly informed.

McKeithen could have said, in the statement, that the partnership was not to be effective until October 1, 1908; but no mention was made to that effect, and, so far as the statement shows, and the proof discloses, the statement was made by a partnership in esse at the time of the rendition of said statement.

As to Neyland being estopped to set up the defense, supra, I recall the general rule regarding estoppel, as follows: "Estoppel by misrepresentation, or equitable estoppel, is defined as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who, in good faith, relied upon such conduct, and has been led thereby to change his position for the worse, and who, on his part, acquires some corresponding right either of contract or of remedy. This estoppel arises when one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. It consists in holding for truth a representation acted upon, when the person who made it, or his privies, seek to deny its truth, and to deprive the party who has acted upon it of the benefit obtained. The doctrine of estoppel in pais, although it has been characterized as odius, a harsh doctrine, and not to be favored, on the ground that it tends to exclude the truth, is no longer to be regarded. The doctrine is derived from courts of equity, and is interposed to prevent injustice, and to guard against fraud by denying to a person the right to repudiate his acts, admissions, or representations, when they have been relied on by persons to whom they were directed and whose conduct they were intended to and did influence. It will be allowed to shut out the truth only when necessary to do justice, and never where it would itself operate as a fraud or work injustice. The estoppel is a protective and not an offensive weapon, and its operation should be limited to saving harmless or making whole the person in whose favor it arises, and should not be made an instrument of gain or profit." 16 Cyc. p. 722 et seq.

The objector was not called upon to investigate the truthfulness of the statement when the statement declares itself that it is true, and is given for the purpose of establishing credit; nor do I think the objector was called upon to ascertain the arrangement as to when Neyland was to become a

partner. It is hardly likely, anyway, that any goods reached the bankrupts between August 25th and September 12th, on which latter date the partnership was in effect, and not October 1st, as testified to by Neyland. For further authority as to estoppel, see the following: In re Schachter (D. C.) 22 Am. Bankr. Rep. 389, 170 Fed. 683; In re Stoddard Bros. Lumber Co. (D. C.) 22 Am. Bankr. Rep. 435, 169 Fed. 190.

The law as to a denial of a discharge because of false statement, made for the purpose of obtaining credit, is so clearly and elaborately discussed in Collier on Bankruptcy (7th Ed.) 284 et seq., that I shall not attempt to discuss the law further here, but refer to that authority. In addition to that authority and the notes, I would call attention to the following cases: In re Terens (D. C.) 22 Am. Bankr. Rep. 895. 172 Fed. 938; In re Darevski (D. C.) 22 Am. Bankr. Rep. 571. 171 Fed. 288; In re Shaffer (D. C.) 22 Am. Bankr. Rep. 147, 169 Fed. 724.

In the recent case of Hardie v. Swafford Bros. Dry Goods Co., 21 Am. Bankr. Rep. 457, 165 Fed. 588, 91 C. C. A. 426, 20 L. R. A. (N. S.) 785, the court said: "The release of the honest, unfortunate, and insolvent debtor from the burden of his debts and his restoration to business activity in the interest of his family and the general public are the main, if not the most important, objects of Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), and the burden of proof is upon creditors opposing the granting of a discharge to bring the inculpatory facts alleged by them strictly within the exceptions enumerated in said statute. Where in the regular course of a partnership business one partner makes a materially false statement in writing, upon the faith of which property is obtained upon credit by the firm, the fraud thus committed may not be interposed as a bar to a discharge of a partner who did not participate in the wrongful act, and had no knowledge thereof"—Shelby, Circuit Judge, dissenting.

That case does no violence to the views already expressed herein. There the three individual members of the firm were adjudged bankrupts, as well as the firm itself. The individuals applied for discharge, and, when objections were filed thereto, two of the members withdrew their applications for a discharge, leaving the objections on file as to the remaining member of the firm. The court decided as indicated, supra. A reading of that case will show it to be easily distinguishable from the one at bar.

The second specification of the objector presents a question of some difficulty. It follows: "And as to the said Neyland, both individually and as a member of said firm, and said firm, that he was in voluntary proceeding as a member of Schwartz & Neyland within six years, to wit, February 10, 1906, granted a discharge from his said indebtedness therein, and that said petitioner is not therefore entitled to said discharge."

Objector is mistaken as to the date of the discharge in the former proceeding, since I find it to be July 11, 1906, instead of February 10, 1906; the latter date being the date of adjudication.

On February 10, 1906, Schwartz & Neyland, a partnership composed of Leon Schwartz and C. H. Neyland, filed their petition in this court, praying that they, as a firm, be adjudged bankrupt. On the same day the said firm was adjudged a bankrupt by J. B. Stirling, Esq., a referee in bankruptcy of this court. No individual petition was filed, nor was an individual adjudication had; only the firm being adjudged bankrupt. The Neyland in that proceeding is the same person in the instant case.

It would appear from a hasty glance at the discharge in the former proceeding as if more were granted therein than contemplated in the adjudication; said discharge reading as follows: "Whereas, Schwartz & Neyland and Leon Schwartz and C. H. Neyland, of Woodville, in said district, has been duly adjudged a bankrupt under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said Schwartz & Neyland be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 10th day of February, A. D. 1906, on which day the petition for adjudication was filed by him excepting such debts as are by law excepted from the operation of a discharge in bankruptcy."

I take it, however, that the words, "and the said Leon Schwartz and C. H. Neyland" are mere words of surplusage, since the preamble refers to the adjudication in the following words, "Whereas, Schwartz & Neyland and Leon Schwartz and C. H. Neyland has been duly adjudged bankrupt," etc., etc., and the adjudication clearly declared only the firm to be bankrupt, and certainly the discharge can grant no more than is contemplated by the adjudication itself. No individual adjudication was had in that proceeding, and surely no individual discharge should be granted, or could have been granted.

The adjudication in the former proceeding is as follows: "In the matter of Schwartz & Neyland, a firm composed of Leon Schwartz and C. H. Neyland, bankrupts. In bankruptcy. At Jackson, Miss., in said district, on the 10th day of February, A. D. 1906, before the Honorable J. B. Stirling, referee of said court in bankruptcy, the petition of Schwartz & Neyland, a firm composed of Leon Schwartz and C. H. Neyland, that they be adjudged bankrupts within the true intent and meaning of the act of Congress relating to bankruptcy, having been heard and duly considered, the said Schwartz & Neyland are hereby declared and adjudged bankrupts accordingly. The first meeting of their creditors will be held at the office of," etc., etc.

If it be held, however, that C. H. Neyland was individually discharged in the former proceeding, certainly he could not be individually discharged in the present proceeding, because of discharge in the former proceeding, being within six years; but it should be noted that the individual discharges, the firm only praying such relief, though the objector is opposing a discharge of C. H. Neyland, individually and as a member of the firm, and of the firm itself, because of the former proceeding.

There are therefore two questions presented for determination, because of objector's second specification, as follows:

First. Is the firm of Neyland & McKeithen entitled to a discharge, notwithstanding the discharge of Schwartz & Neyland within six years in the former proceeding?

The entity doctrine teaches that the firm, and the individual members thereof, are to be treated as separate and distinct persons, each of which may have different liabilities, and assets, and the assets of each are to be first applied to the corresponding liabilities.

This being true, therefore, I should say that, so far as the discharge of Schwartz & Neyland as a firm may affect Neyland & McKeithen as a firm, in the present proceeding, the release of the former firm from its debt should not bar a discharge of the present firm from its firm debts.

Second. Would the discharge of the former firm of Schwartz & Neyland, from its firm debts, operate as a bar to the discharge of C. H. Neyland individually for liability for the firm debts, or individual, either, in the instant case?

It will be seen at a glance that a troublesome question is presented, which is: "Does a discharge of a firm from firm debts release the individual members of the firm from liability for firm debts, as a matter of law, where no individual adjudication has been had?"

It should be noted, to repeat, that C. H. Neyland was not individually adjudged a bankrupt in the instant case, neither does his petition ask for such an adjudication, nor does the application ask for individual discharge.

To correctly answer the question here presented has been the aim of many courts since the act of 1898, and there is much confusion on the subject. A reading of Collier on Bankruptcy (7th Ed.) 125 et seq., demonstrates this assertion beyond doubt.

However, the recent case of In re Bertenshaw, 19 Am. Bankr. Rep. 577, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, answers the question by holding that an individual member of a firm is not discharged from liability for firm debts unless he be individually adjudicated, and individually discharged. That case, the opinion of which was read by Sanborn, J., of the Circuit Court of Appeals for the Eighth Circuit, in November, 1907, discusses at great length this troublesome question, reviewing the conflicting decisions, and finally decides as indicated supra. The opinion is so lengthy that I shall not attempt to insert it, or any part of it, here, but refer to it and ask the curious to read it carefully.

In the instant case, C. H. Neyland filed individual schedules in which no unsecured liabilities were listed, and the only assets listed being the homestead in Woodville, the property in Jackson, and household goods, the real estate being held by two secured creditors.

I am of opinion, therefore, that C. H. Neyland was not discharged from individual liability for the firm debts of Schwartz & Neyland, in the former proceeding; nor is he entitled to a discharge, as a matter of law, in the instant case, individually, nor from liability for the firm debts in either of the proceedings.

Wherefore I conclude that the specifications should be sustained in part, only, for the following reasons:

1. The firm should be denied a discharge because of the false statement.

2. The objection to a discharge of Neyland, individually, should be overruled, because Neyland has not prayed for an individual discharge, nor does the discharge of the two firms from firm debts relieve him from individual responsibility for such firm debts; hence, not having been previously individually discharged, that objection is not well taken here.

Green & Green, for objectors.
E. G. Shannon, for bankrupts.

NILES, District Judge. After a careful examination of the record submitted to me, the report of the special master upon objections to discharge, I find no reason to disturb the conclusions reached by said special master. If a statement is materially false, and made for the purpose of obtaining property, and such property was sold upon the truth and faith of such statement, that credit was obtained because of the said statement, and that the statement was made by the bankrupt, a discharge will be denied the bankrupt. I concur fully in the findings of the referee.

UNITED STATES v. NORTH.

(District Court, D. Oregon. January 9, 1911.)

No. 5,281.

1. POST OFFICE (§ 49*)—OFFENSES—OBSCENE LETTERS—EVIDENCE—MOTIVE.

Accused being on trial for sending an obscene letter through the mails, directed to G., the government offered in evidence an alleged reply to a letter written to accused by a postal inspector, written on the back of the inspector's letter, which the government claimed was in the handwriting of accused, stating that accused had received a dental certificate, and was glad to get it, because it saved him accepting free board and lodging for six months, and that, while he liked big dinners, he did not like to impose on good nature; the government claiming that this had reference to accused's conviction and incarceration before G., as a justice of the peace, on a charge of practicing dentistry without a license. It did not appear that the inspector had any knowledge of accused's incarceration as claimed. *Held*, that the letter was not admissible as showing motive for sending the alleged obscene letter to G.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 49.*]

2. CRIMINAL LAW (§ 404*)—EVIDENCE—HANDWRITING—STANDARD OF COMPARISON.

Where a letter used as a standard for comparison of handwriting was not admitted by accused to be genuine, and had not been treated by accused as genuine, it was not admissible for that purpose, under B. & C.

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

Comp. § 777, providing that evidence respecting handwriting may be given by comparison with writings admitted or treated as genuine by the party against whom the evidence is offered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 892; Dec. Dig. § 404.*]

3. CRIMINAL LAW (§ 404*)—EVIDENCE—HANDWRITING—STANDARD OF COMPARISON.

A writing cannot be introduced in evidence for the sole purpose of using it as a standard to enable the jury to institute a comparison of handwriting to prove that accused wrote the writing in question, since only writings admitted or proved to be genuine and properly in evidence for other purposes may be used for that purpose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 892; Dec. Dig. § 404.*]

E. N. North was convicted of sending nonmailable matter through the mails, and applies for a new trial. Granted.

John McCourt, U. S. Atty.
M. O. Wilkins, for defendant.

WOLVERTON, District Judge. The defendant was indicted, charged with having deposited in a post office, for transmission through the mails, a certain obscene letter, which letter was mailed at Toledo, Or., directed to Judge McGrath, at Lordsburg, in the territory of New Mexico. Trial was had under this indictment, and the defendant convicted. The questions now for consideration arise under a motion for a new trial.

On the trial it was made to appear that North had been twice accused before McGrath, who was a justice of the peace at Lordsburg, in New Mexico, of practicing dentistry without a license, being convicted once on a plea of guilty and once after trial, and sentenced in each case to pay a fine, and that in one or both of such cases the defendant served out his fine in jail. The purpose of this evidence was to show motive for writing and sending the nonmailable letter through the mail, with which the defendant is charged. On the trial a letter was offered in evidence, and admitted by the court, signed "E. N. North," purporting to have been written from Sellwood Station, Portland, to E. C. Clement, postal inspector, and received by him through the mails at Portland, in reply to a letter which the latter had written to North; the purported North letter being written on the back of the "Inspector" letter. The Inspector letter contained a request that the reply be so written. Among other things, the purported North letter has this to say:

"The dental certificate of mine is here, and you bet I am glad to get it; for it saves me accepting free board and lodging six months. I like big dinners, though don't like to impose on good nature."

The certificate that the letter refers to is an Oregon certificate; but it is urged that the reference to free board and lodging alludes to the incident in New Mexico, and is therefore an admission in a way of his being incarcerated there, thus corroborating the testimony previously adduced showing the incarceration, as bearing upon the motive

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

with which the letter that this defendant is charged with mailing was sent. While it might possibly bear this construction, yet the inference is very remote. The inspector knew nothing of North's incarceration in New Mexico; and it is more likely that, having had that experience in New Mexico, if North wrote the letter, he assumed he might be jailed here also for practicing dentistry without a license, and that the reference was not to any previous experience, but to a possible imprisonment under the Oregon laws. The Inspector letter was not, therefore, properly admissible as showing motive for sending the alleged obscene letter through the mail.

The purported North letter to the inspector was, furthermore, permitted to be used by the prosecution as an exemplar or standard for comparison of the handwriting with the obscene and nonmailable letter, to prove that the defendant wrote the latter, and the question arises whether it was competent for that purpose, not being a writing properly admissible in evidence for any other purpose. The state statute provides that:

"Evidence respecting the handwriting may also be given by a comparison, made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered." Section 777, B. & C. Comp.

The Inspector letter was not admissible under this statute, if it be that the statute is available in a criminal cause in this court, because it was not admitted by the defendant to be genuine, nor has he treated it as such. The fact of sending through the mails cannot be said to be a treatment of the letter as genuine; but the mailing stands disputed, as well as the writing and signing.

By the decisions of the Supreme Court it has been determined that a writing cannot be introduced in the cause for the mere purpose of enabling the jury to institute a comparison of handwriting, but that, where the writing has been admitted for some other purpose, then the jury may rightfully institute a comparison. The language of the court in Williams v. Conger, 125 U. S. 397, 413, 8 Sup. Ct. 933, 941 (31 L. Ed. 778), is as follows:

"But where other writings, admitted or proved to be genuine, are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury with that of the instrument or signature in question, and its genuineness inferred from such comparison."

Later in the opinion the court quotes from the case of Doe v. Newton, 5 Ad. & El. 514, wherein it was said:

"There being two documents in question in the cause, one of which is known to be in the handwriting of a party, the other alleged, but denied to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness; and therefore it is best for the court to enter with the jury into that inquiry, and to do the best it can under circumstances which cannot be helped."

And still later the court quotes from Van Wyck v. McIntosh, 14 N. Y. 439, 442, wherein it is said that:

"Where different instruments are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury, and the genuineness or simulation of the handwriting in question be inferred from

such comparison. But other instruments or signatures cannot be introduced for that purpose."

The latest exposition of the rule, or rather of the exception, is found in Withaup v. United States, 127 Fed. 530, 535, 62 C. C. A. 328, 333. Circuit Judge Van Devanter, now a Justice of the Supreme Court, says:

"The general rule has exceptions equally as well settled as the rule itself, one of which is that if a paper is in evidence in the case for some other purpose, and is admitted or satisfactorily proven to be in the handwriting of the party, or to bear his signature, the disputed writing may be compared therewith, and its genuineness inferred, or otherwise, from such comparison."

As bearing upon the subject, see, further, Hickory v. United States, 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170; Stokes v. United States, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667.

The reason for the rule is stated by Mr. Chief Justice Fuller, in the case of Hickory v. United States, as follows:

"The danger of fraud or surprise and the multiplication of collateral issues were deemed insuperable objections, although not applicable to papers already in the cause, in respect of which, also, comparison by the jury could not be avoided."

From these authorities, it would seem that it was not the purpose of the courts, where the writing was admitted in evidence for some other purpose, to require that it must also have been admitted by the defendant to be genuine, or treated by him as such; but it is sufficient that it be satisfactorily proven to be in the handwriting of the party against whom it is sought to establish another writing, being an issue in the case, which he disputes. Ordinarily, before the writing could be admitted for another purpose, it must be satisfactorily proven to bear the signature or to be in the handwriting of the person against whom it is offered, and when the law is satisfied for its admission against the party, and for that reason it is admitted in evidence, then it may legitimately become and be used by the jury as a standard of comparison with other writings the genuineness of which is sought to be established. In no event, however, can the writing be used as a standard of comparison, unless it be actually admitted under the rules of evidence for some other purpose in the case.

It is clear that, under this rule, the Inspector letter was not competent to be offered as an exemplar for the purpose of comparison with the letter sent through the mails in determining whether the latter was written by the defendant.

Some of the state authorities have adopted another rule, thought to be deducible from the common law, which is stated thus by Judge Remick, in the case of University of Illinois v. Spalding, 71 N. H. 163, 51 Atl. 731, 62 L. R. A. 817:

"The true rule is that, when a writing in issue is claimed on the one hand and denied upon the other to be the writing of a particular person, any other writing of that person may be admitted in evidence for the mere purpose of comparison with the writing in dispute, whether the latter is susceptible of, or supported by, direct proof or not; but, before any such writing shall be admissible for such purpose, its genuineness must be found as a preliminary fact by the presiding judge, upon clear and undoubted evidence."

Further on he says:

"And it is fair to assume that, had no statute been enacted (referring to the English statute), the common law of England, adjusting itself to changed conditions, would now accord with the rule we have announced."

See, also, Wigmore on Evidence, § 2000.

This rule is stated with some variation by the Supreme Court of Idaho, in State v. Seymour, 10 Idaho, 699, 79 Pac. 825, by quoting from Greenleaf on Evidence, vol. 1, § 581, as follows:

"But with respect to the admission of papers irrelevant to the record, for the sole purpose of creating a standard of comparison of handwriting, the American decisions are far from being uniform. If it were possible to extract from the conflicting judgments a rule which would find support from the majority of them, perhaps it would be found not to extend beyond this: That such papers can be offered in evidence to the jury only when no collateral issue can be raised concerning them, which is only where the papers are either conceded to be genuine, or are such as the other party is estopped to deny, or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation and explanation of his own testimony"—citing, also, 15 A. & E. Encyc. of Law (2d Ed.) 268.

The same principle has been announced in the case of Smith v. Hanson, 34 Utah, 171, 96 Pac. 1087, 18 L. R. A. (N. S.) 520. And the Massachusetts courts hold to a like proposition.

There is much persuasive force in these authorities, and, were this a matter of first impression in the federal courts, I should be inclined to follow the doctrine announced in the Spalding Case. The present case is a fair illustration of how justice may be thwarted under the doctrine of the federal courts. The inspector wrote the letter to the defendant, and in that letter requested that the reply be indorsed upon the back of the Inspector letter. In due course of mail the Inspector letter came back with a reply indorsed thereon, signed "E. N. North." This in itself is evidence so strong and pertinent that North wrote the reply letter that there can scarcely be a doubt about it. If North was being held to account for writing the reply to the Inspector letter, could there be any cavil as to its admissibility in court against him? If, therefore, it was proper to go in evidence for that purpose, why should it not be admitted for the purpose of comparison, where another writing is in dispute? The conviction in the case at bar in all probability proceeded mainly upon the evidence of comparison of handwriting in this reply letter with the writing contained in the nonmailable letter sent to McGrath.

By the authorities, however, by which I am bound, a new trial should be granted; and it is so ordered.

In re STANDARD CORDAGE CO.

(District Court, S. D. New York. May 20, 1910.)

No. 13,598.

1. BANKRUPTCY (§ 114*)—RECEIVERS—APPOINTMENT—ORDER—DISSOLUTION—NOTICE.

Where all the parties in interest are before the court, an order appointing a receiver in bankruptcy would not be vacated because no notice had been given the bankrupt of the application.

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

2. BANKRUPTCY (§ 114*)—RECEIVERS—APPLICATION TO APPOINT—PROOF.

On an application for the appointment of a receiver for an alleged bankrupt, it must appear affirmatively that the bankrupt's assets are likely to be dissipated or wasted pending the adjudication.

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

3. BANKRUPTCY (§ 114*)—RECEIVERS—ACCOUNT.

An alleged bankrupt corporation, owing to pecuniary losses of its predecessor, impairing its credit from the beginning, decided in 1907 to discontinue business. In 1909 application was made to the state court for a voluntary dissolution of the corporation, and for leave to divide its assets among its creditors and stockholders, but it had not abandoned its business, and was still selling its products in the customary way, though its plant and factories had been shut down to save cost and running expenses. It also appeared that the bondholders and petitioning creditors approved the course of the directors to dissolve the corporation in 1907, and it was not clear that there had been any serious waste of funds or mismanagement. *Held* insufficient to justify the appointment of a receiver.

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

4. BANKRUPTCY (§ 20*)—DISSOLUTION OF CORPORATION—JURISDICTION OF STATE COURT—STATE LAWS.

The bankruptcy law does not suspend the jurisdiction of a state court over a corporation desiring to dissolve and discontinue operation; and hence the insolvency of a corporation does not necessitate the suspension of proceedings in the state court, or its dissolution, though, if the company is insolvent and has committed an act of bankruptcy, its property may be distributed among its creditors in accordance with the bankruptcy act.

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

In the matter of bankruptcy proceedings of the Standard Cordage Company. Motion to vacate an ex parte order appointing a receiver, and to dismiss a petition in involuntary bankruptcy. Application to vacate appointment of receiver allowed, and application to dismiss denied.

Alfred S. Brown, for Standard Cordage Co.

Charles A. Decker, for first-mortgage bondholders and Standard Cordage Co.

H. E. Lippincott, for committee of adjustment mortgage bondholders.

Henry Wollman, Achilles H. Kohn, Irving M. Dittenhoefer, and Benjamin F. Wollman, for petitioning creditors and other adjustment bondholders.

Abram I. Elkus and James N. Rosenberg, for receiver.

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

HAZEL, District Judge. This is a motion to vacate an ex parte order appointing a receiver of the assets and property of the Standard Cordage Company, and also to dismiss the petition in involuntary bankruptcy, on the ground that no act of bankruptcy is therein alleged. In disposing of the motion, it will only be necessary to inquire whether under section 2, subd. 3, Bankr. Act July 1, 1898, c. 541, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3421), the appointment of a temporary receiver is absolutely necessary for the preservation of the bankrupt estate. There was no notice given the bankrupt of the application for the appointment of a receiver, but, as all the interested parties are before me, I would not vacate the receivership for failure to give such notice, if the facts were sufficient to indicate the absolute necessity of the appointment. Looking at the facts as they are now presented, the primal question for consideration is not simply whether it would be better for all parties concerned that the receivership should be continued, but whether such continuance is absolutely essential to protect and conserve the property of the company. The record does not present such a situation. It appears by the papers that the petitioning creditors are holders of adjustment bonds maturing at the end of 25 years, such bonds being secured by a second mortgage upon the real property of the bankrupt, and that the first mortgage covers the same property. There are no unsecured creditors. The first mortgage secures an issue of 25-year bonds amounting to $2,806,000. Interest on the bonds is payable semiannually, and the mortgage, which covers plant, real estate, patents, and franchises, contains a provision that, after a default in the payment of interest, the trustee may either enter upon the premises, taking possession thereof, or institute foreclosure proceedings. It is shown that the credit of the company was impaired from the beginning, owing to the pecuniary losses of its predecessor, and that in the year 1907 the directors, realizing that the income was diminishing from year to year, decided to discontinue the business. In 1909, after some indecision on their part, it was decided to discontinue business and apply to the Supreme Court of the state of New York, under chapter 28 of the general corporation laws (Consol. Laws, c. 23), for a voluntary dissolution of the corporation, and leave to divide the assets among the creditors and bondholders. Such application to wind up the affairs of the company, however, was not made until March 16, 1910. Just prior thereto, the directors paid $70,150 interest, which was due and unpaid on the first mortgage bonds. Such payment, together with the payment of an item for past-due rent of premises, is now claimed by the petitioning creditors to be an act of bankruptcy. The bankrupt however contends that such payments were not intentional preferences, but were necessarily made to preserve the estate and prevent foreclosure of the first mortgage and ejectment for nonpayment of rent. Upon this motion it is not necessary to decide the question whether or not an act of bankruptcy has been committed by the company. That question may safely be left for later determination.

While it is true that a court of bankruptcy will not yield its functions and powers to a state court, or permit a bankrupt corporation

which applies to a state court to wind up its affairs to defeat the operation of the bankruptcy law, yet, on an application for the appointment of a receiver in the bankruptcy court, it must appear affirmatively that the assets of the bankrupt are likely to be dissipated or wasted pending the adjudication. The property of a bankrupt should not be taken out of his control before adjudication, unless it clearly appears either that the property is perishable or that it is apt to become wasted, despoiled, or misappropriated by him or those who have it in their custody or control. In the present case we have a corporation which has not actually abandoned its business. It is still engaged in selling its product in the customary way, although its plants and factories have been shut down to save cost and expense of running. True, the petition alleges that the bankrupt gave unlawful preferences, and that the directors mismanaged the affairs of the corporation. I am not satisfied on this point. On considering the affidavits of the bankrupt, I do not believe that there has been such waste of the funds or mismanagement of the corporation as to justify the court in retaining charge of the property by its receiver. The failure of the board of directors to dissolve the corporation in 1907, as it had determined to do, and keeping on at increasing loss, paying high salaries, paying interest on first mortgage bonds, selling below cost, buying large and unnecessary quantities of hemp, etc., were acts not free from unfavorable criticism. But it now appears by the moving affidavits that in such acts the bondholders and the petitioning creditors acquiesced or stood by, approving the course of the directors and officers of the corporation. It seems to me that the principle recently enunciated by the Circuit Court of Appeals for this district in Re Oakland Lumber Company, 174 Fed. 634, 98 C. C. A. 388, may fittingly be applied to the case at bar. Judge Coxe, speaking for the court, said:

"The power to take from a man his property, without giving him an opportunity to be heard, is both arbitrary and drastic, and should not be exercised except in the clearest cases. Congress recognized the necessity for caution by limiting the appointment of receivers to cases where it is 'absolutely necessary' for the preservation of the estate. In other words, the reason for such an interference with the rights of property must be clear, positive, and certain. Of course, cases frequently arise where this remedy may be necessary—cases where there is reason to believe that the property may be stolen or secreted or turned over to favored creditors. But fraud cannot be presumed, neither can danger to the property be predicated of acts which are honest and lawful."

In that case, it is true the property had been assigned and was in the custody of the assignee, but in my opinion it makes no difference, in the absence of a clear showing of fraud, spoliation, or mismanagement, that the property and management of the business prior to adjudication remains under control of the board of directors. As already stated, the corporation, claiming to be solvent though admitting its financial inability to continue its business operations, wishes to wind up its affairs and distribute its assets under the consolidated laws of the state of New York. This it had a legal right to do. The bankruptcy law does not suspend the jurisdiction of the state court over a corporation desiring to dissolve and discontinue its operations

(In re Watts, 190 U. S. 11, 23 Sup. Ct. 718, 47 L. Ed. 933), and I think the proceeding for dissolution in the state court, in view of the circumstances, was not improper, and should be permitted to continue. Of course, if the company is insolvent, as that term is defined in the bankruptcy act, and has committed an act of bankruptcy, its property must be distributed among its creditors in accordance with the provisions of the bankrupt law, and it will not be permitted to evade the operation of such law by dissolution proceedings in the state court. But as it is not shown that a receiver herein is absolutely necessary to protect the property of the bankrupt, as that term is explained in the Oakland Case, the appointment of a receiver herein must be vacated. Under the state statute authorizing dissolution proceedings, any additional payment of interest on the first mortgage bonds or sale, transfer, or conveyance of property by the company is absolutely void, and such statutory provision therefor is thought to adequately safeguard the rights of the petitioning bondholders. Nevertheless, I think the order vacating the receivership may contain a provision enjoining the further payment of principal or interest on the first mortgage bonds pending the adjudication, and also the distribution to the creditors or bondholders of the assets of the corporation or any fund realized out of the sale of its real or personal property by order of the state court in the dissolution proceedings, to the end that, if an adjudication in bankruptcy is had, such fund, assets, and property may be distributed under the provisions of the bankruptcy act.

The application made by the bankrupt to vacate the appointment of a receiver on May 3, 1910, is granted, and the application for dismissal of the petition to have the company adjudicated bankrupt is denied.

WOODS et al. v. WOODS et al.

(Circuit Court, N. D. West Virginia. December 28, 1910.)

1. PARTITION (§ 83*)—EQUITY—ACCOUNTING—JURISDICTION.

Where a bill for partition and also for an accounting not only alleged the legal title in complainant, but also uninterrupted possession for over 50 years, equity had jurisdiction, though the case also involved a determination of the lawfulness of the claims of certain defendants whom complainant claimed were in possession of the land under unlawful leases and illegal conveyances or as squatters, etc., under the rule that where equity has properly taken jurisdiction of a suit relating to real estate, based on facts showing independent equity grounds, it will consider and decide questions concerning the title necessary to a proper disposition of the entire controversy.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 228, 229; Dec. Dig. § 83.*]

2. QUIETING TITLE (§ 4*)—NATURE OF ACTION—REQUISITES—EJECTMENT.

Where complainants alleged both legal title and possession to the land in controversy, they were entitled to maintain a bill to remove a cloud on the title, consisting of adverse claims made by defendants against

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

whom complainants, because of their possession, could not maintain ejectment.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 5, 7, 12; Dec. Dig. § 4.*]

3. QUIETING TITLE (§ 4*)—CLOUD ON TITLE—REFORMATION OF INSTRUMENTS.
Where, in addition to seeking a vindication of title and a recovery of possession, complainants alleged facts entitling them to a decree canceling certain conveyances made to defendants, ejectment would not afford a complete or adequate remedy.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 5, 7, 12; Dec. Dig. § 4.*]

4. QUIETING TITLE (§ 12*)—EQUITABLE RELIEF.
Where complainants show an independent right to equitable relief, such as will authorize equitable jurisdiction, a prayer to quiet title will be entertained, though complainants are not in possession.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 8–12, 44, 45; Dec. Dig. § 12.*]

5. COURTS (§ 334*)—FEDERAL COURTS—STATE PRACTICE.
Code W. Va. c. 79, § 1, provides that tenants in common and coparceners shall be compellable to make partition, and the circuit court of a county wherein the estate, or any part thereof, may be, shall have jurisdiction in cases of partition, and in the exercise thereof may take cognizance of all questions of law affecting the legal title that may arise in any such proceeding. *Held*, that such section was available in a suit for partition in a federal court sitting in West Virginia to authorize the court in that suit to determine all questions of law affecting the title.

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

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.]

6. PARTITION (§ 63*)—LOCATION OF LAND—PROOF.
Complainants in a suit for partition were bound to show either by an actual survey or by the testimony the location of the land alleged in the bill to be claimed by some of the defendants, so as to enable the court to place complainants in possession of the portion that they should recover if the law and the facts should require a decree to that effect.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 63.*]

7. PARTITION (§ 70*)—TRIAL—DETERMINATION BY JURY.
Where, in a suit for partition and for an accounting, the record disclosed that it was essential thereto that the true amount of the acreage of the land involved should be ascertained, and that in order to do so the validity of the claims of the defendants thereto should be determined, the court would submit such questions of title to a jury.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 70.*]

In Equity. Bill by Samuel V. Woods and others against Harriett L. Woods and others for partition of certain real estate and for an accounting. On final hearing. Decree ordered for complainant as against certain defendants for failing to appear and answer, and continued as to others for the trial of legal issues to a jury.

John Bassel and J. Hop Woods, for complainants.

John J. Davis, John W. Davis, Fred O. Blue, A. F. Peddicord, Warder & Robinson, and Neil J. Fortney, for defendants.

GOFF, Circuit Judge. This suit was instituted at November rules, 1905, in the circuit court of Barbour county, W. Va., and was subsequently as provided by law duly removed to this court. Complainants ask for the partition of a tract of 3,000 acres of land, situated in the counties of Barbour and Tucker in said state, patented to Frederick Berlin and John S. Hoffman by the state of Virginia, on the 1st day of May, 1855, alleging that they, and some of the defendants by proper conveyances and in due course of law, became the owners of said land, and fully vested with the legal title thereof. The prayer of the bill is for partition of the land between complainants and defendants, devisees of Samuel Woods and Frank Woods, as to one moiety thereof, and the defendant Genevieve Boggess Parr, as to the other moiety. The bill further avers that complainants have the possession of the property, and have exercised ownership over it; that they have had tenants representing them thereon; that one Benjamin F. Young of Bath, Steuben County, New York (who had died testate), had during his lifetime set up some claim to the said land, "but that as to the character, quality, and amount of such claim," complainants were not advised; but they allege that said Young never had title, legal or equitable, to the land or any part thereof; that he never was in possession of it or any part thereof, in person or by tenant, holding the same adversely, openly and continuously against said Berlin and Hoffman, or either of them, or against the parties claiming under them, or that the land or any part thereof was ever assessed to him, or that he had ever paid taxes thereon; and complainants further charged that if said pretended claim was intended to cover the land in controversy that it constituted a cloud upon the title of complainants and defendants who claimed under the Berlin and Hoffman title, and that they were in equity entitled to have the same removed. The bill also set forth that the land so prayed to be partitioned was, for the most part rough, mountainous, with but slight improvements and little timber of value thereon, but supposed to be underlaid with the "Freeport" vein of coal and a limestone strata; that some portions of it was occupied by persons claiming possession against both the complainants and the defendants, the extent of such occupancy being unknown to complainants who pray the right to contest the same upon proper pleadings and proofs. It is further alleged that those under whom complainants claim title to said land, had held from the year 1855 not only the legal title, but also the undisputed possession of it, and had paid the taxes thereon; that as between the heirs of Samuel Woods, deceased, complainants and defendants, owners of the one undivided half of said land, and the defendant Genevieve Boggess Parr, owner of the other half, the former had paid the greater part of said taxes, the excess of their share so paid constituting with interest thereon a lien upon the moiety owned by her, which, when the bill was filed, amounted to $952.79, which complainants prayed might be decreed to be a lien on her moiety. A demurrer to the bill was after argument and consideration overruled, and leave to defendants to answer was given; and an amended bill was tendered, and by order of the court filed, in which the allegations of the original bill were incorporated, and a number of additional de-

fendants brought before the court, who were alleged to be claiming title to portions of the land, and to be in tortious possession of the same, among them those claiming under Young before referred to, who it was alleged under a conveyance with covenants of special warranty, dated September 9, 1901, were claiming about 1,500 acres of land, part of which if not all was supposed to be included in the tract conveyed by the Berlin-Hoffman patent, dated May 1, 1855; the coal and mining privileges under said 1,500 acres was alleged to have been conveyed to the defendant William F. Johnston, who conveyed the same to the defendant J. M. Guffey, who then conveyed such interests to the J. M. Guffey Company, a corporation, the title to the surface thereof being vested in the defendants Albert Thompson and Ira E. Robinson.

It is set forth in the amended bill that the defendants thereto who did not claim title by conveyances were either "squatters," "tenants by sufferance under said patent," or "tenants in possession under leases from said patentees or their assigns," or "under the complainants," and the prayer was that the title and possession of all the defendants which were not under and in subordination to the Berlin-Hoffman patent, might be canceled as clouds thereon, and on the title of those claiming under it; that complainants and defendants who claimed under said patent might be placed in complete possession of said land and that if it should be necessary an accounting be had as to those defendants wrongfully in possession, relating to rents and profits; that partition and accounting as between the present owners, claimants under the Berlin-Hoffman patent, be had as before set forth. The original and amended bills were duly verified, and answers under oath were asked for. A demurrer to the amended bill was overruled, and answers were filed by many of the defendants, to which replications were filed and issue thereon joined. A number of defendants who were duly served with summons failed to answer, and as to them the bills were taken as confessed.

Defendants in their answers insist that a court of equity has not jurisdiction of the controversy set forth in complainant's bills. A re-examination of the questions involved compels me to the conclusion I reached when I overruled the demurrers. For a moment let us again consider the case made by the bills. Their object is not solely to remove the clouds alleged to be on the title to the land included in the Berlin-Hoffman patent, charged as owned by complainants and some of the defendants, but also to partition the land among those who if the statements in the bill are true, are the owners thereof, and in addition thereto to secure an accounting among such owners relating to the taxes paid by them respectively on said land. Not only is the legal title alleged to be in said claimants, but also is the uninterrupted possession of the land charged as having been held by them and those under whom they claim, for over 50 years last past. These statements, whatever they may be worth on final hearing, must as regards the demurrer, be taken as true, and consequently well-established grounds of equity jurisdiction—partition and accounting—have properly been presented for the consideration of the court. Connected therewith, incidental thereto, and essential to the proper administra-

tion of justice so far as this case is concerned, are the questions raised by the allegations relating to the clouds charged as having been spread over the Berlin-Hoffman title, by the defendants, who are said to have taken tortious possession of some portions of that land, under unlawful leases, squatters' claims, and illegal conveyances. I think it is well established that, if a court of equity has properly before it for decision a suit based on facts showing independent equity grounds, relating to real estate, it will consider and decide questions concerning the title or the boundary thereof, if necessary to the proper disposition of the controversy. Conceding the allegations of the bills to be true, the holders of the legal title to the land included in the Berlin-Hoffman patent, could not maintain ejectment, for they are in possession, and this is one of the reasons of the rule that a bill to quiet title can be maintained only by those who allege themselves to be in possession. If a suit is filed under our general equity practice—independent of the provisions of statutes—the object being to remove a cloud on title, if it sets forth no facts showing grounds for other equitable relief, it must aver both legal title and possession in the complainant, and if when the proofs are taken there has been a failure to clearly establish both, the bill will be dismissed. A party holding the legal title, but out of possession should bring ejectment; if having the legal title and in possession, should resort to equity to remove the clouds on his title; if his possession is an equitable one he should acquire the legal title and then if out of possession bring ejectment. Judging this case on its alleged facts, and applying the rules I have mentioned, we find ourselves compelled to maintain the jurisdiction of a court of equity over this controversy.

When in addition to seeking a vindication of title and the recovery of the possession of land, complainants allege facts entitling them to a decree canceling conveyances made to the defendants, ejectment is not a complete, nor is it an adequate remedy, and therefore equity will assume jurisdiction. If the complainants show an independent right to equitable relief, such as will authorize equitable jurisdiction, the prayer to quiet title will be entertained even though they are not in possession. The rule that a bill to quiet title will not lie unless complainants are in possession, has in recent years been modified by the terms of state legislation, and the effect given the same in the federal courts. The reason for this is that if such legislation gives a right and a remedy, that then it is essential to the due administration of justice that the federal courts should recognize it. The decisions relating to this question are many and clear.

The Code of West Virginia contains the following provision:

"Tenants in common, joint tenants and coparceners, shall be compellable to make partition, and the circuit court of the county wherein the estate, or any part thereof, may be, shall have jurisdiction, in cases of partition, and in the exercise of such jurisdiction, may take cognizance of all questions of law affecting the legal title that may arise in any proceeding." Chapter 79, § 1.

That this legislation is, in the courts of West Virginia, applicable to cases of the character of the one I am now considering is I think without doubt. Decamp v. Carnahan et al., 26 W. Va. 839, and cases

there cited; Moore v. McNutt, Commissioner, et al., 41 W. Va. 695, 24 S. E. 682; Swick v. Rease et al., 62 W. Va. 557, 59 S. E. 510.

Let us now consider, so far as may be necessary in connection with the action the court finds it proper to take at this time, the answers of certain of the defendants, and the proofs taken by the complainants and said defendants. The answers deny the title of complainants as also their possession; allege possession by such defendants under grants from the commonwealth of Virginia, to Stephen Maylan, and through such grants by regular alienations and lawful possession to the defendants; claims assessment of said land in the name of defendants for the purpose of taxation, and the payment of such taxes; some of them claim color of title by defendants to the land alleged by complainants to be in their possession, while others set forth title papers which they allege give them legal title to the portions of the land in their possession, and all of them insist that they and each of them have been in the actual, open, notorious, exclusive, and continuous adverse possession, by themselves and their predecessor in title, far longer than the statutory period of ten years preceding the institution of this suit.

Complainants insist that they have shown the location of the land they claim, and that they have connected themselves with the original grant from the commonwealth, giving them thereby the legal title. I do not think it advisable at this time, because of the procedure I deem it proper to direct in this case, to fully discuss the weight of the testimony relating to possession, but deem it proper to say that, as to a few of the defendants, it is satisfactory, as to many others it is contradictory and incomplete, while frequently it is valueless in that it does not so identify the tracts of land to which it relates, with the certainty that would justify a decree in favor of the defendants offering it. The complainants by actual survey, and by the testimony of witnesses, some of whom have been upon the ground, claim that they have established the identity as well as the location of the land they claim. However that may be, it is quite clear that they have not by the testimony so designated the land alleged in the bills to be claimed by some of the defendants, as to enable the court to place complainants in possession of the portions they should recover, if the law and the facts should compel a decree to that effect.

As to the defendants against whom the bill has been taken for confessed, the complainants are entitled to decrees, and as the court has jurisdiction of the subject-matter of the suit, it becomes necessary in order to properly dispose of it, that further proceedings should be had for the purpose of aiding the court in so doing. Unless the defendant Genevieve Boggess Parr concedes the correctness of the sum alleged by the complainants to have been paid by Samuel Woods and his representatives, on account of taxes due on the Berlin-Hoffman land, or admits a sum due by her on that account, the correctness of which is not denied by complainants, there will be a reference to the master for the purpose of ascertaining the same.

During the argument reference was made to the case of Buchanan Co. v. Adkins et al., 175 Fed. 692, 99 C. C. A. 246, decided by the Circuit Court of Appeals—this circuit. With the rule laid down in

that case I am in full accord, and it is I think quite apparent that, were it not for the reasons I have already referred to, relating to independent grounds of equity jurisdiction, this cause would not now be entertained. Recognizing as I must do the jurisdiction and duty of this court to entertain and dispose of this case, nevertheless I find myself impelled to also recognize and give effect to the rights of certain of the defendants to this litigation. The record discloses that while partition and accounting is asked for, it is essential thereto that the true amount of the acreage of the land involved should be ascertained, and that, in order to do so, the validity of the claims thereto of the defendants should be decided. It has been made to appear by the answers and the testimony that some of the defendants claim the land they are alleged to hold by titles which are entirely distinct and hostile to the right under which the complainants seek partition, and such being the case they have the right to submit their titles to the finding of a jury. But the court nevertheless having jurisdiction of the controversy, and being required to do those things necessary to dispose of it, will proceed to find where the true legal title is, and desiring the aid of a jury for that purpose, will submit proper issues to be tried by a jury on the law side of the court.

A decree may be drawn along the line indicated in this conclusion of the court. It is likely that complainants will not insist, in the light of the testimony, that all of the defendants claiming adversary to them, be required to submit their claims and proofs to the finding of a jury. If such be the case as to such defendants there may be a decree in their favor. The depositions now in the record may with the consent of the parties hereto be used and read in whole or in part on the trial of the issues to be submitted, and as to such issues, if they are not agreed upon by counsel, the court will hereafter give directions concerning them. Pending said trial on the law side of the court, this case will be continued. This disposition of the questions referred to, renders it unnecessary to dispose of other points argued and submitted by counsel.

The complainants may have leave to amend the amended bill by making the J. M. Guffey Company a defendant, and by asking such special prayers concerning it as they may think proper. The depositions heretofore taken cannot be read as against the J. M. Guffey Company unless with its consent.

HIGSON v. NORTH RIVER INS. CO.

(Circuit Court, E. D. North Carolina. January 3, 1911.)

1. REMOVAL OF CAUSES (§ 89*)—PROCEEDINGS—PETITION TO FEDERAL COURT—EFFECT.

Under Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 435 (U. S. Comp. St. 1901, p. 510), relating to removal of causes, and providing that the petition for removal must be presented to the state court accompanied by a bond, to entitle petitioner to remove, a petition and bond addressed to the judge of the Circuit Court and an order obtained from him for such removal were

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

ineffective to remove the cause, though the petition and bond were subsequently filed in the office of the clerk of the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 189; Dec. Dig. § 89.*]

2. REMOVAL OF CAUSES (§ 89*)—PROCEDURE—PETITION AND BOND—PRESENTATION TO JUDGE OF STATE COURT.

Under Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 435 (U. S. Comp. St. 1901, p. 510), requiring a removal petition and bond to be presented in the first instance to the presiding judge of the state court in which the cause is pending, that he may first pass on their sufficiency, the mere filing of a petition and bond with the clerk is insufficient to remove the cause.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 189; Dec. Dig. § 89.*]

3. REMOVAL OF CAUSES (§ 79*)—APPLICATION—TIME—EXTENSION OF TIME TO ANSWER.

An order extending defendant's time to answer carries with it an extension of the time to file a petition and bond for the removal of the cause to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 144; Dec. Dig. § 79.*]

4. REMOVAL OF CAUSES (§ 79*)—PROCEEDINGS—FILING PETITION—TIME.

Defendant having been served with a summons requiring an answer in the November, 1909, term of the state court, and no such term having been held, the court at the December term made a general order extending the time to answer in all cases not otherwise provided "until the next term as of this term." At the succeeding January, 1910, term a similar order was entered, and on February 23, 1910, the courthouse with the records, including the summons and complaint, was destroyed by fire. At the succeeding March term the court entered an order reciting the fact, and directing that all parties should have until the next term of court to supply papers, and that in all cases in which complaints and answers were filed it would only be necessary to file new complaints and answers without restoring the summons. In cases where no answers had been filed, the summons and complaint should be restored. *Held*, that such order did not extend defendant's time to answer, which had expired at the beginning of the March term, and hence the filing of a petition and bond to remove in the state court on April 23, 1910, was too late.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 144; Dec. Dig. § 79.*]

5. PLEADING (§ 85*)—TIME TO ANSWER—DESTRUCTION OF RECORDS—EFFECT.

The destruction of a county courthouse and all the records of a lawsuit therein contained by fire did not continue or extend defendant's time to answer as a matter of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 174; Dec. Dig. § 85.*]

6. REMOVAL OF CAUSES (§ 103*)—REMAND—STATUTES.

Act March 3, 1875, c. 137, § 5, 18 Stat. 472 (U. S. Comp. St. 1901, p. 511), providing that when a case has been removed to the federal court, and it appears that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of the federal court, or that parties have been improperly or collusively made or joined, the court shall proceed no further therein, but shall dismiss the suit or remand it, etc., has no application where the complaint to remove a cause alleges a removable controversy, and the only question in dispute is whether the case has in fact been removed.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 221; Dec. Dig. § 103.*]

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

7. REMOVAL OF CAUSES (§ 106*)—PROCEEDINGS AFTER REMAND.
Where, after an attempt has been made to remove a cause to the federal court, plaintiff's counsel entered a special appearance for the sole purpose of moving to retire the case from the docket, and insisting that the proceedings taken had been insufficient to remove the cause, there was no waiver of plaintiff's right on his objection being sustained to have the cause retired from the docket.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 216; Dec. Dig. § 106.*]

Action by one Higson against the North River Insurance Company. On defendant's application for an injunction to restrain plaintiff's proceedings in the state court, and on plaintiff's motion to retire the case from the docket. Injunction denied, and motion granted.

Harry Skinner, for plaintiff.
C. W. Tillett and L. I. Moore, for defendant.

CONNOR, District Judge. Plaintiff, a citizen of Pitt county, N. C., sued out of the superior court of said county on September 11, 1909, a summons against defendant corporation, having its residence in the state of New York, which was duly served on September 14, 1909, returnable to the November term of said court. No court was held at the time prescribed for holding the November term, 1909. At the December term of said court a verified complaint was filed by plaintiff, setting out a removable cause of action; more than $2,000 being involved. No answer was filed. A general order was made by the court extending the time, in all cases not otherwise provided, for defendants to file answers "until the next term as of this term." At the next succeeding term, January, 1910, a general order was made in the same terms as that of the December term, 1909. On January 24, 1910, defendant filed a petition addressed to the judge of the Circuit Court, together with a bond, as prescribed by law, for the removal of said cause into the Circuit Court of the United States, together with an order for such removal, which was signed by the judge, and, pursuant thereto, the clerk of the superior court of Pitt county certified a transcript of the record in the case to the Circuit Court at New Bern, N. C., which was filed in the office of the clerk of said court April 14, 1910. No petition was at that time filed in the superior court of Pitt county. On February 23, 1910, the courthouse in said county, together with many of the records, including the summons and complaint in this action, was destroyed by fire. At the next succeeding term of said court, March, 1910, an order was made reciting the fact that the courthouse and records were destroyed, and directing "all parties have until the next term of the court to supply papers. In all actions in which complaints and answers were filed, it will only be necessary to file new complaints and answers without restoring the summons. In all cases where no answer had been filed, summons and complaint must be restored." No other orders which could affect the rights of the parties to this action were made. On March 30, 1910, plaintiff filed a substituted complaint and prosecution bond, but did not file a substituted summons. On April 23, 1910, defendant

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

filed in the office of the clerk of the superior court of Pitt county a petition for removal of the cause, together with a bond as prescribed by the act of Congress. The next succeeding term of the court convened on May 2, 1910, when the judge presiding rendered judgment against defendant by default and inquiry, to which defendant excepted, insisting that the cause had been removed into the Circuit Court of the United States. The judge was never asked to sign an order removing the cause, nor was his attention called to the petition and bond filed with the clerk on April 23, 1910, until the judgment was rendered. On April 20, 1910, plaintiff entered a motion in the Circuit Court of the United States to remand the cause. This motion was, by consent, continued from time to time, and was pending when the judgment by default and inquiry was entered in the superior court. Defendant excepted to the ruling of the superior court for that the cause had by virtue of the proceedings herein recited been removed into the Circuit Court of the United States, and was not then pending in the superior court, and appealed to the Supreme Court of the state. The judgment was affirmed by the Supreme Court. 68 S. E. 920. On the 29th day of October, 1910, defendant filed a bill in equity in the Circuit Court of the United States against the plaintiff herein, setting forth the facts herein recited, and alleging that the plaintiff threatened to proceed to have the writ of inquiry as to the damages demanded in his complaint executed in the superior court of Pitt county, etc. The prayer is for process and an injunction. The motion for a restraining order until the hearing was heard at New Bern and at the same time the motion by plaintiff "to retire the case from the docket," etc., was heard.

It is not very material for the purpose of disposing of the cause whether the motion made by plaintiff to remand be considered as pending, or whether the defendant's prayer for an injunction restraining plaintiff from proceeding with the trial in the superior court of Pitt county be made the basis of the order. No process has issued in the equity suit. It seems clear that the order of January 24, 1910, was ineffectual to deprive the state court of its jurisdiction. The statute (Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 435; 4 Fed. Stat. Ann. 349 [U. S. Comp. St. 1901, p. 510]), by which the power to remove is conferred, requires the petition and bond to be filed, in the first instance, in the state court. "The petition for removal must be presented to the state court, accompanied by a bond to entitle the petitioner to remove. The removal cannot be granted on petition to the Circuit Court." Simonton, Circuit Judge (4th Circuit) in Mayo v. Dockery (C. C.) 108 Fed. 899. The case therefore remained in the state court, unless by filing the petition and bond in the office of the clerk of the superior court on April 23, 1910, it was removed. Two objections are urged to this petition: That simply filing the petition and bond with the clerk was not a compliance with the provisions of the statute; that they should have been presented to the judge presiding so that he might pass upon their sufficiency. Several of the federal judges have so held, and it would seem correctly. Unless the attention of the judge of the state court is called to the petition and bond, how is it

possible for him to grant or refuse the petition to remove? It is certainly proper to present the petition to the judge and is the usual and approved practice. The further objection is made that the time for filing the petition had passed. Eliminating all controversy in regard to the question whether the orders granting time to file answer prior to the March term, 1910, extending the time to file the petition, and conceding that under the ruling in the Fourth Circuit in Wilcox, etc., v. Phœnix Ins. Co. (C. C.) 60 Fed. 929, and Avent v. Lumber Co. (C. C.) 174 Fed. 298, the order extending time to file answer carried with it an extension of the time to file petition for removal, the defendant's time expired at the beginning of the March term, 1910. While it is true that the courthouse was burned on February 23, 1910, and that the court would have granted further time to answer, no such order was made. The order, as made, was doubtless so intended, and it may have reasonably been so interpreted by counsel, but it is not so drawn. Nothing is said about extending time to answer, and this court has no power to write it into the order. The destruction of the courthouse and records did not as a matter of law operate to extend the time to answer. It constituted ample reason why the court should, and doubtless would, have granted time. It would seem that prudence would have suggested that an order to that effect should have been asked. It is held that the statute in respect to the time within which the petition to remove must be filed is to be strictly construed and complied with. Daugherty v. West. Union Tel. Co. (C. C.) 61 Fed. 138. It will be noted that the language of the statute in regard to remanding a cause improperly removed (Act March 3, 1875, c. 137, § 5, 18 Stat. 472; 4 Fed. Stat. Ann. 371 [U. S. Comp. St. 1901, p. 511]) contemplates that when in a case which has been removed it appears that it "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, * * * the said court shall proceed no further therein but shall dismiss the suit or remand it," etc.

This case does not come within the words of the statute. It is conceded that the complaint sets out a removable controversy, one in which the plaintiff and defendant are residents of different states. The real question, therefore, is whether the case has been "removed" into this court. No petition having been presented to the superior court of Pitt county for the removal, as required by the statute, the conclusion seems inevitable that no controversy or cause is pending in this court, unless the failure to do so is an irregularity which the plaintiff may waive, thereby validating the act of the clerk of the superior court in sending to this court a certified copy of the record on April 14, 1910. The record shows that counsel for plaintiff entered a special appearance for the single purpose of making the motion to "retire the case from the docket," etc. I am of the opinion that plaintiff has not waived any of his rights, even if he could, by his action, confer jurisdiction upon this court under the circumstances and conditions appearing in the record. The defendant in its bill asking for an injunction against the plaintiff from proceeding

in the state court presents the real and determinative question. I am of the opinion that the act of the clerk in certifying the record to this court was without authority, and did not operate to remove the case into this court, that the filing of the petition and bond in the office of the clerk of the superior court of Pitt county on April 23, 1910, did not operate to remove the case, and that in no aspect of the record is the defendant entitled to an injunction as prayed for. The cause will be retired from the docket of this court at the cost of the defendant.

It is ordered that the motion for injunction be denied, and bill dismissed.

THE KOENIGIN LUISE.

(District Court, D. New Jersey. December 16, 1910.)

1. ADMIRALTY (§ 5*)—JURISDICTION—SUIT BY ALIEN SEAMAN.

That a seaman is not a citizen of the United States does not disentitle him to maintain a suit in a court of admiralty against a foreign vessel which is within the jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 69–85; Dec. Dig. § 5.*]

2. AMBASSADORS AND CONSULS (§ 6*)—POWERS OF CONSULAR OFFICERS—CONTROVERSIES BETWEEN MASTERS AND CREWS OF VESSELS—TREATY WITH GERMANY.

Under article 13 of the Consular Convention between the empire of Germany and the United States, proclaimed June 1, 1872, 17 Stat. 928, which provides that "consuls general, consuls, vice consuls or consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall have the exclusive power to take cognizance of and to determine differences of every kind which may arise, either at sea or in port, between the captains, officers, and crews, and especially in reference to wages and the execution of mutual contracts," a court of admiralty of the United States is without jurisdiction of a suit betwen an alien seaman and a German vessel arising out of his contract of employment.

[Ed. Note.—For other cases, see Ambassadors and Consuls, Cent. Dig. §§ 16–20; Dec. Dig. § 6.*]

3. AMBASSADORS AND CONSULS (§ 6*)—JURISDICTION—CONSTITUTIONAL PROVISIONS—"ALL."

The provision of article 3, § 2, of the Constitution, that "the judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction" is not to be so construed as to annul the provisions of a treaty giving consular representatives of another nation jurisdiction over controversies between officers and seamen of vessels of such nation, the word "all" in such provision being used for the purpose of excluding jurisdiction of the states over admiralty and maritime causes.

[Ed. Note.—For other cases, see Ambassadors and Consuls, Cent. Dig. §§ 16–20; Dec. Dig. § 6.*

For other definitions, see Words and Phrases, vol. 1, pp. 312–335; vol. 8, pp. 7572, 7573.]

In Admiralty. Suit by Henry Gelbtuch against the Steamship Koenigin Luise. On motion to strike out claimant's plea. Denied.

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

Noel, Rembaugh & Barber, for libelant.
Bedle & Kellogg, for claimants.

RELLSTAB, District Judge. The libelant filed his libel against the steamshp Koenigin Luise, in which he declared substantially that such steamship was owned by the North German Lloyd Steamship Company, a foreign corporation, and that on or about the 9th day of July, 1909, the steamer was in the port of New York, about to go on a voyage to Bremerhaven, Germany; that the master of said steamship represented to libelant that it was to make a return voyage from Bremerhaven to New York soon after its arrival at the first-mentioned port; that the said master did ship and hire libelant to serve as steward on said steamer for and during said voyages, and did agree to return said libelant to the port of New York; that in reliance upon said statement libelant, on the said date, entered on board and into the service of said steamship; that during the whole time he was in the service of said vessel, libelant faithfully performed his duties on board thereof; and that upon his arrival at Bremerhaven, on or about August 7, 1909, the said master informed the libelant that the steamship would not return to the port of New York, discharged him from said service, and refused to return him to New York, or assist him in any way to return, although libelant requested to be sent back; that in consequence of such refusal libelant was compelled to remain upwards of three months in Germany before he could obtain means to bring him back to New York, claiming to be damaged thereby in loss of wages, delay, and cost of return passage, and injury to his health in the sum of $300. To this libel claimants as bailees of said steamship intervened, reserving the right to question the jurisdiction of the court, and pleaded that the owner of such steamship was a corporation of the empire of Germany; that it flew the flag of such empire, and was a merchant vessel thereof; and further, upon information and belief, that libelant is not, and has not been a citizen of the United States, and that by virtue of article 13 of the Consular Convention existing between the United States of America and the empire of Germany, and proclaimed on the 1st day of June, 1872, the jurisdiction of the differences, claims, and matters in dispute in said libel belongs exclusively to the consuls general, consuls, vice consuls, and consular agents of the empire of Germany, and are not within the jurisdiction of this court, and pray, therefore, that said libel be dismissed. The libelant moves to strike out this plea, on the ground that, even if the facts pleaded are true, it presents no valid defense to his action. The libel does not allege the citizenship of the libelant, nor the nationality of the steamship, but on the argument it was admitted that the libelant was not a citizen of the United States. Under this general allegation of insufficient defense, libelant insists that though he is not a citizen of the United States, he should not be barred from maintaining such suit, and, further, that the treaty in question does not apply to the case in hand, inasmuch as the voyage was ended by the wrongful act of the master.

First, as to noncitizenship: "Seamen have always been considered as wards of the admiralty, and the wages of their perilous service

have been by all nations highly favored in the law." Benedict's Admiralty (3d Ed.) § 503. "It is the settled law of this country that our admiralty courts have jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, and the ship or party to be charged is within the jurisdiction of the court. It is a jurisdiction the court may decline to exercise where for some special reason it appears to be inexpedient." Fairgrieve v. Marine Ins. Co., 94 Fed. 686, 37 C. C. A. 190. The noncitizenship of libelant, therefore, does not disentitle him to have his cause heard in our admiralty courts.

Second, as to the treaty pleaded: Article 13 of such treaty between the United States and the German Empire, so far as relevant to the jurisdictional question here raised, provides:

"Consuls general, consuls, vice consuls, or consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall have the exclusive power to take cognizance of and to determine differences of every kind which may arise, either at sea or in port, between the captains, officers, and crews, and specially in reference to wages and the execution of mutual contracts. Neither any court or authority shall, on any pretext, interfere in these differences, except in cases where the differences on board ship are of a nature as to disturb the peace and public order in port, or on shore, or when persons other than the officers and crew of the vessel are parties to the disturbance. Except as aforesaid, the local authorities shall confine themselves to the rendering of efficient aid to the consuls, when they may ask it in order to arrest and hold all persons, whose names are borne on the ship's articles, and whom they may deem it necessary to detain." 17 Stat. 928.

As already stated the libel does not state the nationality of the steamship. The plea asserts that it is a vessel of the German Empire. If the treaty governs, this is a jurisdictional fact; and it not appearing in the libel it may be shown by plea. The August Belmont (D. C.) 153 Fed. 639. On a motion to strike out a plea all well-pleaded facts are taken as true. The libelant's asserted cause of action, therefore, as it stands on this motion, is based on his wrongful discharge from a German vessel in a foreign port.

This treaty provision has been considered in three cases: In the Burchard (D. C.) 42 Fed. 608, the court dismissed the libel, declining to entertain cognizance of the seamen's claim for wages, founded on their right to be discharged under their contract, and remitted the matter to the German consul. In The Neck (D. C.) 138 Fed. 144, the libelant was a United States citizen, and the libel for wages was sustained, the court holding that "a citizen of the United States cannot be deprived by treaty of his constitutional right to invoke the jurisdiction of the national courts of admiralty to determine a cause within the admiralty and maritime jurisdiction to which he is a party, and which is cognizable within the United States." In The Bound Brook (D. C.) 146 Fed. 160, the libelants were not citizens of the United States. In other respects the facts and the questions raised were substantially identical with those of The Neck; and the facts in this case, so far as they relate to the jurisdictional question raised by this plea, are practically the same as in The Bound Brook, where Judge Dodge, in an able review of the authorities, reached a different

conclusion from that announced in The Neck, dismissing the libel for wages on the ground that "the manifest purpose of the treaty is to secure to each nation the privilege of having its own laws govern questions of wages arising where its own vessels are concerned, in ports of the other nation." I fully concur in such conclusion. I do not see how any other result is permissible. By the Constitution of the United States the President has the power, by and with the advice and consent of the Senate, to make treaties. Article 2, § 2, par. 2, cl. 1. And such treaties and laws of the United States, when made in pursuance of such constitutional authority, as well as the Constitution, are declared to be the supreme law of the land. Article 6, par. 2. By the same instrument, the judicial power is vested in the United States courts, and extends to all such treaties and laws, and all cases of admiralty and maritime jurisdiction. Article 3, §§ 1 and 2. A treaty with a foreign nation is essentially of a political character, and under our Constitution is made by the executive branch of the government. It deals with international relations, and when confined to such subjects, and not inconsistent with the Constitution, and the nature of our government, is of binding force until abrogated by executive or congressional action. It is a compact between independent and sovereign nations, and the dictates of morality and national honor, as well as the first principles of sound public policy, demand that its provisions be faithfully carried out. While it is the duty of the court in the exercise of the constitutionally granted judicial power to annul the provisions of a treaty that are clearly violative of the organic law, yet that result is never to be declared unless no other construction is permissible.

The word "all" in the clause "all cases of admiralty and maritime jurisdiction," found in the constitutional grant of judicial power to the United States courts, and in the judiciary act of 1789 (Act Sept. 24, 1789, c. 20, § 9, 1 Stat. 76), giving cognizance over such causes to the therein created courts, cannot be given that embracing meaning which would annul an article in a foreign treaty dealing with a subject peculiarly of international concern, because in the enforcement of it a judicial function is necessarily exercised. The manifest purpose of this inclusive term was to exclude from the states all jurisdiction over admiralty and maritime causes, and not to limit the subject-matter and scope of foreign treaties. The judicial power is necessarily limited by the constitutional grant and the acts of Congress distributing it, to the courts. What is withdrawn by foreign treaties constitutionally entered into, is as effective a limitation as if it had never been authorized by congressional legislation. To give full force and effect to the constitutional provision granting the Executive and Senate the power to make treaties, it is necessary to confine the meaning of this word "all," and limit the judicial cognizance, to such subjects and persons as the treaty making and legislative departments of the government, acting within their constitutional powers, shall indicate.

In Murray v. Hoboken Co., 59 U. S. 272, 284 (15 L. Ed. 372), Justice Curtis, in delivering the unanimous judgment of the Supreme

Court upon that all-important question, What is due process of law? said:

"There are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."

In the judiciary act, or by subsequent legislation, Congress could have excluded from the jurisdiction of the District Courts the cognizance of controversies between the crews and masters of foreign vessels. This has been done by the treaty in question by vesting in the consuls (one class of national representatives), of the parties to such international compact, the exclusive right to determine such controversies. Neither a treaty nor an act of Congress has paramount authority over the other. Both are declared by the Constitution to be the supreme law of the land. The treaty being of later date, it is the last expression of the sovereign will in this behalf, and controls. Chae Chan Ping, 130 U. S. 581, 600, 9 Sup. Ct. 623, 32 L. Ed. 1068.

In the treaty under consideration the exclusive cognizance of consuls is over "differences of every kind which may arise, either at sea or in port, between captains, officers, and crews, and especially in reference to wages and the execution of mutual contracts." It would be difficult to conceive of a controversy that might arise between a master and a member of his crew that would constitute the difference contemplated by such treaty, if the one set up in the libel is not.

That the voyage for which the wages and damages are claimed has been ended is no reason for taking cognizance of the dispute. The Bound Brook, supra.

The motion to strike out the plea is denied.

BRITISH & FOREIGN MARINE INS. CO. et al. v. KILGOUR S. S. CO., Limited, et al.

(District Court, S. D. New York. December 20, 1910.)

1. INSURANCE (§ 606*)—MARINE INSURANCE—SUBROGATION—ACTION BY CARGO INSURER TO RECOVER SALVAGE PAID.

An insurer of cargo becomes a surety for the faithful performance of the contract of the carrier whether such carrier be a common or special carrier, and where the insurer has paid salvage on behalf of the cargo, made necessary by the fault of the ship, it is no defense to a suit brought to recover the amount from the owner and charterer that under the terms of the insurer's contract he was not bound for the salvage because the ship deviated from her voyage, the construction of the insurer's contract by the parties thereto being a matter with which respondents have no concern, since it is a matter of indifference to them whether their liability is to the shipper or insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1506; Dec. Dig. § 606.*]

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

2. SHIPPING (§ 121*)—UNSEAWORTHINESS OF VESSEL—LIABILITY OF CHARTERER AS CARRIER—SALVAGE PAID BY CARGO OWNERS.

A steamship line having contracts to carry the season's product of certain Cuban sugar producers chartered a steamer which loaded at Cuban ports and cleared for New York. When she started, it was known to her master that she had insufficient coal for the voyage, and, as it proved, she had insufficient to take her to Newport News, where he intended to go for more, and in consequence he burned some of the sugar, and in attempting to make a North Carolina port stranded and was released and towed to New York by salvors. A part of the salvage was paid by the cargo owners or their insurers, who brought suit to recover the same from the charterer, which brought in the shipowner. *Held*, that the want of sufficient coal rendered the vessel unseaworthy at the commencement of the voyage, and was a breach of the charterer's contract of carriage, whether as a common or special carrier, and that it was liable for the sugar burned and the salvage paid by the insurers.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 449–451; Dec. Dig. § 121.*]

3. SHIPPING (§ 132*)—CHARTER—UNSEAWORTHINESS OF VESSEL—LIABILITY AS BETWEEN OWNER AND CHARTERER.

Evidence considered, and *held* to show that the unseaworthiness of a steamer under charter in sailing on a voyage with cargo with insufficient coal was due to the fault of the master, who concealed the fact from the charterer, for which fault the owner was responsible and liable over to the charterer for the amount recovered against it by the cargo owners and their insurers for losses resulting from such unseaworthiness.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 132.*]

In Admiralty. Suit by the British & Foreign Marine Insurance Company and others against the Kilgour Steamship Company, Limited, and the Munson Steamship Line. Decree for libelants.

Final hearing in Admiralty. Action by cargo owners, and cargo underwriters on steamship Dunkeld to recover (1) for salvage paid by underwriters and earned by releasing Dunkeld and cargo from peril after stranding on coast of North Carolina; and (2) for value of certain cargo used as fuel by the steamship in completing her voyage after salvage service rendered. The Kilgour Company is the owner of the steamship, which was under time charter to Munson Line.

Mr. Kneeland, for libelants.
Mr. Kirlin, for Kilgour Company.
Mr. Haight, for Munson Line.

HOUGH, District Judge. The Dunkeld left Antilla, Cuba, on March 20, 1908, fully laden with a cargo of sugar, which she intended to and did deliver at New York. She had then on board 110 tons of coal, much if not most of it known to be of inferior quality, though not believed to be so bad as was finally proven. Her master and engineer knew that with such weather and currents as were reasonably to be expected New York could not be reached with the contents of her bunkers. It was hoped that Newport News could and would be made, and their intention was to put in and recoal there. The Dunkeld had gone from England to Vera Cruz, and while there had been chartered to Munson, had then gone direct to Puerto Padre, Cuba, and partly loaded, from there to Antilla (less than one day's voyage)

and finished her cargo. Considering the time of year, the nature of the voyage, the quality of coal, and the average consumption on the journeys last enumerated (as shown by the log), it must be found that to attempt even the trip from Antilla to Newport News with no more than 110 tons was imprudent if not positively dangerous. As matters turned out, although I find in log and master's protest no evidence of weather strange to the North Atlantic in March, the bunkers were so exhausted before reaching Hatteras that it was concluded to put into Portsmouth, N. C. In making this attempt, and because of the drifting and consequent falsity of a buoy shown on chart, the Dunkeld took the ground, was ultimately pulled off by tugs of the Merritt Company, and brought to New York in tow. So exhausted was fuel that 32 bags of sugar (mixed with coal) were burned to give the ship steerage way. On arrival (with cargo otherwise seemingly intact), the Merritt Company asserted a lien for salvage against cargo. Thereupon the underwriters, who had issued the ordinary open policies against marine perils, engaged in writing "to hold ourselves bound to (the Merritt Company) until (that Company) is paid our pro rata proportion of the charges or compensation for the (salvage) services as aforesaid, as soon as the amount of said charges can be properly ascertained." They further agreed to appear on behalf of cargo should legal proceedings be taken. No such proceedings, however, were found necessary, and the underwriters subsequently paid direct to the Merritt Company large sums of money for so much of which as the court may allow this suit (so far as insurers are concerned) is brought, the owner of one lot of cargo joining in respect of his 32 bags of sugar burned as above stated.

It appears from this record that the steamship cleared from Antilla to New York, and that bills of lading were issued for the same voyage, so that nowhere in custom house or shipping documents was any right reserved, nor did any intention appear, of stopping at Newport News or elsewhere for coal or other purposes. It similarly appears that the two shippers whose sugar comprised the Dunkeld's entire cargo had contracts with Munson to carry their season's product, and it is claimed that these contracts were of such nature as to render the Munson Line a special and not a common carrier in respect of the sugar so transported.

From these premises, it is argued that the underwriter libelants have no standing in court, if as matter of law the effort to reach Portsmouth constituted a deviation, because the policies in evidence contain no clause extending insurance to a deviation from the voyage declared, wherefore when libelants paid salvage arising after or on deviation they paid what they were not liable for, became mere volunteers, and cannot assert themselves to be subrogated to the rights of cargo owners. On principle this contention seems ill founded. What is asserted in this cause is breach of a contract of carriage between the Munson Line and certain shippers. Whether as a result of that contract Munson's became a common or special carrier, it is still true that the primary contract is for carriage. An underwriter for cargo owner is but a surety that carrier will fulfill his primary ob-

ligation. Such a surety may interpret his contract in a manner not approved by the carrier. He may even interpret it wrongly or act under a mistake of fact, but still he acts always as surety, and it does not lie in the mouth of one who has broken his contract and is liable to his shipper to complain that the underwriter who is asserting that liability and none other cannot prevail solely because of the terms of his suretyship. Those terms are not the carrier's concern, as soon as it is shown that payment to the underwriter extinguishes the shipper's just demand. Upon authority The Iron Mountain, 1 Flip. 616, Fed. Cas. No. 270, and cases cited, seems conclusive.

The second argument from the facts last stated is that because Munson was but a special carrier the doctrine of deviation does not apply, and neither the shipper nor any one claiming under him can complain of the Dunkeld's leaving her direct route for coal or any other purpose. If it were necessary to base decision on deviation, this contention might require consideration, but in my judgment it makes no difference here whether there was a deviation or not, and none whether the carriage relation was common or special. It is believed to be true that the liabilities of a common carrier grow out of his primary obligation as an insurer, while those of a special carrier rest on the fact that he is a mere bailee. Decision may and often does rest on presumption; so strong in the case of one inviting all the world to patronize his vehicle or ship, while as against a bailee it is sometimes necessary affirmatively to prove lack of ordinary care.

In this case it is not necessary to hold that even in the instance of a private or bailee carrier by water the warranty of seaworthiness attaches to the vessel proffered as the instrument of carriage (plain as that proposition seems), for if there was unseaworthiness in fact, known before voyage begun, that knowledge when proven constitutes the clearest evidence of lack of ordinary care. The shippers of the Dunkeld's cargo had a contract with the Munson Line alone. This action is in personam, and, viewed as a demand against Munson's only, there can be but one result under the authorities. Charterers let the ship finally depart without what they were bound by charter party to furnish and what they impliedly agreed with their shippers to provide. On this point it is immaterial whose was the actual negligence at Antilla. The shippers have a right as against their carrier to at least the exercise of ordinary care toward them. The fact that the steamer cleared from Antilla without even enough coal to reach the end of the stage contemplated by the master (Newport News) is proof enough. Hurlbut v. Turnure (D. C.) 76 Fed. 587, affirmed 81 Fed. 208, 26 C. C. A. 335; Thin v. Richards, 2 Q. B. (1892) 141; The Vortigern, Prob. (1899) 140; Greenock S. S. Co. v. Mar. Ins. Co., 9 Com. Cas. 41. For shippers' purposes it is to be remembered that the master was the charterer's master.

It follows that, had suit been begun against Munson's only, there would be a decree for libelant, but the presence of the shipowner raises another question.

This action not being in rem, it is to be noted that counsel agreed in open court that both charterer and owner were sued in personam on

the request of owner, whose ship was threatened with seizure. The cargo owners have no contract with shipowner, and, whatever might have been their rights against the hull into which their goods were laden, the personal liability of Kilgour Company can only be reached by finding the shipowner liable over to Munson's, and by treating this action as a shorter method of trying the claim of libelants against Munson Company, into which suit the latter had petitioned the shipowner under the equity of the fifty-ninth rule. This may be done under the practice of this court. Evans v. N. Y. & P. S. S. Co. (D. C.) 163 Fed. 405. It follows that the last inquiry raised by this suit is to ascertain as between owner and charterer the responsibility for the proven unseaworthy condition in which the Dunkeld left Antilla. The charter party is in the common form requiring charterer "to provide and pay for all coals," and the fact issue between respondents settles down to this: The Dunkeld's master says he demanded of charterer's representative more coal when he got to Antilla, and was refused it, although the coal was there and could have been gotten; and he was then instructed to sail with his short supply, and put into an American port for more. The charterer while admitting that Puerto Padre afforded no coal asserts that the master said nothing at all about coal at Antilla, and sailed ostensibly for New York without even stating his intention of consuming unnecessary time by putting into Chesapeake Bay, if he got so far on his bunkers. When first considered, both stories seem incredible. Why should any agent refuse coal, or why should any captain neglect to ask for it, with the insistence of a man whose life might depend on its receipt? It is necessary therefore to consider the evidence (1) to note anything unveracious in the captain's story; and (2) to ascertain any motive on either side for taking risks on coal supply when leaving Antilla. The evidence being by deposition, impressions must be drawn from the printed page—a method far inferior to seeing and hearing the men, yet it seems clear to me that the engineer of the Dunkeld (whose knowledge ends at Puerto Padre as he did not go ashore at Antilla) had no great confidence in his captain, for he took his second with him to act as witness when he laid the facts as to coal before the master, while the deposition of the master himself is unpersuasive, and characterized by exaggeration. He attributed much expenditure of coal to "knocking about" Nipe Bay (where Antilla lies), something reduced to trivial unimportance by brief cross-examination. He manifests a feeling against the charterer inexplicable by anything contained in the case, and he makes one assertion for which I can see no justification at all, viz., that, when he left Vera Cruz, he was to go and did go to Havana for orders, which were brought out by small boat off Havana entrance. Yet his log shows nothing of the kind, and he himself finally receded from positive assertion that he did get orders at Havana, while maintaining that, when he left Vera Cruz, he expected to go there. There was no reason for that expectation, the charterer's orders were plain for Puerto Padre, and the exact location of that obscure port was asked for by his owner, and in all probability communicated to him. For these reasons, and by its whole

tone, I am not favorably impressed by the master's deposition; and when motive is looked for there is incentive (though a very poor one) for the ship's doing what was done, and none that I can see for the charterer's agent at Antilla wishing it done. It was one of the terms of the charter party that steamer should arrive at loading port with 100 tons of owner's coal in bunkers. This she did not do, she had but 58, and it was the master's fault that this occurred. If he had gotten coal in Cuba, he must have known that 42 tons of it would have been charged (or sought to be) by charterer against the ship at the high prices actually paid; while, if he could win to Newport News, prices were much lower.

On the whole, it is believed that the Dunkeld's master, even if he did demand coal at Puerto Padre (which is doubted) did not apprise charterer's agent at Antilla of his condition, and took the chance of reaching a cheap fuel market with what he had. If, as is believed, there was a positive concealment of condition by the ship's master, in order to avoid reproof if not heavier discipline for an antecedent breach of charter party, the fault for the Dunkeld's unseaworthiness is placed by the facts on the master in his capacity as shipowner's agent, and his principals must respond for his act.

This renders it unnecessary to rely on MacIvor v. Tate, 1 K. B. (1903) 362, and Park v. Duncan, 25 Sess. Cas. 528, which would make shipowners liable as the result of mere nonaction. Here there was positive wrongdoing.

Libelants may take a decree against both respondents with directions to collect first from Kilgour Steamship Company, any balance remaining uncollected after execution returned (or its equivalent) to be paid by Munson Line, which by payment will become entitled to enforce against Kilgour Steamship Company.

The amount recoverable—i. e., proper salvage award—will be adjusted by a reference.

HANNUM v. JEROME.

(Circuit Court, N. D. New York. January 4, 1911.)

1. COURTS (§ 347*)—FEDERAL COURTS — LAW ACTION — RULES AND PRACTICE—AMENDMENTS OF PLEADINGS.

Where an action at law is instituted in a federal court sitting in New York, the rights of the parties with reference to amendment of pleadings are governed by the New York Code of Civil Procedure and the rules and practice of the Supreme Court of that state.

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

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

2. PARTIES (§ 59*)—SUBSTITUTION—OBLIGATIONS OF DECEDENT—LIABILITY OF HEIR—PLEADING—AMENDMENT.

Where plaintiff, having sent sums of money at different times to defendant's testator for investment in real estate in Colorado claiming that testator had fraudulently converted the same, sued defendant as executrix, who was also testator's widow, and his only heir and next of kin,

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

and also his only legatee or devisee, to recover the money so converted or the property in which it had been invested, and it appeared that defendant had settled her accounts as executrix and that no creditors were interested, plaintiff had a cause of action against the widow individually, and was entitled to amend, so as to make the suit one against defendant in her individual capacity only, or by joining her as an individual.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 90-94; Dec. Dig. § 59.*]

Action by Henry A. Hannum against Ella B. Jerome, as executrix of the last will and testament of Frank Jerome, deceased. On plaintiff's motion for leave to amend, so as to make the action one against Ella B. Jerome, both individually and in her representative capacity, or one against her individually, and not in her representative capacity. Motion granted.

Costello, Burden, Cooney & Walters, for plaintiff.
Fowler, Crouch & Vann, for defendant.

RAY, District Judge. The cause of action, briefly stated, is that prior to the commencement of this action, and prior to the death of Frank Jerome, he, residing in Denver, state of Colorado, by letters written to Hannum at Syracuse, or some place in the state of New York, where he resided and still resides, and perhaps by statements made personally in New York also, and by false and fraudulent representations therein and thereby made, in part at least promissory, induced Hannum to send and pay over to him (Jerome) considerable sums of money at different times, which he was to invest and agreed to invest in real estate for Hannum at and in Colorado, and which he falsely and fraudulently represented he had done; that such of the money so obtained as was put into real estate was put by said Jerome into real estate in his own name, and that it or its proceeds, and perhaps some of it and some of the proceeds, were held by Jerome and in his possession at the time of his death; that said property or its proceeds, on the death of said Jerome at Denver, Colorado, in which state he then resided, went into the hands and possession of said Ella B. Jerome, and is still in her possession and claimed by her as her own, and that it went into her possession either as executrix or administratrix of Frank Jerome originally on his death, and then to said Ella B. Jerome, or to her directly on his death, she being the widow and sole and only heir at law, next of kin, or only legatee or devisee of said Frank Jerome, if he left a will; and that she now has and holds the property or its proceeds as her own, and that it or its proceeds belongs to and is the property of the plaintiff. He seeks to recover its value. It is claimed that she had settled her accounts as executrix or administratrix, whichever she was, and that no creditors are interested. If all this is true, it would seem that the plaintiff has a good cause of action against said Ella B. Jerome either at law or in equity. Assuming this to be an action at law, the practice is regulated so far as may be by the Code of Civil Procedure of the state of New York and the rules of practice of the Supreme Court of that state.

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

I think the amendment can be, and in furtherance of justice should be, allowed. Boyd v. United States Mortgage & Trust Co., 187 N. Y. 262, 79 N. E. 999, 9 L. R. A. (N. S.) 399, 116 Am. St. Rep. 599; Kerrigan v. Peters et al., as Executors, etc., 108 App. Div. 292, 95 N. Y. Supp. 723; Tighe v. Pope, 16 Hun (N. Y.) 180; McDonald v. Ward, 57 Conn. 304, 18 Atl. 51. The amendment does not go to the extent of changing the cause of action, or of substituting a person not served for the one actually served. In Kerrigan v. Peters, supra, the words struck out by the amendment were "as executors of the last will and testament of Edward B. Fellows, late of the city of New York, deceased," after the name of the defendant. This left the action against the defendant as an individual. In Boyd v. U. S. Mortgage & Trust Co., supra, the court said:

"The power of the court to permit an amendment of the summons and complaint, so as to show that the defendant is sued individually instead of being sued in a representative capacity, is hardly open to serious question."

Here the plaintiff, Hannum, seeks to reach this property or its proceeds in the hands of the defendant, Ella B. Jerome, and wrongfully held and detained by her as her own. In Doyle v. Carney, 190 N. Y. 386, 83 N. E. 37, the plaintiff, as administrator of his deceased daughter, sued in his representative capacity to recover the value of services rendered by her in her lifetime. It appeared that she was a minor at the time the services were rendered, and that consequently such services belonged to the father, who was also her administrator. This appearing, and a motion having been made to dismiss on the ground the plaintiff could not maintain the action as administrator, as the recovery or the value of the services did not belong to the estate, but to the plaintiff, the father of the deceased, personally, the court allowed an amendment virtually making it a suit by Doyle individually and by Doyle as administrator. Held that this was error, as the right of recovery by the father rested on a basis different from that of Doyle as administrator, and that—

"if the original plaintiff could not sustain the action, the statute (section 723, Code Civ. Proc.), does not authorize an amendment of the pleading which adds the name of a person who was, as to the original cause of action, a stranger in the eye of the law."

That was, of course, bringing in another person as plaintiff, the father individually to recover upon a cause of action which had always belonged to him, while the action as brought was on a cause of action alleged to have belonged to the deceased daughter.

In Boyd v. U. S. M. & Trust Co., supra, the action was for negligence, and the designation of defendant was changed from that of a trustee to that of an individual. The Court of Appeals approves Tighe v. Pope, 16 Hun (N. Y.) 180, where an attorney sued to recover the value of services rendered to the administratrix of a deceased person's estate. The deceased had incurred no liability, and the administratrix was personally responsible, not the estate represented by her. The words "as administratrix," etc., following the name of the defendant, were stricken out.

In the case at bar, if the money or property or the proceeds of the property mentioned has come into the hands of the defendant, and it was obtained by fraud, she is liable therefor, unless equities have intervened which defeat a recovery. I can see no impropriety, therefore, in allowing an amendment striking out the words "as executrix of the last will and testament," etc., or in allowing those words to remain and adding the words "individually and" after the name Jerome, so that the suit will stand against the defendant individually and as administratrix. I see no necessity for allowing the words "as executrix," etc., to remain, however. If Ella B. Jerome ever was executrix or administratrix, and her accounts have been settled and passed, the property has passed to her individually, unless she is still holding as a trustee under some provision of the will, if there was one.

I think the case should stand as one against Ella B. Jerome individually, taking the papers as they stand. The plaintiff may amend the complaint as he shall be advised, so as to get this case to an issue.

There may be an order accordingly.

SHEPPARD v. LINCOLN.

(District Court, S. D. New York. May 13, 1910. On Rehearing, May 31, 1910.)

1. BANKRUPTCY (§ 293*)—SUIT BY TRUSTEE—BANKRUPTCY COURT—JURISDICTION.

Bankr. Act July 1, 1898, c. 541, § 23b, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3431), as amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1312), vesting the bankruptcy court with jurisdiction of suits by a trustee for the recovery of property under certain provisions of the act only unless by consent of the defendant, did not confer jurisdiction on the bankruptcy court of a suit by a trustee, under section 70e, authorizing a trustee to sue to set aside fraudulent conveyances of the bankrupt's property under the state law, except by the defendant's consent.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 293.*

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

2. APPEARANCE (§ 19*)—OBJECTIONS TO JURISDICTION—WAIVER.

A general appearance of a defendant, and the filing of a demurrer on grounds going to the merits, as well as to the jurisdiction of the court, waives the objection that the court was without jurisdiction of defendant's person.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 79-90; Dec. Dig. § 19.*]

3. BANKRUPTCY (§ 293*)—ACTION BY TRUSTEE—BANKRUPTCY COURT—OBJECTION TO JURISDICTION—WAIVER.

Where a bankrupt's trustee brought suit in the bankruptcy court to set aside an alleged fraudulent conveyance, as authorized by Bankr. Act July 1, 1898, c. 541, § 70e, 30 Stat. 566 (U. S. Comp. St. 1901, p. 3452), without obtaining defendant's consent, which was essential to the jurisdiction of such court, but the defendant appeared generally and demurred on a ground going to the merits, and also because of alleged want of jurisdiction, he thereby consented to the jurisdiction of the court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 293.*]

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

Action by John S. Sheppard, Jr., as trustee in bankruptcy, etc., against Arthur W. Lincoln. On defendant's demurrer to the declaration. Overruled, and reargument denied.

Kellogg & Rose, for complainant.
Hawkins, Delafield & Longfellow and Philip K. Walcott, for defendant.

HAZEL, District Judge. This action is brought to set aside as fraudulent a certain transfer of property to the defendant, under and pursuant to section 70, subd. "e" of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3452]). The defendant has demurred to the complaint on the ground, inter alia, that the court has no jurisdiction of the action without the consent of the defendant. The question submitted has recently been passed upon and decided by Judge Hand, in Palmer v. Roginsky (D. C.) 175 Fed. 883, and I feel constrained to follow his decision. He substantially held that, in an action brought under section 70, subd. "e" of the bankrupt act, to set aside a conveyance of property as fraudulent under the laws of the state of New York, a court of bankruptcy is without jurisdiction unless the consent of the defendant has first been obtained. He disagreed with the holding of Hurley v. Devlin (D. C.) 149 Fed. 268, where it is expressly held that the amendment of 1903 confers jurisdiction upon a court of bankruptcy, without the consent of the defendant, of all actions specified in section 70, subd. "e," and, although appreciating that the construction which he gave to section 70e resulted in effecting no change in the law as it stood prior to the amendment, yet he believed that section 23b clearly indicated that it was the intention of Congress that actions brought in the bankruptcy court under section 70e should be by consent of the defendant, and not otherwise. In Harris, as Trustee, v. First National Bank, 23 Am. Bankr. Rep. 632, 216 U. S. 382, 30 Sup. Ct. 296, 54 L. Ed. 528, the Supreme Court of the United States took notice of the fact that in section 23, specifying the cases wherein the federal courts have jurisdiction, section 70e is not mentioned. The Supreme Court, however, did not deem it necessary in that case to decide whether an action such as this may be brought in this court without the consent of the defendant, and the question is therefore still an open one. The weight of authority, however, seems to favor the view adopted by Judge Hand.

In the present case, however, it is shown that the defendant has appeared generally and demurred to the complaint on different grounds—i. e., to the merits and to the jurisdiction—and therefore I think he has submitted himself to the jurisdiction of the court. The rule is that, by appearing generally and demurring on grounds going to the merits as well as to the jurisdiction of the court, a defendant waives the objection that the court is without jurisdiction of the person of the defendant. Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101; Westinghouse Air Brake Co. v. Christensen Engineering Co. (C. C.) 126 Fed. 764; Ryttenberg v. Schefer (D. C.) 131 Fed. 313; Iowa Lillooet Gold Mining Co. v. Bliss (C. C.) 144 Fed. 446.

True, in Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, the objection that the court was without jurisdiction was raised by demurrer; but it does not appear from a reading of the case that a general appearance had previously been entered, and, moreover, there was no objection to the court considering the point on demurrer.

The demurrer is overruled, with costs.

On Rehearing.

On further consideration, I adhere to my original views that the question of jurisdiction herein is of the person, and not of the subject-matter, and therefore the defendant, by his general appearance and demurrer on jurisdictional grounds and to the merits, must be regarded as having consented to the trial of the controversy in this forum. In Re Michie (D. C.) 116 Fed. 749, cited by the attorneys for the defendant, there was interposed, first a paper challenging the jurisdiction of the court and denying that the petition contained facts sufficient to constitute a cause of action, and next an answer on the merits. On review of the decision of the referee, the court held that the respondent did not consent to the jurisdiction. But nevertheless the weight of authority, as cited in my main opinion, seems to favor interpreting a general appearance and demurrer such as interposed herein as consenting to the jurisdiction.

The reargument requested is denied.

UNITED STATES v. LONG.

(District Court, D. Oregon. January 2, 1911.)

No. 5,100.

1. UNITED STATES (§ 52*)—PUBLIC LAND OFFICE—OFFENSES—INDICTMENT.

Where an indictment alleged that defendant, being then and there a clerk in the employ of the government in the United States land office at D., during his continuance in office, did wrongfully and unlawfully agree to receive compensation for services rendered to a public land entryman, etc., sufficiently alleged that accused was an official or clerk of the government.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 52.*]

2. UNITED STATES (§ 52*)—PUBLIC LAND OFFICE—OFFENSES—INDICTMENT.

Where an indictment against a clerk of a government land office for unlawfully agreeing to receive compensation for services rendered to an entryman alleged that the services were rendered in relation to a proceeding and claim in which the United States was a party and interested, before the United States land office, to obtain title to certain government land from the government, it sufficiently appeared that the land concerning which the alleged agreement was had was the property of the United States.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 52.*]

3. UNITED STATES (§ 52*)— PUBLIC LAND OFFICE — OFFENSES — INDICTMENT—STATUTES—CONSTRUCTION.

Rev. St. § 1782 (U. S. Comp. St. 1901, p. 1212), declares that any officer or clerk in the employ of the government is inhibited from receiving or

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

agreeing to receive any compensation for any services rendered or to be rendered to any person in relation to any proceeding, matter, or thing in which the United States is a party, or interested, before any department. *Held* that, since an application to purchase lands from the government under the timber and stone act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]) is in effect the inauguration of a proceeding through which land is acquired from the government, in which the government is an interested party, such act covered an agreement by a clerk in the employ of the government in a local land office to receive compensation for services rendered in informing an entryman when certain land belonging to the United States would be open for entry under such act, and in assisting him to obtain title thereto from the United States under such act.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 52.*]

Amos W. Long was indicted for furnishing information and rendering services to one Gray, for hire, to assist him in the entry of certain land belonging to the government. On demurrer to indictment. Overruled.

John McCourt, U. S. Atty.
Veazie & Veazie, for defendant.

WOLVERTON, District Judge. The indictment charges that the defendant was, between the dates of January 1, 1906, and June 10, 1908, a duly appointed, qualified, and acting clerk in the United States land office at The Dalles, Or.; that subsequent to December 10, 1907, the defendant, as such clerk, furnished certain information and rendered services to one Gray, by informing and advising him of the status of the title to a certain quarter section of land, specifically described, and other lands, the description of which is unknown, and also by informing him when such lands would be open to entry under the public land laws of the United States; that thereafter, on or about April 10, 1908, the said Gray, in behalf of one Bennett, promised and agreed to pay defendant one-half of all sums of money that Bennett should receive for the said described quarter section of land after procuring title thereto from the government of the United States under the timber land laws, over and above the costs of procuring such title, and that the defendant agreed to receive from Bennett such sum as the latter promised to pay him as compensation for services rendered to the said Gray, and to be rendered Bennett, in relation to said lands, and to any entry or application made to obtain the title thereto from the United States; that in pursuance of said agreement, Bennett made application at said United States land office at The Dalles, Or., to purchase said lands under what is known as the "Timber and Stone Act" (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]); and thereupon it is charged:

"That the defendant, Amos W. Long, being then and there the clerk in the employ of the government, to wit, in the United States land office at The Dalles, Oregon, and during his continuance in office, did, at the time aforesaid, in the state and district of Oregon and within the jurisdiction of this court, wrongfully and unlawfully agree to receive compensation for services

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

rendered and to be rendered to O. J. Gray and Fred A. Bennett by himself in relation to a proceeding and claim in which the United States was a party and interested, before the United States land office at The Dalles, Oregon, as aforesaid, contrary to the form of the statute," etc.

This indictment is challenged by demurrer. It is first urged that it is not shown that the defendant was an official or clerk of the government. I think, however, the fact sufficiently appears by the allegation that he was a clerk in the United States land office. That office is none other than a government office, and this answers the objection.

It is next suggested that it does not appear that the lands concerning which the alleged agreement was had were the property of the United Sates; but it is alleged that title thereto was sought from the government. While it may be that the indictment might have been drafted with greater technical accuracy, yet I do not deem it vulnerable to these objections.

The greater stress is laid, however, upon a contention that, under the facts disclosed, an indictment will not lie for a violation of section 1782, Rev. St. (U. S. Comp. St. 1901, p. 1212). By this section any officer or clerk in the employ of the government is inhibited from receiving or agreeing to receive any compensation for any services rendered or to be rendered to any person in relation to any proceeding, matter, or thing in which the United States is a party, or interested, before any department. Construing this statute, the inhibited services are such as are rendered or to be rendered any person, in relation to any proceeding, matter, or thing in which the United States is a party, or interested, before any department of the government.

An application for the purchase of land from the government under the timber and stone act is, in effect, the inauguration of a proceeding through which to acquire the land from the government, and in which the government is an interested party. It is an interested party in two aspects: First, in its governmental aspect, to see that the laws are enforced and obeyed; and, second, in its proprietary right, as the owner of the land the title to which is sought to be acquired from it. But, were the application to purchase land from the government not the inauguration of a proceeding, it is a matter or thing, at least, in which the government is an interested party. The statute is very broad and comprehensive, and no doubt was designed to cover all cases where the officer or clerk might render services to parties which might be detrimental to the government's interest in some way. The officers and clerks are paid by the government, and their whole time is due to the government. But, beyond this, their positions are more or less confidential, and afford them the opportunity of gaining information respecting the government's side of any proceeding, matter, or thing arising in which it may be interested. So that, if the officers or clerks were allowed to sell their services in relation to such matters to parties other than the government, it would put the government at great disadvantage, and lead to confusion and distrust, and unfaithful and indifferent service. The purpose of the section under which this indictment was drawn is, among other things, to obviate such a state of affairs, and to insure, as far as possible, faithful and trustworthy service by the government's officers and clerks. Such, in effect, is the

construction given to this section by the Supreme Court in Burton v. United States, 202 U. S. 344, 370, 26 Sup. Ct. 688, 50 L. Ed. 1057.

I am of the opinion that the indictment is sufficient, and therefore overrule the demurrer.

UNITED STATES v. BONNERS FERRY LUMBER CO., Limited.

(Circuit Court, D. Idaho, N. D. December 5, 1910.)

PUBLIC LANDS (§ 51*)—UNSURVEYED LANDS—TITLE—LANDS RESERVED FOR SCHOOL PURPOSES.

Idaho Admission Act July 3, 1890, c. 656, § 4, 26 Stat. 215, reserved to the state sections 16 and 36 of every township, or other contiguous land in lieu thereof, for school purposes; and section 5 declared that all such lands should be disposed of at public sale, etc., should constitute a part of the permanent school fund and otherwise regulated its disposition. *Held* that, prior to an official survey, the title to land which, when surveyed, would constitute school sections in the several townships, remained in the United States; and hence, prior to such survey, the state could not grant any authority to remove timber therefrom, nor prevent the United States from recovering the value of timber so removed.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 138; Dec. Dig. § 51.*]

Action by the United States against the Bonners Ferry Lumber Company, Limited. On demurrer to defendant's answer. Sustained, with leave to amend.

C. H. Lingenfelter, U. S. Atty., and W. C. Henderson (Wm. M. Aiken, on the brief), for the United States.

D. C. McDougall and O. M. Van Duyn, for defendant.

DIETRICH, District Judge. This action is brought by the United States to recover from the defendant $2,523.36, stated to be the value of certain timber which it is alleged the defendant wrongfully cut upon and removed from certain unsurveyed lands in Northern Idaho, belonging to the government, and which will, when surveyed, constitute a part of section 36, in township 63 N., range 2 E. of Boise meridian. The defendant denies the extent of the cutting alleged, but admits that it did cut and remove a certain amount, which is stated in the answer, and sets up as a special defense that it did the cutting under a contract with the state of Idaho, and that the state of Idaho is the owner of the lands under the grant of what is ordinarily referred to as the Admission Bill (Act July 3, 1890, c. 656, 26 Stat. 215, 216), and especially of sections 4 and 5 thereof, which are as follows:

"Sec. 4. That sections numbered 16 and 36 in every township of said state, and where such sections or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said state for the support of common schools, such indemnity lands to be selected within said state in such manner as the Legislature may provide, with the approval of the Secretary of the Interior.

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

"Sec. 5. That all lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the Legislature shall prescribe, be leased for periods of not more than five years, and such lands shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

It is conceded by the government that immediately upon survey complete title to the lands vests in the state, if at the time of such survey the United States has not reserved or otherwise disposed of them; but it is vigorously insisted that prior to such survey the state acquires no vested interest, and that the United States may in the meantime reserve or otherwise dispose of the lands, if it sees fit so to do. Under this contention section 4 does not operate to consummate a transfer of title, but amounts only to a promise to grant when the lands are surveyed, a promise which the United States has in the meantime the power to withdraw. To the suggestion that such a view leaves the supposed rights of the state in a most unsatisfactory, if not precarious, condition, it is responded that, with the grant so construed, Idaho stands upon an equal footing with the other states, and that it should not be presumed that Congress will permit her to suffer any injustice by reason of the reservation or disposition of lands embraced in these sections, and in this connection attention is called to the provision of law authorizing a selection of lieu lands. The point is one of great importance; but, as I view the issues, its determination is not necessary to a proper disposition of the demurrer, and therefore no opinion is expressed thereon.

Even if it be assumed that the United States has not the legal right to convey the lands to third persons, or, by including them in reservations, permanently to withhold them from the state, it must be held at least that until the lands are surveyed it retains the legal title, and that the title of the state is therefore not complete. At most the state has but an equitable title, and until an official survey is made exact identification of the grant is impossible. It is therefore thought that the demurrer is ruled by the decision of the Supreme Court in United States v. Montana Lumber Manufacturing Company, 196 U. S. 573, 25 Sup. Ct. 367, 49 L. Ed. 604. That was an action brought by the United States against the defendant lumber company to recover the value of certain timber alleged to have been cut and removed by the defendant from unsurveyed lands, which, when surveyed, would be embraced in a section within the limits of the grant made by Congress to the Northern Pacific Railroad Company. The defense there relied upon was very similar to the defense set up in the present answer. While the lands from which the timber had been removed had never been officially surveyed by the government, they had been located by surveyors employed by the railroad company. The third section of the act granting lands in aid of the Northern Pacific Railroad Company contains the usual granting words: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns," etc.—language which, as will be observed, is similar

to that of section 4 of the act under consideration, and which, as was remarked by the court, has been frequently held to import a present grant. In the course of the opinion it is said:

"The equitable title becomes a legal title only upon the identification of the granted sections. Deseret Salt Co. v. Tarpey, 142 U. S. 241 [12 Sup. Ct. 158, 35 L. Ed. 999.] As expressed in Leavenworth, etc. Railroad Co. v. United States, 92 U. S. 733, 741 [23 L. Ed. 634]: 'They' (the words 'there be and is hereby granted') 'vest a present title, * * * though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract.' The right of survey is in the United States. It was error, therefore, in the trial court to admit the survey made by Ashley. It was also error to instruct the jury to return a verdict for the defendants. Until the identification of the even and odd numbered sections, the United States retained a special property, at least, in the timber growing in the township; and this was sufficient to enable it to recover the value of the timber cut and removed by the defendants. A contrary conclusion would impair the government's right of survey, and force it into controversies over surveys made by the railroad or its grantees. It would enable the railroad company or its grantees to despoil the lands of their timber, and leave them denuded, and maybe worthless, to the government. Indeed, it would reverse the statutory grant of powers, and transfer the location of the sections from the government to the railroad company. The extent and the effect of the power of the government to make its own surveys is expressed and illustrated in the following cases: Maguire v. Tyler, 8 Wall. 650 [19 L. Ed. 320]; Cragin v. Powell, 128 U. S. 691 [9 Sup. Ct. 203, 32 L. Ed. 566]; United States v. McLaughlin, 127 U. S. 428 [8 Sup. Ct. 1177, 32 L. Ed. 213]; Blake v. Doherty, 5 Wheat. 358 [5 L. Ed. 109]; Central Pacific Railroad Co. v. Nevada, 162 U. S. 512 [16 Sup. Ct. 885, 40 L. Ed. 1057]; United States v. Hanson, 16 Pet. 196 [10 L. Ed. 935]; Les Bois v. Bramell, 4 How. 449 [11 L. Ed. 1051]; McKay v. Dillon, 4 How. 421 [11 L. Ed. 1038]; Glenn v. United States, 13 How. 250 [14 L. Ed. 133]; Smith v. United States, 10 Pet. 326 [9 L. Ed. 442]. There is nothing in Northern Pacific Railroad Company v. Hussey, 61 Fed. 231 [9 C. C. A. 463], which militates with these views. In that case relief was granted by injunction against a trespasser upon unsurveyed land at the suit of the railway company, its contingent interest being held sufficient for that purpose. The paramount control and property in the United States was not in question."

It was conceded at the argument that under this decision it would be impracticable for the defendant by proof to establish the fact that the lands from which the timber was cut are embraced in what will be section 36, and, were it not for the admission in the complaint substantially identifying the lands with this section, it would be impossible successfully to defend upon this ground; but in my view such admission in the complaint does not substantially alter the case. The general principle remains the same, and the reasoning of the court in the Montana Lumber Company Case is thought to be decisive.

The amended demurrer to the answer will therefore be sustained, with leave to defendant to amend.

In re KEARNEY et al.

(District Court, N. D. New York. December 29, 1910.)

BANKRUPTCY (§ 156*)—ACTION AGAINST BANKRUPT—DEFENSE BY TRUSTEE.

While it is not necessarily the duty of a trustee in bankruptcy to follow the wishes of a majority in number and amount of the creditors in prosecuting or defending suits, when his judgment concurs with that of a great majority of the creditors who speak, all having the opportunity to speak, that it would be inadvisable to defend a pending suit against the bankrupt and not for the best interest of the estate, he is justified in refusing to defend; and it is not error for the referee, on application of the minority, to refuse to direct him to do so, unless such creditors will assume responsibility for the expense.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 240; Dec. Dig. § 156.*]

In the matter of William H. Kearney and others, comprising the firm of Kearney Bros., bankrupts. Review of order of C. L. Stone, referee, refusing to direct the trustee to defend an action in replevin brought prior to the institution of proceedings in bankruptcy, and permitting a compromise whereby the plaintiff in such action is to retain the goods replevied and which were not reclaimed, and discontinue the action without costs. Affirmed.

McGowan & Stolz, for trustee.

Tracy, Chapman & Tracy, for certain creditors.

RAY, District Judge. Prior to the institution of the bankruptcy proceedings one Charles A. Shafer brought a replevin action in the Supreme Court of the state of New York to recover certain goods obtained from him by the bankrupt firm on materially false statements made in writing as to their financial condition. The goods in question, of the value of $3,970, were actually replevied, and, no bond being given, the goods were turned over to Shafer. After bankruptcy proceedings a meeting of creditors on due notice was called and held to determine whether the trustee should appear and defend said action, or allow Shafer to retain the goods and discontinue the action without costs. At such meeting the trustee, who is a reputable attorney of standing, appeared in person and by Benj. Stoltz, his attorney. Geo. D. Chapman, also a reputable attorney and representing certain creditors, and Chas. G. Irish, also a reputable attorney, representing another creditor, appear to oppose and opposed the proposed compromise. Other creditors were present in person or by attorney.

The firm assets, as shown by the schedules made in May, 1910, are $16,150.29, and the liabilities $32,353.31. The liabilities of the individual partners are greater than their assets. Forty claims, representing a total of $17,766.69, voted in favor of the proposed compromise, and nine claims, representing $3,301.22, voted in opposition. No question was raised as to the right of those voting to represent such claims and vote at the meeting. It seems to be beyond all question that in their written statement made to Shafer March 1, 1910,

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

false statements on which he relied, presumptively so, at least, were made. The assets were placed at $30,791.44, and May 9th the firm placed them at $16,150.29. The liabilities were placed at $17,664.25, and May 9th following at $32,353.31. March 1, 1910, the firm in writing represented itself as solvent by some $13,000, while May 9, 1910, in writing it showed itself insolvent by some $16,000. This great change in less than two months from apparent and represented solvency to absolute and serious insolvency was not explained to the trustee or to the referee. It was not claimed that it grew out of misfortunes, or losses, or shrinkage in value.

The referee certifies that the attorney for the bankrupts stated at the meeting that the assets of the firm were much less, and the liabilities a great deal more, than set forth in the statement given Shafer. The referee also certifies that the creditors objecting to the compromise "refused to indemnify the estate for any expense the trustee might incur in defending said suit."

The question is whether a trustee shall defend such a suit under such conditions against his own judgment and against the wishes of a large majority in number and amount of those creditors who speak at all, something like one-fifth in number and amount of those speaking at all requesting that it be done. That the defense of such a suit would delay the settlement of the estate and the payment of dividends and result in considerable expense is apparent. Success in defending, under the facts appearing, would seem improbable. It is not necessarily the duty of the trustee to follow the wishes of a majority in number and amount of the creditors in prosecuting or defending suits. He is to exercise his own judgment, of course. But when his own judgment concurs with that of a great majority of all the creditors who speak, all having the opportunity to speak, and also with that of the referee or court in charge, it would seem plain that such judgment should control, and that the referee commits no error in authorizing or directing the compromise.

Section 55c of the bankruptcy act says:

"The creditor shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act." Act July 1, 1898, c. 541, 30 Stat. 559 (U. S. Comp. St. 1901, p. 3442).

Section 47 says:

"Trustees shall respectively * * * (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest."

General Order 28 (89 Fed. xi, 32 C. C. A. xxviii) provides that:

"Whenever it may be deemed for the benefit of the estate of a bankrupt * * * to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee * * * may file his petition therefor, and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee."

All this authorizes and provides for the course pursued in this matter. But unanimity of action on the part of the creditors is not suggested or demanded. The determining question is what action is for the best interests of the estate; that is, the creditors as a whole. Section 11 of the bankruptcy act, relating to suits by and against bankrupts, especially those pending at the time the bankruptcy proceedings are instituted, says (subdivision "b"):

"The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt."

In relation to this provision Collier on Bankruptcy (7th Ed.) 221, says:

"The words here used are not the same as those of the former law, but their effect is similar. One option is with the trustee. He may or may not decide to defend, though, when in doubt, he should report at a meeting of creditors for instructions. The other is with the court. It may, but need not, order the trustee to intervene."

It cannot be that the court must direct the trustee to intervene and prosecute a pending suit or defend a pending suit, regardless of the merits and prospects of success; and it cannot be that a trustee must defend such a suit when the creditors are appealed to and four-fifths in number and amount vote against such action. See Traders' Bank v. Campbell, 14 Wall. 87, 20 L. Ed. 832; Reade v. Waterhouse, 52 N. Y. 587; In re Porter (D. C.) 109 Fed. 111. When there is a fair chance of success in the pending litigation, and its prosecution to judgment would benefit the estate by preventing the taking away of money or property, or by way of the recovery of money or property, or by way of the establishment of some important fact or question of law necessary to the efficient administration of the estate, and the amount involved directly or indirectly is substantially more than the probable cost of the litigation, it would be the plain duty of the trustee to defend or prosecute as the case may be. But here the evidence, so far as known, indicates probable and almost inevitable defeat, and both the trustee and his attorney, as well as the learned referee and a very large majority of the creditors, have united in virtually declaring the defense of the suit not wise or beneficial to the estate, and the proposed compromise and settlement wise and proper.

I discover no good reason for entertaining a different view. If the objecting creditors, or any of them, will fully indemnify the trustee for all costs and expenses incurred in defending the suit, and will come in and defend at their own cost, with the provision that, if successful in the defense, they shall be fully reimbursed from the recovery—that is, the value of the property taken in the replevin action, if held to have been wrongfully taken and its value is recovered—they may do so; and if within 10 days after service of a copy of the order herein they so elect in writing, and file a bond of indemnity with two sureties, approved by the referee, the order of the referee will be opened and reversed, and the trustee directed to defend; otherwise, the order of the referee is approved and affirmed.

CAMPBELL v. ADAIR et al.

(Circuit Court of Appeals, Fifth Circuit. January 3, 1911.)

No. 2,089.

TRESPASS TO TRY TITLE (§ 35*)—PLEADING—ISSUES.

The defendants in an action of trespass to try title under the Texas statute filed a plea of not guilty and also a special plea, alleging that the sale of the land by the state under which plaintiff claimed had been canceled, and also setting up title in themselves under subsequent sales. The land was originally public school land of the state, and, to authorize a sale thereof under the statute, the purchaser must have been at the time a settler on the land, and he was required to continue to reside thereon for three years, and make improvements of a certain value, otherwise the sale was subject to forfeiture. It was admitted that a forfeiture of the sale under which plaintiff claimed was declared by the Commissioner of the General Land Office. *Held* that, under the issues, it was not error to instruct the jury that, to sustain his title, plaintiff must prove that the purchasers under whom he claimed resided on the land at the time they made the purchases, and also complied with the statute as to continued residence and improvements.

[Ed. Note.—For other cases. see Trespass to Try Title, Dec. Dig. § 35.*]

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

Action at law by D. A. Campbell against C. J. Adair and others. Judgment for defendants, and plaintiff brings error. Affirmed.

G. G. Wright and K. R. Craig, for plaintiff in error.

A. H. Kirby and S. H. Morrison, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. This case is a consolidation of seven suits instituted by plaintiff in error for the recovery in the aggregate of eight sections of land situated in Martin county, Tex., four sections of which were claimed by plaintiff under a purchase from the state of Texas by William Moss, and four sections under purchases made by J. P. Waggener and William Young. The original suit under the style of this cause was for two sections of said land held by the defendant, one section of which was embraced in the Moss purchase and one section in the Waggener and Young purchases. So that all the issues involved in all the other cases were involved in this suit, and, for that reason, the remaining six cases were consolidated and tried with this case. The pleadings in all of the cases were identical, except for the difference in the names of the defendants and the tracts of land involved, and by agreement the pleadings in only one case were set out in the bill of exceptions, and said pleadings are referred to as the pleadings under each one of the other cases. The original petition was in statutory form of trespass to try title. The defendant answered by a plea of "not guilty," which plea was followed by the following special pleading:

"For further answer to said petition this defendant says: That the land in controversy was originally set apart for the benefit of the public free

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

school fund of the state of Texas, and plaintiff claims title to the same through and under the sales claimed to have been made by the state of Texas to Wm. Moss and W. P. Young on or about the 3d day of October, 1902, and 21st day of January, 1903, by virtue of his application, affidavit, and obligation to purchase same, filed in the General Land Office of the state of Texas, and an award thereof by the Commissioner of the General Land Office of the state of Texas. That thereafter the Commissioner of the General Land Office of the state of Texas declared said land forfeited, and, so indorsed, the obligation given for said land, which indorsement was made and entered on the 17th day of November, 1905. That thereupon said land became and was forfeited to the state of Texas, subject only to the right of plaintiff's vendor within six months thereafter to institute a suit in the district court of Travis county, Tex., against the Commissioner of the General Land Office of the state of Texas for the purpose of contesting such forfeiture and setting aside the same upon the ground that the facts did not exist authorizing such forfeiture. That neither plaintiff nor his vendors, immediate or remote, ever instituted such suit within such time, by reason of which such forfeiture of the Commissioner of the General Land Office became and is fixed and conclusive, and plaintiff is now and has been since the expiration of said six months from the date of the indorsement of such forfeiture barred from any right or interest in or to said land, and defendant here now pleads such bar, and is ready to verify the facts constituting such bar. For further answer, and by way of cross-action, defendant says: That he is the owner of, entitled to, and in possession of, section 6, block 36, township 1-S, Texas & Pacific Railway Company survey, in Martin county, Tex., and section 12, block 37, township 1-S, Texas & Pacific Railway Company survey, in Martin county, Tex. That plaintiff asserts title to such land by virtue of and under a purchase thereof of one Wm. Moss from the state of Texas for section 12, and one by W. P. Young for said section 6. That all the right, title, or interest of said Wm. Moss and W. P. Young, and all persons claiming under them, has been forfeited by the Commissioner of the General Land Office of the state of Texas, and that such forfeiture has become, and is now, fixed and conclusive. That the claim asserted by the plaintiff to said land by reason of a mesne conveyance from the original purchaser of said land has been recorded in Martin county, Tex., and that said claim and said conveyance constitute and are a cloud upon defendant's title to said above-described property, which cloud defendant is entitled to have removed. Wherefore, premises considered, this defendant prays that he have judgment against the plaintiff for the title to and possession of said land, removing the cloud constituted by the claim of the plaintiff, and the conveyance above named upon defendant's said title, that he have his writ of possession, and recover of and from the plaintiff all costs of suit, and for general relief."

To this answer the plaintiff filed his first supplemental petition, as follows:

"First. Plaintiff excepts to so much of such answer as sets up the failure of the plaintiff or his vendor to institute suit in the district court of Travis county for the purpose of setting aside the alleged action of the Commissioner of the General Land Office, for the reason that such failure to sue is no bar to this action.

"Second. Further replying to said answer, plaintiff says that the alleged act of the Commissioner of the General Land Office in declaring and indorsing a forfeiture of the purchase of plaintiff's respective vendors, R. L. Slaughter and Wm. Moss, was void and of no effect, for the reason that the facts did not exist which under the law were prerequisite to the exercise of such power, for that the alleged declaration and indorsement of forfeiture were based upon the sole grounds of the alleged failure of plaintiff's vendors, R. L. Slaughter and Wm. Moss, to reside upon and improve the respective lands purchased by them as required by law; whereas the facts were that plaintiff's said vendors had resided upon and improved their respective lands as required by law, that long prior to the date of said attempted forfeiture

plaintiff's vendor, R. L. Slaughter, and his predecessors in title, and the said Wm. Moss, had for a period of three consecutive years, each next after the purchase thereof from the state resided upon and improved in good faith his home section of the respective purchases, viz., R. L. Slaughter, section No. 2, block 37, and Wm. Moss, section 46, in block 37, such improvements being of a value in each case in excess of $300. And the Commissioner of the General Land Office was without the power or jurisdiction to forfeit said purchases upon the grounds stated or for any other reason, all interest due the state on said purchases having been paid as the same matured, all of which plaintiff is ready to verify."

This comprises all the pleadings that there were in the case. That portion of defendant's answer which set up plaintiff's failure to bring suit in the district court of Travis county was abandoned at the hearing. Hence there was no action taken on the demurrer thereto, and it was not considered by the court on the trial. The case, consolidated as before stated, went to trial before a jury on October 13, 1909. The verdict of the jury was in favor of the defendants, each for the particular tract of land claimed by him. Upon which verdict, the court rendered and entered judgment that plaintiff take nothing by his suit, and that he pay all costs, to all of which plaintiff excepted and duly sued out a writ of error.

William Moss made application the 3d day of October, 1902, to purchase from the state as his home section 46, in block 37, and subsequently on the same day made application for the purchase of sections 8, 12, and 44, in block 37, as additional lands. On October 5, 1905, he conveyed all these sections to R. L. Slaughter. On October 3, 1902, J. P. Waggener made his application as an actual settler for the purchase of section 2, in block 37, for a home. On January 21, 1903, he conveyed this section to W. P. Young, who duly filed his substitute applications and obligations, and on June 12, 1903, filed his applications and obligations for the purchase of his additional lands, sections 6 and 18, in block 36, and June 17, 1904, for purchase of section 22, in block 37. On December 13, 1904, he conveyed these four sections to R. L. Slaughter, who on the same day filed his substitute applications and obligations covering these sections, and December 7, 1907, conveyed to D. A. Campbell all of the eight sections involved in this suit. The applications of Moss and Waggener for the purchase of these lands from the state show that they were made under the provisions of title 87, c. 12a, Rev. St. 1895, and the amendments thereto by the act of May 19, 1897 (Laws, 1897, c. 129), and the provisions of an act relating to the sale and lease of public free school and asylum lands, and to repeal all laws and parts of laws in conflict therewith, approved April 19, 1901 (Laws 1901, c. 125). The statute prescribing the manner of sale of such lands provided:

"When any portion of said land has been classified to the satisfaction of the commissioner under the provisions of this chapter or former laws, such land shall be subject to sale, but to actual settlers only." Article 4287, Sayles' Ann. Civ. St. 1897.

The purchases of the land involved were made under the act of 1901, which prescribed the form of application, bond, affidavit, amount of payment, and rate of interest. No question was made in this case

as to the purchases of William Moss, Waggener, and others being in the form prescribed by the statute.

Section 3 of the act of 1901 (Supplement to Sayles' Annotated Civil Statutes of 1897–1904, p. 442) provides, among other things:

"Every purchaser shall be required within three years after his purchase to erect permanent and valuable improvements on the land purchased by him, which improvements shall be of the reasonable market value of three hundred dollars. If any purchaser shall fail to reside upon, and improve in good faith the land purchased by him as required by law he shall forfeit said land and all payments thereon to the state to the same extent as for the nonpayment of interest, and such land shall be again upon the market as if no such sale and forfeiture had occurred, and all forfeitures for non-occupancy shall have the effect of placing the land upon the market without any action whatever on the part of the Commissioner of the General Land Office."

Article 4218*l*, Sayles' Ann. Civ. St. 1897, provides:

"If upon the 1st day of November of any year the interest due for the year on any obligation remains unpaid, the Commissioner of the General Land Office shall indorse on such obligation 'land forfeited' and shall cause an entry to that effect to be made on the account kept with the purchaser, and thereupon said land shall be thereby forfeited to the state without the necessity of re-entry or judicial ascertainment and shall revert to the particular fund to which it originally belonged and be resold under the provisions of this chapter or any future law."

The act of 1901 did not repeal the section just recited, which is in the act of 1897 (Slaughter v. Terrell, 100 Tex. 600, 102 S. W. 399), and the Commissioner of the General Land Office was authorized to indorse the forfeiture of the land for failure to reside upon and improve the land in the same manner as was provided for his declaring the forfeiture for nonpayment of interest; his authority for doing so being dependent upon the existence of the facts of nonpayment or failure to improve. Gracey v. Hendrix, 93 Tex. 30, 51 S. W. 846.

Article 4218j, Sayles' Ann. Civ. St. 1897, provides:

"All sales shall be made by the Commissioner of the General Land Office or under his direction. He shall prescribe suitable regulations whereby all purchasers shall be required to reside upon as a home the land purchased by them for three consecutive years next succeeding the date of their purchase except when otherwise provided. Such regulations shall require the purchaser to reside upon the land for three consecutive years herein mentioned, and to make proper proof of such residence and occupancy to the Commissioner of the General Land Office within two years next after the expiration of said three years by his affidavit, corroborated by the affidavits of three disinterested and credible persons to be certified by some officer authorized to administer oaths. And on making such proof the commissioner shall issue to the purchaser, his heirs and assigns a certificate showing that fact."

The plaintiff on the trial introduced evidence of the classification and valuation of the land, the several applications to purchase, obligations, and awards covering all of the lands in controversy as well as the mesne conveyances from the original purchasers down to the plaintiff, and then introduced testimony tending to prove the residence upon the lands and improvements made thereon and the value of such improvements.

The plaintiff in error, who was plaintiff below, submits that the only issue made by the pleadings, and which the plaintiff was required to meet, was as to the residence upon and improvement in good faith of the land by the respective persons claiming to have purchased them from the state, that the error of the trial court was in submitting the additional issue of the validity of the original purchase from and the sale by the state, that is, the question as to whether the respective persons had actually settled upon the land at the time of the filing of their respective applications for the purchase of the same. He urges that this issue was not only not raised by the pleadings, but was in effect excluded thereby; that the defendant by his pleadings specifically alleged that there was a sale by the state and a purchase by the plaintiff's vendor; that this, where nothing to the contrary was alleged, was equivalent to an admission of a legal or valid sale, and that the allegation of forfeiture implied that there was a sale and rights acquired by it as a subject of forfeiture; that the declaration of forfeiture indorsed on the several applications as well as the reclassification and appraisement of the land was an admission that there had been a sale and right acquired under it, and such rights were forfeited because of the supposed failure to reside upon and improve the land; that, if the applicants for purchase were not in fact actual settlers on the land at the time they filed their application to purchase, there was no sale, because there was not a person to whom the commissioner by law was authorized to make a sale, and it is settled law that, although the commissioner may accept the money of a proposed purchaser, approve his application and bond, and award the land, it is not a sale, and that the transaction is void, and does not have the effect of taking the land off the market, and another person who is an actual settler on the same land may file his application and obligation and tender the purchase money to the commissioner, and upon proof of such facts recover the land by suit of trespass to try title from the person to whom the commissioner had so improperly awarded it.

Plaintiff in error further contends that the special pleading filed by the defendant in addition to his plea of "not guilty" was an abandonment of his plea of "not guilty," that the reply of the plaintiff to the plea of defendant was in effect an admission by the plaintiff that his title was as stated by the defendant, and that the commissioner had declared the purchase forfeited, but made the issue that the action of the commissioner was ineffective and void for the reason that the facts did not exist, viz., the failure to reside upon and improve the land, which were prerequisite to the power of forfeiture given by statute to such officer. On the other hand, the defendant submits and urges that this being a statutory action of trespass to try title, and the defense being "not guilty" (the special plea in bar by defendants having been abandoned at the trial and not being considered by the court), the burden was on plaintiff to show, first, a valid purchase of the land from the state by his vendors; second, continued residence upon and occupancy of the land by the original purchaser and his vendees for three years next succeeding the date of purchase; third, placing on the land purchased by such original purchaser within these three years improvements to the value of $300.

That none but those who were actual settlers on the public free school land at the time of making application and affidavit of purchase were entitled to purchase and the award by the Commissioner of the General Land Office to one not such actual settler was void, and conferred no rights. That no question was made at the trial by defendants, nor is any made here that the applications, affidavits, and obligations under which the plaintiff claimed were not in the form prescribed by the Commissioner of the General Land Office, nor was any question made as to the plaintiff's ownership of whatever rights existed under said applications, affidavits, and obligations. The contention was made at the trial, and is here made, that the affidavit made by William Moss and the similar one by J. P. Waggener in their respective applications to purchase were false when made and conferred no rights on them or their vendee, plaintiff in error. The plaintiff admitted in open court on the trial below that the Commissioner of the General Land Office after having indorsed the forfeiture placed these lands on the market for sale again, and that these defendants purchased under that sale and are holding under a purchase made from the state from this subsequent offer; also, that all the applications, obligations, and affidavits by these defendants were in due form.

There was conflict in the testimony on the trial as to the occupancy of what are called the "home sections" by the vendors of the plaintiff.

The trial judge charged the jury in substance that:

"If you believe from the evidence that William Moss was an actual settler on section No. 46 of block No. 37, which he claimed to be his home section, and that he in good faith resided upon it as a home for three years next succeeding the 3d of October, 1902, and improved the same and during said years placed on said section permanent and valuable improvements of the reasonable market value of $300, you will find for the plaintiff as to the Moss land. On the other hand, if you fail to find from the evidence that William Moss was such actual settler on October 3, 1902, or to find that he in good faith resided on the section as a home for the three years specified, and improved the same, or if you fail to find that during the three years mentioned he placed on said land valuable improvements of the reasonable market value of $300, then in either of these events your verdict will be in favor of the defendant."

And similar instructions were given as to the other sections involved.

Against these instructions plaintiff in error assigns that the court erred by submitting to the jury by his charge, as an issue, the question of whether the plaintiff's vendor, William Moss, was an actual settler on the land at the time he filed his application to purchase same. Whatever disposition we make of this assignment will render the other assignments immaterial and excuse us from specially examining them. In Shields v. Hunt, 45 Tex. 426, we find in the opinion this language:

"It has, at least ever since the decision of this court in the case of Rivers v. Foote, 11 Tex. 662, been, we believe, the recognized rule of pleading and practice in actions of trespass to try title that when the defendant pleads 'not guilty,' and also pleads specially, the effect of the plea of 'not guilty' is merely to impose on the plaintiff the necessity of establishing his title, and as a consequence the defendant is limited in his defense to the special defenses upon which, by his pleading, he has notified the plaintiff he intends to rely. * * * By pleading specially the defendant gives notice of his defenses, and the plaintiff has the right to suppose he will rely on none

other, and ought not to be required to come prepared with evidence to meet other defenses than those which the defendant by his pleadings has asserted as the matters of defense upon which he will rely."

In Custard v. Musgrove, 47 Tex. 217, the question in the case on appeal was: Did the burden of proof rest on the defendant Musgrove, he having pleaded title in himself, derived, as the interest sued for, from the plaintiff Walter Custard? If so, the court erred in directing the jury to find a verdict for the defendant, defendant having adduced no evidence in support of his plea and in fact no evidence at all.

"Since the decision of the case of Rivers v. Foote, 11 Tex. 670, it has been regarded as substantially settled that when a defendant in an action of trespass to try title to land files a special plea setting up title in himself and setting out his title he is confined in his defense to the title set up by him, and that the general denial or plea of 'not guilty' that he may have pleaded also is thereby waived. This rule has been directly affirmed by the late decision of this court in Shields v. Hunt, supra."

It will be observed, we think, from a comparison of all the cases, and we think we have examined all of the Texas cases on this subject, that the rule recognized as well settled cannot be applied to this case in the manner contended for and to the effect insisted on by the plaintiff in error. The fact that that portion of defendant's answer which set up plaintiff's failure to bring suit in the district court of Travis county was abandoned at the hearing, and that hence there was no action taken on the demurrer thereto, and it was not considered by the court on the trial, does not in our opinion at all affect the application of the rule to the plea the defendant had filed, and the suggestion of that fact by the defendant is without force.

We conclude that the judgment of the court below should be affirmed. It is so ordered.

ARMSTRONG CORK CO. v. MERCHANTS' REFRIGERATING CO. et al.

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

No. 3,385.

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 245*)—ENFORCEMENT—NATURE OF ACTION.
   A suit to enforce and foreclose a mechanic's lien is a suit in equity, and not an action at law in the national courts.
   [Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 428; Dec. Dig. § 245.*]

2. ACTIONS (§ 30*)—DISTINCTION BETWEEN ACTIONS AT LAW AND IN EQUITY—NATIONAL COURTS.
   The difference between causes of action at law and in equity inheres in the natures of the causes, is of substance, and not of form, cannot be eradicated by declarations or names, and is sedulously preserved in the national courts.
   [Ed. Note.—For other cases, see Action, Cent. Dig. § 216; Dec. Dig. § 30.*]

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

3. COURTS (§ 414*)—ACTIONS (§ 30*)—DUAL JURISDICTION OF CIRCUIT COURTS—SUIT AT LAW OR IN EQUITY.

The Circuit Courts of the United States have a dual jurisdiction, a jurisdiction at law and a jurisdiction in equity, vested in the same judges and officers.

The facts stated, and the relief sought in a first pleading, and not its form or name, determine whether it invokes the jurisdiction and commences a suit at law or in equity.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 414;* Actions, Dec. Dig. § 30.*]

4. EQUITY (§ 275*)—PLEADINGS—AMENDMENT.

An amendment to a pleading which sets forth no new cause of action relates back to the filing of the pleading amended, and the case stands as though the amendment had been then filed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 567; Dec. Dig. § 275.*]

5. EQUITY (§ 330*)—DEFECTS—WAIVER.

Defendants whose names are stated in the caption or the body of the bill, who have been subpœnaed, have appeared generally, and have defended on other grounds, but have not demurred on the specific ground that the bill contains no prayer for process, are estopped from defeating the pleading or the suit on that ground, for such a defect is of form, and not of substance.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 661, 662; Dec. Dig. § 330.*]

6. LIMITATION OF ACTIONS (§ 118*)—LIS PENDENS (§ 22*)—SUIT COMMENCED BY FILING OF BILL.

A suit in equity is commenced in a national court by the filing of the bill with the honest intention to prosecute the suit diligently, provided there is no detrimental or unreasonable delay in the subsequent issue or service of the subpœnas.

However, notice of lis pendens is not given by the filing to a bona fide purchaser until the subpœnas are served on the material defendants.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 528; Dec. Dig. § 118;* Lis Pendens, Cent. Dig. § 35; Dec. Dig. § 22.*]

7. COURTS (§ 366*)—FEDERAL COURTS—EFFECT OF DECISIONS OF STATE COURTS—LIMITATION.

The courts of the state of Missouri hold that where a petition to enforce a mechanic's lien that was created and limited by a statute of that state is filed within the time limited, but the process is not issued until after the expiration of that time, the suit is not barred.

Held: Applying the doctrine of laches in analogy to this statute, as interpreted by the courts of the state, a complainant in a federal court who pursues a similar course is not guilty of fatal laches.

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

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

8. MECHANICS' LIENS (§ 260*)—COMMENCEMENT OF SUIT—AMENDMENTS.

A complainant on the last day for commencing such a suit filed, in a Circuit Court of the United States in a state in which a suit to enforce a mechanic's lien may be tried and treated in the state courts as an action at law, a petition to enforce a mechanic's lien which was in the form used in such courts, and not in the form of a bill in equity in the federal courts, but which stated facts and prayed relief sufficient to constitute a good cause of action in equity. Three days later the complainant caused subpœnas to be issued and served. Six days after the filing of the bill, and before any copy had been taken out of the clerk's office, the com-

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

plainant filed an amended bill in the form of a bill in equity which stated no new cause of action.

Held: The filing of the original pleading was the commencement of a suit in equity, the amended bill related back to that time, and the suit was not barred by laches, although the subpœnas were not issued until three days after the time to commence the suit prescribed by the statute had expired.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 456–468; Dec. Dig. § 260.*]

9. MECHANICS' LIENS (§ 23*)—RIGHT TO LIEN—IMPROVEMENT REMAINING PROPERTY OF LESSEE.

A. made a lease to B. of a warehouse he was to rent, and therein gave B. permission to insulate it to enable him to use it as a cold storage warehouse, by placing within it material which could not be removed without destroying the value of the material and seriously injuring the building, but they stipulated in the lease that this material should not be a part of the realty, but should remain the property of the lessee, and the latter, by a provision of the lease, pledged this material to secure payment of the rent. The lease was recorded, A. constructed the building, thereafter the complainant made a contract with B. to insulate the building and performed the contract.

Held: The reversion of the lessor was not liable to a mechanic's lien for the value or the price of the insulation.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 24; Dec. Dig. § 23.*]

10. MECHANICS' LIENS (§ 10*)—PROPERTY SUBJECT.

Personal property is not liable to a mechanic's lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 12; Dec. Dig. § 10.*]

11. FIXTURES (§ 4*)—INTENT OF OWNER.

The true test of the character of an improvement is the intent of the owner of the real estate to incorporate, or not to incorporate, it permanently in his realty as a part thereof.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 3; Dec. Dig. § 4.*]

12. FIXTURES (§ 14*)—PERSONALTY AND REALTY BETWEEN LESSOR AND LESSEE, VENDOR AND VENDEE AND MORTGAGOR AND MORTGAGEE.

The line of demarcation between realty and personalty in cases of landlord and tenant differs from that in cases of vendor and vendee, or mortgagor and mortgagee, because the occupancy of the premises is more transitory in cases of landlord and tenant.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 22; Dec. Dig. § 14.*]

13. MECHANICS' LIENS (§ 78*)—IMPROVEMENT BY LESSEE—RECORD OF LEASE—NOTICE TO CONTRACTOR.

The record of a lease is notice to a subsequent contractor with the lessee of the terms of the lease pertinent to the questions of a mechanic's lien upon the reversion of the lessor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 111; Dec. Dig. § 78.*]

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

Bill by the Armstrong Cork Company against the Merchants' Refrigerating Company and others. Decree (171 Fed. 778) for defendants, and complainant appeals. Order sustaining demurrer of certain defendants and dismissing the bill as to them sustained, and order sus-

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

taining demurrers and dismissing the bill against the other defendants reversed, and cause remanded.

Denton Dunn (William S. Gilbert and Henry D. Ashley, on the brief), for appellant.

James S. Botsford (Buckner F. Deatherage, Goodwin Creason, and F. V. Kander, on the brief), for appellees.

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

SANBORN, Circuit Judge. This is a suit to foreclose a mechanic's lien. The materials and labor were furnished to a lessee, the defendant, the Merchants' Refrigerating Company, a corporation, to enable it to insulate a building which had been erected by the lessor, the defendant, Morris Lyon, as trustee, on land owned by him. The bill of the complainant was repeatedly amended, and the suit was finally submitted to the court below on the last amended bill and numerous demurrers and pleas, which presented two questions: Was the suit of the complainant barred by its laches? and, if not, did the amended bill state facts sufficient to show that the complainant was entitled to a lien upon the interest of the lessor in the land and building? The court below answered the first question in the affirmative, dismissed the bill in pursuance to that answer, and did not consider or decide the second question. The facts which conditioned the determination of the first question were these:

The statute of Missouri, which creates the mechanic's lien, limits the time within which a suit may be brought to enforce it to 90 days after the date of the filing of the statement of the lien with the clerk of the court. Rev. St. Mo. 1899, § 4218 (Ann. St. 1906, p. 2310). Under the established practice in the courts of the state of Missouri such suits may be treated and tried as actions at law, but in the courts of the United States they are suits in equity. Scheffield Furnace Co. v. Witherow, 149 U. S. 574, 579, 13 Sup. Ct. 936, 37 L. Ed. 853; Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co., 133 Fed. 267, 271, 68 C. C. A. 19, 23. One of the defendants in the suit in hand was Willard P. Hall, who, as receiver and trustee in bankruptcy of the Refrigerating Company, had succeeded to the interest of that lessee in the land and building. Complainant's counsel had prepared their petition to foreclose the lien for filing in the state court on the assurance of Mr. Hall that he would be officially discharged before the ninetieth day after the filing of the statement of lien. The ninetieth day was February 7, 1908, and on February 6, 1908, Hall told the counsel for the complainant that an obstacle had appeared which would prevent his discharge until after the ninetieth day. Then it became necessary to make Mr. Hall a defendant in the suit, and counsel found that there was no federal district judge in the Western district of Missouri from whom they could obtain leave to sue the receiver and trustee, and they went to Red Oak, Iowa, and obtained from Judge McPherson, who had been assigned to the Missouri district, an order permitting them to sue the officer of the federal court, but the judge requested that the suit be brought in the federal court if counsel found

that that court had jurisdiction of the controversies. Thereupon the counsel for the complainant inserted the jurisdictional averments in the petition which they had drawn and filed it on the ninetieth day, but did not have time to redraft it in the usual form of a bill in equity. On the same day a summons at law was issued upon the petition and delivered to the marshal who subsequently returned it without service on April 27, 1908, by direction of complainant's counsel who learned on Saturday, February 8, 1908, that subpœnas in chancery instead of a summons at law should have been issued, and on Monday, February 10, 1908, they caused such subpœnas to be issued and to be served upon the defendants on that day and the succeeding one. On February 13, 1908, and before any copy of their petition had been taken out of the clerk's office they filed an amended petition in the customary form of a bill in equity, except that it contained no prayer for process, nor did the original petition.

Counsel for the defendants argue (1) that the original petition was filed in an action at law on the ninetieth day, and while a summons was issued none was served so that the action at law was never commenced; (2) that neither the original petition, nor the amended petition which was filed on February 13, 1908, were effective as bills in equity because neither contained any prayer for process; and (3) that the amended petition could not constitute an amendment of the original petition because it was a bill in a suit in equity, while the original petition was a complaint in an action at law; and (4) that the amended petition and the subpœnas were too late to commence a suit in equity to foreclose the mechanic's lien, because the former was not filed and the latter were not issued until several days after the expiration of the ninety days from the date of the filing of the statement of the lien, and it was indispensable to the maintenance of the suit that the former should have been filed and the latter should have been issued within the ninety days.

For the purpose of the consideration and decision of this case it is conceded that no action at law was commenced by the filing of the original petition and the issue of the summons which was returned without service by order of complainant's counsel. But that petition stated facts which constituted a good cause of action in equity, a cause of action which entitled the complainant to a decree for the foreclosure of its mechanic's lien. That petition set forth the interests of the defendants in the property in controversy, a contract between the Refrigerating Company and the complainant for the materials and labor requisite to insulate the building in order to make it a cold storage warehouse, the furnishing of the materials and the performance of the labor by the complainant pursuant to the contract, the Refrigerating Company's indebtedness to the complainant for these materials and this labor in the sum of $12,761.16, and the filing of the statement and claim of lien as prescribed by the statute, and it also contained a prayer that the complainant have judgment against the Refrigerating Company for the amount of the latter's indebtedness, and that "the same may be declared a lien against the property above described prior and superior to the lien or claim of each and

all the defendants." The United States Circuit Court for the Western district of Missouri was one court with a dual jurisdiction—a jurisdiction of actions at law and a jurisdiction of suits in equity—vested in and exercised by the same judges and the same clerk and marshal. The difference, however, between causes of action at law and causes of action in equity is in matter of substance, and not of form. It inheres in the natures of the causes themselves, and it cannot be extracted by legislation or declaration. This ineradicable difference is sedulously preserved in the forms of the suits which enforce these causes in the national courts. In those courts a legal cause of action may not be sustained in equity because the parties are entitled to a trial of the issues in such a cause by a jury under article 7 of the amendments to the Constitution of the United States, and it is only when there is no adequate remedy at law that a suit in equity can be maintained. On the other hand, equitable causes and defenses are not available in actions at law because such causes invoke the judgment and appeal to the conscience of the chancellor, and the free exercise of that judgment and conscience is forbidden in actions at law by the rule which entitles either party to a trial of all the issues of fact by a jury. Bagnell v. Broderick, 13 Pet. 436, 10 L. Ed. 235; Foster v. Mora, 98 U. S. 425, 428, 25 L. Ed. 191; Scott v. Armstrong, 146 U. S. 499, 512, 13 Sup. Ct. 148, 36 L. Ed. 1059; Lindsay v. Bank, 156 U. S. 485, 493, 15 Sup. Ct. 472, 39 L. Ed. 505; Schoolfield v. Rhodes, 82 Fed. 153, 155, 27 C. C. A. 95, 97; Davis v. Davis, 72 Fed. 81, 83, 18 C. C. A. 438, 440; Highland Boy Gold Min. Co. v. Strickley, 116 Fed. 852, 854, 54 C. C. A. 186, 188; Schurmeier v. Connecticut Mutual Life Ins. Co., 137 Fed. 42, 46, 69 C. C. A. 22, 26. As the essential character of a cause of action and of the remedy it seeks determines whether it is a cause at law or in equity, neither the parties to it nor the court can by declaration or procedure make a cause of action at law a cause in equity, or vice versa, and when a pleading by the complainant, whether styled a petition, a declaration, or a bill, is filed with the clerk of a federal court which states any cause of action, it necessarily states one at law or one in equity, and the facts set forth in the pleading and the remedy sought thereby determine whether the cause of action pleaded is at law or in equity, and whether the pleading filed invokes the jurisdiction of the court at law or in equity. Van Norden v. Morton, 99 U. S. 378, 380, 25 L. Ed. 453; New Orleans v. Construction Co., 129 U. S. 45, 9 Sup. Ct. 223, 32 L. Ed. 607.

The facts stated and the remedy sought in the original pleading in the case at bar constituted a cause of action in equity because the issues tendered thereby were not triable by a jury, and the relief sought, the adjudication and foreclosure of the mechanic's lien, was grantable by a court of equity and not by a court of law. In other words, the pleading disclosed the fact that the complainant had no adequate remedy at law in the federal courts, and hence that that court in equity had jurisdiction. The petition was in fact a bill in equity, although in the form of such a petition as was customarily filed in the state courts in cases of this character. It was filed on the ninetieth day

after the filing of the statement, and therefore within the time limited for the prosecution of such a suit by the statute of Missouri, and under the twenty-eighth rule in equity the complainant had the right "to amend his bill as of course in any matters whatsoever before any copy had been taken out of the clerk's office." In compliance with that rule the complainant filed its amended bill on February 13, 1908, before any copy of the original had been taken out of the clerk's office. The amended bill presented no new or different cause of action. It simply stated the facts set forth in full in the original bill in the form of a bill in equity in the federal courts, save that it contained no prayer for process. Hence it related back to the filing of the original bill, and the case thenceforth stood as though the amended bill had been filed on February 7, 1908, and within the 90 days limited for the commencement of the suit. Bowden v. Burnham, 59 Fed. 752, 8 C. C. A. 248; Goodman v. City of Fort Collins, 164 Fed. 970, 973, 91 C. C. A. 98, 101.

Rules 11, 12, and 23 in equity provide that no process of subpœna shall issue until the bill is filed, that when the bill is filed the clerk shall issue the process of subpœna of course upon application of the plaintiff, and that the prayer for process in the bill shall contain the names of all the defendants named in the introductory part of the bill, but in this case neither the original nor the amended bill contained any prayer for process. No objection, however, to the subpœnas issued on February 10, 1908, on the application of the complainant, or to the original or amended bill was made upon this ground by any of the defendants, either by motion or by demurrer, but they entered their appearances and claimed on other grounds that the suit could not be maintained. Was the absence of the prayer for process fatal to the bills? Section 954, of the Revised Statutes (U. S. Comp. St. 1901, p. 696) provides that no declaration, process or proceedings in civil causes in any court of the United States shall be abated, arrested, quashed or reversed, for any defect or want of form, but that such court shall proceed to give judgment according to the right of the matter without regarding any such defect or want of form except those which, in cases of demurrer, the party demurring specially sets down together with his demurrer as the cause thereof, and that the court may at any time permit either party to amend any defect in the process or pleadings. The only reason for a prayer for process is that the names of the defendants to be subpœnaed may be clearly set forth in the pleading so that the clerk may issue the process to the right parties. The names of the defendants in this case were stated in the caption and in the introductory part of the bill. The absence of a prayer for the process of subpœna, and the failure of the complainant to state the names of the defendants a third time in the prayer, was not set down for hearing by any of the defendants as the cause of his or its demurrer. The absence of this prayer for process was a mere defect of form, and defendants who are named in the body of the bill, who have been subpœnaed, who have entered their general appearance, and have not demurred on the specific ground that there was no prayer for process against them are estopped from defeating

the bill upon that ground. Jennes v. Landes (C. C.) 84 Fed. 73; Segee v. Thomas, 21 Fed. Cas. No. 12,633, pages 1018, 1020; Buerk v. Imhaeuser (C. C.) 8 Fed. 457; Wilson v. Plutus Mining Co., 174 Fed. 317, 320, 98 C. C. A. 189; and cases there cited. There was, therefore, a sufficient bill in equity filed in this case within the time fixed by the statute, but the subpœnas were not issued until the ninety-third day after the filing of the statement of lien and they were not served until that day and the next succeeding day. The remaining question is, was the delay in issuing the subpœnas fatal to the suit?

The rule upon this subject under the ancient English chancery practice and in the early practice in the chancery courts of the states, seems to have been that a suit in equity was commenced when the subpœna was issued with the honest intent, followed by a diligent attempt, to serve it speedily. United States v. American Lumber Co., 85 Fed. 827, 829, 830, 29 C. C. A. 431; Harg. Law Tracts, 321, 425; Pigott v. Nower, 3 Swanst. 534; Hayden v. Bucklin, 9 Paige (N. Y.) 512; Fitch v. Smith, 10 Paige (N. Y.) 9; Pindell v. Maydwell, 7 B. Mon. (Ky.) 314. This rule was perhaps a natural result from the fact that in the ancient English chancery practice subpœnas were issued before the bills were filed. The multiplication of courts of concurrent jurisdiction in this country, and the necessity for the frequent application of the rule that the court which first acquires jurisdiction of a subject-matter retains it against all others until the purpose of the invocation of its jurisdiction has been served have led to a wise modification of this rule in the federal courts where the modern and the wiser rule now prevails that a suit in equity is commenced by the filing of the bill with the bona fide intention to prosecute the suit diligently, provided there is no detrimental or unreasonable delay in the issue or the service of the subpœna. Farmers' Loan & Trust Co. v. Lake Street R. R. Co., 177 U. S. 51, 60, 20 Sup. Ct. 564, 44 L. Ed. 667; Humane Bit Co. v. Barnet (C. C.) 117 Fed. 316. There is an exception to this rule that notice of the pendency of the action to third persons who are bona fide purchasers is not given by the mere filing of the bill until the subpœna is served upon the defendant. Miller v. Sherry, 2 Wall. 237, 250, 17 L. Ed. 827. Under this rule a suit was commenced within the 90 days and it may be maintained.

Moreover in the courts of the state of Missouri the filing of a petition is the commencement of the suit, although no process issues until after the time limited by the statute has expired, and if this suit had been brought in the state court, and the summons had not been issued until the ninety-third day it would undoubtedly have been sustained. Rev. St. Mo. 1899, § 566 (Ann. St. 1906, p. 595); Gosline v. Thompson, 61 Mo. 471; South Missouri Lumber Co. v. Wright, 114 Mo. 326, 332–334, 21 S. W. 811; McGrath v. St. Louis, K. C. & C. R. Co., 128 Mo. 1, 30 S. W. 329; State v. Wilson, 216 Mo. 215, 115 S. W. 549. This is a suit in equity in a federal court. The defense under consideration is not the statute of limitations, but the laches of the complainant, for courts of equity are not bound by the statute of limitations, but are governed by their analogous doctrine of laches. This doctrine is applied in analogy to the statute of limita-

tions relating to actions at law of like character. Under ordinary circumstances courts of equity will not stay a suit before, nor maintain it after, the time fixed by the corresponding statute of limitations at law; but if extraordinary circumstances make it equitable to allow its prosecution after a shorter, or to forbid its maintenance after a longer, period than that fixed by the statute they will determine the extraordinary case in accordance with the equities which condition it. Kelley v. Boettcher, 85 Fed. 55, 62, 29 C. C. A. 14, 21; Ide v. Trorlicht, etc., Carpet Co., 115 Fed. 137, 148, 53 C. C. A. 341, 352; Brun v. Mann, 151 Fed. 145, 154, 80 C. C. A. 513, 522, 12 L. R. A. (N. S.) 154. Now, even if the rule of the federal courts were that a suit in equity was not commenced until the subpœna was issued, or until it was served, yet since the analogous statute of limitations at law, as interpreted by the courts in the state of Missouri which enacted it, would not bar an action like this in hand in which the petition was filed within, and the summons was issued and served without, the 90 days, a national court in equity ought not to bar such a suit under the circumstances of this case. No facts have been pleaded or proved, no detriment to the defendants by the three days' delay in the issue and service of the subpœnas, no bona fide purchasers in the meantime have been suggested which require a more rigorous application of the doctrine of laches than the established interpretation of the statute of limitations in Missouri requires. And the conclusion is that the delay in issuing the subpœnas was not fatal to this suit and it may be lawfully maintained.

The second question in this case is, Did the amended bill state facts sufficient to show that the complainant was entitled to a lien upon the interest of the lessor, Morris Lyon, as trustee, in the land and building owned by him? By stipulation of the parties it is agreed that the lease which conditions the true answer to this question shall be deemed an exhibit to the bill. That lease was made on May 10, 1906, between Morris Lyon, trustee for Morris Lyon and Theodore Lyon and M. Lyon & Co., called lessors, and one Brady, and the Merchants' Refrigerating Company, a corporation, called the lessees, but for the purposes of this decision Morris Lyon, the trustee, will be termed the lessor and the Refrigerating Company the lessee. The premises leased consisted of a part of a building to be erected and constructed on certain lots in Kansas City, Mo., the term was 10 years, with the privilege of a further term of 15 years, the rental was $4,060 per year, the building was to be erected, and it was subsequently erected, by the lessor, and the lease contained provisions that "the lessees shall have the right to install in said building, and in and upon said premises, its pipes and insulation for refrigerating purposes throughout said building, and said pipes, insulation and necessary attachments thereof shall be and remain the property of the lessees, and shall never be considered as having become a part of the realty and belonging to the lessors, provided, however, that if the lessee shall fail to pay any monthly installment of rent due the lessors on the tenth of the month after the same shall have become due on the first day of the month," then the lessors may give written notices, and if the rent

is not paid, all the insulation, appurtenances, and machinery thereto belonging in said building, or on said premises, may be sold by the lessors, and after deducting the costs and expenses of such sale the proceeds shall be applied to the payment of the rent and the lessee shall still be liable for the portion unpaid. This lease was recorded in the office of the recorder of deeds for Jackson county, Mo., before the complainant made its contract with the Refrigerating Company to furnish the material and perform the work for which it claims a mechanic's lien. At the time the lease was made Lyon and the Refrigerating Company were aware of the facts that the sole business of the latter company was acquiring and operating cold storage plants and pipe lines for supplying refrigeration, that the insulating material was necessary for the use of the warehouse as a cold storage warehouse, and that it must be so attached to and built into the building as to become a part thereof and to constitute a permanent improvement thereof, irremovable therefrom without partially destroying and damaging the building. The complainant made a contract with the Refrigerating Company to furnish the requisite labor and materials to insulate this building after it had been erected, and this suit is brought to maintain a mechanic's lien for a portion of the value thereof which has never been paid, under sections 4203 and 4206 of the Statutes of Missouri of 1899 (Ann. St. 1906, pp. 2277, 2289). As the right to this lien arises from these statutes their construction by the courts of Missouri is controlling in this court, and the question whether or not the reversion of Lyon as trustee is subject to this lien must be determined by the decisions of the courts of that state.

It is settled in that state by repeated decisions that no mechanic's lien can exist upon personal property. The line of demarcation between realty and personalty in cases between landlord and tenant is by no means the same as in cases between vendor and vendee and mortgagor and mortgagee, and this for the reason that the relation of landlord and tenant is transitory—the use of the property is by one who is to stay for a limited time, and many articles are placed upon the realty by the tenant which both parties intend shall be removed at the end of the term; while the things placed upon the realty by the vendor or the mortgagor are put there by one whose term of occupancy is ordinarily unlimited and generally with the intention that they shall become a part of the real estate, and that they shall be perpetually and habitually used with it. Thus in Press Brick & Machine Co. v. Brick & Quarry Co., 151 Mo. 501, 513, 514, 52 S. W. 401, 404 (74 Am. St. Rep. 557) the Supreme Court of Missouri says:

"Of course there is no lien on the house or land given by the statute for any kind of machinery that is simply stored in the house awaiting sale, or for any temporary purpose, nor can there be a lien where a tenant puts in machinery under a lease which reserves to him a right of removal, for in such cases the chattel never becomes part of the realty; but if the machinery is put into a building by the owner with the intention of making it a permanent part, then the person furnishing the material is entitled to a lien on the building, and it is then wholly immaterial when the machinery is so put in the building, whether at the time it was originally constructed or at any time afterwards."

And so is Hooven, Owens & Rentschler Co. v. John Featherstone's Sons, 111 Fed. 81, 94, 49 C. C. A. 229, 242. Counsel for the complainant argue that it is entitled to a lien upon the reversion because the insulating material was secured to the walls of the building by cement and by nails so that it could not be removed without injury to the insulation, and also to the building, and they rely upon this fact and upon the claim that the lessee, the Refrigerating Company, was the agent of the lessor, Lyons, to make the contract with the complainant for this material and the connecting pipes. In support of their contention they cite Press Brick & Machine Co. v. Brick & Quarry Co., 151 Mo. 501, 513, 514, 517, 52 S. W. 401, 74 Am. St. Rep. 557; Crane Company v. Construction & Real Estate Co., 121 Mo. App. 209, 218, 222, 98 S. W. 795; Dougherty-Moss Lumber Co. v. Churchill, 114 Mo. App. 578, 582, 583, 584, 586, 90 S. W. 405; Hardware Co. v. Churchill, 126 Mo. App. 462, 465, 104 S. W. 476; Crandall v. Sorg, 198 Ill. 48, 58, 60, 61, 62, 63, 64, 64 N. E. 769; Carey-Lombard Lumber Co. v. Jones, 187 Ill. 203, 205, 211, 58 N. E. 347; and Winslow Bros. Co. v. McCulley Stone Mason Co., 169 Mo. 236, 243, 244, 245, 247, 248, 69 S. W. 304. In the last case the owners of real estate organized a new corporation, and caused a partially erected building to be leased to it with the intention that this new corporation should complete the building for the benefit of the owners, and the court held that the lessee was in reality the agent of the owners, and that their interest was lienable. The lease in this case negatives any such agency as well as the fact that the lessor kept his interest in the property separate from that of the lessee, constructed the warehouse himself, and expressly stipulated that the insulating material and the pipes might be placed therein by the lessee and should remain its property and not that of the lessor. The other cases which have been cited rest largely upon the facts peculiar to those cases which were deemed by the courts to show a clear intention on the part of the parties that the material and labor furnished should work a permanent improvement to the building for the benefit of the owner. The true test of the liability of the property of an owner to a lien for materials furnished and labor performed under a contract with a lessee is the intention of the parties to work a permanent improvement to the reversion for the benefit of the lessor. If they had no such intention when the lease and the contract were made and performed then there can be no mechanic's lien, because the improvement made never becomes a part of the realty; if they had such intention the lien upon the reversion may be sustained. Press Brick & Machine Co. v. Brick & Quarry Co., 151 Mo. 501, 513, 52 S. W. 401, 74 Am. St. Rep. 557; Hooven, Owens & Rentschler Co. v. John Featherstone's Sons, 111 Fed. 81, 94, 49 C. C. A. 229, 242. The character of the improvement, the method of its attachment and its other incidents are but evidences of the intent or the lack of intent to incorporate permanently the improvement in the plant or property, and they are material in the determination of the real question only as they indicate such an intent. Where, at the end of the lease, the improvements are to become a part of the property of the lessor, this fact, the character of the improve-

ment, and the method of its attachment sometimes furnish evidence so conclusive that it was the intent of the lessor that the improvements should be permanent and should be made for his benefit that a stipulation to the contrary in a lease is ineffective to bar a materialman from his lien. Dougherty-Moss Lumber Co. v. Churchill, 114 Mo. App. 578, 582, 583, 584, 90 S. W. 405. But the legal presumption and the general rule is that parties intend what their contracts evidence, and that an agreement between the landlord and tenant which leaves to the latter the right to remove his improvements at the end of his term renders them personal property, and deprives parties who have notice of their contract of the right to a lien upon the reversion for improvements made under a contract with the lessee. McLain Investment Co. v. Cunningham, 113 Mo. App. 519, 523, 87 S. W. 605; White's Appeal, 10 Pa. 252; Springfield Foundry & Machine Co. v. Cole, 130 Mo. 1, 8, 9, 31 S. W. 922. The facts that the improvements of the lessor and the lessee were by the terms of the lease and by the acts of the parties in this case clearly segregated each from the other, that the lessor was to construct and did build the warehouse, that the lessee was permitted by the terms of the lease, and not required to place within it for its own purpose of using it as a cold storage warehouse, the insulating material and pipes, that this material and these pipes were not to become the property of the lessor at the end of the lease but were to remain the property of the lessee, and that the latter pledged them to the lessor as security for the rent, overcome all other indications in this case and clearly show that it was the intent of the lessor and of the lessee when this lease was made and when these improvements were placed within the warehouse that they should remain personal property and should never become a permanent part of the real estate of the lessor. The fact that the contract under which the complainant furnished the material and performed the labor was not with the lessor, but was with the lessee alone, confirms this conclusion. Boiler Works Company v. Haydock, 59 Mo. App. 653, 656, 658, 659; Koenig v. Mueller, 39 Mo. 165, 168. The record of the lease was notice to the complainant that the improvements he was placing in this warehouse remained the personal property of the lessee, that they did not become a part of the realty and that Lyon's reversion in the warehouse and the land upon which it stood were not chargeable with a mechanic's lien for the purchase price of the work and the material it was furnishing, Faxon v. Ridge, 87 Mo. App. 299, 307, and the conclusion is that the amended bill did not state facts sufficient to show that the complainant was entitled to a lien upon the interest of the lessor in the land and warehouse. The result is that the order and judgment sustaining the demurrer of the defendants, Morris Lyon, trustee of M. Lyon & Co., Morris Lyon, Theodore Lyon, and Lee Lyon, partners under the firm name of M. Lyon & Co. and dismissing the bills as against them, must be sustained, and the order of the court below sustaining the demurrers and pleas, and dismissing the original and amended bills in this suit against the other defendants, must be reversed, and the case must be remanded to the court below, with directions to overrule all the demurrers

and pleas, except the demurrer of the defendants, Lyon, as trustee, and Morris Lyon, Theodore Lyon, and Lee Lyon, and to permit the other defendants to answer, and it is so ordered.

PARTRIDGE v. BOSTON & M. R. CO.

MINARD v. SAME.

BOSTON & M. R. CO. v. MINARD.

(Circuit Court of Appeals, First Circuit. December, 13, 1910.)

Nos. 875, 882, 883.

1. APPEAL AND ERROR (§ 273*)—NECESSITY OF SPECIFIC EXCEPTIONS—INSTRUCTIONS.

A federal appellate court is not required to take notice of such a general exception as "to the charge of the court as far as the instructions given were inconsistent with the requests for rulings" or of a general exception to the court's refusal to give a number of requested instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1621; Dec. Dig. § 273;* Trial, Cent. Dig. §§ 689, 694.]

2. RAILROADS (§ 324*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.

Plaintiff's intestate was driving a carriage, in which he was riding with a young lady, to whom he was engaged to be married, when the carriage was struck by a train on defendant's railroad on a country crossing, and he was killed. It was about 10 o'clock on a summer night and dark, although starlight. He was not familiar with the locality, and, although he knew there was a railroad in the vicinity, did not know the location of the crossing. Although the engine was running backward with no light in front except a lantern set on the top of the tender, the cars were lighted, and could have been seen from the highway for some 3,000 feet before the train reached the crossing. It appeared, however, that deceased was talking to his companion, and paying no attention to his driving, and did not see the train until the engine struck his carriage after the horse had passed over the plank crossing. *Held*, that he was chargeable with negligence, which precluded recovery for his death.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1022; Dec. Dig. § 324.*]

3. TRIAL (§ 89*)—RECEPTION OF EVIDENCE—DEPOSITIONS—MOTION TO STRIKE OUT ANSWER OF WITNESS—DISCRETION OF COURT.

Where the testimony of a plaintiff was taken by deposition, the refusal of the court on the trial to strike out a portion of one of her answers to a question on cross-examination which was not responsive, but was material to plaintiff's case, and which could not then have been supplied, *held* not reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 228-234; Dec. Dig. § 89.*]

4. RAILROADS (§ 350*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

The question of the contributory negligence of a plaintiff who was struck and injured by a train on a highway crossing of defendant's railroad while she was riding in a carriage with another, who was driving, *held*, under the evidence, properly submitted to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1166; Dec. Dig. § 350.*]

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

5. DAMAGES (§ 168*)—PERSONAL INJURY—ELEMENTS OF DAMAGES—MENTAL SUFFERING.

In an action by a young woman to recover for a severe personal injury, evidence was admissible on the question of damages to show that plaintiff's injuries were of such a character that childbearing would thereby be rendered dangerous to her life, and also to show that she had endured mental suffering on account of such fact.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 480–482; Dec. Dig. § 168.*]

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

Actions at law by Warren G. Partridge, administrator, and by Alice B. Minard, against the Boston & Maine Railroad Company. Judgment for defendant in the first action, and plaintiff brings error. Affirmed. Judgment for plaintiff in the second action, and both parties bring error. Affirmed on defendant's writ. Reversed on plaintiff's writ.

George L. Mayberry (Warner, Warner & Stackpole, on the brief), for plaintiff in error.

Henry F. Hurlburt (Damon E. Hall, on the brief), for defendant in error.

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

PUTNAM, Circuit Judge. Three writs of error are here involved, and are grouped together by us as a matter of convenience for the reason that, in this case, the injury happened through a collision at a railroad crossing while the intestate, Phillips Payne Partridge, represented by the administrator of his estate, the plaintiff in error in No. 875, and Miss Alice B. Minard, the plaintiff in error in No. 882, and the defendant in error in No. 883, were riding together over the crossing, the injury occurring to both simultaneously, resulting in the death of Phillips Payne Partridge after a space of conscious suffering, and in a severe injury to Miss Minard. A verdict was rendered in favor of Miss Minard, against which the Boston & Maine Railroad sued out the writ of error in No. 883. During the course of the trial which resulted in that verdict, an exception was taken to the refusal of the court to allow certain evidence offered by the plaintiff on the issue of damages, which resulted in the writ of error sued out by Miss Minard in No. 882.

At the trial, the evidence for the plaintiff in these cases was practically the same. Especially is this the fact with reference to Miss Minard's testimony, which came in the form of a deposition taken for both cases. In Miss Minard's suit, the Boston & Maine Railroad put in a full defense, with several witnesses; but in the other suit a verdict was directed for the defendant at the close of plaintiff's testimony. Therefore the proofs are the same for each case so far as evidence was offered for the plaintiff, and that evidence may be considered in each, with comments only on some points as to its distinctive bearing on either proceeding. The evidence offered by the de-

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

fense in Miss Minard's suit cannot be used with reference to the writ of error arising out of Mr. Partridge's suit. These statements it is necessary to bear in mind, because, on one very important question which we will explain later, Miss Minard's evidence will be found to be inadmissible with regard to the Partridge suit, while admissible in her own behalf.

The leading facts, which we will state at the outset, are shown in the brief of the Boston & Maine Railroad as plaintiff in error in No. 883, substantially as follows:

"This is an action of tort brought by the plaintiff, now the defendant in error, but hereinafter referred to as the plaintiff, to recover damages for personal injuries alleged to have been received by her at Kennebunk, in the state of Maine, on the evening of August 15, 1907, by reason of the collision of a train of the defendant, now the plaintiff in error, but hereinafter referred to as the defendant, with a vehicle in which she was riding at a place in said Kennebunk known and hereinafter spoken of as Wormwood's Crossing, where a highway crossed at grade the railroad track of the defendant company. The accident occurred at 10 o'clock p. m. The wagon in which the plaintiff was riding was being driven at the time of the accident by one Phillips Payne Partridge, to whom the plaintiff was engaged to be married. The said Partridge received injuries at the time of the accident from which he died within a few hours, but Miss Minard survived, and her deposition which was read at the trial was the only evidence produced by the plaintiff of any eyewitness to the accident.

"The following facts appeared in evidence and were undisputed:

"The plaintiff, Miss Minard, was spending her first summer at Kennebunk Beach, where she arrived about July 1, 1907. Mr. Partridge was also spending the summer at the same beach with the Partridge family. He, however, had spent six weeks at the same beach in 1906 and the same length of time in 1905, and had been there for a couple of summers several years before 1905. In July, 1907, Partridge and Miss Minard met, and soon after became engaged.

"On the afternoon of August 15th, Partridge and Miss Minard took the train from Kennebunk Beach to Kennebunkport to attend a dinner party. In the evening, at about 8 o'clock, having learned that the great conflagration which practically wiped out Old Orchard was in progress, the plaintiff and Mr. Partridge left the dinner party and went together to a telephone booth, where Mr. Partridge called up a livery stable and engaged a team to drive to Old Orchard to witness the progress of the fire.

"'X–Q. 72. You and he started for the common purpose of seeing the fire at Old Orchard? A. Yes, sir.'

"Miss Minard testified that she had never been over the highway from Kennebunkport to Old Orchard before. There was no evidence as to whether Mr. Partridge had been over this highway prior to the night of the accident or was acquainted with it or not, but the evidence did show that both of them—Miss Minard at least once and Mr. Partridge several times—had been by train over the highway where the accident occurred.

"Wormwood's Crossing, where the injury occurred, was the ordinary country crossing where a single-track railroad crossed the highway at grade. The highway ran from southeast to northwest, and was substantially straight for many hundred feet each side of the crossing. The team in which the plaintiff was riding approached the crossing from the southeast. The defendant's track ran substantially from northeast to southwest. The train which collided with the plaintiff was coming from the northeast, and the defendant's track, from the crossing, in the direction from which the train approached, was straight for nearly 3,000 feet. It will therefore be seen that as the plaintiff's team approached the crossing it was traveling on an angle towards the approaching train.

"It further appeared that at the crossing were the usual white fences and cattle guards on each side of the crossing, and that projecting over the highway on the southerly side of the crossing, and close to it, was the usual.

warning post found at grade crossings, namely, a tall post, painted white, with a crossbar, and painted thereon in large black letters, 'Railroad Crossing,' with a supporting arm on which was painted in large letters 'Look Out for the Engine.'

"The accident occurred at just about 10 o'clock p. m. It was undisputed that it was a clear night; that is, there were no clouds in the sky. The witnesses described it as 'rather dark,' 'fairly dark,' and 'just a common starlight night without a moon.'

"The train which collided with the team in which the plaintiff was riding was scheduled to run regularly between Old Orchard and Portland. Old Orchard is on the Western Division of the Boston & Maine Railroad. This particular train left Portland for Old Orchard on the evening of the accident. and on each preceding day between 6 and 7 p. m., and arrived at Old Orchard at 7:23 p. m. It was due to leave Old Orchard for Portland again at 7:55 p. m.

"This train carried from Old Orchard to Portland each night three sleeping cars, one of which would be turned over at Portland to the Canadian Pacific Railroad and the other two to the Grand Trunk Railroad. These sleeping cars arrived in Old Orchard each morning and remained on a siding there throughout the day until they were picked up by the train for Portland in the evening. Inasmuch as there was no turntable at Old Orchard, the engine drawing this train customarily backed from Portland to Old Orchard, drawing a combination baggage and smoking car and an ordinary day coach behind it. In this way the engine was always headed towards Portland. At Old Orchard, the engine was shifted from the Old Orchard end of the train to the Portland end of the train, and what had been the Old Orchard end of the train would be connected to the three sleepers, so that, as the train was made up to go to Portland, there would first be the engine, a combination baggage and smoking car, a day coach, and then at the rear the three sleepers. The necessary switching was done and the train was made up on the night of the accident as on other nights, on the Boston side of the Old Orchard depot. Shortly before its departure for Portland the great fire at Old Orchard broke out—a fire which will be remembered as destroying a greater part of the summer settlement in Old Orchard, together with numerous hotels. Before the train could leave for Portland the fire had swept across the railroad tracks near the Boston & Maine station, which stood between the train and Portland, and warped and twisted the rails so that it was impossible for the train to go to Portland over its regular route.

"But there was another route to Portland. By running west from Old Orchard through Saco, Biddeford, West Biddeford, and Kennebunk to North Berwick over the Western Division, the train could get into Portland over the Eastern Division, which intersected the Western Division at North Berwick.

"The people at Old Orchard were in a panic by reason of the conflagration, and they threw what belongings they could save into the baggage car in paper bundles, sheets and every other way they could get them aboard the train. As before stated, there was no turntable at Old Orchard, and therefore all that could be done when the fire blocked the way over the usual route was to shift the engine, still headed towards Portland, from the eastern or Portland end of the train to the western or Old Orchard end of the train. This was done, with the result that the tender of the engine became the head end of the train, and the sleeping cars, which as the train was ordinarily made up had composed the rear part of the train, became the forward part of the train and were next the engine.

"Either on the trip from Portland to Old Orchard or while at Old Orchard, what was known as the 'tail light' on the engine—that is to say, a light similar to the headlight and consisting of a lamp with a reflector behind it inclosed in a wooden or metal case with a glass front and mounted upon the extreme end of the tender—caught fire and was rendered useless. No other tail light or headlight was procurable nearer than Portland, and, as a precautionary measure, an ordinary brakeman's lantern was placed upon the inverted manhole cover in the center of the rear part of the tender, and pieces of coal were placed along its base in order to keep the lantern in place. The lantern was so placed that no part of its light was obscured by the tender

or the coal or by any part of the manhole cover. The manhole referred to, upon which the lantern was placed, sticks up several inches above the flange or flaring part of the top of the tender. The light was therefore plainly visible, and not obscured in any way. Moreover, the headlight of the engine —that is, the regular headlight upon the Portland end of the engine—was lighted and shown upon the end of the Pullman coach next the engine. All of the Pullman sleepers were brightly lighted with Pintsch gaslights or acetylene gas. None of the berths in these Pullman sleepers had been made up at the time of the accident, and the curtains at the windows had not been lowered. Moreover, all of the Pullmans had monitor tops through which the light shone. The day coach and the combination smoking and baggage car were lighted with kerosene lamps. These cars also had monitor tops. It was not disputed that all of these lights in the train, together with the lantern upon the tender and the headlight of the engine, were burning brightly from the time the train left Old Orchard until and after the accident occurred.

"Thus made up and equipped the train left Old Orchard for Portland by way of North Berwick at 9:20 p. m. The distance from Old Orchard to Wormwood's Crossing was 11 miles. The first stop the train made after leaving Old Orchard was at Saco. This stop was only momentary. The next stop was across the river at Biddeford. At Biddeford there was a turntable, but it was impracticable, if not impossible, to turn the engine there that night. It was estimated by witnesses that a crowd of as many as 10,000 people, which had been attracted by the conflagration at Old Orchard, thronged the station platforms and tracks at Biddeford. The crowd at Biddeford overran the tracks. They thought that the train was going back to Old Orchard, and they were anxious to get there to see the fire, and they accordingly clambered onto the engine and train and into the cab, and they were so densely crowded along the track that it was with difficulty that the train was run through the station. In order to have turned the engine on the turntable at Biddeford, it would have been necessary to run the engine back and forth through the crowd several times and to shift other engines which occupied the tracks leading to the turntable. It was therefore deemed unsafe and inexpedient to turn the engine there, and it was the only place at which it could have been turned.

"The train stopped at Biddeford five or six minutes before it was able to proceed. Its next and last stop before arriving at Wormwood's Crossing was at West Biddeford, where it stopped for about a minute."

The plaintiffs claimed that the train was run at an unusual speed, and that no bell nor whistle was sounded as Wormwood Crossing was approached. There was evidence on both sides of these propositions, which we need not refer to further than we have spoken of them later in this opinion.

In the Minard suit, the Boston & Maine Railroad passed the court 53 requests for instructions. Four of them seem to have been withdrawn. With reference to these requests, the bill of exceptions states at one point, near the close, as follows:

"The defendant excepted to the charge of the court as far as the instructions given were inconsistent with the requests for rulings."

It is settled in the federal courts that the court is not required to take notice of this form of exception. It is impossible for the court to go through and analyze the instructions given, and arrange them with the requests for rulings in parallel columns; that is a burden which every court which has regard for the successful result of its labor refuses to undertake.

At another place in the bill of exceptions it is said, "The court declined to give the following rulings requested by the defendant," and

then are given the numbers of sundry requests. The record continues: "And the defendant duly and seasonably excepted to such refusal." This is also under the settled practice of the federal courts a useless form of exception. This practice is particularly applicable here, because the blank which we have left in giving this extract covers all the requests except 9, 24, 25, 44, and 48. The result is that we have here 47 requests, covering nearly 8 printed pages of the record, passed up in one bunch, and ruled out in one bunch. Of course, it was impracticable for the trial court to deal intelligently with the requests so submitted, and for this court to deal intelligently with a mass of requests thus offered and ruled out, without vastly more labor of a mechanical and clerical kind than we ought to consent to burden ourselves with. Parties desiring the views of an appellate tribunal must find some way to bring out their propositions in such form as to enable it to understand them in a pointed manner; otherwise the appellate tribunal may fall into errors which it cannot avoid and which cannot properly be charged against it. We shall therefore only endeavor to dispose of such leading propositions as it is apparent to us the case involves, or which a court may fairly be required to consider no matter how inartificially the same are brought to its attention. We are, however, satisfied that we shall reach a correct result in the Partridge Case, and that, so far as we go, we shall reach a correct result as to the main propositions in the Minard Case, leaving the trial court unfettered as to minor propositions, which may either be corrected on new trial or left in a position to be apprehended on appeal without too much labor.

As to the charge of negligence on the part of the Boston & Maine Railroad, so far as the matter has been called clearly to our attention, we are satisfied with the propositions of law propounded by the learned trial judge. Under the circumstances of the conflagration at Old Orchard, which it may well be said were notorious, we are unable to perceive that the corporation is chargeable with negligence merely for the manner in which it was running its trains, except it be for the fact that, in view of the peculiar conditions of moving backward, it was perhaps chargeable with special caution as to speed at crossings. The evidence on the question whether or not its whistle and bell were sounded, was the ordinary kind found in these cases where negative proofs are ordinarily accepted by juries as sufficient to overcome the just presumption arising out of the fact that ringing bells and blowing whistles at crossings has ordinarily become a matter of habit with the locomotive engineers and firemen. The negative evidence was weak on this point as against the cumulative proofs furnished by the defendant corporation in Miss Minard's suit, and so weak that, if the ruling of the trial judge had been a direction to the jury in favor of the defendant corporation in regard thereto in her suit, we probably would have sustained it. On the other hand, as the testimony was that of several witnesses pro and con on a question of this character under somewhat peculiar circumstances, the presumption in favor of the correctness of the action of the trial judge in submitting the question to the jury is too strong to justify our interference. Therefore, so far

as that is concerned, we cannot disturb the verdict in favor of Miss Minard.

So far as the Partridge suit is concerned, we are satisfied that the ruling of the court directing a judgment in favor of the corporation, which direction, no doubt was in view of the entire lack of care on the part of Partridge, the deceased, was correct. The question is not one of stopping, looking, and listening. This crossing was in the country, and the circumstances as stated by the corporation itself were not such as rested a burden on the deceased, charging him with looking out for this particular crossing, and therefore charging him with the duty of stopping, looking and listening. Partridge was only a summer visitor at a point several miles away from the crossing; and the most that could be presumed with reference to him was what Miss Minard testified as to herself, namely, that she knew that there was one railroad in that neighborhood, but did not know specifically where it was.

Miss Minard and Mr. Partridge had been riding for about two hours as shown, without any evidence in the record that they were at all familiar even with the road on which they were traveling. She testified that Partridge was sitting at her right, and they were talking together. So far as appears, the conversation was such as might have ordinarily been expected under the circumstances. They were talking when a "dark object loomed up." This "dark object" was the locomotive, and was the first thing that attracted her attention either by sight or sound. The horse had been walking, and they had been "talking together right along for a mile or two before this dark object loomed up." Her whole testimony leaves the unquestioned impression that neither of them had been giving any attention whatever to their movements so far as driving was concerned. Although the night was a starlight night, she on the whole leaves the impression that at any rate it was a dark night. Of course, the darker the night, the greater the necessity for giving some attention to the movements of the carriage. The crucial fact we may say is that, although the crossing had the usual planking, Partridge could not have noticed the sound of the horse's feet on it; and yet the horse entirely crossed the track and was uninjured, while the locomotive struck the carriage squarely on the end of the seat in which the young lady and the young man were without being before noticed by him. This proves beyond doubt an absorption on the part of these two people which shut out from their attention everything except themselves. The question, therefore, is not one of stopping, looking, and listening, but whether persons driving on a country road in the neighborhood of very considerable towns, on what is described by one of them as a dark night, are to be regarded as using reasonable care when no attention whatever is given to the surrounding circumstances or to the progress of the carriage.

This train consisted of five lighted passenger cars, traveling on a tangent of at least 3,000 feet toward this crossing, upon an elevation above the surrounding country, which for the most part was free from obstructions; and it is impossible to conceive that any persons who were giving any attention whatever to their surroundings would not

have had visual information of its approach, independently of any questions of the method in which the locomotive was being run, of its speed, or of bells or whistles. Therefore, while there was no special negligence in regard to the matter of stopping, looking, and listening, there was general negligence with which the driver of the team was chargeable with reference to anything with which he might come into collision. The man is singularly unfortunate whose experience does not teach him how absorbed in each other these young people must have been; but that absorption cannot create a cause of action where otherwise none would exist. There was the same general negligence which was fatal to the plaintiff's recovery in Whitman v. Lewiston, 97 Me. 519, 521, 55 Atl. 414, and in Whitman v. Fisher, 98 Me. 575, 578, 57 Atl. 895. Therefore in the Partridge Case we are clearly of the opinion that we cannot reverse the judgment of the Circuit Court, whatever disposition might be made of any minor propositions coming from the plaintiff in error.

Returning now to the case in behalf of Miss Minard, we first draw attention to a cross-question put to her in her deposition, to which we have referred, and also to her answer to the same, and to the ruling of the court in reference thereto:

"X–Q. 151. Did you see Mr. Partridge looking for the approach of any train just before the accident—previous to the time of the collision? A. I cannot say that he looked for the approach of a train previous to this time. He was watching out for the approach of any object, I am sure, from his general driving; from the way he drove.

"[At the time of the taking of the deposition the defendant requested that all of the answer after the word 'train' be stricken out on the ground that the remainder of it was not responsive, was an expression of opinion, and was incompetent. This request was again made when the deposition was read at the trial. The court declined to strike out the portion of the answer requested, but allowed it to be read to the jury, and the defendant duly excepted.]"

The record shows that the defendant corporation raised an objection at the time the deposition was taken, and also followed it up at the trial in the manner required by the practice of the Federal courts. Undoubtedly, if the witness had been on the stand, the court would have stricken out the concluding sentence of her answer according to the corporation's request. Nevertheless the question of striking out evidence that is not responsive to a question is for the trial court, and it does not amount to a reversible error unless it is of a more obnoxious character than anything found here. It could not be stricken out, of course, by the examiner under the decisions of the Supreme Court; and, if stricken out at the trial, Miss Minard would have been left without a very important factor in her case. This was one of the unfortunate risks often taken by cross-examiners.

Much discussion is made to us with reference to the relative responsibility of Miss Minard for the negligence of Partridge. We do not regard it as necessary to go through all the propositions pro and con on this point; and, for the reason we have already stated as to the way in which the record is made up, it is impracticable for us to do so. The charge of the learned circuit judge in regard thereto is in all substantial matters correct. If it was lacking in any particulars, they

were minor particulars, and the attention of the trial court should have been called to them specifically; and, likewise, our attention should be called to them in a pointed manner, so that we might appreciate the criticisms without difficulty. The instructions we refer to were as follows:

"But suppose you do find that the defendant was negligent—and you will understand that in making that suggestion I am not suggesting that you will find that the defendant was negligent, but that I have got to review all the circumstances of the case in every possible aspect—suppose you find the defendant was negligent, you will then consider whether the plaintiff, Miss Minard, was also negligent. The law says that when an accident is caused by the acts of negligence of two people, the defendant and the plaintiff, the plaintiff cannot recover; but the law also says that, where the defendant is supposed to be negligent and the plaintiff is charged with negligence also, the burden of proof to show the plaintiff's contributory negligence is upon the defendant. So that the burden of proof on this issue is upon the defendant, and not upon the plaintiff. So it is for you to determine whether Miss Minard lacked ordinary prudence in what she did. Has the defendant satisfied you upon that point? Did she act like an ordinary prudent woman under the circumstances in which she was situated? I held, as you have learned, that Mr. Partridge did lack that prudence, that he was careless, the evidence shows it plainly, and that he cannot recover on that account, that his estate cannot recover on that account. But Miss Minard's situation was different from that of Mr. Partridge. Mr. Partridge was driving the team along the road with all the responsibility which driving a horse implies. Miss Minard was not driving the horse. She was riding with him. The horse was not in her control. You have heard what the situation of the parties was, that the horse was hired. You have heard the relations of Mr. Partridge and Miss Minard, and it is for you to determine whether in what she did not do she failed to use ordinary care, the ordinary care of a young woman in her place. The care of a woman riding in that way with a man is not the kind of care or the degree of care which is expected from a man who is actually holding the reins of a horse. I am not stating to you, gentlemen, any recondite principle which requires one to read the books in order to find out, but you yourselves know that when a man is driving a horse, and a woman is sitting beside him, the first responsibility for driving that horse rests upon the man, the man who is guiding the horse; and you also know that a woman is not expected ordinarily to shut her eyes and do nothing. She also in her degree must not be careless. She also in her degree must act like a prudent person, and you are to determine whether, under all the circumstances of this case, Miss Minard did act like a prudent person. The burden of the proof is on the defendant, who seeks to show you that she did not. There was a case in Massachusetts, the facts were somewhat different, but the rule laid down is applicable to this case, and I shall read to you substantially the language of the court:

" 'The result is that the plaintiff (that is, Miss Minard) would not be entitled to recover, if, in the exercise of common prudence, she ought to have given some warning to the driver of carelessness on his part, which she observed or might have observed in exercising due care for her own safety, nor if she negligently abandoned the exercise of her own faculties and trusted entirely to the vigilance and care of the driver. She cannot hide behind the fact that another is driving the vehicle in which she is riding, and thus relieve herself of her own negligence. What degree of care she should have exercised, in accepting the invitation to ride, or in observing and calling to the attention of the driver perils unnoticed by him, depends upon the circumstances at the time of the injury. On the other hand, she would be permitted to recover if, in entering and continuing in the conveyance, she acted with reasonable caution and had no ground to suspect incompetency and no cause to anticipate negligence on the part of the driver, and if the impending danger, although in part produced by the driver, was so sudden or of such a character as not to permit or require her to do any act for her own pro-

tection.' Shultz v. Old Colony Street Railway, 193 Mass. 323 [79 N. E. 878, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502].

"I think, gentlemen, that makes the issue plain. The question, in other words, is not whether Miss Minard would have been guilty of contributory negligence if she had been driving the horse, but whether in doing as she did, or in refraining from doing things which she refrained from doing, Miss Minard acted like a prudent woman under her circumstances. The burden of proof is upon the defendant. If, upon the whole, the defendant has satisfied you that she did not, then she cannot recover. If, upon the whole, the defendant has not satisfied you that Miss Minard was negligent, then on that issue you will find for the plaintiff."

In view of these instructions, the fact as to which Miss Minard testified as to "general driving," "the way he drove," was of importance. If she in her association with him, which had been intimate, had observed that he was one whose driving was such that it would show that he was "watching out for the approach of any object," this was an important fact with reference to the degree of responsibility which she was under as shown by the learned judge in our extracts from his charge.

We think the law is correctly stated in the following decisions. We refer first to State v. Boston & Maine Railroad, 80 Me. 430, 446, 15 Atl. 36. Here Thorogood v. Bryan, 8 C. B. 115, was disapproved; and it was also in Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652. In the latter case it was disapproved only in certain particulars, the case calling for nothing more. State v. Boston & Maine Railroad disapproved Thorogood v. Bryan as applied to members of a party who had been journeying on a pleasure excursion in an open team, except as against the one who owned the team and was driving it. This, to be sure, was a mere dictum; but it is accepted as the law of Maine. Whitman v. Lewiston, 97 Me. 519, 55 Atl. 414, Whitman v. Fisher, 98 Me. 575, 578, 57 Atl. 895, Denis v. Railway Company, 104 Me. 39, 48, 70 Atl. 1047, Pyle v. Clark (decided by the Circuit Court of Appeals for the Eighth Circuit in March, 1897) 79 Fed. 744, 748, 25 C. C. A. 190, and Davis v. Ry. Co. (decided by the Circuit Court of Appeals for the Eighth Circuit in 1907) 159 Fed. 10, 18, 19, 88 C. C. A. 488, 16 L. R. A. (N. S.) 424, with the qualifications and limitations which they contain, fully sustain generally the rulings of the Circuit Court which we have quoted on this point. Therefore we repeat that, if these rulings, which were generally correct, were deficient in any detail, that should have been seasonably called to the attention of the learned judge of the Circuit Court, and pointedly brought out again before us. Therefore, on the whole, we are not able to say that the court should have withdrawn Miss Minard's case from the jury as asked by the Boston & Maine Railroad on its writ of error.

This leaves only the writ of error of Miss Minard against that corporation. So far as that is concerned, the only complaint is based on the following alleged errors:

"1. That the court erred in ruling that it would not be competent evidence for the plaintiff to show that 'the plaintiff's injuries were of such a character that childbearing would be thereby rendered perilous to life,' and in refusing to admit such evidence.

"2. That the court erred in ruling that it would not be competent evidence in behalf of the plaintiff 'that, because of the contraction of the area

of the pelvic opening occasioned by the accident, it would be impossible for the plaintiff to give birth to a child of normal size in a natural way. That, if the plaintiff should ever become pregnant, it would be necessary either to bring about a premature birth, or to remove the child by a Cæsarian section through the abdomen. That both of these remedies involve danger to the health and life of the plaintiff,' and in refusing to admit such evidence.

"3. That the court erred in ruling that it would not be competent for the plaintiff to prove 'that by reason of the injuries to the pelvis occasioned to the plaintiff as the result of the accident the capacity of the plaintiff to perform the functions of a woman in regard to childbearing has been seriously impaired, and the performance of such functions has been rendered dangerous to her health and life,' and in refusing to admit such evidence.

"4. That the court erred in ruling that it would not be competent for the plaintiff to show 'that the plaintiff has endured much mental suffering because of her condition in respect to her ability to bear children,' and in refusing to admit such evidence."

It is often said that mere mental suffering does not support a claim for damages; but mental suffering in connection with physical suffering stands on a different footing. The evidence offered on the other point related to a clearly physical condition which was alleged to be the immediate result of the injury for which the suit was brought. This was a physical fact of a character which usually and properly goes to the jury as bearing on the question of damages, existing or reasonably probable in the future; and we think it should have been admitted.

In No. 875, Partridge, Administrator, v. Boston & Maine Railroad, the judgment of the Circuit Court is affirmed; and the appellee recovers its costs of appeal.

In No. 883, Boston & Maine Railroad v. Minard, and in No. 882, Minard v. Boston & Maine Railroad, in each the judgment of the Circuit Court and the verdict therein are set aside, and the case is remanded to that court for further proceedings in accordance with law; and Miss Minard recovers one bill of costs of appeal.

ALDRICH, District Judge (concurring). On the whole I concur in the results reached in the foregoing opinion, but with a great deal of hesitancy in the particular result which turns the Partridge Case decisively against the administrator, upon the ground of the contributory negligence of his intestate; and I desire to state the reasons for my conclusion.

At the arguments I was impressed with the strength of the plaintiff's position based upon the fact that the engine, which was hauling a train of Pullman cars, was running at a high rate of speed, with the tender forward, with no headlight but a lantern on the tender.

The plaintiff says, though the general rule in Maine is that the defendant's negligence is no excuse or justification for the plaintiff's negligence, that such rule is subject to the qualification that, if the negligence of the defendant is of such a kind as to deceive and lead the injured party into a field of danger, then the defendant's negligence becomes something to be considered upon the question of the injured party's care. This position apparently finds some support in the Maine case (State v. B. & M. R. R. Co., 80 Me. 430, 443, 15 Atl. 36), where it is said in effect that, if a party sees a gate open at a crossing, he

may place some reliance on the supposition that there would be no danger in attempting to cross; but the position finds more considerable support in the case of Baltimore & Potomac R. R. v. Cumberland, 176 U. S. 232, 237, 20 Sup. Ct. 380, 382 (44 L. Ed. 447), a case in which the engine was running tender forward with no headlight, but a lantern, and where the Supreme Court said, referring to the lantern:

"The light was clearly not an ordinary headlight, * * * shedding a dazzling light which could scarcely fail to be noticed by a person crossing in front of an engine, but an ordinary lantern which might readily be mistaken for a lantern carried by a foot passenger, or even a street lamp, or other smaller light."

The plaintiff's position as to the qualification upon the general rule that the defendant's negligence may be considered upon the question of the plaintiff's negligence, if it is of a nature to mislead or deceive a traveler into a position of danger, is doubtless true as a legal proposition, and it therefore results that the plaintiff's rights do not turn upon any question of law, but upon the question whether the defendant's negligence deceived the plaintiff, or whether there was any substantial evidence, viewing the circumstances as they are explained, and making all reasonable inferences in favor of the plaintiff, which would entitle him to go to the jury upon the question of fact thus presented. In other words, this being a case where the defendant was negligent, and where the plaintiff's intestate apparently, without seeing or hearing, rode into the situation of danger, is there anything substantial tending to show that the traveler, while in the exercise of ordinary care, was misled; or was it a case where he was so clearly lacking in care and attention, in respect to the hazards of driving in the nighttime in the vicinity of railroads and other dangerous agencies, that there is nothing substantial upon which the plaintiff could go to the jury?

If the intestate was misled at all, it was through not seeing rather than seeing.

In the case of the open gate, to which reference has been made (State v. B. & M. R. R. Co., 80 Me. 430, 443, 15 Atl. 36), the injured parties saw the gate open, and the fact of the open gate was what misled them. That, I think, distinguishes the Maine case from the case at bar, because there is no evidence in this case tending to show that the injured party was misled by anything that he saw.

The reasoning of the Supreme Court with respect to the absence of a headlight is nearer to the situation here than cases based upon conditions which were seen and which misled.

The story of the intestate's misfortune, so far as it is told and so far as it can be known, making all natural inferences, on the whole would seem to justify the conclusion that he was wholly unmindful of the responsibilities resting upon a driver in the nighttime in a thickly settled locality, where it must have been well known to him that he was in the neighborhood of railroads, automobiles, and other dangerous agencies.

This apparently is not a case to be influenced at all by any considerations in respect to the look and listen rule, because there is nothing

to show that he had any actual knowledge that he was at a railway crossing; but it is a case where the result, unfavorable to the injured party, is reached upon the theory that the driver was altogether thoughtless of dangers and unmindful of the responsibilities which rest upon highway travelers in the nighttime.

He had been two hours making four miles. The steady old horse was apparently going at its own pace. The night was still and clear, but rather dark; and, without knowing it, the intestate, with his companion, was approaching the railroad track at nearly right angles. After they passed the Towne house, which was on the right of the highway, and something like 8 or 10 rods from the railroad, if he had been on the lookout ahead and to the right and left, he would have discovered the train, because there was a long stretch of straight open track, which was higher than the highway upon which the intestate was traveling, with nothing to obstruct the view.

When it comes to distinguishing the reasoning of the headlight case, to which I have referred, where it is said that a dazzling light could scarcely fail to be noticed by a person crossing the track, from reasoning which should apply to the case at bar, I must say that the task is not free from difficulty; still there is nothing in the testimony of Miss Minard, nor is there anything in the circumstances, which indicates that the train was discovered at all or that the light, which was a lantern instead of a headlight, misled the driver, and therefore, if the case is turned for the plaintiff upon the lack of a headlight, it must be upon the theory that, while the lantern did not mislead, the presence of a headlight would have commanded attention; and that would be a theory in the field of conjecture.

It is well known that in the nighttime many of the ordinary distracting sounds of daytime are absent, and that on country roads the stillness of night prevails. It is conceded that the signpost projecting over the highway, the white fences and the cattle guards, and such other things as usually exist at railway crossings, were not seen, and that the rapidly approaching train, on elevated ground, with combination smoker and baggage car, a day coach, and three sleepers, all lighted, was neither seen nor heard. Thus the indicated condition of personal absorption and thoughtlessness would, on the whole, seem to fairly justify an assumption that what would have been the effect of the presence of a proper headlight, under all the circumstances, is something conjectural.

I think the case one very near the line, and one not free from difficulty, but, on the whole, I concur in the conclusion that the plaintiff's intestate was not giving proper attention to the hazard of night driving, and that he was so wholly indifferent to surrounding dangers that the plaintiff is not in a position to be relieved from the doctrine of contributory negligence on the ground that the defendant's negligence deceived the intestate into the injury complained of.

In re TELFER.

In re UNION BANK, WHITNEY, GILKEY & CO.

(Circuit Court of Appeals, Sixth Circuit. December 1, 1910.)

Nos. 2,041, 2,042.

1. BANKRUPTCY (§ 351*)—DISTRIBUTION OF ESTATE—PARTNERSHIP AND INDIVIDUAL ESTATES AND CREDITORS—"PERSON."

Neither the judicial recognition by the courts of a state of the partnership entity, nor the provisions of the bankruptcy act, which define a partnership to be a "person" within the meaning of the act, and authorize it to be adjudged a bankrupt (Bankr. Act July 1, 1898, c. 541, §§ 1a (19), 5a, 30 Stat. 544, 547 [U. S. Comp. St. 1901, pp. 3418, 3424]), work a change of the established rule fixing the substantive rights of creditors, respectively, of the partnership and of its individual members.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 351.*

For other definitions, see Words and Phrases, vol. 6, pp. 5322–5335; vol. 8, p. 7752.]

2. BANKRUPTCY (§ 351*)—DISTRIBUTION OF ESTATE—PARTNERSHIP AND INDIVIDUAL ESTATES AND CREDITORS.

Bankr. Act July 1, 1898, c. 541, § 5g, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), which provides that "the court may permit the proof of the claim of the partnership estate against the individual estates and vice versa, and may marshal the assets of the partnership estate and the individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates," does not change the established equity rule of distribution between partnership and individual creditors, which is expressly recognized in subdivision "f"; and, while the trustee of a partnership estate may prove a claim against the individual estate of a partner, such claim is not entitled to payment pro rata with those of individual creditors, but only from the surplus, if any, remaining after the individual claims have been paid.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 351.*]

Petition for Revision of Proceedings of the District Court of the United States for the Western District of Michigan.

In the matter of Union Bank, Whitney, Gilkey & Co., a copartnership, Wallace W. Dewey, Elias W. Bowman, Patrick H. Gilkey, Asa Stratton, Rell S. Wilson, and Richard D. Whitney, individually and as members of said copartnership, bankrupts. On petition of Robert R. Telfer, trustee, to review an order of the District Court. Affirmed.

Robert R. Telfer, as trustee in bankruptcy, has brought two cases into this court upon petitions to review in matter of law an order made by the court below in each case reversing the order of the referee.

Patrick H. Gilkey, Wallace W. Dewey, Elias W. Bowman, Rell S. Wilson, Richard D. Whitney, and Asa Stratton, as copartners, conducted a banking business in Michigan under the name of Union Bank, Whitney, Gilkey & Co. In November, 1907, the copartnership and all the partners were adjudicated bankrupts. The Kalamazoo Trust Company was later selected as trustee of the several bankrupt estates. Telfer, present trustee, is its successor.

A claim of the Central National Bank against the estate of Gilkey was proved and allowed in the sum of $5,000. David L. Merrill also presented a claim against the estate of Gilkey which was finally allowed for $10,482.91.

On September 9, 1908, the trustee on behalf of the copartnership filed proof of a claim against the estate of Gilkey for a loan of money repre-

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

sented by certain promissory notes signed by him with others to the amount of $95,502.13, which claim was allowed on the following day. It is agreed that: "No personal notice was given to either of the petitioners of the proof and allowance of this claim." The claims allowed against Gilkey's estate, excepting that of the copartnership, amounted to $33,002.61, and claims to the amount of $127,520.29 were allowed against the copartnership. Two dividends, one of 20 per cent. and another of 5 per cent., were declared on certain of the partnership claims; and also one of 14 per cent. on the separate claims against Gilkey, excepting those of the Central Bank and Merrill. The first dividend paid on claims against Gilkey's estate amounted to $15,117.62, of which $13,370.30 was paid to the estate of the bankrupt copartnership. Merrill filed a petition with the referee asking that his claim against Gilkey's estate be paid in full before the copartnership estate be paid any dividend on its claim against the Gilkey estate, and that the trustee of the copartnership be required to return to Gilkey's estate a sufficient amount of the dividends taken from it to pay this claim. The Central National Bank filed with the referee a similar petition respecting its claim. The referee entered orders denying the petitions, which orders as stated were reversed by the court below.

By the orders of the court below the petitioners were given priority in payment of their claims out of the estate of Gilkey as against the trustee of the copartnership on its claim against such estate, and the trustee was directed to pay to the petitioners their respective claims in full out of the assets of such estate or so much thereof as the property might be able to pay (taking into consideration other individual creditors whose claims had been allowed), and was further directed, if sufficient funds were not realized from the estate to pay the claims in full, to "turn back and pay over into the hands of the trustee" of Gilkey "all moneys (or other moneys instead thereof) which may have heretofore been paid by said trustee of the estate of Patrick H. Gilkey out of his individual property" either to the copartnership or to its creditors; "or so much of said money which has been paid as shall be necessary to pay in full" the claims of the petitioners, and that the assets of the bankrupt estates shall be marshaled accordingly.

Stewart & Jacobs and Dallas Bondeman, for claimant Merrill.
Stewart & Sabin, for claimant Central National Bank.
A. M. & C. H. Stearns, for trustee.

Before WARRINGTON, Circuit Judge, and COCHRAN and TAYLER, District Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). At the time the partnership and each of its members were adjudged bankrupts, there were both joint and separate assets. A dividend, however, at the same rate as that paid to the ordinary individual creditors (i. e., in contradistinction to the partnership as a creditor) of one of the partners was paid out of his separate estate to the joint estate upon a claim for money loaned to him by the partnership.

The trustee maintains that this disposition of individual assets must be sustained independent of the bankruptcy act, but more especially in consequence of certain of its provisions, upon the principle that a partnership is an entity, distinct from its membership, and so is entitled to have the claim treated regardless of any partnership relations and of the old rule touching the primary rights of joint creditors in the estate of a partnership and of individual creditors in the separate estates of the partners. Unless the proposition as thus stated and strenuously urged upon us so far differentiates the present case from decisions rendered under the bankruptcy act of 1867 and under certain

state insolvency enactments, it would seem unnecessary to consider this case further. In re McLean, 16 Fed. Cas. 240 (No. 8,879) 15 N. B. R. 333; In re Lloyd, Bankrupt (D. C.) 22 Fed. 90; Re Lane, Brett & Co., Re Boynton, 2 Low. 333, Fed. Cas. No. 8,044; Somerset Potters Works v. Minot, 10 Cush. (Mass.) 592; Pott & Co. v. Schmucker, 84 Md. 535, 36 Atl. 592, 35 L. R. A. 392, 57 Am. St. Rep. 415.

To sustain the contention made irrespective of the bankruptcy act, counsel for the trustee relies mainly on Robertson v. Corsett, 39 Mich. 784; Carpenter v. Greenop, 74 Mich. 664, 42 N. W. 276, 4 L. R. A. 241, 16 Am. St. Rep. 662; Burrows v. Leech, 116 Mich. 32, 74 N. W. 296; Cross v. National Bank, 17 Kan. 340, and Walker v. Wait, 50 Vt. 668. As illustrative of the feature of those cases upon which reliance is placed, we may call attention to the first one. An issue arose concerning the right to remove certain machinery from land, which had been placed there by a partnership, but it appears that the land was held by some of the partners under title independent of that of the partnership property. Judge Cooley, after speaking of the partnership machinery as trade fixtures which could be removed, said at page 784 of 39 Mich.:

"The partnership for most legal purposes is a distinct entity—having its own property, capable of contracting separate debts, having the right to sue in equity its several members, and to be protected against their conduct to the same extent that it might be against the conduct of strangers."

In support of his insistence under the bankruptcy act, counsel points out certain language of the act, and particularly certain portions of the opinion in which a majority of the learned judges concurred in Re Bertenshaw (8th Circuit) 157 Fed. 363, 365, 85 C. C. A. 61, 63 (17 L. R. A. [N. S.] 886). The question in that case was whether an adjudication of bankruptcy against a copartnership alone draws into the administration of its estate in a court of bankruptcy the property of solvent partners who are not adjudged bankrupts. In the course of the opinion Judge Sanborn said:

"There are two conceptions of a partnership, one springing from the agreement on which it is founded, that it is an aggregation of persons associated together to share its profits and losses, owning its property, and liable for its debts. The other that it is an artificial being, a distinct entity separate in estate, in rights, and in obligations from the partners who compose it. In most of its relations to persons and things the latter conception is the more accurate."

After quoting from several of the decisions before mentioned as now relied on by the trustee and referring to one among others of the definitions found in section 1 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418])—thus (at pages 368, 371 of 157 Fed., at pages 66, 69 of 85 C. C. A. [17 L. R. A. (N. S.) 886]) "A 'partnership' is a 'person.' Section 1 (19)"—the learned judge again alludes to the present bankruptcy act and states:

"The uniform current of authority is that under this act a partnership is a distinct entity separate from the individuals who compose it. * * *"

In Mills v. J. H. Fisher & Co. (6th Circuit) 159 Fed. 897, 899, 87 C. C. A. 77, 79 (16 L. R. A. [N. S.] 656), in passing upon the effect

of the act of a member of a partnership in transferring the whole of his separate estate to satisfy a claim of a partnership creditor, the present Mr. Justice Lurton had occasion to say:

"A partnership, under the bankrupt act of 1898, is a distinct entity—a 'person.' * * * As an entity it may be adjudged to be a bankrupt, irrespective of any adjudication against the individual members."

Again, the difference in this regard between section 5 of the present bankruptcy act, on the one hand, and section 14 of the act of 1841 (Act Aug. 19, 1841, c. 9, 5 Stat. 448) and section 36 of the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 534), on the other, is enough to show that Congress intended by the present act to treat partnerships as entities distinct from their members for the purpose at least of permitting partnerships to be adjudicated bankrupts either through voluntary or involuntary proceedings. This is clearly pointed out by Judge Wallace in Re Meyer, 98 Fed. 976, 979, 39 C. C. A. 368, 370, where he said:

"These sections of the earlier acts authorized adjudication of bankruptcy of 'persons who are partners in trade' instead of 'partnerships'; and while providing for the administration of the joint and separate estates substantially like section 5, provided as section 5 does not, for granting or refusing a discharge to each partner."

But we are not satisfied that the existence of the entity as declared either by judicial decision or statutes is decisive of the present question. We have not discovered anything concerning the doctrine of partnership entity which shows that its origin or development arose out of any difficulty touching the substantive rights of the two classes of creditors under consideration. It is true that facility in the conduct of business has been achieved by those engaged in mercantile affairs through this artificial entity—(Parsons on Part. [4th Ed.] 2; 1 Bates, Part. § 170 et seq.; 1 Lindley, Part. [2 Am. Ed.] 233), and, further, that much annoyance and delay in procedure have been avoided both through judicial recognition of partnership title to joint property and legislative substitution of simple remedies for technical common-law remedies by and against partnerships. Among the citations made on behalf of the trustee and before mentioned to show judicial recognition of the theory of distinct entity will be found the much cited cases of Walker v. Wait and Carpenter v. Greenop, which afford apt illustrations both of the tendency of courts to escape the effects of common-law technicality in point of remedy concerning partnerships and of the need of legislative aid in that behalf.

It seems that in this country, except Louisiana, the earliest statement of the doctrine of partnership entity was made in 1834 (Parsons on Part. [4th Ed.] 3) by Chief Justice Hornblower in Hollingshead v. Curtis, 14 N. J. Law, 402, 409–410, when in passing upon a statutory right of attachment against property of one of several partners for a partnership debt he said:

"In the case of partnerships, the firm is the contracting party, not the individuals composing the firm. The credit is given to the firm. The partnership, the ideal person, formed by the union of interests, is the legal debtor. A partnership is considered in law as an artificial person, or being, distinct from the individuals composing it. It is treated as such at

law and in equity. Its property is first to be appropriated to the payment of its debts."

The late Justice Brewer, when a member of the Supreme Court of Kansas and speaking for that court in Cross v. National Bank, 17 Kan. 336, 340, before cited, recognized and declared the partnership entity, stating, in substance, the same as was said by Judge Cooley in Robertson v. Corsett: "The firm owns the property, holds the business, and owes the debts." And in Hubbardston Lumber Co. v. Covert, 35 Mich. 254, Judge Graves reached substantially the same conclusion in considering the question of residence of a partnership under a statute providing for the filing of partnership chattel mortgages. Without attempting to trace the development of this doctrine, it may be added that the Supreme Court, speaking through Justice Strong, recognized it, when in Forsythe v. Woods, 11 Wall. 484, 20 L. Ed. 207, he said: "The partnership is a distinct thing from the partners themselves."

Now we shall be aided as we progress by observing that the rule of primary right of joint creditors to the joint estate and of separate creditors to the separate estates has long survived the establishment of the doctrine of partnership entity. We shall derive some assistance, too, by referring briefly to the effect of legislation of a remedial character, such as authorizing a partnership to sue and be sued and judgments rendered against it to be satisfied by executions levied only upon the partnership property. In Whitman v. Keith, 18 Ohio St. 134, 145, proceedings in garnishment against a partnership by its name were considered in connection with a statute authorizing a partnership to sue and be sued. In the course of the opinion it was said by Judge Scott:

"The purpose of this statute was to give to every partnership of the kind which it describes a status in court as a person, an artificial or ideal person, it is true, but still the status of a person, who is regarded as the owner of the partnership property and rights in action, and is responsible for the partnership debts and liabilities of every kind. To render the administration more convenient and easy, this statute authorizes suits to be brought by and against this ideal person in the name which the partners have seen fit to give it, and authorizes judgments which may be rendered against it to be satisfied by executions to be levied only on the partnership property."

In Parsons on Partnership (4th Ed.) p. 4, it is, we think, correctly said in a note, after citing a number of decisions:

"In some of these cases a statute provided that the partnership might sue and be sued by its name. This statute, however, since it applied only to the remedy, could not change the nature of a partnership. If, as is everywhere decided, it is an entity in the eye of the law after such a statute, it must really have been so before the passage of the statute."

Judge Bates states in his work on Partnership:

"We have seen that in the absence of a statute partners can neither sue nor be sued in the partnership name. But in England and a number of states recent statutes have been passed authorizing actions by and against partnerships to be brought in certain cases in the firm name. This makes the firm a distinct entity as far as remedies are concerned." 2 Bates, Part. § 1059.

It may tend further to clarify the subject by considering the effect of absence of legislation touching the right of partnerships to sue or

be sued. While, as before shown, the partnership entity has long been recognized in Michigan by judicial decisions, yet the common-law rule still prevails in that state which prevents a partnership from maintaining a suit at law as payee of a promissory note executed by one or more of the partners as evidence of a loan of money. Kalamazoo Trust Co. v. Merrill, 159 Mich. 649, 653, 124 N. W. 597, 599. Now would a statute authorizing such suits to be maintained operate further than to clothe existing partnership entities with a remedial right? Would that right differ except in form from the right acknowledged so long to exist in equity? The Michigan case just cited was a suit at law brought by the present trustee's predecessor against Merrill, one of the petitioners herein, upon most of the notes which are the basis of the dividends paid and now in controversy. The trustee was denied the right to maintain his action at law as against Merrill, who it was said was jointly liable on the notes with Gilkey, the partner whose individual estate is under consideration. The court said:

"* * * We think it may be said to be settled law in this state that a copartnership may not maintain a suit at law against one of its partners, and the reason for the rule is that, inasmuch as all the partners have a joint interest in the claim, all are necessary parties plaintiff, and to permit the action would present the anomaly of a single individual acting as both plaintiff and defendant in the same suit. And it is elementary that in suits at law, by or against a copartnership, all the partners must be named as plaintiffs or defendants, as the case may be. As to both these propositions, the authorities (where, as in this state, the common law obtains) are practically unanimous."

But it was expressly held that a suit in equity could be maintained by the trustee; the court finally saying upon this subject (at page 657 of 159 Mich., at page 600 of 124 N. W.):

"In a suit in equity the assets in the hands of this plaintiff, belonging to the individual assets of defendant's co-obligors, will be marshaled in accordance with familiar rules."

It has not been suggested that the court's reference to marshaling "in accordance with familiar rules" was made with any idea that those rules would be changed or in any wise affected by reason of the rule prevailing in that state respecting the partnership entity.

There has always been a steady refusal in England to adopt the idea of the old Roman lawyers (Goudsmit's Rom. Law [Gould Ed.] 74) upon the subject of partnership entity, although the doctrine is recognized in Scotland. Lord Lindley in his work on Partnership, written in 1877, stated the commercial view of a firm in England to be that of a "body distinct from the members composing it, and having rights and obligations distinct from those of its members," though he further stated:

"But this is not the legal notion of a firm. The firm is not recognized by lawyers as distinct from the members composing it." 1 Lindley, Part. marg. pp. 110, 111.

Sir Frederick Pollock makes substantially the same statement in the recent edition of his Digest of the Law of Partnership (9th Ed.) p. 23; and it is worthy of observation that in his first edition (page 121) when considering provisions expressly authorizing copartners to "sue

or be sued in the name of their respective firms" he was of opinion that the substantive results were the same as under the former practice. What he said in that regard does not appear in the ninth edition, but it is there stated (page 159) that while it was thought in view of section 40 of the bankruptcy act of 1883 the joint creditors would not be permitted longer to prove against a partner's separate estate in cases where there was no joint estate—a feature characterized by him as "a most capricious exception to the general rule"—yet that it had been held by Justice Chitty in Re Budgett (1894), 2 Ch. 555, 557 (criticised in Re Wilcox [D. C.] 94 Fed. 100), that as the law in that behalf was settled by a long course of authority, "the court could not treat it as altered by mere negative implication, and that accordingly it is still in force."

We are thus brought to believe that neither the judicial recognition of the partnership entity, nor the provisions of the bankruptcy act which define a partnership to be a "person" within the meaning of the act and authorize it to be adjudged a bankrupt, can be rightfully said to work a change of the established rule fixing the substantive rights of creditors respectively of the partnership and of its individual members. But it is contended finally that these statutory provisions, together with section 5g of the act, have wrought a change in the substantive law, in the sense that the trustee of a bankrupt partnership is entitled not only to prove a claim of the partnership against the individual estate of one of the bankrupt partners, but also to share therein pari passu with the individual creditors. Section 5g provides:

"The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates, so as to prevent preferences, and secure the equitable distribution of the property of the several estates."

This would seem to provide for action of the court before proof of the character mentioned could be made. It differs in this respect from section 57 in regard to proof of claims of ordinary unsecured creditors. When it is considered that 5g concerns partnership relations, it is not surprising that supervision of the court was so imposed. There are sufficient reasons, however, for the enactment of such a provision without giving to it the extreme effect urged in this case. It affords means of adjusting in advance all disputes touching the claims specified. Such adjustments may in many ways affect the duty imposed by the same paragraph to marshal both classes of assets so as to avoid preferences and secure equitable distribution. Obviously all this must be done before the provisions of section 5f can be finally carried out. Furthermore, prior to the date of the act a rule prevailed in this country, as also for a long period in England, permitting joint creditors to prove against the separate estates for purposes distinct from that of sharing therein pro rata with the individual creditors. Wilkins v. Davis, 2 Lowell, 511, 514, Fed. Cas. No. 17,664; In re Wilcox, supra, where the history of the rule as adopted through orders of the lord chancellors is exhaustively treated.

Judge Lowell had occasion to consider 5g in Re Denning (D. C.) 114 Fed. 219. The facts of that case furnish another illustration of

the object of 5g. There the sale by one partner to the other of his interest in the partnership assets and the subsequent use of the property by the purchasing partner resulted in conversion of joint estate into separate estate so far at least as the rights of joint creditors were concerned. The purchasing partner was adjudged a bankrupt and the selling partner proved his claim on the purchase money notes against the bankrupt purchaser. The claim, however, on motion of the trustee was expunged. In speaking of the conversion of joint estate into separate estate through the sale mentioned, and of the rights of joint creditors thereto, the learned judge said (at page 221):

"Moreover, section 5g of the bankruptcy act was intended, I believe, to clear up the whole matter, and to permit the court to deal with conversions of this kind so as not only to prevent preferences in the technical meaning of that word, but also so as to secure the equitable distribution of property of the several estates."

But 5g must be construed with reference to the rest of section 5, especially 5d, e, and f. The first two relate to keeping separate accounts and payment of expenses of administration of the joint and separate properties. Section 5f provides:

"The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."

It is scarcely necessary to say, indeed we understand it to be admitted, that paragraph 5f is declaratory of an established equity rule. Under the facts of the case none of the old and controverted exceptions to this rule can arise. For instance, neither the question of exception where there are no partnership assets, nor the one concerning a claim arising out of the prosecution of a distinct trade by one or more of the partners, needs to be considered here. No objection is made to the proof of the partnership claim nor to a transfer to the partnership assets of any surplus that may remain of Gilkey's individual estate after the claims of his separate creditors are satisfied. The objection is to the alleged right of the partnership through its trustee to share pro rata in that estate. Proof, but not sharing, is mentioned in 5g. To permit sharing upon proof allowed under that paragraph is to ignore most important relations attending a partnership, where as here the partnership and its members are alike insolvent and adjudged bankrupts. Neither the bankrupt partnership nor its trustee can have any possible interest in the separate estate of any of the bankrupt partners, except only for the benefit of the partnership creditors. Whatever disability then that can be predicated of the partnership creditors respecting the separate estate and creditors of one of the partners ought to attach to the bankrupt partnership estate and its trustee. Can it be that in a case like this there is anything in the bankruptcy

provisions we have been considering, which requires a court to decline to see or to consider these plain facts? It was long ago settled that the partnership creditors would not either directly or through the assignee be allowed so to deplete the separate estate of one of the partners to the prejudice of his separate creditors (Story on Part. § 391; Gow on Part. marg. pp. 317, 318; also decisions first cited in this opinion). It is not claimed that this rule of protecting separate creditors should be ignored upon any theory of fraud; for admittedly the claim in question is founded on consent, on simple contract. Hence, unless the trustee of the bankrupt partnership is to be accorded greater rights than would be given to those in whose interest alone the claim is pressed, there is nothing to warrant the removal of the separate estate in question from the ordinary category and liabilities of such estates (Story on Part. § 391, note); in short, the partnership estate should not be now any more than it would have been prior to the enactment of the present bankruptcy act allowed to claim against "the separate estate in competition with the separate creditors." Amsinck v. Bean, 22 Wall. 395, 402, 22 L. Ed. 801. We may now advert to a test that ought to be decisive.

If the asserted rule would work in favor of the partnership estate, it ought by the same token to work in favor of the separate estate; yet the right so to share in a partnership estate was denied in Re Rice (D. C.) 164 Fed. 509, 513. A partnership and its members were all declared bankrupts and a trustee common to all was appointed. One of the partners filed a claim against the partnership based on promissory notes alleged to have been given for money advanced to the firm. In the course of the opinion Judge McPherson said:

"No doubt the claim of Joseph A. Rice against the firm of which he was a member is an asset of his individual estate; but it is an asset with a particular disability, and in this respect it differs from the claims of other partnership creditors. Its disability consists in the fact that, according to the well-settled rule governing the marshaling of partnership and of individual assets, it cannot participate in the distribution of the partnership assets until other partnership creditors have been satisfied in full. For this reason, the individual creditors of the claimant cannot profit by it as completely as if he were an ordinary creditor of the firm, and not a member also. But nothing is taken away from the individual creditors to which they are equitably entitled, because the claimant himself could not share in the distribution of the partnership assets pari passu with other partnership creditors. To sustain the claimant's position would give to his individual creditors a more extensive right against the bankrupt firm than he himself possesses, and would thus do violence to the rule that the individual creditors succeed only to such equity in the firm assets as belongs to their debtor himself."

In re Denning (D. C.) 114 Fed. 219, 220, before cited, it does not appear that the former partner who sought to prove his claim against the bankrupt was insolvent, but it does appear that his former firm was indebted to him. Judge Lowell said:

"It is plain that the bankrupt's former partner cannot be allowed to prove in this case. To permit him to do so would permit him to compete with his own creditors. * * * There are joint creditors in this case who have proved, and, until the claims of the joint creditors are settled, Brown cannot share in the distribution of his former partner's estate. * * * There is nothing in section 5g of the act to change this well-established rule."

See, also, In re Filmar (7th Circuit) 177 Fed. 170, 100 C. C. A. 632; In re Ervin (D. C.) 109 Fed. 135, affirmed in Wallerstein v. Ervin (D. C.) 112 Fed. 124; In re Terens (D. C.) 175 Fed. 495.

As we understand these decisions, one principle to be deduced from them is we think that the rule of distribution prescribed by section 5f is not to be varied by anything permissible under section 5g, where the partnership and the individual members are all adjudged bankrupts and the estates of all are before the court, and as here are unaffected by preference or fraud. This is but applying the general rule laid down in Amsinck v. Bean, supra, at page 402 of 22 Wall. (22 L. Ed. 801):

"Where all the partners become bankrupt the general rule is that the separate estate of one partner shall not claim against the joint estate of the partnership in competition with the joint creditors, nor shall the joint estate claim against the separate estate in competition with the separate creditors."

See, also, Murrill v. Neil, 8 How. 414, 426, 12 L. Ed. 1135; Rodgers v. Meranda, 7 Ohio St. 180. It may be observed, further, that prior to the promulgation in 1825 of the Code of Louisiana both the doctrine of the partnership entity (Smith v. McMicken, 3 La. Ann. 319, 322) and that of allowing partnership creditors to be paid out of the partnership estate and separate creditors out of the separate estates before either class of creditors could resort to the other estate (Morgan v. His Creditors, 8 Mart. [N. S.] 599, 601, 20 Am. Dec. 262) prevailed; the court in alluding to the latter rule in Morgan v. His Creditors saying:

"This principle, first acknowledged by the Roman law was adopted by the jurisprudence of Spain, and makes a part of that of England and that of the United States."

We conclude that the substantive rights, as distinguished from the remedial rights, respecting bankrupt partnerships and their creditors upon the present issue and facts, remain unchanged; and so we regard the cases first alluded to and cited in this opinion as apposite and as an additional answer to the trustee's contention in the present case.

The charges of laches made against the petitioners are not sustained by the evidence. As to the claim made that there are not sufficient partnership assets remaining to repay the portion erroneously taken from Gilkey's separate estate, the evidence is not satisfactory touching the amount of partnership assets that may be collected. It is not apparent that any question of individual liability of the trustee will ever arise and hence we see no reason for considering revision of the orders in that respect.

The order of the court below reversing that of the referee is in each case affirmed, with costs.

CITY OF SHELBYVILLE, KY., v. GLOVER.

(Circuit Court of Appeals, Sixth Circuit. December 6, 1910.)

No. 2,071.

1. RECEIVERS (§ 29*)—JURISDICTION—APPOINTMENT OF RECEIVERS.
Where property of a corporation is situated in different federal districts of a state a federal court in one of the districts has jurisdiction to appoint a receiver for all of such property.
[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 29.*]

2. RECEIVERS (§ 73*)—REMEDIES IN RECEIVERSHIP PROCEEDING—PROTECTING POSSESSION OF PROPERTY.
A proceeding by a receiver of a federal court to enjoin another from interfering with his possession of property, whether situated within the district or in another district of the same state, may properly be by petition in the suit in which he was appointed, although the proposed defendant is not a party to such suit, when his rights can be as fully protected in such proceeding as in a separate suit, which is a matter to be determined by the court in the exercise of its discretion.
[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 131; Dec. Dig. § 73.*
Actions by and against receivers of federal courts, see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 49.]

3. RECEIVERS (§ 73*)—REMEDIES IN RECEIVERSHIP SUIT—ANCILLARY PETITION.
A receiver appointed by a federal court for an electric railway company completed the construction of a line under an order of the court and a grant from a fiscal court of a county of right of way to the company over a pike, to the limits of a city. He also purchased a lot and was proceeding to construct a station building thereon and also a Y on the pike when the city, which had extended its limits to include such terminus, denied him permission to construct such terminal facilities, and threatened to prevent such construction. *Held*, that the receiver, having undoubted possession of the lot, had also such joint possession of the street as gave the court jurisdiction to determine the rights of the parties to the controversy on a petition filed by the receiver in the original suit.
[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 73.*]

4. APPEAL AND ERROR (§ 954*)—REVIEW—DISCRETION OF LOWER COURT—ORDER GRANTING INJUNCTION.
On an appeal from an order granting a preliminary injunction, the decision of the judge who made the order will not be reversed unless it appears, after a consideration of the grounds presented to him for his action, that his legal discretion to grant or withhold the order was improvidently exercised. If, however, it appears on appeal that the record is such as to forbid final relief it would be the duty of the court to at least reverse the order for injunction.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818–3821; Dec. Dig. § 954.*]

5. RAILROADS (§ 93*)—RIGHTS IN USE OF HIGHWAYS—LEGISLATIVE GRANT.
Section 768 (5) of the Kentucky Statutes (Russell's St. § 5368 [5]), which gives a railroad company power "to construct its road upon or across any * * * highway, street * * * and across any railroad or canal" relates to a complete crossing made necessary as part of a continuous road, and does not apply to a switch or Y extending merely from a track in a street to a lot adjoining the same.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 260–265; Dec. Dig. § 93.*]

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

6. FRANCHISES (§ 3*)—LEGISLATIVE GRANTS—CONSTRUCTION.
Legislative or municipal grants or franchises in which the public has an interest are to be strictly construed in favor of the public.

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

7. RAILROADS (§ 79*)—RIGHTS IN USE OF HIGHWAYS—CONSTRUCTION OF GRANT—INCIDENTAL RIGHTS.
The fiscal court of a county in Kentucky granted to an electric railroad company right of way to construct its line on a pike to the limits of a city. *Held* that, whether such grant by implication included the right to build a Y at the city limits necessary to the company for the making of a terminal station at that point depended on whether the court in making the grant contemplated the reasonable possibility that such point would constitute the terminus of the road either permanently or temporarily, and that pending final determination of such question, in a suit, it was within the discretion of the court to grant a temporary injunction restraining interference with the construction and use of such Y.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 79.*]

8. APPEAL AND ERROR (§ 479*)—SUPERSEDEAS—DISCRETION OF COURT.
The granting or denying of a supersedeas, on an appeal from an order granting a preliminary injunction, is within the discretion of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2251–2256; Dec. Dig. § 479.*]

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

Suit in equity by William Love against the Louisville & Eastern Railroad company. On petition by Henry Glover, receiver, against the City of Shelbyville, Ky. From an order granting a preliminary injunction, the city appeals. Affirmed.

J. B. Baskin and P. J. Beard, for appellant.
A. E. Richards, for appellee.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

KNAPPEN, Circuit Judge. This is an appeal from an interlocutory order granting an injunction restraining the city of Shelbyville from interfering with the receiver of the Louisville & Eastern Railroad Company in the construction by that officer of a depot abutting upon Main street in the city of Shelbyville on which the railway track was laid, and in the construction of a Y from the track to the depot lot. The important facts are these:

The Louisville & Eastern Railroad Company was organized under the laws of Kentucky for the purpose of building and operating an electric railway from Louisville to Lagrange, with branches to Shelbyville and other places. On April 3, 1906, the Shelby county fiscal court gave said railroad a franchise in the following terms:

"The Louisville & Eastern R. R. Co. is hereby granted a right of way over the Shelbyville & Louisville pike, beginning in the middle of said pike at the

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

western limits of the city of Shelbyville, Ky., thence running about west in the middle of said pike to a point opposite the western boundary of the yard of Mrs. Gordon Logan, thence W. on the north side of the said right of way of the Shelbyville & Louisville pike to the western boundary on the Agricultural & Mechanical Association Grounds. Said railroad not to obstruct the ditches or culverts along said pike. The part that is in the middle of the said pike shall conform to the present grade of the pike, the top of the rails not to extend above the metal of the pike next to them, and said track is to be laid as far from the center of pike as practicable, and to keep in repair and maintain road between tracks and three feet on either side thereof until they pass Mrs. Gordon Logan's residence, or the other end of her pavement."

A month later, and on May 3, 1906, the city of Shelbyville gave the railroad company a right of way over Main street (which was a continuation of the Shelbyville & Louisville pike), upon condition that the railroad company should reconstruct certain parts of Main street and should extend its line to Eminence, Ky., by August 1, 1908, under an agreement to pay the city $2,000 for each year of default in making that extension, and with provision for the reverting of the right of way to the city of Shelbyville in case the road was not constructed to and through that place by August 1, 1907. The railroad company partially constructed its line through Shelbyville, but never completed any part of it. The city accordingly repudiated the franchise and ordered the ties, rails, poles, etc., removed from the streets, and on August 8, 1907, began suit in equity in the Shelby county circuit court, asking that the right of way be adjudged to have reverted to the city, that the company be required to remove the material, construction, and equipment from the streets, and for injunction restraining further construction through Shelbyville. Meanwhile, in June, 1907, the city limits of Shelbyville had been extended westerly so as to take in about 1,637 feet of the pike, being that part included within the franchise previously granted by the Shelby county fiscal court, the pike so taken in thus becoming a part of Main street. The line to Eminence was never built. The company began the construction of its line from Beechwood to Shelbyville, but never finished it. On October 23, 1908, in a suit brought by William Love in the Circuit Court of the United States for the Western District of Kentucky, in equity, appellee was appointed receiver over the railroad company. He took the position that it was impracticable for his insolvent road to build and operate through Shelbyville under the conditions of the ordinance of 1906, and negotiations for a satisfactory modification of those terms having failed, on June 11, 1909, the court instructed the receiver to complete and equip the extension from Beechwood to the old limits of Shelbyville, and thus on the part of the pike over which the right of way had been granted by the Shelby county fiscal court, the validity of which grant has never been questioned. The order directing such extension is not in the record, but it seems to be assumed that it contemplated establishing the old western limits of Shelbyville as a terminus (at least temporary) of the Shelbyville extension, and that terminal requirements included a depot and a Y for the switching of cars. The receiver bought a lot adjoining Main street (on the south), near the old western limits of Shelbyville. His request for permission from the city to construct a depot was refused, and the

city having threatened to interfere with the building of the depot and Y, the receiver filed his petition in the original suit for an injunction against such interference. After the filing of said petition the city, on its own motion, discontinued its suit in the Shelby county circuit court for the cancellation of the city's franchise. The city's pleas to the jurisdiction of the court under the receiver's petition having been overruled, answer was filed accompanied by affidavits. Hearing on the motion for injunction was had upon the receiver's petition and the city's answer, and affidavits filed on both sides, no oral testimony being taken.

The jurisdiction of the court to entertain the receiver's petition for injunction is denied by plaintiff upon the ground that the controversy arising under the petition was an independent and adverse controversy between the receiver and the city, first, over the validity of the city's ordinance requiring the city's permission to erect the depot, and, second, over the right of the receiver to occupy the portion of the street proposed to be taken for the Y, the adverse possession of which portion the city claims to have had prior to the receivership; and that such adverse controversy cannot be tried except in a plenary suit. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, is relied upon as authority for this proposition. In our opinion the case before us is not ruled by considerations pertaining to the statutory proceeding in bankruptcy, and the case cited is not pertinent.

We think the objection under consideration was not properly raised in the court below. The plea which we understand to be relied upon for the purpose asserts—

"that the subject-matter of said petition lies in the county of Shelby and commonwealth of Kentucky, and is not situated in the jurisdiction of this court for the Western District of Kentucky; that this court had no jurisdiction, nor has it any jurisdiction, to appoint the said Henry Glover receiver, for the purpose and with directions to take possession of the subject-matter involved in said petition. Wherefore (the defendant) insisting upon its exemption from suit in this court, and upon its right to have the matter set forth in said petition adjudicated within the court having proper jurisdiction, it says that this court has not jurisdiction in the premises of this defendant."

That the defense we are considering was waived unless properly presented below is clear. Lake Shore & M. S. Ry. Co. v. Felton (6th circuit) 103 Fed. 227, 229, 43 C. C. A. 189. But assuming that the objection to the jurisdiction of the court is still open: There was jurisdiction in the original suit over the property in the Eastern District of Kentucky by virtue of a suit brought in the Western District of that State, in which part of the defendant's property was situated. Horn v. Pere Marquette Ry. Co. (C. C.) 151 Fed. 626, 631. The petition is a dependent proceeding, and depends for its jurisdiction (so far as the citizenship of parties is concerned) not upon the conditions requisite to an independent suit, but upon the jurisdiction of the case in which it is filed. A proceeding by a receiver to enjoin another from interfering with his possession of property may properly be by petition in the suit in which he was appointed, although the proposed defendant is not a party to such suit, when his rights can be

as fully protected in such proceeding as in a separate suit, which is a matter to be determined by the court in the exercise of its discretion. Lake Shore & M. S. Ry. Co. v. Felton, supra.

No reason was assigned below, so far as shown by the record, and none is suggested here, why the defendant's rights cannot be as well protected by a proceeding in the receivership suit as in a new and independent suit, nor under a dependent petition rather than a dependent bill. In our opinion the questions we are considering were not so far adverse, nor was the city's possession of the street not previously occupied by the Y so far of that nature, as to exclude the authority of the court to determine controversies respecting the right to use the street. As already said, the validity of the ordinance of the fiscal court, granting the right of way over the street, was not denied. The receiver was lawfully proceeding to construct the road thereunder, and in pursuance of the order of the court which appointed the receiver. Prior to the receivership no controversy existed either as to the right to build the Y or construct the depot. Those controversies arose simply in an attempt to construct the road under the interpretation placed by the receiver upon the grant. The subject-matter of the contract was merely the construction and interpretation of the grant under which the road itself (as distinguished from the Y) was being lawfully built. In our opinion the receiver had such concurrent possession of the street, growing out of his actual construction of the main track thereon, his lawful use of the street for that purpose, his claim of right to construct the Y, under his interpretation of the grant, and his proceeding to act thereunder by authority of the court, as to destroy the alleged sole and adverse occupancy by the city. The city claims no possession of the depot grounds. In our opinion the interpretation of the franchise in question was clearly within the jurisdiction of the court below.

The meritorious question is, Was the court's discretion properly exercised in granting the injunction? For the rule is that upon an appeal from an order granting a preliminary injunction the decision of the judge who made the order will not be reversed unless it appears, after a consideration of the grounds presented to him for his action, that his legal discretion to grant or withhold the order was improvidently exercised. Duplex Printing Press Co. v. Campbell Printing Press Co. (6th Cir.) 69 Fed. 250, 252, 16 C. C. A. 220; Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co. (6th Cir.) 72 Fed. 545, 549, 19 C. C. A. 25; Thompson v. Nelson (6th Cir.) 71 Fed. 339, 341, 18 C. C. A. 137; Mayor, etc., of Knoxville v. Africa (6th Cir.) 77 Fed. 501, 505, 23 C. C. A. 252. If, however, it appears upon appeal that the record is such as to forbid final relief, it would be the duty of the court to at least reverse the order for injunction. Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co., supra, at pages 545, 550, of 72 Fed., 19 C. C. A. 25; Mayor, etc., of Knoxville v. Africa, supra, at page 505, of 77 Fed., 23 C. C. A. 252. In such case there could be no room for the exercise of discretion in granting the writ.

The city insists that the railroad company has no authority under the grant of the fiscal court to construct the Y in question, but that

its right is merely to lay a single track in the street on the line described in the grant. It is conceded that the receiver has no greater right than the railroad company would have had. The receiver claims the right to construct the Y, first, under the authority of section 768 (5) of the Kentucky statutes (Russell's St. § 5368 [5]) which gives a railroad company power "to construct its road upon or across, any * * * highway, street * * * and across any railroad or canal." In the opinion of a majority of this court the section invoked relates to a complete crossing made necessary as part of a continuous road, and does not apply to a switch or Y extending merely from a track in a street to a lot adjoining the same. The receiver also insists that the right to build the Y is implied in the fiscal court grant, as a necessary incident to the enjoyment of the thing granted. The rule is well settled that legislative or municipal grants or franchises in which the public has an interest are to be strictly construed in favor of the public. Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801; Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353; Central Trust Co. v. Municipal Traction Co. (C. C.) 169 Fed. 308; District of Columbia Com'rs v. B. & P. R. Co., 114 U. S. 453, 456, 457, 5 Sup. Ct. 1098, 29 L. Ed. 216; Illinois Central R. R. Co. v. Chicago, 176 U. S. 646, 665, 20 Sup. Ct. 509, 44 L. Ed. 622; Rapid Ry. Co. v. City of Mt. Clemens, 118 Mich. 133, 76 N. W. 318.

As to the specific question whether the right to construct the Y is necessarily implied in the fiscal court grant, as an essential incident of the authority to construct the road: In Nellis on Street Surface Railroads, at page 244, it is said:

"A street railroad company has the right to put down such appliances, in the way of turnouts and switches and side tracks, as are needful for the convenient use of its franchise. The only restriction upon the use of this right is that the use may not be negligent or unskillful, or without reasonable care therein."

In 3 Elliott on Railroads, § 1076, it is said:

"But it has been held that authority to construct and operate a railroad in a street includes the power to make a switch or turnout to a station on the street."

In New Orleans, etc., Co. v. Second Municipality of New Orleans, 1 La. Ann. 128, it was held that where the charter authorizes a railway along a public street to a particular point, the company will be allowed to make a turnout from the main track to communicate with a depot erected near the terminus of the road, where no objection exists to the construction of the turnout at that particular point. In Black v. Philadelphia, etc., R. R. Co., 58 Pa. 249, 252, it was held that in the authority to a railroad company to construct a railroad (which terminated on a navigable river) are included, by the force of the term, sidings, and branches to the company's wharves. In Wilkesbarre v. Railroad Co., 8 Kulp. (Pa.) 298, and in Wyoming v. Wilkesbarre, 8 Kulp. (Pa.) 113, it was held, in substance, that authority to lay tracks and operate a railroad upon the center of a designated

street carried with it the right to put down a switch and siding necessary for the accommodation of the public. In Romer v. St. Paul City Ry. Co., 75 Minn. 211, 217, 77 N. W. 825, 74 Am. St. Rep. 455, it was held that the grant in question, to construct and operate a railway, carried with it the right to use the connecting streets as reasonably necessary for taking cars in and out of the barn from the streets on each side of the barn. See, also, Wooley v. Railway Co., 83 N. Y. 121, 126.

The majority of this court is not satisfied to adopt the extreme view taken by some of the decisions just cited. But we are of opinion that if the fiscal court, in making the grant, contemplated the reasonable possibility that the eastern limits of its grant would constitute, either permanently or temporarily, the terminus of the Beechwood and Shelbyville extension, the grant would carry with it the right to such incidents as would be necessary to make the grant effective as a terminal grant, so long as it continued to be such. If, therefore, the fiscal court grant is susceptible of being construed as a terminal grant, we should not interfere with the discretion of the district judge in treating the Y as necessary to the enjoyment of the grant and in restraining the city's interference with its construction pending final hearing, especially since (as we understand to be the case) the depot and Y have been constructed under the protection of the injunction, and are now in use in connection with the operation of a public service road. The record before us is not such that we can say that the fiscal court, in making the grant, did not contemplate the reasonable possibility that either permanently or temporarily the eastern limit of the fiscal court grant might be the terminal. The grant of the fiscal court antedated that of the city of Shelbyville by a month, and the record does not show any connection between the grant of the fiscal court and that of the city. We must not be understood as holding, however, that if it shall be ultimately determined that the fiscal court grant was intended only as a link in a continuous grant, in other words, that it was dependent upon the building of the road through and beyond Shelbyville, the right to build the Y would be implied. That question is not now presented. The building ordinance of Shelbyville is plainly void, under the decision in Boyd v. Board of Council, 117 Ky. 199, 77 S. W. 669, as attempting to confer upon the city council arbitrary power to withhold a building permit; and the failure of the receiver to obtain such permission is therefore immaterial.

For the reasons we have stated, we cannot say that the district judge improvidently exercised his discretion in granting the injunction. It follows that we cannot review his action in refusing a supersedeas on appeal. Such relief is not of right, the granting or withholding of supersedeas being within the discretion of the court. In re Haberman Mfg. Co., 147 U. S. 525, 530, 13 Sup. Ct. 527, 37 L. Ed. 266; Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co., supra, at pages 545 548 of 72 Fed., 19 C. C. A. 25. And if it was proper to allow the injunction, it is by no means apparent that the court abused its discretion in denying the supersedeas, in view of the public nature of the railway and the fact that the inconvenience from withholding it

during the pendency of the suit may, in the judgment of the court below, have well been thought to outweigh that from granting it.

The order appealed from will be affirmed.

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

EVANS, District Judge. Certain liens on the property of the Louisville & Eastern Railroad Company are sought to be enforced in this action, and soon after its institution a receiver was appointed with the usual powers. Subsequently, at the request of nearly or quite all of the lien creditors of the railroad, the receiver was authorized to issue certificates, which were given a first lien upon certain of the company's property. Such certificates to the amount of $350,000 were issued and sold, and with the proceeds the receiver was directed to complete the construction of the railroad from Beechwood, in Jefferson county, to the old city limits of the city of Shelbyville, in Shelby county. This direction to the receiver involved the completion to Shelbyville of what is known as the Shelbyville Branch of the defendant railroad. The main line of the railroad extended from the city of Louisville, by way of Anchorage, Pewee Valley, and other places, to Lagrange, in Oldham county, and had been in operation for some years before the receiver was appointed. The attempt to construct a branch railroad to Shelbyville and beyond was the main cause of the collapse of the railroad company. That branch left the main line at Beechwood, and when completed to Shelbyville will itself be some 22 miles long. Much work on the branch had been done before this suit was brought, but all of it had been done between Beechwood and the city of Shelbyville, in which city also considerable work had been done by the company.

Antecedent to this the fiscal court of Shelby county, in April, 1906, had granted the necessary permission for the construction of the railroad up to the then city limits of Shelbyville. Its action in the premises was embraced in an order expressed as follows: "The Louisville & Eastern Railroad Company is hereby granted a right of way over the Shelbyville & Louisville pike, beginning in the middle of said pike at the western limits of the city of Shelbyville, Ky., then running about west in the middle of said pike to a point opposite the western boundary of the yard of Mrs. Gordon Logan, thence west on the north side of the said right of way of the Shelbyville & Louisville pike to the western boundary of the Agricultural & Mechanical Association grounds. Said railroad not to obstruct the ditches or culverts along said pike. The part that is in the middle of said pike shall conform to the present grade of the pike, the top of the rails not to extend above the metal of the pike next to them, and said track is to be laid as far from the center of pike as practicable, and to keep in repair and maintain road between tracks and three feet on either side thereof until they pass Mrs. Gordon Logan's residence, or the end of her pavement."

In June, 1907, the city of Shelbyville extended its limits and took into the city certain adjacent territory, embracing that described in the foregoing order. For several months the effort to complete the work of the branch to Shelbyville has been prosecuted by the receiver, and large sums of money have been expended thereon. It is very desirable that the station for the company's use at Shelbyville should be located in the central and business section of the city, but the latter has refused and still refuses to grant the necessary permission. When the work on the branch approached completion, the city manifested opposition to its coming into the city at all; and when, upon the continued refusal of permission to that end, the receiver began preparation for the erection upon property owned by the company of a station under the grant given by the county previous to the extension of the city limits, the city, in order to prevent this, threatened the enforcement of its building ordinance, thus, while refusing permission for the road to be extended further into the city, endeavoring to prevent the receiver from erecting a station on the company's property outside of the old city limits. It is this situation which caused the filing of the petition by the receiver, in which

he prays that the city may be enjoined from interfering with the erection of the station.

Some time previous to the financial collapse of the railroad company the city had made an agreement with it, whereby the city granted the company the use of Main street upon certain conditions, among them that the railroad company should keep the street in repair, and that it would pay the city liquidated damages to the extent of $2,000 for each and every year which should elapse before the railroad company completed and put into operation the branch to Eminence, some 12 miles or more beyond Shelbyville. Before its insolvency the company did much work on Main street, and laid its track therein, which, however, the city has covered up. The creditors, for whose benefit alone this suit is pending, and whose claims will entirely exhaust the company's property, have no interest in the extension of the branch beyond Shelbyville. Their interest in that part of the branch between Beechwood and Shelbyville arose out of the fact that the company had done so much work thereon. There is no one to supply the money for the purpose of extending the branch on to Eminence. It is estimated that it will take at least $350,000 to do that.

Previous to the institution of this action the city had filed a suit in the Shelby circuit court, and in its petition therein had shown that what we have called an agreement between the railroad company and the city took the form of an ordinance adopted May 3, 1906, by the city at the request of the railroad company. The ninth section of that ordinance was as follows: "If the Louisville & Eastern Railroad Company fails to begin work on its said road in the city of Shelbyville, in good faith, for six months, or fails to construct its roadbed on said Main street, in the city of Shelbyville, for twelve months from the date on which it commences the construction of its roadbed on Main street, and also if it fails to construct its said road to and through the city of Shelbyville, as in this contract provided, by the 1st day of August, 1907, then its right of way herein granted shall revert to the city of Shelbyville; and if the Louisville & Eastern Railroad Company fails to begin work on its road from Shelbyville, Kentucky, to Eminence, Kentucky, in six months after said road has begun operation through the city of Shelbyville, on Main street, or fails to complete same to Eminence, Kentucky, by August 1, 1908, then said company agrees to pay the city of Shelbyville, as liquidated damages, the sum of $2,000 per year, until said road is completed to Eminence, Kentucky, and said amount shall be a lien on the property of said company; but it is understood and agreed that if said road is begun in good faith, and it is delayed by proceedings in court or other unavoidable delays, and said company is using reasonable diligence to complete said road, the board of council of the city of Shelbyville will grant it a reasonable extension of time, not exceeding altogether twelve months."

The city had also alleged in its petition that the railroad company had not, by August 1, 1907, constructed its railroad to Shelbyville, and "that the defendant by failing to construct its road on Seventh street has not accepted the provisions of said ordinance; that defendant, by failing to construct its road on Main street through Shelbyville by the 1st day of August, 1907, has not accepted the provisions of said ordinance; the defendant, by failing to construct its road to Shelbyville by the 1st day of August, 1907, has not accepted the provisions of said ordinance; and for each of said reasons the plaintiff is discharged from the provisions of said ordinance, and the right of way through said Main street and Seventh street has reverted to the city of Shelbyville. The plaintiff states that there was and is no consideration for said ordinance or the acceptance thereof as aforesaid. It states that said ordinance and the aforesaid written acceptance thereof did not and does not contain any mutual agreement or binding agreements between the parties thereto. It states that there is not in same any obligations upon the part of the defendant to construct said road either to or through Shelbyville, and by the terms of said ordinance and said written acceptance it was left to the defendant to choose whether it would proceed to construct said road either to Shelbyville or through Shelbyville, or to abandon the construction thereof, and there was and is no mutuality in said contract, and same was and is a unilateral executory contract, and a nudum pactum and unenforceable by ei-

ther party hereto, and same was and is only an option without consideration offered to the defendant, by which it might choose to construct or to abandon the construction of said road, and the defendant has not accepted said option by the construction of said road as provided in said contract, and as hereinbefore set out, and said option has expired by the terms contained therein and expressly agreed to by the parties hereto. The plaintiff states that on August 3, 1907, it gave the defendant notice to remove its ties and rails, poles, and equipment heretofore placed by it on Main street from of and on Main street and to restore the said street to the condition in which same was in on July 1, 1907, the day before it commenced the construction of its said road on Main street; but the defendant fails and refuses to do so, and has now rails and ties and poles partly on Main street, and same constitute an obstruction to public travel on said street, all of which is unlawful and wrongful and without authority of law, and same constitutes and is a trespass upon the streets of the city and against the rights of the city."

And the city in its petition prayed as follows, namely: "That it be adjudged that the defendant has no right of way upon the streets of Shelbyville, and that the same as set out in said ordinance has reverted to the city of Shelbyville; that the defendant be required forthwith to remove from and off of the streets of Shelbyville all poles, ties, and rails or other equipment placed by it upon said streets, and that it be required to restore said streets to the condition same were in on the day before it commenced to construct its road on said Main street, and that in doing so that it be required to remove said its ties, and rails, poles, and equipment from one square at a time, and to restore said street as aforesaid, before removing said ties, rails, poles, and equipment from another square, so as to impede the public travel as little as possible while removing same, and while restoring said street, and that the defendant be restrained and enjoined from further proceeding to construct said road through the city of Shelbyville, or upon any of the streets thereof, and from operating any trolley wires or cars through or in the city of Shelbyville, for its cost, and for all proper and equitable relief."

The receiver appeared in that case very soon after his appointment, and, for reasons stated in a paper then filed, asked for a delay, and expressed the hope that something might be done in a very short time to adjust the difficulty; but in this paper the receiver in no way adopted the contract nor agreed to undertake its performance. Soon afterwards the city dismissed its suit, but has refused all offers of the receiver for leave to go into the city beyond the old boundary. The court has never authorized the receiver to undertake to perform the agreement between the city and the railroad company, nor has the receiver ever agreed to perform the same. There is no way known by which he can do so without the direction of the court, which, of course, could not properly be given without the consent of the creditors of the railroad company, as it would further burden the property. It may be added that this suit is nearly ready for a final decree. Such decree waits almost entirely upon the completion of the road to Shelbyville. It is not at all likely that such a decree will deal with anything but the completed road and all its equipment, and after a sale thereunder the purchaser will not have the slightest interest in the contract with Shelbyville, and the railroad company itself obviously will be entirely unable to comply with its terms. Literal enforcement of the terms of that agreement would not only impose upon the defendant railroad company the duty of keeping the streets in repair, but would also impose upon it a burden of $2,000 a year until the branch was completed to Eminence. Such completion would seem to be extremely improbable within any definite or ascertainable time. Those questions, however, would not affect the purchaser, but only the present insolvent railroad company.

It was objected at the outset that the court has not jurisdiction of this particular phase of this case, because Shelbyville is in the Eastern district, and not in this; but the court overruled the objection upon the authority of Horn v. Pere Marquette Railroad (C. C.) 151 Fed. 631. See, also, Lake Shore Ry. Co. v. Felton, 103 Fed. 227, 43 C. C. A. 189.

We shall not go into details in passing upon the motion for a temporary injunction pendente lite, but after an attentive consideration of the facts shown by the record we have concluded:

(1) That the pending questions can in no proper way be made to depend upon the unexecuted agreement between the railroad and the city of Shelbyville; that contract not having been accepted by the court nor by the receiver with its authority, and it being a matter with which the lienholders have no concern. United States Trust Co. v. Wabash, etc., R. R. Co., 150 U. S. 287, 4 Sup. Ct. 86, 37 L. Ed. 1085, and case cited.

(2) That the order of the court directing the receiver to complete the branch road from Beechwood to the old western limits of the city of Shelbyville covers and embraces as an appropriate and necessary incident the erection of such stations, depots, switches, etc., as are essential to putting the railroad in condition for effective operation.

(3) That under section 768 of the Kentucky Statutes (section 5388, Russell's St.) the receiver, in carrying out the orders of the court, has the right with its track to cross Main street extended (formerly the Louisville & Shelbyville turnpike road) in order to reach the lot owned by the company on the other side of that street and on which it proposes to erect its station. Under a proper construction of the Kentucky Statutes this results, notwithstanding anything said in the very different case of Edmunds v. Baltimore & Potomac R. R. Co., 114 U. S. 453, 5 Sup. Ct. 1098, 29 L. Ed. 216.

(4) That the building ordinance of the city of Shelbyville under which that city is seeking to prevent the receiver from doing this is void. Boyd v. Board of Councilmen, 117 Ky. 199, 77 S. W. 669, 111 Am. St. Rep. 240, State v. Tenant, 110 N. C. 609, 14 S. E. 387, 15 L. R. A. 423, 28 Am. St. Rep. 715, Tilford v. Belknap, 126 Ky. 247, 103 S. W. 289, 11 L. R. A. (N. S.) 708, and Diebold v. Ky. Traction Co., 117 Ky. 146, 77 S. W. 674, 63 L. R. A. 637, 111 Am. St. Rep. 230, the latter of which cases establishes the proposition that this railroad is a "trunk line" within the meaning of the law.

(5) That when the city of Shelbyville filed its suit in the Shelby circuit court, in which it made the claims and assertions set out above, and thereupon sought the judgment prayed for propositions were asserted which seem to be sound and maintainable, and which are none the less so because the city voluntarily dismissed its action. Furthermore, it may be that the city thus made an election from which it cannot recede.

(6) That the fact that the city prefers that the station shall be erected nearer the center of the city and its business can be given no force in the decision of the pending motion, because the city declines to aid in bringing about that location of the building by refusing, instead of granting, the necessary consent whereby the receiver can lawfully use the streets of the city in order to get to the point where the city now says it desires a station to be built. If the city will give the necessary consent, the court will gladly authorize and direct its receiver to construct and maintain a station at the place desired by the city, instead of the one so much further out, and which location is made necessary by the act of the city alone.

(7) There is urgent need for the erection of a station somewhere in or near Shelbyville. Those who are in any way interested in the subject, as well as the court and its receiver, prefer that the station shall be near the center of the city and at the point where the latter says it prefers it to be located; but, failing to get it there, because of the refusal of the city to grant the right to use its streets, the station will have to be erected where the right to do so is clear, even if we have ultimately to go entirely outside the city limits. However, the last alternative is not important now, as previous to the extension of the city limits the state and the fiscal court of Shelby county, under the state's authority, granted all the rights necessary for the location and erection of the station at the place where the receiver proposes to build it, and we think the extension of the city limits did not destroy the right previously granted. The city took in the new territory, subject to the right already acquired by the railroad company.

(8) There does not appear to be any law which forbids the erection and maintenance of two stations in Shelbyville. The erection of one in the center of the city would probably be all that would be necessary; but as the right to do that is not given by the city, the court and its receiver are restricted to a course which locates the station at a point which may be quite inconvenient

alike to the receiver's business and to the patrons of the road. For that result we are not responsible. We cannot help ourselves.

(9) The objection that it would be a nuisance to the neighborhood in the outskirts of the city to erect a station, by reason of bad smells which might result and from the noise of crowds which might assemble, is by no means impressive in view of the use of stations in every town or city where a railroad runs, and it may well be supposed that those conditions, if they arose at all (which is improbable), would be much emphasized in the more central and busy part of the city, and at the point where the city professes to want the station located.

Regretting that the action of the city leaves no alternative but to construct the station where the receiver proposes to do so, upon property owned by the company, for the reasons stated, the motion for a temporary injunction pendente lite will be sustained.

HOGUE v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 22, 1910. On First Application for Rehearing, December 13, 1910. On Second Application for Rehearing, December 29, 1910.)

No. 2,014.

1. PERJURY (§ 19*)—INDICTMENT—REQUISITES.

Since, as before, the enactment of Rev. St. § 1025 (U. S. Comp. St. 1901, p. 720), providing that no indictment shall be held insufficient for defects in matter of form only, and section 5396 (U. S. Comp. St. 1901, p. 3655), relating to indictments for perjury, every indictment for perjury in a federal court must contain allegations showing (a) judicial proceeding or course of justice; (b) that the defendant was sworn to give evidence therein; (c) the testimony given by him; (d) its falsity; and (e) its materiality to the issue or inquiry.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 65, 66, 70, 71; Dec. Dig. § 19.*]

2. PERJURY (§ 26*)—INDICTMENT—DESCRIPTION OF OFFENSE—SUFFICIENCY.

An indictment under Rev. St. § 5392 (U. S. Comp. St. 1901, p. 3653), charging the defendant with perjury in falsely swearing that material changes were made in a certain document before he signed it, is insufficient, where it does not show the substance at least of the change which it is charged that he testified was made.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 91; Dec. Dig. § 26.*]

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

W. J. Hogue was convicted of a criminal offense, and brings error. Reversed.

The indictment against the plaintiff in error (who will hereafter be called the defendant) is as follows:

"At a regular term of the United States District Court for the Northern District of Texas begun and holden at Dallas, Texas, on the first Monday of May, A. D. 1909, which was the 3d day of said month, the grand jurors wherefor, good and lawful men, duly selected, impaneled, sworn, and charged to inquire into and a true presentment make of all crimes and offenses cognizable under the authority of the laws of the United States of America, committed within the Northern District of Texas, upon their oaths present into open court that heretofore, to wit, on the 2d day of February, A. D. 1909, there came on regularly for trial in the United States District Court for the

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

Northern District of Texas, before the Honorable Edward R. Meek, United States District Judge presiding, the cause of the United States versus W. J. Hogue, which said cause was then and there an indictment which had theretofore been duly returned by a grand jury in and for the Dallas Division of the Northern District of Texas, against the said W. J. Hogue for a violation of section 5480, as amended, of the Revised Statutes of the United States, to wit, for having devised a scheme and artifice to defraud, which scheme and artifice to defraud was to be effected by opening and intending to open correspondence in communication with various and sundry and divers persons in the United States, and in pursuance of such scheme and artifice, depositing and caused to be deposited in the United States postoffice at Dallas, Texas, for mailing and delivery, various and sundry and divers letters and packets; and the said cause being regularly called for trial, and being regularly on trial before a duly impaneled petit jury and the Court and Judge aforesaid, to wit, on the second day of February, A. D. 1909, within the Dallas Division, to wit, in Dallas county, state of Texas, the defendant, the said W. J. Hogue, whose Christian name is to the grand jurors unknown, appeared therein as a witness, and took an oath before a competent tribunal, to wit, before the said United States District Court for the Northern District of Texas, the said oath being then and there administered in the said open court by L. C. Maynard, the duly constituted and appointed clerk of the said court, the said oath being this, to wit: 'Do you solemnly swear that the testimony which you are about to give in the case now on trial shall be the truth, the whole truth and nothing but the truth, so help you God?' and he, the said W. J. Hogue, after having taken said oath before the said tribunal in the said cause and in the said court, and on the said date and within the jurisdiction of this court, as aforesaid, did unlawfully, willfully, feloniously, and corruptly and contrary to such oath testify to a material matter in the said cause then and there being tried, which he did not believe to be true at the time of so testifying; that is to say, he, the said W. J. Hogue, after having been sworn as aforesaid before the said tribunal, and by the said officer and on the said date and within the said court and in the said cause and within the jurisdiction aforesaid, did unlawfully, willfully, feloniously, and corruptly and contrary to said oath, while holding a certain instrument which was dated 'Chicago, May 16, 1908,' and headed 'S. A. Buffington, Chicago, Ill., Dear Sir,' and comprising five pages and signed on one line of the last page, 'W. J. Hogue,' and on one line of the last page, 'S. A. Buffington,' testify that the written word 'out,' as the same appeared on the margin of the first page, and the written word 'out' as it appeared on the margin of the second page, and the written word 'out' as it appeared upon the margin of the third page, and the written word 'out' as it appeared upon the margin of the fourth page, and the written word 'out' as it appeared upon the margin of the fifth page, was in the handwriting of S. A. Buffington, and written and placed there by the said Buffington, before he, the said W. J. Hogue, had signed the same, and that the said word 'out' so appearing on the margin of the said pages was so placed there by the said Buffington, before he, the said Hogue would sign the same, and was so placed there to strike out the portion of each of said pages so embraced within the said word 'out'; that at the time aforesaid, when he, the said W. J. Hogue was testifying, he, the said W. J. Hogue, then and there well knew that the word 'out' was not written on the margin of said contract by the said S. A. Buffington, nor by any one else, at the time of the signing of the same said instrument, and he, the said W. J. Hogue, did not believe at the time of so testifying that the word 'out' had been written and was written on the margin of the pages of the said instrument hereinbefore mentioned by the said S. A. Buffington, or by any one else, at the time of the signing of the said instrument or prior thereto, and he, the said W. J. Hogue, in so testifying as hereinbefore set out, and at the time and place and within the court aforesaid, then and there well knew that he was testifying to what was not true, and did not believe he was testifying to what was true, and as a matter of fact, the word 'out' where the same appears written upon the margin of said instrument, was placed there months after the said instrument was signed, and was not placed there by the said Buffington, and that the said part of the said instrument and the paragraphs

thereof embraced within the written word 'out' where the same appears upon the margins aforesaid was not and were not struck out by the word 'out' or by any other method before the same was signed by the said W. J. Hogue, nor prior thereto, as the said W. J. Hogue then and there well knew, and he, the said Hogue, did not believe they were so stricken out; the said instrument herein mentioned and referred to being an instrument dated and directed as aforesaid, and purporting in substance to be a proposition by the said W. J. Hogue to the said S. A. Buffington, relating to the loan and borrowing of a large sum of money, and purporting to detail the names of the officers of a so-called Union Central Construction Company, the capital stock of said company, and other statements and matters relating to the condition of the so-called Union Central Construction Company, and the personal worth of the said W. J. Hogue, and purporting to detail assets of the said company and property of the said company, and concluding immediately above the signature of the said W. J. Hogue, with these words: 'If, after examination of the properties hereinabove referred to, and investigation of the matter hereinabove warranted to be true, you shall be dissatisfied and not willing to make or procure said loan of $15,000, without fault on my part or the fault of said Union Central Construction Company, then this proposition to be null and void, and of no effect,' and the testimony of the said W. J. Hogue, as aforesaid, was material to and in the issue and said cause and about a material matter in the issue and cause being tried, as aforesaid, before the tribunal and court aforesaid, in this: that the said scheme and artifice to defraud charged in the said bill of indictment related to and was concerned with a so-called Union Central Construction Company, with which the said W. J. Hogue was concerned, all of which he, the said W. J. Hogue, as aforesaid, then and there well knew at the time of so unlawfully, willfully, feloniously, and corruptly testifying, and the jurors aforesaid upon their oaths aforesaid say that the said W. J. Hogue did commit willful and corrupt perjury in the manner and form hereinbefore set out, all of which was contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The defendant demurred to the indictment, alleging many grounds of demurrer, and, among others, the following:

"(a) Said indictment fails to set forth the substance of the false statements alleged to have been made by the said W. J. Hogue, and wholly fails to disclose to this defendant wherein his said testimony is alleged to be false.

"(b) Said indictment is wholly insufficient in itself and of itself to apprise this defendant of the nature of the charge against him.

"(c) This indictment is wholly insufficient to charge the defendant, W. J. Hogue, with knowledge or notice of the false statements alleged by him to have been made.

"(d) Said indictment fails to set out by innuendo or otherwise the false statements alleged to have been made, and wholly fails to show the materiality of the same upon the trial of said cause, in which it is alleged that he swore falsely.

"(e) This indictment is defective in this fundamental requirement that the defendant shall in the allegations of the indictment alleging perjury be apprised of what he is called upon to defend."

The court overruled the demurrer. The defendant was convicted. A motion was made in arrest of judgment, which was also overruled. The defendant sued out a writ of error, and in this court it is assigned that the District Court erred in overruling the demurrer to the indictment.

J. W. Kearby, for plaintiff in error.

Wm. H. Atwell, U. S. Atty.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge (after stating the facts as above). The indictment shows that the defendant, Hogue, had been tried for a violation of section 5480 of the Revised Statutes (U. S. Comp. St.

1901, p. 3696) for having devised a scheme or artifice to defraud to be effected by using the mail. On that trial he testified as a witness for himself, and the charge of perjury is based on his testimony given in that case. The document about which he testified was presumably relevant to the issues on his trial for violation of the postal laws. It is not shown that there was any controversy as to the original contents of, or the signatures to, the document. The indictment indicates that the alleged false evidence, so far as it was material, related alone to the question of whether or not the document had been changed or amended by eliminations before it was signed by the defendant.

The general question to be decided is whether or not the indictment contains a sufficient charge of perjury. The English and American books on criminal law show that great precision and certainty has been required to write an indictment for perjury. So many indictments for this offense failed under the scrutiny of the courts that statutes have been passed in England and America to eliminate many of the requirements that were considered too exacting. But there remains as inherent in the subject a requirement for certainty and particularity in the statement of the substance of the offense intended to be alleged—a requirement that the facts constituting the crime should be sufficiently stated to apprise the defendant of the substance of the offense charged against him. The federal statute defining perjury is simple and plain, but it preserves all the essential elements of the crime, and plainly requires that the false oath shall relate to a "material matter." Rev. St. § 5392 (U. S. Comp. St. 1901, p. 3653). It is provided in another statute that indictments for perjury may dispense with the recital of specified records and proceedings that were at common law often held to be necessary parts of the indictment. But this statute shows that the indictment should "set forth the substance of the offense charged upon the defendant, * * * together with the proper averment to falsify the matter wherein the perjury is assigned." Rev. St. § 5396 (U. S. Comp. St. 1901, p. 3655). We have another statute, not confined to perjury, which provides that no indictment shall be deemed insufficient because of any defect in matter of form, but it does not seek to dispense with matters of substance. Rev. St. § 1025 (U. S. Comp. St. 1901, p. 720). It remains a fundamental requirement that the substance of the crime sought to be charged must be stated in the indictment, and so stated that the defendant, from the allegations of the indictment, may understand what he is called upon to defend. This is a constitutional requirement. Const. Amend. 6.

Since, as before, the statutes, every indictment for perjury must contain allegations showing (a) judicial proceeding or course of justice; (b) that the defendant was sworn to give evidence therein; (c) the testimony given by him; (d) its falsity; and (e) its materiality to the issue or inquiry. The averments, therefore, are necessarily of two classes: First, those which disclose the foundation for the commission of the offense; and, second, those which charge the offense itself. The first, constituting the inducement, may be general in terms, but the second—the charge of the offense itself—must be direct and specific, intelligible, and plain. It is the second class of the

allegations to which our attention must be directed, and especially the attempted description of the alleged false testimony of the defendant. As to that part of the indictment, notwithstanding the statutes to which we have referred, reasonable fullness and particularity are required, for it pertains to the very gist of the offense. 2 Bishop's New Criminal Procedure, § 916.

The indictment is copied in full in the statement of the case, but it is well to repeat here the part of it which in charging the offense describes the defendant's testimony. It charges that the defendant did—

"testify that the written word 'out,' as the same appeared on the margin of the first page, and the written word 'out,' as it appeared on the margin of the second page, and the written word 'out' as it appeared on the margin of the third page, and the written word 'out' as it appeared upon the margin of the fourth page, and the written word 'out' as it appeared upon the margin of the fifth page, was in the handwriting of S. A. Buffington, and written and placed there by the said Buffington before he, the said W. J. Hogue, had signed the same, and that the said word 'out' so appearing on the margin of the said pages was so placed there by the said Buffington before he, the said Hogue, would sign the same, and was so placed there to strike out the portion of each of said pages so embraced within the said word 'out.'"

The defendant is charged with swearing falsely in reference to a certain instrument in writing which he held in his hand while testifying. The instrument is described by giving its date, address, by whom signed, and part of its contents, especially the first and last part of it. It appears that it contained at least five pages. The alleged false testimony relates to the condition and contents of the document when it was signed by the defendant. The charge intended to be made was that the defendant had falsely sworn that before he signed the instrument certain portions of it had been stricken out, or taken out of the instrument, probably by including such portions in brackets or parentheses, and writing the word "out" on the margin opposite the portions so taken out of the document. This false testimony, it is alleged, was material. The word "out" on the margin would be entirely immaterial, unless it was so used as to make some material change in the document. It is alleged that the word was written on the margin of each one of five pages of the document, but we search the indictment in vain to learn what part of the instrument, if any, was eliminated by the use of the word. It does not show whether its effect was to eliminate one word, or twenty, or more, and consequently it does not show whether the change effected in the document, if any, was material or immaterial. It is alleged that the defendant testified that the word "out" so appearing on the margin of said pages was so placed there "to strike out the portion of each of said pages so embraced within the said word 'out.'" It in no way appears in the indictment what portion was *"embraced within the word 'out'"*—whatever that may mean. The learned United States attorney in the brief before us explains that at the time the alleged perjury was committed and the document was introduced in evidence it had the "penciled words 'out' and the parentheses around certain paragraphs. * * *". And the district attorney discusses the materiality and importance of the part of the document included in the parentheses, and adds:

"It thus appears that the testimony of Hogue, with reference to the word 'out' and the parentheses, was of the utmost materiality in the fraudulent use of the mail case."

But none of this appears in the indictment. It does not show that any parentheses, or other means, were used to show what was referred to by the word "out," and does not in any way show the substance of the part of the document, if any, that the defendant is charged with swearing was stricken out or eliminated before he signed it. In brief, it is charged that Hogue testified that by the use of the word "out" certain portions of the document were eliminated before it was signed by him, but the indictment does not in any way show what portions were so eliminated. It gives the defendant no notice of the substance of his alleged testimony as to eliminations. He could not read the indictment, and tell what changes he was charged with having sworn had been made in the document. The word "out," in the margin by itself, has no significance or importance. It was immaterial, on the issues in the first case, whether it was in the margin once or five times, or whether Buffington wrote it or Hogue wrote it. It was only material if it indicated that a part of the document was stricken "out." Read as you may the elaborate indictment and the very many statements and descriptions of parts of the document, no hint is found of the words, phrases, or sentences, if any, that Hogue is charged with having sworn were eliminated before he signed the instrument. The only foundation for a surmise or guess on the subject is the averment that the word "out" was so placed "to strike out the portion of each of said pages so embraced within the said word 'out.'" If we assume that the word "out" can embrace a portion of a page, we cannot tell from the indictment what part was so embraced, or what words of the document appeared on such part.

The gist of the charge is that the defendant falsely swore that material changes were made in the document before he signed it. The defect is that it is not shown what changes he swore were made. This is a matter of substance. It is the very pith of the alleged falsehood. The indictment should be so written that the defendant and the court, on reading it, could tell the substance at least of the change which it is charged that the defendant testified was made in the paper before he signed it.

The witnesses when they appeared before the grand jury may have testified that Hogue swore to the elimination of certain parts of the document, and the grand jury, finding that Hogue's statement was false, may have voted to indict him. The petit jury may have come to the conclusion that Hogue's statement as to that part of the document was true, but may, on the evidence before them, have convicted him of perjury for swearing that some other portion of the document had been eliminated before he signed it. And in this way the defendant, on an indictment failing to state the substance of the alleged testimony as to alterations, might be convicted of a matter in relation to which he had never been indicted. State v. Mace, 76 Me. 64, 66. An indictment that would permit such a result cannot be sustained. The District Court erred in overruling the demurrer to the indictment.

There are many other assignments of error raising grave and im-

portant questions as to the conduct of the prosecution by the United States attorney, and as to the rulings of the trial court during the progress of the case. In view of our conclusion that the indictment is fatally defective, we find it unnecessary to decide the other questions.

The judgment of the District Court is reversed, and the cause remanded, with instructions to sustain the demurrer to the indictment.

On First Application for Rehearing.

PER CURIAM. The petition for rehearing herein does not comply with our rule 29, and is mainly made up of irrelevant and immaterial statements in relation to matters outside the record and which are tinged with impertinence and disrespect to the court.

It is therefore ordered taken from the files; and, that the United States may not be prejudiced, the mandate of the court will be stayed until January 2, 1911, to afford an opportunity to apply for a rehearing in accordance with the rules of court.

On Second Application for Rehearing.

SHELBY, Circuit Judge. In the application for a rehearing it is admitted that an indictment for perjury must show conclusively that the testimony given by the defendant and alleged to be false was material on the trial in which he was sworn; and it is said that this may be done "either by a direct allegation that it was material, or by the allegation of facts from which its materiality will appear."

The defect found in the indictment is not in the manner in which the materiality of the evidence is alleged. The defect is that the indictment does not state the alleged false testimony of the defendant. The opinion directs especial attention to the "attempted description of the alleged false testimony of the defendant"; and all that is said is meant to point to that defect.

If the indictment had been so written as to show the substance of the defendant's testimony which was alleged to be false, it would have been sufficient. What the defendant said on his examination is the basis and pith of the charge against him. Evidently it was intended to indict him for swearing that eliminations were made in a document consisting of five pages, and, therefore, no understanding of the substance of his alleged false testimony can be had unless it appears substantially what changes he testified had been made. The writer of the indictment seemed to comprehend this, but utterly failed in the effort to designate the changes. Whether it was intended by the indictment to disclose the materiality of the testimony by an allegation that it is material, or by statements from which its materiality may be inferred, if it be assumed that either mode is sufficient, the indictment must show substantially and in intelligible language what it is that the defendant is charged with having sworn.

It appears clearly from the indictment, we think, that it was intended, and that an attempt was made, to charge that defendant swore that changes had been made in a document, and to state what changes he swore were made; but, through inadvertence, the allegations are wholly insufficient for this purpose. But if we assume that the in-

dictment charges literally what was intended to be charged, and that it sets out all of the evidence alleged to be false, then the indictment is insufficient, because it affirmatively appears that what is set out, so far as it can be understood, is wholly immaterial on the issues of the trial in which defendant was testifying.

The application for a rehearing is denied, and mandate may issue immediately.

NOTE.

The first application for a rehearing, which was ordered taken from the files, contained the following:

"I would not be so certain in my position, had I not given the authorities an exhaustive search, both before the drawing of the indictment, during the trial, and in the preparation of my brief. I did this because Hogue is one of the most reckless criminals it has ever been my misfortune to prosecute. Ruthlessly, mercilessly, and untruthfully he attempted to stab one of the cleanest, purest men I ever knew upon the Bench, and this was but natural with Hogue, and so it was when he committed perjury in defense of himself in the fraudulent use of the mail case. It was a consummate attempt to grasp the last opportunity and save himself from what he saw must come. That a case so clearly proven, even to the satisfaction of that portion of the public who were at first doubtful, can be reversed upon a technicality, and an infamous perjurer turned loose, is more than the average layman can understand."

CORPORATION OF ST. ANTHONY IN NEW BEDFORD v. HOULIHAN.

(Circuit Court of Appeals, First Circuit. December 13, 1910.)

No. 876.

1. COSTS (§ 189*)—EXPENSES OF AUDITORSHIP—CHARGES FOR STENOGRAPHER.
Where an auditor was appointed in an action at law in a federal court by agreement of the parties, and a stenographer selected by the parties was employed on the hearing before the auditor, the case stands the same legally as to costs as though the stenographer had been expressly selected and appointed by the auditor.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 744–749; Dec. Dig. § 189.*]

2. COSTS (§ 189*)—TAXABLE COSTS—EXPENSES OF AUDITORSHIP—CHARGES FOR STENOGRAPHER.
The use of stenographers, including their use by auditors and masters, has been so general in late years that it must be assumed that, when a court appoints an auditor, it, by implication, authorizes and directs him to make reasonable use of stenographers, and the charge therefor must be classed with the ordinary charges necessarily incurred by the auditor, which, together with the auditor's fees, are ordinarily taxable against the losing party.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 744–749; Dec. Dig. § 189.*]

Aldrich, District Judge, dissenting.

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

Action at law by Michael J. Houlihan against the Corporation of St. Anthony in New Bedford. From an order (173 Fed. 496) relating to costs, defendant brings error. Affirmed.

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

James E. Cotter, Joseph T. Kenney, and Joseph P. Fagan, for plaintiff in error.

Gardner, Pirce & Thornley (Rathbone Gardner, Charles R. Haslam, and Franklin T. Hammond, of counsel), for defendant in error.

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

PUTNAM, Circuit Judge. This was an action of contract, in which the original plaintiff, whom we here will style the plaintiff, claimed $44,000, and the defendant declared in set-off for $52,772.05. The case was evidently one in which the court might, of its own motion, have required an auditor, but the following order was made:

"February 12, 1906, by agreement of the parties, it is ordered by the court that Clarence H. Cooper, Esquire, be and hereby is appointed auditor in the above-named action, to hear the parties, state the facts, and report the questions of law and evidence relating thereto as either party may request."

It appears that the proceedings before the auditor were reported by a stenographer, that the stenographer was selected by the parties, and that one-half of his charges for his official work was paid by each of the parties as the case progressed. There is nothing in the record to show that the stenographer was formally appointed by the auditor, and nothing to show any agreement as to the ultimate payment of the stenographer's charges. The presumption is, however, that what was done with reference to the stenographer was in order to harmonize the parties in his selection, and to arrange convenient advances to him as the work progressed. In other words, in the absence of anything to the contrary, the presumption is that the case stands legally as it would have done if the stenographer had been expressly selected by the auditor, and the stenographer's charges paid by the plaintiff, as well as those of the auditor, without any agreement as to the ultimate disposition in regard thereto.

The auditor stated the account for the plaintiff so as to show an amount due him of $34,082.08, and disallowed the entire set-off of the defendant. The jury rendered a verdict in favor of the plaintiff, but reduced the auditor's finding to $4,000 and interest, and judgment for that amount was entered for him. The court taxed against the defendant the entire amount of the auditor's charges, including the charges of the stenographer, except so far as they had been paid by him. Thereupon the defendant sued out this writ of error.

We need not discuss the question whether in an action of law like this a writ of error lies on a question of costs alone, because that is fully settled to be within the range of the statute establishing the Circuit Courts of Appeals. The City of Augusta, 80 Fed. 297, 304, 25 C. C. A. 430. Neither will we discuss the citations made by the defendant to the effect that auditors' fees are not taxable in federal courts. None of them sustain that proposition. Even were the local decisions adverse to such taxations, yet, as said by the Circuit Court in Primrose v. Fenno, 113 Fed. 375, 376, decided February 7, 1902, no rules of that character in the local courts bind us "so far as to embarrass us in doing justice between parties."

There can be no question of the right of the federal courts in this circuit to allow auditors' reasonable fees and reasonable disbursements in suits at law, as well as of their duty to do so. While in equity the courts have large discretion in matters of costs, at law they, as we will show, must follow fixed rules with some very slight exceptions, as in Primrose v. Fenno, already cited, and also disposed of on appeal in 119 Fed. 801, 56 C. C. A. 313, by an opinion passed down January 7, 1903. Primrose v. Fenno was a special case, where the court appointed an auditor of its own motion and entirely for its own protection, and ultimately divided the costs of the auditorship, applying there the rule explained in Whipple v. Manufacturing Co., 3 Story, 84, 86, Fed. Cas. No. 17,515, with reference to dividing between the parties the costs of a survey ordered by the court. This was one of the exceptional cases to which we refer, where the court was required, from the very peculiar circumstances, to exercise its discretion in adjusting the costs of the auditorship as it did.

None of the cases cited by the defendant sustain its proposition that either the Supreme Court of the United States or the Massachusetts courts have refused to compensate a stenographer reasonably employed by an auditor under the usual circumstances. For the reason already given, if the state courts had established such a rule, we would not feel bound to follow them, because for us to refuse an auditor the assistance of a stenographer, or to compel him to pay the stenographer out of his own fees, would merely obstruct the course of justice with reference to cases involving extensive investigation. Judges must know as a matter of judicial information that the use of stenographers often largely reduces the expenses of legal investigations, as well as the time and labor involved therein. It must also be accepted that, when the court appoints an auditor, it by implication authorizes him to make such disbursements as are reasonably desired for the proper administration of the duties of his office. Of late years the use of stenographers, including their use by auditors and masters, has been so general that, in view of what we have said, it must be assumed that, when a court appoints an auditor, it by implication authorizes and directs him to make reasonable use of stenographers. Therefore, in this case, we must assume there was an implied order in favor of such a use. There are, of course, extreme cases where even a formal order of the court does not so far protect disbursements as to permit taxation thereof in costs; but where the order, whether expressed or by implication, is in accordance with the general practice, or is clearly in furtherance of advancing the ordinary progress of the cause, the action of the court, according to the common understanding, protects the disbursements. Paragraph 10 of rule 23 of the Circuit Court in this district, providing for taxing the cost of a brief when not exceeding 20 pages, illustrates this proposition. It is more specifically illustrated by the decision of the Circuit Court of Appeals for the Ninth Circuit in Jacobsen v. Exposition Co., 112 Fed. 73, 80, 50 C. C. A. 121, where a commission paid a surety company was allowed, resting for the allowance on the direction contained in admiralty rule 53 requiring a respondent to a cross-libel to give se-

curity. The same rule was lately applied for the same reason by the Circuit Court of Appeals in the Second Circuit in The Volund, 181 Fed. 643, 667.

No complaint is made that the employment of the stenographer under the present circumstances was unreasonable. Therefore his charges must be classed with the ordinary charges necessarily incurred by the auditor. In the present case the defendant might have been relieved from the burden of these charges by offering early in the litigation to be subjected to a judgment for the amount lawfully due from him; and, in any event, any party may protect himself against unreasonable employment of stenographers by auditors, or against payments to stenographers of unreasonable amounts, by seasonable application to the court in reference thereto. There may, of course, be occasional cases of special hardship arising out of the payment of costs of this class; but probably such cases will not occur more often than with reference to other costs taxed according to the settled practice of the courts, and by vigilance on the part of counsel, such special hardships can ordinarily be avoided in the way we have shown, and otherwise.

In conclusion, as this is a suit at common law, the prevailing party was entitled to his costs lawfully taxed; and while, perhaps, there is no statute which in express terms establishes this proposition, yet, as explained in Hathaway v. Roach, 2 Woodb. & M. 63, 64, 65, Fed. Cas. No. 6,213, and The Baltimore, 8 Wall. 377, 390, 19 L. Ed. 463, there are statutes which recognize this right to costs, and there have been other such statutes enacted since the decisions cited. The fundamental proposition, however, is that the Statute of Gloucester (6 Edw. I, c. 1), giving the prevailing party his right to costs, was fully recognized in England for so many years that it became a part of the common law in this country, and became obligatory on the Federal courts, as stated in Day v. Woodworth, 13 How. 363, 372, 14 L. Ed. 181, in 1851, and again in The Baltimore. It must thus be agreed that the prevailing party in common-law suits in the federal courts has been fully and always recognized as entitled to his costs as a matter of right. There is also, as we have shown, an implied order of the Circuit Court in favor of the payment of reasonable stenographers' fees. We can discover nothing in any fundamental principle recognizing the allowance of costs, or in any decision, which permits us to refuse to apply the general rules to the present case.

The judgment of the Circuit Court is affirmed, with interest, and the appellee recovers his costs of appeal.

ALDRICH, District Judge (dissenting). The auditor items have a status quite different from that of the stenographic charges. The auditor was appointed by the court upon consent and under conditions of controverted accounts which justified the judicial act.

The theory of Fenno v. Primrose, 119 Fed. 801, 804, 56 C. C. A. 313, is that an absolute rule, in respect to taxing auditor charges as costs, is not admissible in the absence of a statute, and that in cases where an auditorship is created by the court upon grounds of neces-

sity inherent in the situation, and where there is no authority for resting the expense upon the government, that the burden of such a preliminary trial may, in the discretion of the court, be divided between the parties, or placed upon either party according as justice may require in view of the question as to which side of the case made it necessary to have an auditor, and that the question of burden is so far outside the field of legal taxable costs, which arbitrarily and necessarily follow the event of the action, and so far removed from any arbitrary rule that in a proper case the entire expense may be rested upon the prevailing party.

In the case at bar, the court below, under the authority of Primrose v. Fenno, 113 Fed. 375, and Fenno v. Primrose, 119 Fed. 801, 804, 805, 56 C. C. A. 313, and in the exercise of discretion, taxed the auditor fees wholly against the defendant, and therefore, while I should prefer in a case like this to see the expense divided between the parties, I make no point against the auditor fees.

But it seems to me to be a very long step from the Primrose v. Fenno Cases to a rule of taxation which, without stipulation to that end, would include as taxable costs stenographic expenses incurred by the parties in the usual way and without express authority from the court or the auditor, and I cannot concur in the result which compulsorily, and under supposed rules of law, puts the entire expense of the stenographer service upon the losing party as taxable costs.

While the use of a stenographer is for the convenience of the parties, as well as that of the court, it is not by any means always a necessary expense or a necessary expedient. Of course, such service shortens a trial, and is therefore for the benefit and convenience of both parties, as well as that of the court.

Such service being a modern device and a thing of convenience for the court, and for the one side as well as the other, its nature is such that the burden of it should rest upon the parties equally, and not upon one alone, unless the parties have stipulated otherwise, or unless the court expressly directed the expenditure upon justifiable grounds of necessity.

In this case the stenographer was not selected by the court or by the auditor. Neither tribunal passed upon the question of necessity, or in any way authorized a stenographer. As the stenographer was neither employed nor authorized by the auditor, it is difficult to see under what legal rule the charges must be classed with the ordinary charges necessarily incurred by an auditor.

This is not a question whether auditor fees, where the auditor was agreed upon, are taxable, neither is it a question whether an auditor may authorize the employment of a stenographer, or whether a stenographer should be compensated.

We have no express statute authorizing any of these expenses, and so far as the record goes this case was like any one of the many cases reported by a stenographer, where the court, or the auditor, has no knowledge whether the stenographer was selected by one side or the other, or by both, and I cannot agree with the suggestion, in the majority opinion, that under presumption, or through implication, he

stood as though selected by the auditor. It cannot be possible that the stenographic charges became legal charges and legal taxable costs against the losing party through the operation of any presumption or by virtue of a supposed implied order of the court upon the auditor, who, in fact, never selected or employed a stenographer or authorized stenographic expense.

But, quite beyond the idea that any supposed presumption, or implication, is justifiably admissible as a basis for making stenographer charges taxable costs, is the case of Bridges v. Sheldon (C. C.) 7 Fed. 17, 42, where the master expressly certified that the stenographer was selected under his procurement as master, and that the charges should be taxed as costs of the accounting, is the potent reasoning and holding of Judge Wheeler, who was a very able lawyer and judge, and who says:

"The court cannot employ a stenographer at the expense of the government, neither could it at the expense of parties without their consent, nor allow one to do so at the expense of another, by requiring the expense to be treated as taxable costs. The authority of the master cannot exceed that of the court appointing the master."

And so far as I know the doctrine of this case has been universally followed.

This is the ordinary and usual situation in which the parties, for their own convenience, selected a stenographer to render service at the trial, each paying half of the expense as the case progressed, and it happened in this case that the stenographic charges amounted to something over $2,000.

The fair and reasonable interpretation of such an agreement, for such purposes in a trial, is that each party is to pay half of the expense. The parties doubtless so understood it because each paid his half without any suggestion or intimation that it was to be taxed against his adversary, and in my view there is no warrant whatever in law, in the absence of stipulation, for placing the entire burden upon the losing party as legal taxable costs.

It is because of the historical, oppressive, and burdensome taxations of old that we have had in Congress and in the state Legislatures, from the earliest period, attempts to regulate, and through enumerations of subjects to cover, taxable costs, to the end that parties to litigation shall not be unreasonably oppressed, and in this line, and in addition to the regulatory provisions, there have been various express legislative limitations upon costs, as, for instance, that costs shall not exceed the damages, etc.

I think it is the common understanding of the bar that stenographic expenses like those in question do not, in the absence of statute, become legal taxable costs in favor of the prevailing party unless it is so stipulated.

The practice in equity, in respect to depositions, taken under the rule and through the instrumentality of a stenographer, stands upon a different ground and has no bearing upon the question of legal taxable costs in an action at law.

I do not propose to follow out the decisions, and will only refer to a few of the cases.

Bridges v. Sheldon (C. C.) 7 Fed. 17, 42, previously referred to, was a case where the parties, under the procurement of a master, joined in engaging a stenographer but did not stipulate that the charges should become taxable costs, and Judge Wheeler treated the absence of an express agreement to that end as something decisively against the idea of legal taxation.

Judge Benedict, in Gunther v. Liverpool (C. C.) 10 Fed. 830, excluded stenographic expenses upon the ground that there was no consent that they should be inserted as charges in the bill of costs.

In Monahan v. Godkin (C. C.) 100 Fed. 196, Judge Seaman, citing authorities, said:

"The mere fact of a stipulation by the parties to have the testimony on the trial taken by a stenographer cannot operate to make the expense of a transcript of the notes taxable as costs without express stipulation to that effect."

A rule which would make stenographic expense, an expense which the parties have usually divided, taxable as costs against the losing party, would work great hardships, and operate oppressively, upon parties of small means, and would become a menace to the ordinary suitor who feels that his rights have been invaded and that legal proceedings ought to be so ordered and directed that he may rely in full faith upon the idea that justice shall be reasonably inexpensive as well as reasonably speedy, and that modern inventions for convenience shall not make litigation so expensive as to put legal remedy beyond his reach.

I think the proposition involved in the majority opinion is one which will greatly surprise the profession generally, and it is difficult to conceive of a more oppressive visitation of an unwarrantable burden, by way of costs, than that of forcibly placing the entire stenographic expense, amounting to something more than $2,000, upon the defendant in this case as taxable cost.

The defendant was sued for $44,000 and succeeded in reducing the claim to $34,000 at the auditor trial, and upon the subsequent jury trial it succeeded in reducing the $34,000 to $4,000. Thus in a very substantial measure the defendant prevailed.

The law on the point in question is aptly, and I think correctly, stated in 11 Cyc., at page 125, and the proposition there is that "a stenographer's fees are not taxable as costs in the absence of a statute or some special agreement between the parties authorizing it," and the authorities cited in the notes sustain the proposition.

Paul's Masters and Auditors states the understanding of the profession I think in saying, "In any event, the compensation of a stenographer is not taxable as part of the costs of the case." The author was, of course, referring to situations in which the parties had not expressly stipulated that the stenographic expenses should become taxable costs. Such is the theory of Boston Belting Co. v. Boston, 183 Mass. 254, 260, 67 N. E. 428. In that case there was an agreement for a stenographer and each party paid half. The stenographic expense was disallowed as not taxable because the law does not require

the service of a stenographer, and because, if parties voluntarily provide one, they do it for their own convenience and at their own expense, and because the law does not recognize such payments as costs to be taxed by the prevailing party.

It is quite true that the Massachusetts case was one involving a jury trial, but I fail to see any distinction between a jury trial and an auditor trial. The point of taxability does not depend, generally speaking, upon the question whether it is a jury trial or a trial before a court, or an auditor or a referee. It depends upon the question, whatever the trial, whether the expense was expressly directed by the court, upon grounds of necessity, or by some one exercising authority over a trial or a hearing, or whether the parties made the costs taxable by stipulation.

The Massachusetts cases are not at all in conflict with the federal view as generally expressed.

Such cases as Pine River Logging Co. v. United States, 186 U. S. 279, 297, 22 Sup. Ct. 920, 46 L. Ed. 1164, and The William Branfoot, 52 Fed. 390, 395, 3 C. C. A. 155, recognize the idea that the expense of reporters' notes is not taxable costs even in a case where they were necessarily used by a party in the preparation and presentation of his case, and it would seem quite apparent that the expense of such notes and transcripts is nearer the nature of costs than is the expense of a stenographer, under an independent agreement between the parties to have one, and where each party paid one-half as the work progressed.

It is not pretended by any one, so far as I know, that stenographic expenses incurred under such circumstances as exist in this case are arbitrarily taxable under Massachusetts law in favor of a prevailing party and against the losing party, and aside from such costs as are specially covered by the federal statutes, and aside from express federal decisions based upon possible exceptional situations of necessity, the Massachusetts law should control.

The cases cited by the defendant in error, so far as they relate to stenographic expense—E. Luckenback (D. C.) 19 Fed. 847, Brickhill Case (C. C.) 55 Fed. 565, Rogers v. Brown (D. C.) 136 Fed. 813—all refer to services which were rendered in pursuance of an express direction of the court or an auditor.

I cannot find that stenographic expense incurred without express judicial authority, but under an agreement between the parties, whereby each paid half as the case progressed, without any stipulation that it should be taxed as costs, has ever been accepted as taxable against the losing party by any of the courts of this country or of England, and, except in jurisdictions where there is an express statute to that end, I do not think there is any warrant for such a taxation, in an action at law, under any rule of legal right.

WABASH SCREEN DOOR CO. v. LEWIS.

(Circuit Court of Appeals, Sixth Circuit. December 6, 1910.)

No. 2,053.

1. APPEAL AND ERROR (§ 263*)—ASSIGNMENTS OF ERROR—NECESSITY OF EXCEPTIONS.

Assignments of error, based on a charge of the court to which no exceptions were taken, are not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1516; Dec. Dig. § 263.*]

2. APPEAL AND ERROR (§ 1056*)—EXCLUSION OF EVIDENCE—PREJUDICE.

Where, in an action for injuries to and death of a servant, defendant was allowed wide latitude in the cross-examination of plaintiff's physicians on the issue whether decedent's death was the result of the accident, he was not prejudiced by the court's refusal to permit a question as to whether syphilis in a patient advanced to the stage of gumma in the brain would produce headache and thrombosis, in the absence of any offer of proof that deceased was afflicted with that disease.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.*]

3. TRIAL (§ 296*)—INSTRUCTIONS—PREJUDICE—CURE BY OTHER INSTRUCTIONS.

Where, in an action for injuries to and death of a servant as the alleged result of the fall of a weight on his head, the court charged at defendant's request that, if the jury believed from the evidence that deceased died from a tumor caused by tuberculosis, syphilis, or other cause, it must find for the defendant, and that the burden of proof was on plaintiff to show that the death was caused by the blow, defendant was not prejudiced by a prior instruction, in which the court stated that he did not recall testimony tending to show that deceased ever had tuberculosis or syphilis.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713; Dec. Dig. § 296.*]

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

Action by Mary Lewis, as administratrix of the estate of Dock Wright, deceased, against the Wabash Screen Door Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. D. Martin, for plaintiff in error.

J. E. Bell, for defendant in error.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

WARRINGTON, Circuit Judge. This action was commenced in the circuit court of Shelby county, Tenn., and subsequently removed to the court below; the plaintiff below being the administratrix of the deceased, who was her son, and the defendant a Minnesota corporation. The declaration states a case of personal injuries and ultimate death caused through alleged negligence. Two pleas were filed; one of not guilty, and the other of contributory negligence. Issue was joined upon the latter plea by replication. A verdict was recovered for $5,750 against the company. A motion for a new trial was over-

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

ruled, and judgment entered on the verdict. It is sought in this court on proceedings in error to reverse the judgment.

Plaintiff's intestate, a boy nearly 16 years of age, while in the employ of the screen door company and working about one of its machines, suffered an injury upon the head by the falling of an iron weight. The weight was fastened to a cord suspended from a lever attached to the machine. The boy seems to have been standing at a point directly under the weight when the cord separated. This happened in June, 1908, and the boy died in June, 1909. At the close of the evidence the plaintiff moved the court to direct the jury to return a verdict in her favor "for whatever damages were the natural and proximate result of the injuries"; and it was agreed in open court for the company that the motion ought to be granted, though it was insisted that according to the evidence the blow received by the boy from the fall of the iron weight did not produce his death. The motion was not in terms granted, but in the course of the charge to the jury the court stated:

"It is conceded by counsel for the defendant that it is liable for whatever damage that was sustained by reason of the weight falling on the head of plaintiff's intestate; but it says that it is not liable for the boy's death, because the weight falling on his head did not cause his death."

The issue thus presented was whether the boy's death was directly traceable to the blow. The charge was clear and full, and no exception whatever was taken to it. Further, numerous special instructions to the jury were asked by the company, and were all given by the court. Assignments of error concerning the charge are presented, but it is settled that in the absence of exceptions such assignments cannot be considered.

The only exception reserved during the trial that need be noticed concerns a question of evidence. An autopsy was held shortly after the death, which resulted in an alleged discovery of a brain tumor. After offering testimony describing the accident and the condition of the intestate, both before that event and afterward to the time of his death, and also the autopsy and its results, an hypothetical question of considerable length was put to the physician who conducted the autopsy; and this question was closed with a request to state to what in the physician's opinion the death was attributable. His answer was that "I attribute it to the traumatism or blow." The cross-examination was quite extended, and in parts was calculated to test the knowledge and experience of the witness. Finally this question was put:

"Now, doctor, suppose a patient had syphilis, where it had reached the stage that gumma was caused in the brain as the result of it, would that produce headache and thrombosis?"

Upon objection being made, counsel for the company stated that the purpose of the question was to test the knowledge of the physician, and it was submitted, also, that the burden of proof was on the plaintiff to show that the blow resulted in the death of the boy. The court asked counsel whether he expected to introduce proof that the intestate had syphilis, and on receiving a negative answer sustained the objection, to which exception was taken.

Apart from the reason assigned for ruling out the question, in view

of what the company was permitted to show and the latitude which was given to its counsel to cross-examine plaintiff's physician, we think it would have been but the exercise of a reasonable discretion if the court had denied the right through that question further to test the knowledge of the witness. Thomas v. Fidelity & Cas. Co., 106 Md. 299, 317, 67 Atl. 259; People v. Augsbury, 97 N. Y. 501, 506; Bever v. Spangler & Blake, 93 Iowa, 580, 608, 61 N. W. 1072.

If, however, it be assumed that error was committed in ruling out the question,[1] still we think it was not prejudicial error. It is not perceivable how an answer to the question could have materially affected the issue of fact touching discovery of a brain tumor during the autopsy. The only result of any importance that might have been elicited is that such symptoms and tumor as were described in the testimony could have been caused by syphilis. In other words, if an answer to the question would have shown that there might have been causes other than that of the blow, still defendant was permitted to offer enough testimony of this character to render the exclusion of syphilis as a potential cause immaterial, in the sense that it could not have been more than cumulative.

A second autopsy was held some weeks later; and, although the remains were said then to have been too far decomposed to enable the physicians to secure satisfactory results, a pleural adhesion to the right lung was discovered. One of the physicians called by the company, who was present at the second autopsy and joined in the report made of it, was permitted to testify on direct examination that this adhesion could have indicated, not that it did indicate, "the presence of tuberculosis," and, further, that it "undoubtedly did indicate pleurisy at some time or other; pleurisies are usually tuberculous." He also testified in chief:

"Q. Now, then, I want to ask further, Doctor, if there are other causes of tumor which might have been found in that body, had it not been in such a decomposed condition? A. Yes, sir. Q. And I believe you stated that tubercular tumor is the most frequent of the causes of tumor? A. One of the most frequent. Q. I will ask you further to state, where there is no fracture of the skull, if tumors resulting many months afterwards are of frequent or rare occurrences—where there is no fracture of the skull, if traumatic tumors are of frequent or rare occurrences? A. Rare. Q. About what would be the percentage? A. I think it would be a very small percentage. Q. You have stated that you found no fracture in the skull? A. Absolutely none."

It is true, as urged by counsel, that the learned trial judge in the course of his charge stated that he did not recall "testimony tending to

[1] West Chicago St. Ry. Co. v. Fishman, 169 Ill. 196, 200, 48 N. E. 447; Uniacke v. Chicago, Milwaukee & St. Paul R. Co., 67 Wis. 108, 114, 29 N. W. 899; Vohs v. Shorthill & Co., 130 Iowa, 538, 543, 107 N. W. 417; Taylor v. Star Coal Co., 110 Iowa, 41, 45, 81 N. W. 249; West-Pratt Coal Co. v. Andrews, 150 Ala. 368, 377, 43 South. 348; Pensacola Elec. Co. v. Bissett (Fla.) 52 South. 367, 370, where it was declared to be unnecessary to go to the extent reached in some of the cited decisions; Louisville, New Albany & Chicago Ry. Co. v. Falvey, 104 Ind. 409, 415, 3 N. E. 389, 4 N. E. 908; Williams v. Great Northern Ry. Co., 68 Minn. 55, 65, 70 N. W. 860, 37 L. R. A. 199; Missouri, K. & T. Ry. Co. v. Dalton (Tex. Civ. App.) 120 S. W. 240, 243. Contra: Nichols v. Oregon Short Line R. Co., 25 Utah, 240, 247, 70 Pac. 996; People v. Dunne, 80 Cal. 34, 37, 21 Pac. 1130.

show that this dead boy ever had tuberculosis or syphilis"; and on that hypothesis he charged that, if there was no proof as to such diseases or others that would produce tumor of the brain, it would be improper to speculate upon the effect of such diseases. But on defendant's request the court specially instructed the jury later that, if it believed from the evidence that the plaintiff's intestate died "from tumor caused by tuberculosis or syphilis or other cause," it must find for the defendant. Besides, the court expressly instructed the jury that the burden of proof as to cause of the death was upon the plaintiff below. Thus the benefit of the effect of possible causes of the death other than that alleged respecting the blow, and also the claim concerning the burden of proof, were substantially secured to the defendant.

The judgment must therefore be affirmed.

STREETER v. LOWE.

(Circuit Court of Appeals, First Circuit. January 24, 1911.)

No. 903.

1. BANKRUPTCY (§ 314*)—CLAIMS PROVABLE—GAMBLING TRANSACTION—STATE LAW—PROOF OF CLAIM.

Where a customer of a bankrupt who was a stockbroker filed a claim for a balance due on account of purchases and sales of stock, for the claimant's account, on the theory that the transactions were real purchases and sales, but the evidence showed that the creditor knew that the bankrupt was operating a bucket shop, and intended no real purchase or sale, the creditor was nevertheless entitled to the allowance of his claim for the amount of cash deposited with the bankrupt and interest thereon, under Rev. Laws Mass. c. 99, § 4, providing that whoever on credit or margin contract shall buy or sell securities or commodities intending that there shall be no actual purchase or sale, he may sue for and recover in an action on the contract from the other party to the contract any payments made, or the value of anything delivered on account thereof, etc.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

2. BANKRUPTCY (§ 341*)—CLAIMS—ALLOWANCE—AMENDMENTS—VARIANCE.

Where a creditor filed a claim against a bankrupt for an alleged balance of an account of purchase and sale of stock, on the theory that they were actual transactions and valid, but the evidence showed that the claimant knew that the bankrupt was running a bucket shop, and that neither intended a real purchase and sale, claimant was entitled to an allowance of his claim without amendment to the extent of the cash deposited and interest thereon as authorized by Rev. Laws Mass. c. 99, § 4; the statement of claim containing the necessary information from which such allowance could be made.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 341.*]

3. BANKRUPTCY (§ 455*)—CLAIM—PARTIAL ALLOWANCE—THEORY—DEFENSES—APPEAL.

A trustee's objection to the allowance of a creditor's claim for less than the amount demanded on a different theory from that on which the claim was founded, on the ground that costs would be thereby unjustly imposed upon the bankrupt's estate, in defending the creditor's

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

claim for the entire balance, was solely for the determination of the District Court, and would not be reviewed on appeal.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 455.*]

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

Claim by Joseph D. Lowe for an alleged balance due him on the purchase and sale of stock of a bankrupt who prior to bankruptcy conducted the business of a stock trader. The claim was disputed by the trustee on the ground that the transactions were wagering contracts, and therefore invalid. This contention was overruled, and the claim allowed by the referee, who held that the evidence showed that the transactions were valid and real. On appeal to the District Court, the judge on review of the evidence sustained the contention of the trustee that the transactions were wagers, and reversed the ruling of the referee, but held that the claim should be allowed under Rev. Laws Mass. c. 99, § 4, for the amount of the sums paid to the bankrupt by the claimant, and from this determination the trustee appeals. Affirmed.

Frank W. Knowlton (Choate, Hall & Stewart, on the brief), for appellant.

Clarence W. Rowley, for appellee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. We accept the finding of the learned district judge that the bankrupt was the keeper of a bucket shop, neither making nor intending real sales and purchases of stock, but only wagers on its price. We accept also his finding that the creditor understood that the transactions were wagers, and did not intend that the orders which he gave the bankrupt should be carried out by actual sale or purchase. The bankrupt rendered to the creditor accounts in which the transactions were treated as real sales and purchases, and in these accounts he entered also certain cash payments actually made as margins by the creditor to the bankrupt. The creditor's proof claimed "a balance due deponent from the bankrupt on account of the purchase and sale of stocks by the bankrupt for the account of the deponent and interest thereon according to the account hereto annexed." This account was that just mentioned as rendered by the bankrupt to the creditor. It showed a balance due the creditor of $4,739.72, increased by interest to $5,808.39. The items of cash deposited by the creditor amounted to $2,275, which came with interest to $3,130.40. The learned referee found that the creditor intended actual purchase and sale, and allowed his claim for the full amount. The learned district judge, as above stated, found that the creditor knew the nature of the bankrupt's business, and intended no real purchase or sale. He allowed proof for the amount of the cash deposited and interest thereon. The allowance was based upon Rev. Laws Mass. c. 99, § 4:

"Whoever upon credit or upon margin contracts to buy or sell, or employs another to buy or sell for his account, any securities or commodities, in-

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

tending at the time that there shall be no actual purchase or sale, may sue for and recover in an action of contract from the other party to the contract, or from the person so employed, any payment made, or the value of anything delivered, on account thereof, if such other party to the contract or person so employed had reasonable cause to believe that said intention existed; but no person shall have a right of action under the provisions of this section if, for his account, such other party to the contract or the person so employed makes, in accordance with the terms of the contract or employment, personally or by agent, an actual purchase or sale of said securities or commodities, or a valid contract therefor."

From the decision of the District Court the trustee appealed, alleging as error that the creditor was allowed to prove under the Massachusetts statute for the cash which he had deposited, while he had sworn, contended, and testified that he did not know the nature of the bankrupt's real business, and intended actual sale and purchase.

We concur with the district judge. The facts as found by him entitled the creditor, upon proper allegations, to recover the deposits and interest. The trustee contends only that the creditor is in some way prevented or estopped from asserting the proper consequences and liabilities arising from these facts. If this objection of the trustee were well founded, the defect in the proof would be merely formal, and, at the worst, allowance would follow upon the filing of a proper amendment. Hutchinson v. Otis, 115 Fed. 937, 941, 53 C. C. A. 419. But we do not think that an amendment is necessary. No objection to the form of proof was raised before the district judge. None has been argued in this court. "The practice in respect to proofs has always been liberal and free from technicalities." Lowell on Bankruptcy, § 221. It is true that the account annexed, made part of the proof, must be deemed to fail as to the items which set out the purchase or sale of stock. But those other items which show cash deposits by the creditor are correctly stated, and from these items, without alteration, can be ascertained the amount allowed by the district judge. Some items of the account have been allowed, others have been disallowed. That the account annexed is declared by the creditor to be based upon the purchase and sale of stocks does not vitiate those items which set out a valid claim.

The trustee has cited Standard Varnish Works v. Haydock, 143 Fed. 318, 74 C. C. A. 456, in which the Circuit Court of Appeals for the Sixth Circuit held that a creditor from whom the bankrupt had obtained goods by fraud could not recover the goods themselves after he had elected to affirm the sale by proving his claim and voting for trustee. There the creditor was entitled to elect either of two remedies under a given state of facts. Once having made his election he was not permitted to change it. In the case at bar there can be no election. If the creditor believed that the stocks were actually bought and sold, his only remedy was by proof on the account. If he intended that there should be no actual purchase or sale, his only remedy was by way of recovering his deposits under the statute. He alleged the first-mentioned state of facts, and sought the remedy provided in that case. The judge found the facts against him, and that finding of facts entitled him to recover his deposits which appeared in some of the items of the account annexed.

The trustee sought to defeat the allowance of the creditor's claim for deposits on the ground of the cost unjustly imposed upon the bankrupt estate in meeting the creditor's claim for the entire balance. This objection, however, affects only the question of costs in the district court, with which we here have nothing to do.

The decree of the District Court is affirmed, and the appellee recovers his costs of appeal.

NOTE.—The following is the opinion of Dodge, District Judge, in the court below, on petition by trustee for review of order by referee denying reconsideration of claim proved by Joseph D. Lowe.

DODGE, District Judge. The bankrupt in this case was doing business in September, 1902, as a stockbroker under the name of Braman & Co. The claim against his estate here in question was proved by Joseph D. Lowe, at the time also doing business as a stockbroker in Boston. From time to time, between September 4th and September 26th, Lowe gave orders to Braman for the purchase or sale of various stocks at current quotations. Braman kept an account current with Lowe between those dates, wherein Lowe was charged with the stocks he had ordered bought, as if bought, also with commission on purchases and sales and with interest, and was credited with the stocks ordered sold, as if sold, and also with certain amounts of cash which were deposited by Lowe from time to time as margins. On September 26, 1902, Braman closed his business and disappeared for a time from Boston. His petition in these proceedings was filed December 1, 1908.

The account above referred to has remained unsettled since September 26, 1902. It then showed a balance in Lowe's favor amounting to $4,239.72. This, with six years' interest, constitutes the claim which has been allowed, or $5,808.39 in all. The cash deposited for margins and included in the account amounts to $2,275, and, with interest thereon, constitutes $3,130.40 of the total amount allowed.

The trustee's objection to the claim is that wagering contracts are its only foundation, and it is, therefore, invalid. The bankrupt never did actually buy or sell any of the stocks, and it is sufficiently clear that he never intended to buy or sell any of them. Thus far there is little or no dispute. If it was also Lowe's understanding that there were to be no actual purchases or sales, the trustee's contention is established, and the claim ought to be reconsidered and rejected, so far as it consists merely of a balance in Lowe's favor resulting from the wagering transactions between the parties.

An account, annexed to the proof of claim presented, and accounts rendered by the bankrupt to the creditor from day to day, show in detail the daily transactions between the periods upon which the claim is based. There appear to have been transactions on 20 different business days, and more than 400 transactions in all, more than 200 of which were purchases, and more than 200 sales. Most of the purchases were in lots of from 10 to 50 shares, and involving amounts less than $5,000; but I find between 60 and 70 transactions in which the amounts involved were over $5,000, and in 10 of these instances the amounts involved were over $10,000. The aggregate amount involved in the purchases made September 4th to 6th, inclusive, was about $14,000; in the purchases September 8th to 13th, inclusive, about $79,000; in the purchases September 15th to 20th, inclusive, about $57,000; and in the purchases from September 22d to 26th, inclusive, about $750,000—making the aggregate amount of purchases about $900,000.

The accounts further show that the stocks ordered to be bought were, in nearly every case, ordered to be sold within a very short time afterward, in most cases on the same day, though in some instances the sale was delayed for a day or two. In no instance could they have been "carried" for more than a day or two, as is shown by the fact that, notwithstanding the very large amounts which would have been required for the actual purchase of the stocks charged in the accounts as purchased, and although the margin which the bankrupt required the creditor to deposit was only a margin of "three points, with five points kept good overnight," the total amount of in-

terest charged in the account, during the entire period of 22 days covered by it, was only $4.03. It appears, further, that the orders to purchase were given in view of the current telegraphic quotations of stock exchange prices, as these were from time to time received, and that the corresponding sales were thereafter ordered, generally speaking, as soon as these quotations disclosed a fluctuation of one-half a point in the quoted values of the stocks purchased; the instances in which it was delayed until the difference of a point was disclosed, being comparatively few in number.

The referee has found the creditor's intention to have been that the bankrupt "should buy and actually carry the stocks for him in accordance with the usual custom of brokers." He has further found that the bankrupt agreed to do this, represented that he was doing it, and that the creditor so believed. If this is true, the creditor must at least have intended that the bankrupt should make on his behalf, in the case of each purchase, a binding contract for the transfer of the stock bought or sold, and in the case of stock bought and not sold on the same day that there should be an actual transfer of the stock to the bankrupt, or some one representing him, upon payment of the purchase price; the bankrupt providing all funds required for the payment in excess of what the creditor had deposited with him as margin, and thereafter keeping the stock at all times, until its sale was ordered, ready for transfer to the creditor upon demand and settlement of the account between them. It is undisputed, not only that Lowe never received, but also that he never asked for, transfers of any of the stocks appearing in the accounts. None were, of course, ever received by the bankrupt, or by any one representing him, because, as stated above, the bankrupt never went so far as to make an actual contract for the purchase or sale of any of the stocks.

The evidence transmitted by the referee with his certificate shows the following facts: The bankrupt was not a member of any stock exchange, except the "Boston Mining and Stock Exchange," upon which none of these transactions could have been or were supposed to be executed. His transactions with Lowe were, as he gave Lowe to understand, to be executed on the New York Consolidated Stock Exchange, of which he was not a member, though he owned a seat, and was, through others, doing business upon it. Lowe had previously conducted a stockbroking business in Boston for several years, in the course of which he had dealt with Consolidated Stock Exchange brokers in New York, and had become thus familiar with the rules of that exchange and of stock exchange houses generally. He understood that the bankrupt was not a member of the exchange.

One thus familiar with the business of trading in stocks, engaging in a series of frequent daily transactions, consisting of orders to buy, followed immediately by orders to sell, the same stock, such as most of his transactions with the bankrupt were, must, of course, have known that no actual transfers would or could in such cases be made, and that the transactions must of necessity amount to mere bets upon the course of the market, won if the stock ordered went up, lost if it went down, and to be settled by payment of the difference between the prices at which the respective orders to buy and sell were filled. Whatever the conclusion might be as to the legality of such transactions, had there been a bona fide intention that there should be actually made in the case of each transaction a binding contract between members of the exchange above referred to, giving Lowe (or the bankrupt for him) the right to demand actual delivery of the stock bought in the remotely possible case that he should (as he never did) decide to exercise that right, instead of selling too soon to allow time for such delivery, they were clearly illegal in my opinion, unless it can be said that such actual contracts were really intended. The only question here being as to Lowe's intention, the nature of the transactions and the course of dealing between him and the bankrupt seems to me to raise a strong presumption that no such actual contracts were ever intended by him, any more than by the bankrupt.

Lowe's testimony before the referee was that he believed his orders were being executed, that the bankrupt so informed him, that he had no reason to think otherwise, and that it was his purpose and intention to have every share of stock he ordered purchased or sold in the stock market. But this testimony appears to be based upon the result of inquiries made by him

about the bankrupt's business and responsibility, and upon representations made by the bankrupt to him, before the account between them was opened and the dealings between them began. The real question is: Could he honestly have so believed, in view of what was done while this series of transactions was in progress? The following facts disclosed by the evidence, in connection with those already referred to, seem to me to forbid an affirmative answer to this question:

His orders, irrespective of the number of shares involved, for small lots as well as large, were reported filled at the "ticker" quotations, upon which they were based. These quotations represented the current prices for lots of 100 shares each. He understood and expected them to be thus filled, and objected if there was delay in reporting them as thus filled. It is not easy to credit him with a real belief that every one of the 10, 20, 30, 40, or 50 share lots which he ordered bought or sold was thus promptly bought or sold by actual contract on the exchange, at the quoted price for 100 share lots.

The commission charged by the bankrupt upon the transactions was a commission of $1/16$ only, or one-half the regular commission for an actual transaction upon the exchange. Unless Lowe believed that the bankrupt, though not a member, could get the orders executed on the exchange without charge, belief on his part that they were being actually executed would seem to have required the belief that the bankrupt was getting nothing for his own services in connection with them.

The amount of the margin which the bankrupt required of Lowe upon the transactions has already been referred to. It was so much less in amount than that ordinarily required when actual purchases and sales are intended, and so much less in amount than can be supposed adequate to protect the broker in bona fide transactions so numerous and extensive as those set forth in these accounts, as to afford to one whose experience in such matters had been what Lowe's appears to have been a strong indication that the bankrupt must be dealing with the orders given him just as he did, in fact, deal with them.

The "confirmation slips" transmitted by the bankrupt to Lowe set forth the transactions of each day, and each had printed upon it the express statement that "both parties intend to complete" (the purchases or sales) "by the actual receipt and delivery of all certificates thereof." But the decisions are numerous in which it has been held that recitals of this kind, made under such circumstances, so far from tending to establish the legitimate character of the transactions to which they refer, are strong indications to the contrary. See Re Baxter Co., 152 Fed. 137, 141, 81 C. C. A. 355.

Taking all the facts and circumstances into account, I am unable to believe that Lowe's intent, regarding the execution of his orders by the bankrupt, differed from that of the bankrupt himself. His testimony is not, in my opinion, sufficient to establish, against the indications to the contrary, an intent on his part that every order given should result in an actual contract. I am obliged to hold that the transactions were understood to be wagers, as in fact they were.

It follows, from this conclusion, that the claim cannot be allowed for the entire balance of the account. But as there is no question that the bankrupt not only had reasonable cause to believe, but knew, that the intention existed not to make actual purchases or sales, Lowe was entitled, by virtue of Rev. Laws Mass. c. 99, § 4, to recover from the bankrupt the amount of the payments made from time to time as margins.

The referee's order allowing the claim in full must therefore be vacated, and the claim allowed for the amount of $2,275, with interest.

HARDESTY et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. January 3, 1911.)

No. 2,056.

1. BAIL (§ 63*)—WRIT OF ERROR—SUPERSEDEAS.

While a writ of error to review a conviction for a noncapital crime, and a supersedeas to stay the execution of the sentence is a matter of right, an appearance or bail bond is required to entitle the accused to go at large pending the writ of error.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 63.*]

2. CRIMINAL LAW (§ 1194*)—WRIT OF ERROR—APPEARANCE BOND—ACTION TO RECOVER FINE.

Rev. St. § 1007 (U. S. Comp. St. 1901, p. 714), provides that, in any case where a writ of error may be a supersedeas, defendant may obtain the same by filing and serving the writ within 60 days after judgment, and giving the security provided by law on the issuance of citation, but if he desires a stay of process, he may after having served his writ of error give the security required by law within 60 days after judgment or thereafter with the permission of a justice or judge of the appellate court. Section 1041 (page 724) provides that a fine may be enforced against the property of accused as a judgment in civil cases, provided that where the judgment directs that defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment will not discharge defendant from imprisonment until the amount of the judgment is collected or otherwise paid. Court of Appeals rule 13 (150 Fed. xxviii, 79 C. C. A. xxviii) requires that a supersedeas bond shall be conditioned that appellant shall prosecute his writ or appeal to effect and answer all damages and costs, if he fails to make his plea good, and that, where the judgment or decree is for the recovery of money not otherwise secured, such indemnity must be for the "whole amount of the judgment or decree including just damages for delay, costs and interest of the appeal." Rule 37 (150 Fed. lxxxv, 79 C. C. A. lxxxv) declares that the proper security may be taken and citation signed by the justice or judge allowing the appeal or writ of error, and that he may also grant a supersedeas and stay of execution of proceedings pending such writ of error or appeal, and section 2 of the rule empowers the Circuit Court or District Court, or any justice or judge thereof, after the citation is served, to "admit the accused to bail in such amount as may be fixed." *Held*, that the first paragraph of rule 37 was not limited to civil cases, but embraces criminal as well, of which the Court of Appeals had appellate jurisdiction, and hence where accused were each sentenced to a term of imprisonment and to pay a fine of $1,000, and, after executing a supersedeas bond conditioned that they would prosecute their writ to effect and also damages and costs which might be awarded against them or either of them if they failed to make their pleas good, executed appearance bonds, such supersedeas bond was neither unauthorized nor without consideration, but, on the affirmance of the judgment and on defendants' surrender to serve the imprisonment portion thereof, the United States was entitled to recover the amount of the fine in a proceeding on the supersedeas bond.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1194.*]

3. CRIMINAL LAW (§ 1199*)—APPEAL—ERROR—OBJECTION.

After affirmance of a conviction on a writ of error, proceedings were taken to obtain a recovery of the fines assessed against the surety of the supersedeas bond in the same proceeding. No objection to the form of the remedy was made at the time of the hearing, nor was such objection taken by exception or by assignment of error, but was raised by counsel representing the indemnitor of the surety company, who appeared on the

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

briefs as counsel for plaintiffs in error. *Held*, that the objection that recovery could only be had in an independent action against the surety was without merit.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1199.*]

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

Jerome E. Hardesty and another, each having been convicted of violating the federal oleomargarine act and each sentenced to a term of imprisonment and to pay a fine of $1,000 and the conviction having been affirmed, the United States applied for judgment in that proceeding on defendants' supersedeas bond against the Fidelity & Guaranty Company, defendants' surety. From a judgment in favor of the United States on the bond, defendants and the surety company bring error. Affirmed.

Cary & Rogers (Bates & Blodgett, of counsel), for plaintiffs in error.

Casey Todd, U. S. Atty.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

KNAPPEN, Circuit Judge. The writ of error in this case brings up for review the judgment of the court below in favor of the United States upon a supersedeas bond given by Hardesty and Voges as principals and the United States Fidelity & Guaranty Company as surety under these circumstances:

Hardesty and Voges were convicted in the District Court of violating the federal oleomargarine act. Each was sentenced to a term of imprisonment and to pay a fine of $1,000. They petitioned the court for a writ of error to this court, asking also:

"That an order be made fixing the amount of the bond which the defendants shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of the said writ of error. * * *"

The court ordered that the writ be allowed, and that "the amount of bond on such writ of error be and is hereby fixed at the sum of $3,000." The bond in question was accordingly given; its condition being that Hardesty and Voges "shall prosecute their writ of error to effect and shall answer all judgments, damages and costs that may be awarded against them or either of them, if they or either of them fail to make their pleas good." Hardesty and Voges then petitioned the court to "fix an appearance bond for their appearance in said court to abide by the judgment of (this court) in the prosecution of this writ of error," stating that they had "perfected their writ of error and the same has been granted." An order was made reciting the giving of "a supersedeas bond in the sum of $3,000, which has been approved by this court," and permitting the respective respondents to give separate appearance bonds in the sum of $1,000 each. Hardesty and Voges accordingly each gave a bond in the penalty of $1,000,

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

with the United States Fidelity & Guaranty Company as surety; its condition being that the principal "surrender himself in execution of the judgment and sentence appealed from" should the judgment be affirmed by the Court of Appeals. The judgment of the District Court was affirmed by this court February 18, 1909 (Hardesty v. United States, 168 Fed. 25, 93 C. C. A. 417). The District Court thereupon fixed the time for the commencement of the sentence of imprisonment, and Hardesty and Voges were committed accordingly. The Fidelity & Guaranty Company then moved that the supersedeas bond be set aside, on the ground that its execution "was not required by law a condition precedent to the granting of the writ of error in said case, and was therefore unauthorized, without consideration, and null and void"; and on the further ground that Hardesty and Voges had surrendered themselves to the court, had been sentenced, and were then serving the term of imprisonment to which they were sentenced, and had thus fully complied with the terms of the undertaking in question. The counsel for the United States having moved for judgment upon the bond, the motion of the Fidelity & Guaranty Company was overruled, and judgment entered against Hardesty and Voges each in the sum of $1,000, "being the amounts of the fines heretofore imposed on each of them," and against the United States Fidelity & Guaranty Company, "surety on the said supersedeas bond," in the sum of $2,000.

The question is thus raised whether there was any authority in law for the taking, and thus any consideration for the giving, of the supersedeas bond. Section 1000 of the Revised Statutes (U. S. Comp. St. 1901, p. 712) provides that:

"Every justice or judge signing a citation on any writ of error, shall, except in cases brought by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

Section 1007 (page 714) provides that in any case where a writ of error may be a supersedeas the defendant may obtain the same by filing and serving the writ within 60 days after the rendering of the judgment complained of, "and giving the security required by law on the issuing of the citation," but, if he desires to stay process on the judgment, he may, having served his writ of error, "give the security required by law within 60 days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court." By rule 13 (150 Fed. xxviii, 79 C. C. A. xxviii) of this court the prescribed condition of the supersedeas bond is that "appellant shall prosecute his writ or appeal to effect, and answer all damages and costs, if he fails to make his plea good"; and it is provided that "such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay and costs and interest on the appeal." Rule 37 (150 Fed. lxxxv, 79 C. C. A. lxxxv) of this court provides that "the proper

security" may be taken and the citation signed by the justice or judge allowing the appeal or writ of error, and that "he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal." By section 2 of the rule the Circuit Court or District Court, or any justice or judge thereof, is given power, after the citation is served, to "admit the accused to bail in such amount as may be fixed."

It is well settled that a writ of error from a judgment of conviction of a crime not capital is a matter of right, and that a supersedeas has the effect, under the statute and rules cited, of staying the execution of the sentence, but that it does not involve the question whether the defendant shall be permitted to go at large pending the writ of error, an appearance or bail bond being required to permit such result. In re Claasen, 140 U. S. 200, 205, 11 Sup. Ct. 735, 35 L. Ed. 409; Hudson v. Parker, 156 U. S. 277, 283, 287, 15 Sup. Ct. 450, 39 L. Ed. 424; McKnight v. United States, 113 Fed. 451, 452, 51 C. C. A. 285. In the Claasen Case (page 208 of 140 U. S., page 738 of 11 Sup. Ct. [35 L. Ed. 409]) it is said that:

"As there is no security required in a criminal case, the supersedeas may be obtained by merely serving the writ within the time prescribed, without giving any security, provided the justice who signs the citation directs that the writ shall operate as a supersedeas, which he may do when no security is required or taken."

Hudson v. Parker cites the Claasen Case with approval. This court in the McKnight Case, speaking through Judge (now Mr. Justice) Lurton, said (page 452 of 113 Fed., page 286 of 51 C. C. A.):

"The writ of error, when filed within 60 days of the judgment complained of, operates as a supersedeas or stay of proceedings. * * * If the writ of error is not allowed until after the lapse of 60 days, it will equally operate as a supersedeas, provided the judge signing the citation shall so direct."

In the Claasen Case and in Hudson v. Parker, the sentences were merely of imprisonment. The Claasen Case involved merely a motion for leave to file a petition for a writ of mandamus to compel the settling of a bill of exceptions, and a motion, on behalf of the United States, to set aside a supersedeas. Hudson v. Parker involved the power of a circuit justice not assigned to the circuit in question to order a prisoner, after citation served, to be admitted to bail. The McKnight Case was heard on application for bail pending writ of error. The statute under which the applicant was sentenced provided only for punishment by way of imprisonment; and, although the record in the main case shows that a nominal fine was actually imposed in addition to the sentence of imprisonment, that fact was in no way involved in the application under consideration. In the Claasen Case (on which the Hudson and McKnight Cases were based) the decision that no security is required on granting supersedeas in a criminal case was based upon the proposition that in such case there was nothing to secure, because there could be no damages in a criminal case, nor were costs recoverable upon appeal, and that, therefore, the limitation of the rule that supersedeas be granted on giving the security required by law had no application.

It is certainly true that, where the only judgment is one of imprisonment, there is nothing to secure except the appearance of the defendant, and this appearance may be assured in spite of the supersedeas by the commitment of the respondent, if bail is not allowed to be given. But such is not the case where, as here, there was in addition to the sentence of imprisonment a judgment for the payment of a fine. Section 1041 of the Revised Statutes (U. S. Comp. St., 1901, p. 724) provides that such fine "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced, provided that where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid." It is doubtless within the discretion of the court to order the imprisonment of the defendant to coerce the payment of a fine (Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877); and, if nothing be said in the judgment concerning the mode of enforcing the fine, it seems to be the rule that the district attorney, at his election, may adopt the method by execution under the statute or by a capias; but that, where the judgment provides only that execution be issued against the defendant, that is an exclusive mode of enforcing the sentence. 2 Desty's Federal Procedure, § 577. The judgment in this case provided that:

"For the collection of which said fine and costs, the writ of execution will issue against said defendants together with the usual writs of mittimus with copy."

Where a judgment appealed from requires the payment of money, a supersedeas bond conditioned according to the statute and the court rule covers, not merely damages and costs, but the amount of the judgment. Catlett v. Brodie, 9 Wheat. 553, 6 L. Ed. 158; Jerome v. McCarter, 21 Wall. 17, 22 L. Ed. 515; Wood v. Brown, 104 Fed. Rep. 203, 206, 43 C. C. A. 474. That the respondents had in mind that the supersedeas bond would secure the payment of the fines seems apparent from the facts first, that the supersedeas bond and appearance bond were applied for practically simultaneously, the two respective bonds being applied for, executed and filed on the same dates respectively; and, second, that the condition of the supersedeas bond contains the word "judgments," which is not contained in the language of either the rule or the statute pertaining to supersedeas bonds, but is within the protection afforded by the statutory bond. If in all criminal cases not capital a writ of error operates, as a matter of law, as a supersedeas, without the giving of security, it follows that in the large class of cases in which the sentence is merely for the payment of a fine, to be enforced only by execution against the property of the defendant, the United States can get no security, upon the taking of writ of error by the defendant, that the fine will be forthcoming (even to the extent of the then property of the defendant), in case the judgment is affirmed. We cannot believe such was the intention of the statute and rules. In such case there is something to be secured besides the appearance of the defendant for commit-

ment to imprisonment. The first paragraph of rule 37 (150 Fed. lxxxv, 79 C. C. A. lxxxv), which in fact contains the general provision on supersedeas, is not limited to civil cases, but embraces all cases, civil or criminal, of which this court has appellate jurisdiction. Hudson v. Parker, supra, at page 284 of 156 U. S., 15 Sup. Ct. 450, 39 L. Ed. 424. While the United States is not properly interested in securing the imposition of fines for mere purposes of revenue, it is in our opinion legally interested in collecting a judgment for a fine lawfully imposed. As applied to such cases, the general statements contained in the Claasen, Hudson, and McKnight Cases cited above are in our opinion obiter. Indeed, in Hudson v. Parker, at page 293 of 156 U. S., 15 Sup. Ct. 456, 39 L. Ed. 424, Mr. Justice Brewer, speaking of Supreme Court rule 36, 11 Sup. Ct. iv (rule 37 of this court being substantially the same), says that the provision in the first paragraph of the rule, in reference to security, "evidently refers to those cases in which the sentence of the trial court directs the payment of a fine. In respect to such a sentence 'security' is an apt and suitable word." While this language was contained in a dissenting opinion, we think there is nothing in the majority opinion necessarily inconsistent with it. It is matter of common knowledge that on writs of error from judgments imposing fines against corporations for rebating under the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) security in some form has been sometimes required.

Assuming, but not deciding, that the writ of error without order for supersedeas would have suspended the power of commitment to coerce the payment of the fine, it would not in our judgment have suspended the issue of execution against the property. Conceding that the court had no authority to require security for the payment of damages for delay and for interest and costs, the court in our judgment had at least authority in its discretion to make the suspending of the execution against the property conditional upon the giving of security for the payment of the fines. Presumably the respondents believed, at least, that it was to their advantage to have the collection of the fines stayed, and so volunteered to give the bond, although the record does not disclose whether or not they had any property. The judgment on the bond is for the amount of the two fines, without interest, costs, or damages for delay, and the securing of these fines we think must fairly be held to have been covered by the bond. The conclusion we have reached is that the giving of the supersedeas bond was not without consideration or authority of law.

Counsel in fact representing the indemnitor of the surety company, and appearing upon the briefs as of counsel for the plaintiffs in error, raise in this court the objection that the judgment is invalid because the proceeding was instituted by motion for judgment, and not by independent suit. No objection as to the form of the remedy was made at the time of the hearing, nor has such objection been specified in exception or assignment of error. It was evidently not thought of by the surety or by any one on his behalf until the filing of the supplemental brief in this court prepared by counsel for the indemni-

tor, and the subject is thus not discussed in the brief of the defendant in error. It is apparent that no injury to the plaintiffs in error has resulted from the form of the proceeding. The question raised is merely one of law, to be decided by the court. Not only was the surety in court and without objection on its part, but it was there upon its own application for the purpose of trying out the question of its liability.

There is in our judgment no merit in the objection referred to.

The judgment of the court below is affirmed.

SOUTHERN TOWING CO. v. EGAN (two cases).

(Circuit Court of Appeals, Fourth Circuit. November 10, 1910.)

Nos. 920, 921.

1. TOWAGE (§ 4*)—DUTIES OF TUG TO TOW—LIABILITY FOR LOSS OF TOW.

A towing boat is not an insurer of the safety of the tow nor has she imposed on her the obligations of a common carrier, but those charged with her management are required to exercise reasonable or ordinary care, caution, and maritime skill in the performance of the service undertaken, and, if these are omitted and disaster occurs, the towing boat is responsible.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. TOWAGE (§ 19*)—LOSS OF TOW—LIABILITY OF TUG.

The tug Dixie of 50 tons net and 225 indicated horse power left Baltimore for Norfolk and beyond with 5 heavily laden barges. At 4 o'clock in the afternoon the weather became threatening, the wind increasing and the barometer falling, and conditions became worse during the night. At midnight the wind was flawy and the barometer falling rapidly, culminating in a gale and violent storm at 4 in the morning, and at 7, finding it impossible to withstand the storm, the tow anchored, the barges cutting loose and anchoring separately. One of the barges foundered, and all on board were drowned. During the night the tow passed two or three harbors where a safe anchorage could have been made. It was customary for tugs of the Dixie's class to take tows of that size down the bay, but except in favorable weather, without much adverse wind or sea, they were not able to manage such a tow. *Held* that, in view of the heavy tow, it was particularly incumbent on the master of the tug to exercise care in guarding against probable storms, and that under the circumstances his failure to seek a harbor was reckless, and not in the exercise of the seamanship and care demanded, and rendered the owner of the tug liable under the law of Virginia for the death of the master and mate of the barge.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 41; Dec. Dig. § 19.*]

Appeals from the District Court of the United States for the District of Maryland, at Baltimore.

Suits in admiralty by Sarah J. Egan, administratrix of the estates of John J. Egan and John Egan, respectively, against the Southern Towing Company. Decrees for libelant, and respondent appeals. Affirmed.

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

These are appeals from two decrees of the United States District Court for the District of Maryland, entered on the 15th day of March, 1909, in favor of the appellee, libelant in the lower court, against the appellant. The two cases were by consent heard together in both courts, though separate decrees and separate appeals were taken. The libels were filed under the Virginia statute (Code Va. §§ 2902, 2903), giving a remedy for loss of life by wrongful act of another, to recover damages arising from the drowning of libelant's husband, John Egan, and son, John J. Egan, by the sinking of the barge Frank W. Cumminsky, Jr., on the 9th day of April, 1907, in the waters of Chesapeake Bay, and within the territory of the state of Virginia, they being, respectively, the master and mate of the barge. The barge was the fourth of five in tow of the tug Dixie, owned by the appellant, en route from the port of Baltimore, Md., to the ports of Norfolk and Richmond, Va. The Dixie was a tug of 50 tons net, 225 indicated horse power. The 5 barges were heavily laden, of the average of 375 tons net, and the forward barge was on a hawser of 110 fathoms. The length of the other hawsers was not specifically given in the pleadings. The tow left Baltimore early Friday morning, April 5, 1907, and about 12 o'clock that night put into the Patuxent river for harbor, where it remained Saturday and Sunday, leaving there early Monday morning, the 9th, and proceeded down the bay with fairly good weather, until about the middle of the afternoon, when the indications became less satisfactory, and about 4 o'clock p. m. the wind increased considerably, the barometer falling, evidencing serious weather conditions, which continued as night came on, and during the night, to grow worse, and a rain set in. The wind at midnight was flawy, with the barometer going down rapidly, culminating in a gale and violent storm about 4 a. m. of the 9th of April. About 7 o'clock, finding it impossible to withstand the storm, the tow anchored, the barges one after another cutting loose, and anchoring or endeavoring to do so, and the tug was forced to look out for her own safety. Two of the barges remained at anchor, two were blown well from their mooring, and the Cumminsky foundered, and all on board were drowned.

The libelant's case, briefly, is that the Dixie was in fault and guilty of negligence for not going into some one of the convenient harbors along the western shore of Chesapeake Bay, in view of the then existing weather conditions, namely, Great Wicomico harbor, which was passed about 3 o'clock in the afternoon of the 8th, the Rappahannock harbor, which was passed about 9 o'clock that night, and, later, the Piankitank harbor, during the passing of all which harbors the weather conditions were serious, and it was observable that other tugs and tows had put into harbor for refuge, and, instead, in persisting in the effort to take a tow of the size in hand, in the open bay, with the knowledge on her part that she could not safely do so in anything approaching a storm; whereas, the Dixie insists that there were no weather or other conditions that made it impracticable for her to navigate as she did, that in passing the harbors specifically mentioned above there were no reasons apparent to her why she should have discontinued her journey and gone to harbor, whatever others may have thought, that her master was intelligent and competent, exercised his best judgment in determining what should be done in the then appearance of the weather conditions, that about 3 a. m. on the morning of April 9th, while in the lower Chesapeake Bay, between Wolftrap Lighthouse and New Point, in view of the falling barometer, he deemed it advisable to be near harbor, and so altered his course to make for New Point, that about 4 o'clock the wind shifted to the southwest, gradually increasing and hauling to the westward, that he found that he could not make material headway, and a violent gale followed, causing him to anchor his tow about 7 a. m., and that the disaster was brought about by the violence and suddenness of the storm, without any negligence on the part of the tug, or lack of good judgment and good seamanship on the part of her navigator.

Arthur D. Foster (John F. Lewis and Francis C. Adler, on the brief), for appellant.

J. Walter Lord (Howard M. Long, on the brief), for appellee.

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

WADDILL, District Judge (after stating the facts as above). The law applicable to these cases, regarding the tug's liability to its tow ordinarily, seems not to be seriously controverted; that is, that the towing boat is not an insurer of the safety of the tow, nor has she imposed upon her the obligations resting upon a common carrier, but there is required of those charged with her management the exercise of reasonable or ordinary care, caution, and maritime skill in and about the duties imposed upon and performed by them, and if these are omitted, and disaster occurs, the towing boat becomes responsible. The Syracuse, 12 Wall. 167, 20 L. Ed. 382; The Cayuga, 16 Wall. 177, 21 L. Ed. 354; Eastern Transp. Line v. Hope, 95 U. S. 297, 24 L. Ed. 477; The Adelia, 154 U. S. 593, 14 Sup. Ct. 1191, 21 L. Ed. 672.

In the trial, which lasted four days before the lower court, a large number of witnesses were examined, and there was considerable conflict in the testimony as to some of the important features of the occurrence. At the conclusion of the evidence, and after arguments of counsel, the court in an oral opinion announced its conclusions and findings of fact in substance as follows:

First. That it is the custom of tugs of the same class as the Dixie to tow five and often as many as eight loaded barges from Baltimore to Norfolk.

Second. That except in favorable weather, without much adverse wind or sea, they are not able to manage such a tow.

Third. That against a strong wind, a heavy tide, or rough sea they are not able to move such a tow with any speed, and in anything like a storm, or anything approaching a gale, such a tug has as much as it can do to save itself.

Fourth. That, in order to conduct such towage with safety, the navigators of tugs should be very observant of the weather, and not run any risks that they could avoid, and should make for one of the numerous harbors in the bay, which, particularly along the western side thereof, are generally not more than from ten to fifteen miles apart, as soon as it becomes evident that stormy weather is to be expected.

Fifth. That the master of the tug, in the exercise of the degree of prudence and skill required of him, which under the circumstances here was necessary, and without which his tow could not have been safely carried, could have, if observant of the weather conditions, gone into harbor safely, before it was too late.

Sixth. That the weather indications were threatening, and the barometer falling, when the Dixie was passing the harbor of Piankitank.

Seventh. That at the time of passing Wolftrap, about 1:20 a. m., the conditions certainly were alarming. The barometer at midnight had begun to go down rapidly, the wind was flawy, there were indications of severe storm, and on the whole testimony it was reckless not to have gone into Wolftrap, if not into Piankitank harbor, and that a prudent man would have gone into the latter.

Eighth. That Wolftrap is a place where a tug can take her tow to safe anchorage.

Ninth. That the conduct of the navigator of the Dixie in failing to take timely precaution to avoid the storm, which under existing conditions he should have known was imminent, was more than an error of judgment. That it was negligence and the fault which brought about the disaster.

And thereupon rendered judgment in favor of the libelant, from which these appeals were taken.

We readily appreciate the importance of these cases as affecting the large towing business done on Chesapeake Bay, which forms a considerable part of its commerce, and the difficulty presented in having to pass upon the correctness of the judgment of the tug's navigator, in the light of after, as distinguished from the existing, conditions and lights under which he acted. Undoubtedly much latitude must be allowed to a ship's master in the control of his vessel, and it may be said that his determination as to the proper manœuvre to make, or the best and safest course to pursue, should be accepted, unless it seems manifest from a full consideration of all the facts and circumstances that he failed to exercise that degree of prudence, care, and caution that one having ordinary maritime skill and experience should and would have shown in the condition in which he was then placed. The service, to be effective, must be timely, as, here, in many cases, the time within which a given course may be determined on, or adopted, is all important. With a tow that could not be managed in bad weather it was quite, and indeed more, necessary for the tug to guard against and look out for probable storms, and which it would seem, with the admonition of the barometer and other signs of warning familiar to those navigating the sea, ought reasonably to have been foreseen, anticipated, and provided against than it was to pursue any particular course after the same had arisen, and which, by the tardiness of her navigators, placed her in a position in which she was powerless to protect the tow committed to her care. The Syracuse, 12 Wall. 167, 172, 20 L. Ed. 382, supra; The Frank G. Fowler (D. C.) 8 Fed. 340; The Temple Emery (D. C.) 122 Fed. 180; Tucker v. Gallagher (D. C.) 122 Fed. 848.

After full consideration and investigation of the record in these cases, we are forced to the same conclusion as that reached by the learned judge of the lower court, that there was no excuse for the failure of the Dixie, in the circumstances in which she was placed, with her information as to the existing condition of the weather, and her warning or opportunities of warning of the impending storm, to delay getting to a place of safety easily within reach, until it was too late for her to protect her tow, and that her omission of duty and negligence in this respect is so manifest and flagrant as to constitute a fault sufficient within itself to account for, and which did bring about, the disaster which resulted in the drowning of the libelant's intestates.

The witnesses in these cases having been seen and heard by the judge of the lower court, his findings of fact are to be received with the strong presumption of correctness which usually in admiralty courts is given them (Jacobsen v. Lewis Klondike Exposition Co., 112 Fed. 73, 78, 50 C. C. A. 121; Memphis & Newport Packet Co. v. Hill, 122 Fed. 246, 58 C. C. A. 610; The Oak, 152 Fed. 973, 82 C. C. A. 327), and independently, our conclusions are in accordance with such findings as

affect the essential features of the cases, believing, as we do, that the preponderance of the evidence fully sustains the same.

The amounts allowed libelant of $500 for the loss of the life of her intestate John J. Egan and of $3,500 for loss of the life of her intestate John Egan are challenged as excessive. These sums seem to us entirely reasonable under the facts of these cases.

The decisions of the lower court in both cases will be affirmed at the cost of the appellants.

Affirmed.

THE WILLIE.

(Circuit Court of Appeals, Second Circuit. December 12, 1910.)

No. 9.

TOWAGE (§ 11*)—INJURY TO TOW LEFT AT PIER—LIABILITY OF TUG.

A tug which left her tow at a pier where she was at the time, and for some hours thereafter, entirely safe, *held* not liable for her subsequent injury due to a change in the direction of the wind.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. § 11.*]

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

Suit in admiralty by Edward G. Murray as owner of the canal boat George Emsley against the Shepard & Morse Lumber Company and the steam tug Willie, Charles W. Bridgins and others, claimants. Decree for respondents, and libelant appeals. Affirmed.

On appeal from a decree of the District Court for the Southern District of New York, dismissing the libel in an action brought by the owner of the canal boat George Emsley against the Shepard & Morse Lumber Company and the steam tug Willie to recover damages sustained by the canal boat on the 1st day of February, 1908, while lying at the pier at the foot of Twenty-Eighth street, South Brooklyn.

Wray & Callaghan (Albert A. Wray, of counsel), for libelant.

Conway & Williams (Charles F. Williams and Eustace Conway, of counsel), for the Lumber Co.

Alexander & Ash, for the Willie.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The controlling question is—was the tug negligent? If not, there can be no recovery. The cause was tried in open court the witnesses appearing before the District Judge. The principal fault charged against the tug is that she left the canal boat moored at the pier at Twenty-Eighth street when she should have placed her in the Richards Basin. The owners of the tug insist that the contract was to tow her to the foot of Twenty-Eighth street and that they expressly declined to put her into the basin because it was congested, explaining that:

"Richards was hauling boats from Twenty-Eighth street and putting them in the basin where he could take charge of them."

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

The canal boat was left on the south side of the Twenty-Eighth street pier. The master of the tug says that she arrived there in the morning about 11 o'clock. The canal boat owner says she did not arrive until 12:30. At 11 o'clock the wind was SE, blowing 35 miles per hour; at 12 o'clock it was SE, 29 miles; at 1 o'clock it was S, 26 miles; at 2 o'clock it was W, 26 miles. It was not until 2 o'clock, therefore, that the wind hauled around to the west and continued west until about 11 o'clock that night. There was no danger to the canal boat at the pier from a south or southwest wind as it came over the land and the pier was sheltered by a high bluff. The court found that the tug could not have taken the canal boat into the basin and that when the tug left the canal boat at the pier it was with the consent and approval of her master, at a time when the conditions were perfectly safe and when she could have gone into the basin, using the local facilities, if her master desired to place her there. There was no reason at any time prior to 2 o'clock to apprehend a change of wind to the westward and the damage which occurred from that cause. The canal boat captain had from one to two hours to get his boat into the basin before the wind shifted. Bearing in mind that the tug was only bound to exercise ordinary skill and care, we agree with the District Judge in thinking that she is to be judged by the conditions existing at the time she left the canal boat at the pier, when there was no reason to apprehend danger.

The libelant testified that when the charter was made Mr. Hudson agreed to return the Emsley "in the same condition she was in at the time he took her, ordinary wear and tear excepted." Mr. Hudson denies that anything of this kind was said during the conversation, which was by telephone. The District Judge did not discuss this testimony in detail. Quite likely he thought such a course unnecessary, in view of his finding that the delivery of the Emsley in good condition at the pier at the foot of Twenty-Eighth street was sufficient. The two witnesses were in sharp conflict and it is evident that if the judge had believed that the charter contained the conditions now insisted upon by the libelant he would have so stated in his opinion. We are of the opinion that the charter was a simple bailment for hire.

There was a conflict of testimony as to the conditions at the basin, as to what took place when the canal boat was left at Twenty-Eighth street pier, and upon several other minor points. We think, however, that the preponderance of proof sustained the conclusions of the District Judge.

The decree is affirmed with costs.

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

ADAMS, District Judge. This action was brought by Edward G. Murray against the Shepard & Morse Lumber Company and the steamtug Willie, to recover damages sustained on the first of February, while the libellant's boat, the canal boat George Emsley, was lying at a pier at the foot of 28th Street, South Brooklyn.

The charges are that the Emsley was towed to the foot of 28th Street and there made fast to the pier at a time when the wind was blowing a heavy gale, which continued for some time, causing the canal boat to chafe against the pier, breaking her top, and so forth; that at the time the canal boat was

sound and strong and seaworthy; that the pier was exposed to winds and was a dangerous and unsafe place for a boat of her character to be made fast in bad weather. Such is the substance of the libel.

The faults charged against the Lumber Company are:

(1) That they allowed the Willie to place the canal boat at the pier when there was a high wind.

(2) That it allowed the canal boat to remain fast to the pier.

(3) In that it did not return the boat to the libelant in good order and repair.

The charges against the tug Willie are:

(1) That she placed the boat at the said pier while there was a high wind and allowed her to remain there and suffer damages.

(2) That she made the boat fast to the said pier.

(3) That she did not remove the canal boat before she suffered damage.

(4) In that she did not tow the boat to Richards Basin as ordered and there leave it in a safe place.

The Lumber Company's defense is that it hired the Emsley from Mr. Murray by oral contract and that by the terms of such contract Mr. Murray and his agents and representatives were to retain control and to be in charge of the boat Emsley; that, thereafter, the tug Willie took the canal boat in tow to be towed to Richards Basin in Brooklyn, but without respondents' knowledge and consent the tug took her to the foot of 28th Street.

The answer of the owners of the Willie is that on or about the first of February, 1908, the Willie was engaged to tow the boat Emsley from the foot of 30th Street, North River to the foot of 28th Street, South Brooklyn. That in conformity with said contract, the tug took the canal boat in tow at the place mentioned, proceeded on the voyage and duly arrived at the foot of 28th Street, South Brooklyn, where she left her properly secured. That the berth in which the canal boat was left, was a good safe one, and one which is, and has for a long time been, used for vessels to receive and discharge cargo. That the Willie carefully performed the entire duty for which she was engaged and was not guilty of any fault or act of negligence.

The testimony here shows that the canal boat was taken in tow at 30th Street, North River, by the Willie as alleged, and was towed on hawsers 75 or 100 feet in length to 28th Street, and she was to be taken, according to the shipping people to Richards Basin, which is in the immediate vicinity of 28th Street. Instead of taking her to Richards Basin the tug left her at the south side of the pier at the foot of 28th Street.

The tug was required, if practicable, to deliver the boat in Richards Basin and she did not do so. No excuse for that is pleaded, but the testimony shows that the tug in leaving her on the south side of 28th Street, did so as she could not take her into the Basin, because the Basin was congested, there being many canal boats in there, and, therefore, she left her at 28th Street.

There is a conflict of testimony as to the condition of affairs when the tug and tow arrived at 28th Street. It is said, in behalf of the canal boat, that the master when arrived there saw that the place was unsafe and told the captain of the tugboat not to leave him there. On the other hand, the captain of the tug says that the captain of the canal boat, instead of protesting at all, accepted the place that was found for him between two other vessels, and told the captain of the tug he was "all right," and allowed the tug to leave. I am inclined to believe that is so. I doubt very much, in the face of this testimony, whether the tug would have done such a foolish thing as to leave that canal boat there in an unprotected place where there was a strong wind blowing and a high sea prevailing. It is extremely unlikely and I reject the testimony that is put forward to establish that condition of affairs. On the contrary, I believe that when the canal boat arrived there, there was not anything to indicate any immediate danger. It is agreed here that at 9 A. M. the wind was east and the force 25 miles; at 10 A. M. it was from the same direction with a force of 32 miles. At 11 A. M. the wind was southeast with a force of 35 miles. At 12 the wind was southeast, with a force of 29 miles. At 1 P. M. the wind was south with a force of 26 miles. At 2 P. M. it had veered around to the west with a force of 26 miles and then from the same direction it ran around from 25 to over 40 miles during the afternoon.

There is no doubt but that a strong wind prevailed, the testimony shows it was the highest wind that had been there during the season. The watchman on the pier—a perfectly disinterested witness and one who seemed to me to be truthful—says it was the worst day of the year, that it was the worst storm and that the boat would have been dangerously exposed in the Basin assuming that it could have been put in there.

This being the state of affairs at that place and at that time the boat was left there, is there any liability shown here on the part of the tug? Of course it was her duty, under the contract, to take the boat to Richards Basin, but she says, and I believe truly, that she could not put the boat in the Basin because there was not room enough. She also says she could not go in herself, because there was not water enough, that is, in the Basin. She could have gone in from below, but that entrance was all blocked up with the boats, and the weather being calm when she reached there, she took the canal boat to a safe place on the south side of 28th Street and left her there in an easy position from which to get into the Basin if the canal boat wished to do so; and there were facilities for warping in there with her own lines.

On the other hand, the captain of the canal boat said—and I believe truthfully—that after the wind came up he could not move his boat, that he tried to get around the boat ahead of him but he could not handle his boat. The consequence was he was left there through the afternoon hours and during the night in the high wind and his boat was subjected to being forced against the wharf and chafed and damaged.

The only question in this case, in my judgment, is whether the tug was negligent. The tug did not say the canal boat would be safe even if it was shown that the Basin was the safer place. That has not been shown, because the watchman to whom I have just alluded, said the Basin was not any safer than the wharf, and although there is no proof of damage to boats that were in the Basin yet there is nothing to convince me that the canal boat might not have been damaged if she had been in the Basin. There is quite a sweep there for a westerly wind, there is very slight protection towards the west. I think the testimony shows there is but a slight "L" from the end of the 32d Street Pier, which is the south side of this Basin—not the 33d Street, as the diagram Exhibit No. 3 shows. There was a very slight protection there from the west wind, perhaps 100 feet or something like that, and the canal boat would not have been protected there, in my judgment, from a high west wind. There would have been considerable sea and she would have been just as liable there to be injured as on the south side of 28th Street.

The tug is not liable for the extra high wind. The captain, I think, left her on the south side of 28th Street in good faith and thought she was safe there and there was not anything at that time to tell him it was an unsafe place to leave the canal boat. The tugboat was not insurer of the safety of the canal boat. After she was left there the wind changed around, as I have already said, so that from an eastward direction in the morning it got to be westerly in the afternoon and it then became dangerous for this boat and it was injured. Whether the canal boat would have been injured in other place or not, we do not know. There is no testimony to show that any boats were injured in that Basin, but the Basin was just as much exposed to the wind from that direction as this wharf was and I think it quite likely the canal boat might have been injured had she been there.

The canal boat was injured at the wharf from the effect of the westerly wind. The tug was not obliged to anticipate a wind from that quarter. When he left the canal boat there the wind was from the east although later on it did work around.

Whether some other tug might have been secured to come to the relief of the canal boat does not appear. There has been some testimony that tugs are there in that vicinity all the time. But without attaching much importance to that testimony, I think the case can be decided upon the ground that there was no negligence on the part of the tugboat captain at the time he left the canal boat there and I therefore think she should not be held liable.

I therefore dismiss the libel as against both the tug and the Lumber Company.

THE LAURETTA SPEDDIN.

(Circuit Court of Appeals, Fourth Circuit. November 10, 1910.)

No. 901.

1. COLLISION (§ 17*)—FAULT—OBEDIENCE TO RULES.
Obedience to the rules of navigation is not a fault, even if a different course would have prevented a collision, and the necessity must be clear and the emergency sudden and alarming before an act of disobedience can be excused.
[Ed. Note.—For other cases, see Collision, Cent. Dig. § 16; Dec. Dig. § 17.*]

2. COLLISION (§ 45*)—STEAM AND SAILING VESSELS MEETING—FAILURE OF STEAM VESSEL TO KEEP OUT OF THE WAY.
A collision occurred in the daytime in calm weather between a small sailing vessel known as a "bugeye" sailing down the Patapsco river in a southeasterly direction, with a 14-mile northeast wind, and an empty scow in tow of a tug on a 300-foot hawser passing up. At the time of collision the tug was to the eastward of the bugeye, and there were no other vessels in the vicinity, which left ample room for safe navigation. *Held*, that the case was governed by articles 20 and 21 of the inland rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), which required the tug to keep out of the way and the sailing vessel to keep her course and speed; that, under the evidence, the latter complied with such rules and that the fault was solely that of the tug which, if she did not cross the course of the other vessel as claimed, failed to give sufficient room to allow for the tailing of the scow to leeward.
[Ed. Note.—For other cases, see Collision, Cent. Dig. § 51; Dec. Dig. § 45.*
Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

3. SHIPPING (§ 63*)—INTOXICATION OF MASTER.
Intoxication of master. Such charge presents a grave question. Only sober persons should be placed in charge of, or allowed to navigate or take part in the navigation of, vessels plying the seas or other navigable waters; and too much care cannot well be adopted in prescribing and enforcing rules intending to bring about such result, or make such condition impossible, or at least exceedingly improbable.
[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 63.*]

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

Suit in admiralty by Robert L. Rogers, individually and as owner of the bugeye, Nettie Allinnson, against the steam tug Lauretta Speddin. Decree for libelant, and claimant appeals. Affirmed.

Frederick Dallam, for appellant.
Milton Roberts, for appellee.

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

WADDILL, District Judge. This is an appeal from a decree of the United States District Court for the District of Maryland rendered on the 27th day of January, 1909, in a libel filed by the appellee against the appellant, and a cross-libel filed by the appellant against the appellee;

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

said two cases being heard together, by which decree the lower court dismissed the cross-libel, and adjudged in favor of the libelant, the appellee herein. The case involved a collision between a small sailing vessel, known as a "bugeye," and an empty scow in tow of the steam tug Lauretta Speddin, which occurred about 9 o'clock on the morning of July 31, 1908, in Patapsco river, about half way between the entrance of the Baltimore harbor and Ft. Carroll. The facts are thus accurately summarised in the opinion of Judge Morris of the lower court:

"The bugeye was proceeding on a southeast course down the river, having up her mainsail, foresail, and jib, with a fresh 14-mile breeze from the northeast. Her master was at the wheel, and two colored sailors forward. The case for the sailing vessel is: That, when she had cleared the harbor, she saw the tug and tow to the leeward about a mile and a half to two miles off. That the sailing vessel kept her course, but the tug in approaching crossed the course of the sailing vessel from the sailing vessel's starboard to port, and the scow, being about 300 feet behind tug and more to the leeward, collided with the sailing vessel. That the master of the sailing vessel, when he saw that a collision with the scow was imminent, put his wheel to port, and let her main sheet run off bringing the sailing vessel's head to the starboard and before the wind and nearly clearing the scow, but they came together, the sailing vessel striking head on near the corner of the scow with such violence that the bugeye sank and her master was injured. The case for the tug made by the answer is: That, while the tug was coming up the river with the empty scow on a 50-fathom hawser, they saw the bugeye approaching under full sail coming rapidly down the river on a course parallel to the course of the tug and about 250 feet to the westward. That when the bugeye was nearly abreast of the tug, and about 250 feet to the port side of the tug, the master of the bugeye put his wheel to starboard, and began to haul down her mainsail, and the bugeye began to luff to her port. That the tug blew warning whistles, and the master of the bugeye, seeming to see the scow, put his wheel to port and threw the head of the bugeye to starboard and collided with the scow, bows on."

The officers and crews of the two vessels were examined as witnesses before the court, and there was the same conflict between them that is presented in the pleadings between the parties, except the testimony of the scowman, and steward on the tug, tends to support the claim of those on board the bugeye, as to her navigation; that is, that without changing her course, except to lighten the lick of the collision, she continued straight forward, head on, into the scow. The contention of the parties thus set up in their pleading, and maintained by the testimony introduced by them, respectively, involves the application of the rules under which they were severally navigating, and being between a sailing vessel and a steam vessel, the rules respecting the passing of such vessels, namely, articles 20 and 21 of the rules of navigation (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), apply, unless there is something peculiar to their situation that excused them from their operation. These rules provide that, when steam and sailing vessels are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel, and imposes upon the latter the obligation to keep her course and speed. The sailing vessel in this instance insists that this rule was strictly observed on her part, and says that although the vessels were in full view of each other for some two miles, and the tug sighted by her to leeward at that distance, that the latter crossed her course from starboard to

port, and that the scow 300 feet behind the tug tailing to the leeward collided with the sailing vessel. The tug admits seeing the sailing vessel at the distance indicated, but insists that she was proceeding rapidly down the river on a course parallel to that of the tug, that the latter was never to the leeward at all, but was to the windward—that is, on the port side of the bugeye, and eastward of the channel—and continued to so navigate until the bugeye was nearly abreast of the tug, and about 250 feet on her port when the navigator of the bugeye suddenly starboarded his wheel, began to haul down his mainsail, causing the bugeye to luff to port, whereupon the tug immediately sounded danger signals, causing the master of the bugeye to put his wheel to port, and throw the head of the bugeye to starboard, and to run into and collide with the scow.

The defense interposed on the part of the tug and burdened vessel briefly is that seeing a sailing vessel a mile and a half to two miles away, not crossing, but running on practically parallel courses, she continued her course, as did the sailing vessel, allowing a berth of 250 feet, until the latter vessel, which was only required to keep her course and speed, arrived at a point opposite the tug, suddenly luffed up into the wind and ran into the scow. The improbability of this defense was called attention to by the judge of the lower court in his opinion, and its unreasonableness is so apparent that the court ought not to adopt it in the absence of some circumstance tending strongly to support it, unless the testimony clearly establishes the same. It is what burdened vessels have frequently sought to do, but by reason of the inherent weakness of the contention it has rarely been accepted by the admiralty courts. It should not be lightly assumed that men who follow the sea, and whose duty it is to obey and respect rules of navigation, will expressly run counter to them, when to do so involves serious loss and risk to themselves. We think the statement of Mr. Justice Grier, speaking for the Supreme Court of the United States, aptly characterises this defense:

"This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. It is always improbable, and generally false."

And proceeding further said:

"The hypothesis set forth in the answer to excuse this collision, that the boats were passing on parallel lines, 300 yards apart, and that, when within 100 or 150 yards of passing each other, the schooner turned round and ran herself under the bows of the steamer, is not only grossly improbable in itself, but contradicted by the testimony, and is a mathematical impossibility." Haney v. Baltimore S. P. Co., 23 How. (64 U. S.) 287, 291, 293, 16 L. Ed. 562.

There is a conflict in this case, it is true, as to the sailing vessel suddenly luffing and bringing about the collision, though we think that two of the witnesses for the respondent go far to support the sailing vessel's theory that she continued on her course, without change, until the actual giving of the danger signals. But here, as in the Haney Case, 23 How. 293, 16 L. Ed. 562, supra, it was in effect a nautical impossibility for the collision to have occurred as contended for by the tug. If the tug was proceeding to windward of the sailing vessel, and the latter 250 feet distant from her, the sailing vessel, by luffing, would have

been thrown into the wind, and brought practically to a standstill, instead of to have continued on her course, as is contended here, bringing about the collision. We entirely agree with the learned judge of the court below that "it is much more probable that the strong 14-mile breeze from the north and east, acting upon the empty scow at the end of a 50-fathom hawser, caused the scow to sag over to the westward and across the course of the bugeye, and that its sagging was not observed by those on the tug," particularly in view of the testimony of the tug's master, that the scow was tailing off of his course the length of the scow, which was some 90 feet. All that was required of the sailing vessel in this case was to keep her course and speed; whereas on the tug was imposed the burden of not only avoiding the collision, but the risk of collision. Upon her own showing, for she admits having proceeded straight ahead, she should have allowed ample room to the sailing vessel, so as to avoid an accident arising from sudden, unforeseen, and unanticipated whims of navigation, as claimed by her to have been the case on the part of the bugeye, especially as there was plenty of space, and no weather conditions or other causes to prevent her from so doing.

Counsel for appellant earnestly insists that the ordinary passing rules above referred to governing sail and steam vessels do not apply to this case, but that article 29, known as the "Special Circumstance" rule does, and the defense, as well as arguments of counsel, is largely predicated upon this theory. We cannot accept that view of this case. There are undoubtedly situations in which the circumstances are such that the vessel having the right of way has to look out for the burdened vessel, but they are exceptional, and clearly do not apply to a case like this, where the two craft in collision are the only shipping present, in a river of the width of the one here, and where neither in the weather conditions, or otherwise was there anything exceptional calling for a change or modification of the general rules of navigation. One vessel was proceeding at the rate of some 4½ miles an hour, and the other 8 or 10, with a good breeze, it is true, but one of only 14 miles an hour, which presented in those waters no unusual condition. It occurred in broad daylight in good weather, and the master of the tug should have anticipated the speed at which such a breeze would move the bugeye, and have governed himself accordingly.

The rules of navigation should not be lightly departed from. "Obedience to the rules is not a fault, even if a different course would have prevented a collision, and the necessity must be clear and the emergency sudden and alarming before an act of disobedience can be excused." Belden v. Chase, 150 U. S. 674, 14 Sup. Ct. 264, 37 L. Ed. 1218.

The cases cited by the appellant will, upon careful examination, be found not to support his view as to what rules should govern the navigation in these circumstances. The Marion W. Page (D. C.) 36 Fed. 329, was a case of a sailing vessel with a free wind, meeting a steam propeller with a tow of five barges. After safely passing the propeller and three barges, the schooner attempted to cut across between the fourth and fifth barge and brought about the disaster. It occurred in

the early morning, with the propeller and tow meeting four sailing vessels, two on each side. The Minnie C. Taylor (D. C.) 52 Fed. 323, was a case of a collision at night between the Taylor, while tacking, encountering a tug, having two barges in tow, on long hawsers of some one hundred and one hundred and twenty-five fathoms each, and another sailing vessel, and in a channel of less than three-fourths of a mile wide. The Rose Culkin (D. C.) 52 Fed. 328, was a collision in a busy harbor, between a schooner and a tug, during a gale, near to an anchored barge, and in the presence of another barge, moving under the influence of the storm.

In the answer of the tug and in the cross-libel the further claim is made that the bugeye, and not the tug, should be held responsible for the collision, because the master of the bugeye was incapacitated from drink to safely navigate his vessel. This, of course, presents a serious question, and has given us much concern, because of the gravity of the charge, as, manifestly, only sober persons should be placed in charge of, or allowed to navigate, or take part in the navigation of vessels plying the seas, or other navigable waters; and too much care cannot well be adopted in prescribing and enforcing rules intended to bring about such result, or make such condition impossible, or at least exceedingly improbable. Upon this question much testimony was adduced, some of it very strong as to the bugeye's master sometimes drinking to excess. We cannot say, however, that the same was sufficient to maintain the charge of his drinking on the occasion of this occurrence, or that his habits had anything to do with the collision. On the contrary, we do not think they had, and that the collision is otherwise readily accounted for. This was the conclusion of the trial court, presided over by District Judge Morris, whose well-recognized ability and long experience as an admiralty judge entitles his judgment to much weight respecting an unusual and delicate question of this character. He saw and heard the witnesses testify, doubtless knew many of them, and could the better determine, from their manner, appearance, and deportment on the stand, the weight that should be given to their several statements. He also was entirely familiar with the river at the scene of the collision, and the local customs, if any, of those navigating the same, and we are unwilling to disturb his findings of fact, regarding either the condition of the captain of the bugeye, at the time of the collision, or the effect that the same had upon the occurrence, if any.

The judgment of the lower court will be affirmed.

N. P. PRATT LABORATORY v. BUFFALO FORGE CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 91.

1. CONTRACTS (§ 346*)—PLEADING AND PROOF.

Under Code Civ. Proc. N. Y. § 481, which provides that a complaint shall contain a plain and concise statement of the facts and a demand of the judgment to which plaintiff supposes himself entitled and which

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

by the conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) is made applicable to the federal courts in that state, it is not fatal to a recovery for work done under a contract that plaintiff declares on the contract when he should have declared on a quantum meruit, where his complaint fully sets out the facts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1748; Dec. Dig. § 346.*]

2. CONTRACTS (§ 305*)—ACTION FOR BREACH—WAIVER OF DELAY IN PERFORMANCE.

In an action to recover on a contract by which plaintiff was to install an extensive heating and ventilating plant in defendant's manufacturing buildings, where the work was delayed through the acts and omissions of both parties, but was continued without objection beyond the time fixed by the contract and until nearly completed, the jury were justified in finding that defendant had waived such time limit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1467–1475; Dec. Dig. § 305.*]

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

Action at law by the Buffalo Forge Company against the N. P. Pratt Laboratory. Judgment for plaintiff, and defendant brings error. Affirmed.

The action is upon a contract dated October 4, 1906, whereby the plaintiff for the sum of $4,050 agreed to install for the defendant at Atlanta, Ga., a heating apparatus for its plant, consisting of two large buildings and three small ones. The plaintiff is engaged in manufacturing, among other things, heating and ventilating machinery at Buffalo, N. Y.

Edwin P. Shattuck, Garrard Glenn, and John W. Van Allen, for plaintiff in error.

Henry W. Killeen, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. This action is founded upon a written contract between the parties dated October 4, 1906, whereby the plaintiff agreed to install a heating plant for the defendant at Atlanta, Georgia, for $4,050. The specifications show a complicated system of heating and ventilating consisting of fans, engines, heaters, pumps, pipings, etc., which were to be furnished and erected by the plaintiff, with the exception of some galvanized iron pipe, which was to be furnished by David Slusky of Augusta, Georgia. The contract provided that the apparatus was to be shipped from Buffalo October 25, 1906, and the plant completed December 1, 1906. The contract also provided that the defendant was to build the foundations upon which the machinery was to rest, make steam and drip connections from the heaters and engines, do whatever cutting and patching was necessary, furnish common labor and lay tile piping. It was further agreed that the plaintiff should not be liable for delays occurring without its fault and that "all dates of shipment, are contingent upon strikes, accidents, delays of carriers or other causes unavoidable or beyond our (the plaintiff's) control."

The work proceeded in about the usual manner where contracts are being executed requiring the prompt action of both parties, as well as subcontractors and carriers. The defendant asserts that the apparatus was not shipped on or prior to October 25th; the plaintiff answers that the foundations which the defendant was to furnish were not built at that date; the defendant replies that its failure in this respect was due to the fact that it could not get the plans for the foundations from the plaintiff.

Notwithstanding the bickering and contention which seems inseparable from such undertakings, the work progressed almost to completion when it was stopped on January 16, 1907, by the defendant because of the alleged insufficiency of the galvanized iron pipe furnished by the Augusta subcontractor. Some of the objections to this pipe were not justified by the terms of the written contract, but the plaintiff was endeavoring to remedy all of the alleged defects when the defendant wrote:

"We consider your part of the contract as unfulfilled and we are therefore relieved from any obligation thereunder; in other words, the failure of the Buffalo Forge Company to conform to their part of the contract gives us the right to cancel same, which we hereby do."

It will thus be seen that a contract for installing an extensive plant had, with the acquiescence of the defendant, been extended beyond the stipulated date until it was within a few hundred dollars, and a week or two, of final completion, when it was repudiated by the defendant.

The grounds on which this repudiation rested were some of them, at least, untenable, but the plaintiff was endeavoring in good faith to comply with all the defendant's objections—reasonable or unreasonable.

The defendant has the plant and has been using it since it was installed; it also has the money it agreed to pay for the plant. The plaintiff has nothing.

It may as well be conceded at the outset that, in such circumstances, the court is not inclined to strain unduly the rules of evidence or of pleading to continue a situation so inequitable.

The principal contention of the defendant is based upon an alleged defect in pleading. It is argued that plaintiff has mistaken its remedy and that instead of suing upon the contract, the action should have been upon a quantum meruit. The authority chiefly relied upon is Dermott v. Jones, 23 How. 220, 16 L. Ed. 442, which arose in 1859 in the District of Columbia and was governed by the rules of common law pleading. The case is a striking illustration of how a simple cause of action may be stifled under the old system of pleading.

In this court, since 1872, pleadings must conform as nearly as may be to the forms prescribed by the laws of New York. Act June 1 1872, c. 255, § 5, 17 Stat. 197; Rev. St. § 914 (U. S. Comp. St. 1901, p. 684). Referring to this act, the Supreme Court, in Indianapolis R. Co. v. Horst, 93 U. S. 291 say, at page 300 (23 L. Ed. 898):

"Where a state law, in force when the act was passed, has abolished the different forms of action, and the forms of pleading appropriate to them, and

has substituted a simple petition or complaint setting forth the facts, and prescribed the subsequent proceedings of pleading or practice to raise the issues of law or fact in the case, such law is undoubtedly obligatory upon the courts of the United States in that locality."

This is precisely what the state of New York has done. It has provided for a "simple complaint setting forth the facts." Section 481 of the Code of Civil Procedure provides inter alia, that the complaint shall contain:

"2. A plain and concise statement of the facts constituting each cause of action without unnecessary repetition. 3. A demand of the judgment to which the plaintiff supposes himself entitled."

The plaintiff in this action has, we think, complied with these requirements.

Happily the day has gone by when a meritorious cause of action can be lost in a maze of complicated pleading. The pleader is now required to give the court the facts which constitute his client's grievance against the defendant. If these show a cause of action it is enough. The courts are now concerned not with the nomenclature, but with results.

That the second amended complaint alleges every necessary fact relating to this controversy cannot be denied. Indeed, it might be criticised for attempting to anticipate possible defenses and for alleging more than was necessary. That the complaint states facts which constitute a cause of action cannot be questioned. It is said that the court should have dismissed the complaint because it appears that the contract was not completed according to its terms. We have seen, however, that the delay was owing in part to the defendant's action and that the defendant waived the delay and permitted the plaintiff to proceed without objection until the comparatively inconsequential dispute arose over the galvanized iron pipe. If the trial court could not say as matter of law that there had been a waiver of the general time limit, the jury were amply justified in so finding upon the facts.

The charge to the jury has not been printed but we must assume, in the absence of an exception, that every disputed question was presented to the jury as fairly as the defendant could desire.

The defendant argues that the dispute between the parties was settled in March, 1907, for $1,893.61. In reply to a request by the defendant that some one be sent to Atlanta to settle the dispute, the manager of the plaintiff's Southern office, O. A. Robbins, called upon the defendants and he and Mr. G. L. Pratt arrived at an understanding by which the sum above mentioned was "to be paid in cash at once." The amount was not paid at once and before it was tendered the plaintiff had repudiated the attempted settlement, insisting that Robbins was merely an agent having no authority to settle the dispute and was sent to Atlanta only to investigate and report. When a check was sent for the amount it was promptly returned on the ground that Robbins lacked authority.

The contract expressly provides:

"That no agent or salesman has any authority to obligate this company by any terms, stipulations or conditions not herein expressed; and that no

modifications of this contract shall be binding on this company unless the same are in writing and approved by the Home Office, Buffalo, N. Y."

On all the plaintiff's letter heads, including the one on which Robbins wrote to the defendants his understanding of the proposed settlement, were the words:

"All contracts and orders taken subject to approval of an executive officer of this company."

If immediately after the tentative settlement between Robbins and Pratt had been agreed upon, the defendant had paid the money or sent a certified check, a different question would be presented. Upon the proof, the defendant waited until it was informed that Robbins had no authority to settle and then attempted to pay the amount. Upon the record the alleged settlement with Robbins depended upon several questions of fact and the verdict of the jury cannot be disturbed.

We find no error requiring a reversal of the judgment in the other assignments.

The judgment is affirmed with costs.

THE RAPPAHANNOCK.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 58.

1. SHIPPING (§ 132*)—DAMAGE TO CARGO—EXCEPTION IN BILL OF LADING—BURDEN OF PROOF.

The burden rests upon a lake carrier, who, having agreed to deliver in good condition, "the dangers of navigation excepted," delivers cargo water-damaged, to show that the damage was caused by a danger of navigation.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 479–482; Dec. Dig. § 132.*]

2. SHIPPING (§ 132*)—DAMAGE TO CARGO—SEAWORTHINESS OF VESSEL.

The cargo of grain carried by a steamer from a Lake Superior port to Buffalo was found on arrival to have been damaged by water escaping from a crack in the main feed pipe running through the cargo space between the boiler and engine. Such construction was not unusual, and the vessel had an A1 rating, but had been built for 11 years, during which time the pipe had not been renewed, and had not been thoroughly inspected for more than a year, being covered with asbestos and inclosed in a box, which had not been removed in that time. Rough weather was encountered on the voyage, but not worse than was to be expected at the season. *Held*, that the evidence was not sufficient to sustain the burden of proof resting on the vessel to show that the damage resulted from a danger of navigation within the exception of the bill of lading, rather than from a defect in the pipe which rendered her unseaworthy at the beginning of the voyage.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 132.*]

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

Suit in admiralty by the Northern Elevator Company against the steamer Rappahannock; the Davidson Steamship Company, claim-

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

ant. The suit was brought to recover damages sustained by a cargo of grain shipped by the steamship Rappahannock, in October, 1905. The voyage was from ports in Lake Superior to Buffalo. Decree for respondent (173 Fed. 829), and libelant appeals. Reversed.

Wallace, Butler & Brown (A. G. Thacher, of counsel), for appellant.

Clinton & Clinton (George Clinton, Jr., of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The grain was shipped under bills of lading which acknowledged its receipt "in good order and condition" —"to be delivered in like good order and condition, the dangers of navigation excepted." The grain was delivered in greatly damaged condition through contact with water while in the hold. This water dripped through a crack in the main feed pipe, which pipe extended about nine feet through the cargo space between the engine and the boiler. Manifestly the ship would be liable for such damage unless she can bring herself under an exception which protects her. The exception relied upon is "dangers of navigation," an equivalent of the old expression "perils of the sea." As we have pointed out in Oil Seeds Co. v. S. S. Konigin Luise (opinion filed to-day) 184 Fed. —, if the exception read "not liable for leakage from boilers and connections," the ship would be excused, unless it were shown that the leakage resulted from some negligence on her part; but, where the exception reads "perils of the sea," the burden rests upon the carrier, who, having agreed to deliver in good condition, delivers cargo water-damaged, to show that the damage was caused by a peril of the sea. The only real question in this case is whether the claimant has borne that burden and satisfactorily shown that damage resulted from the sea peril, without negligence on the part of the ship.

The following statement of the facts proved is mainly a quotation from the findings of the District Judge, with some additions and modifications:

The Rappahannock was built 11 years before the accident and had been repaired in 1904. It was not unusual, in vessels constructed for service on the Great Lakes, to have a feed pipe running from the engine to the boiler, which was situated in another part of the vessel. By the Inland Lloyds' register for 1905 she was rated in class A1, signifying a high grade and approved system of water pipes. Subsequently, and after this controversy arose, her rating was reduced. "It is probably true that at the present time her general construction would not be approved for carrying grain, but in 1905 when she was given her classification it was not criticised." The pipe was of wrought iron one-quarter inch thick and about 2½ inches in diameter. Although such pipe comes in lengths long enough to bridge the distance which it ran through the cargo space, two lengths were coupled, not quite midway, but nearer the boiler room bulkhead. Each length was threaded and screwed into the coupling nearly to the end of the thread. There is a conflict between the expert witnesses as to whether this method of construction would or would

not have a tendency to weaken the piping at the joint. The deck was not planked in the cargo space, the pipe running about on a line where the main deck beams would be. The pipe was covered with asbestos, and with this covering had a diameter of about five inches. It was inclosed in a wooden box having an inside diameter of about six inches. The box was supported on deck beams, which projected out to the edge of the hatch aft near the engine room and forward by the boiler room and was bolted or spiked to the deck beams. There was room so that the pipe could move in the box. The asbestos covering was to keep the heat in the pipe; the box, to protect the pipe from the grain.

After the damage was discovered and the grain in part removed, the pipe was stripped. It was found to be cracked at the bottom of one thread at the edge of the coupling. The crack went just through the pipe, probably three-quarters of an inch long; but the pipe was not broken off. The pipe looked apparently good except for this crack, and was not rusty except a little bit of brown where the water had been running through. The thread being cut into the pipe one-sixteenth, the pipe would not be as thick there as elsewhere, and would break off there easier than any place else. A thorough inspection of such piping can be had by tapping it with a hammer. Manifestly this could not be done while the asbestos and the boxing remained on. It is apparent, therefore, that, with a single exception, the various inspections which are testified to amount to no more than an investigation to see if water was coming or had come through these coverings. The last inspection with the covers removed was had in the summer of 1904, when the vessel was being repaired.

We cannot concur with the District Judge in the finding that at the inspection by United States officers in September, 1905, the pipe was tapped with a hammer. There is not a particle of evidence to show that the pipe was stripped at that time. On the contrary, the captain testified that he was present at this very inspection, and, elsewhere, that the boxing was not taken off at any of the inspections of which he had testified. The chief engineer corroborates him, saying the pipe was boxed at the time of the September, 1905, inspection. At this inspection the hydrostatic test was applied to boilers and connections, including this pipe. The normal pressure when in service is 160 pounds, the hydrostatic test runs up to 240 pounds, and as soon as that is reached the pump is shut off and the pressure runs down; the parts being under pressure somewhat less than two minutes. If sufficient water escapes through a leak during this test to soak through the asbestos and ooze out of the box, it may be seen; but if very little comes through it would seem that it might not indicate its presence on the outside of the box. This test is a well-known one. When the parts under test are open to inspection, it will reveal the presence of a leak by water oozing through. It may also develop an incipient crack into a fissure, but if it does not do so it would seem not to indicate, by itself, the presence of the incipient crack, and, apparently for that reason, it is customary for the United States inspectors, when the pressure is on, to test also by tapping with a hammer. Certainly they did not use a hammer on this pipe,

for it was boxed, at the time. We are not satisfied that the proof shows any such inspection, since the summer of 1904, as would negative the existence of an incipient crack at the place where the leak subsequently developed.

Moreover, reasonable prudence called for more frequent thorough inspections than might have been required some years before. The pipe had been in use without renewal for ten years, and while we think that the testimony of libelant's experts as to pulsation of the water passing through the pipe is somewhat exaggerated, there must have been some, and it was to be expected that the pipe was not as well fitted to resist strains as it was when new. Claimant contends that, because the pipe had gone ten years without leaking, it had proved itself sufficiently strong to withstand the ordinary lake storms. To this proposition we cannot entirely assent. After service for some months, it might fairly be assumed that the pipe was a good one, since no flaw had developed; but nothing in use will wear forever, and as time goes on every appliance of this sort draws near the end of its life. The experts for libelant estimate the serviceable life of such a pipe so placed and used at about ten years. Even if its normal life were longer, it is a perfectly fair inference that it required more careful watching than it had required five years before. And this it does not seem to have received.

The evidence showed that the Rappahannock on this trip encountered three severe gales, on Lakes Superior, Huron, and Erie, respectively. The captain and mate estimated the wind velocity at 60 miles an hour. They encountered heavy seas, sometimes quartering; but in the fall of the year such gales and seas are not infrequently encountered on the Lakes, as the captain himself admitted. None of the witnesses claim or pretend that the gales were extraordinarily terrific, or that there was exceedingly heavy pitching and plunging of the vessel on the swells of the sea. Her barge, the Grenada, of about 3,000 tons displacement, was securely kept in tow throughout the entire voyage. It was not supposed by any of the officers or crew of the steamer that her seaworthiness was extraordinarily tried, although, of course, she labored and strained in the gales she encountered. There was no thought of the vessel foundering or going ashore. The waves were high enough to wash her deck and break a few doors and windows, besides sweeping off a pair of fenders which had been lashed down with rope. Some butts were slightly started on the port and starboard sides of the boiler house, the extent of the starting being an eighth of an inch; but there was no leak anywhere, no open seams, no evidence of rain in the waterways, except that some of the oakum had worked out a little, no damage in the engine room, the machinery was in line, and the engines fair in their settings. The butts which were started were not in the vicinity of this pipe. The crew made all necessary repairs.

The conclusion is that the Rappahannock encountered conditions of wind and sea which were not unusual at that season of the year. Seaworthiness imports ability to meet such conditions. Probably the "twisting" to which she was exposed opened the pipe at its weakest point; but whether the leak resulted because a seaworthy pipe was

exposed to some extraordinary strain, or because pipe weakened by age and by some incipient crack which had developed since its last thorough inspection over a year before, gave way under strains which were to be anticipated, and which would not have broken a seaworthy pipe, we cannot say upon this proof. The case is very similar to The Aggi, 107 Fed. 300, 46 C. C. A. 276, where sea water entered underneath the scroll work at the vessel's stem, owing to the fact that a number of bolts had become loosened. We said:

"It is contended for the vessel that they were loosened by the heavy weather upon the voyage. This contention rests upon evidence that more or less severe weather was encountered, that there had been no leakage around the bolts upon previous voyages, and that the vessel was in an apparently sound and seaworthy condition when she received a general overhauling and inspection some two years before. There is no evidence of a later inspection of the bolts, and none that they received any injury upon the voyage beyond the wear and tear ordinarily incident to a voyage of that character and duration. In the most favorable view for the appellant, the presumptions authorized by the evidence are as consistent with the conclusion that the bolts were loose at the inception of the voyage as that they were loosened by any unusual strains to which they were subsequently subjected."

In our opinion the claimant has not sustained the burden of proving that the leak resulted from a "danger of navigation" within the exception of the bill of lading.

The decree is reversed, with costs of this appeal and in District Court, and cause remanded, with instructions to take further action in conformity to this opinion.

MERCHANTS' COAL CO. OF WEST VIRGINIA v. LEONARD.

(Circuit Court of Appeals, Fourth Circuit. December 12, 1910.)

No. 972.

PRINCIPAL AND AGENT (§ 89*) — ACTION FOR COMPENSATION — REQUEST TO CHARGE—REFUSAL—EVIDENCE.

In an action to recover commissions on coal sales, evidence *held* to require the granting of a request to charge that if the jury from the evidence believed, at the time a certain contract for the sale of coal was made, plaintiff's employment contract covering the territory in question had been terminated, they should find for defendant.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 89.*]

In Error to the Circuit Court of the United States for the Northern District of West Virginia, at Martinsburg.

Action by Frank H. Leonard against the Merchants' Coal Company of West Virginia. Judgment for plaintiff, and defendant brings error. Reversed.

The defendant in error brought an action of assumpsit against the plaintiff in error in the United States Circuit Court for the Northern District of West Virginia in June, 1909, in which a judgment was rendered in favor of the defendant in error for $6,739.17 and costs, and the proceedings of the court below are now here on writ of error for review. This action was based upon a contract between the plaintiff in error and the defendant in error, which

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

provided that the defendant in error should act for the plaintiff in error in making sales of its coal, and that the defendant in error should receive a proper compensation for his services in bringing about such sales, and that his services should be confined to sales in the New England states. The second count is on a quantum meruit for work, services, etc., rendered in and about the business of the plaintiff in error before that date. In the bill of particulars attached to the declaration of the defendant in error commissions are claimed for sales made to three different persons and one corporation. With respect to the commissions on the sales to David Sturtevant, the Murrell Coal Company, and John Wills, the court at the trial of the case decided that the defendant in error was not entitled to recover any of these commissions. It practically confined the case and the consideration of the jury to the commissions on the sales to Archibald McNeill, so that the final judgment is based on the McNeill sales. It was insisted by the defendant in error that he had devoted a large amount of time and trouble in an effort on his part to procure a very important and valuable contract for the sale by the plaintiff in error to McNeill of 250,000 tons of its coal, and that this contract was brought about by means of continuous efforts on the part of the defendant in error, and after the contract was entered into between McNeill and the plaintiff in error a very large proportion, amounting to something over 200,000 tons, of the coal included in this contract was delivered by the plaintiff in error to McNeill in different quantities and extending over a considerable period of time. It was insisted by the plaintiff in error, among other things, that the McNeill contract of 250,000 tons was wholly made after the agreement of the defendant in error with the plaintiff in error as to New England sales had terminated.

Joab H. Banton (P. J. Crogan, on the brief), for plaintiff in error.
Henry M. Russell, for defendant in error.

Before PRITCHARD, Circuit Judge, and McDOWELL and ROSE, District Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). Under the fifth assignment of error, among other things, it is insisted that the court below erred in refusing to grant the following instruction:

"The court instructs the jury that if they believe from the evidence that what is known as the McNeill contract of 250,000 tons was wholly made after the plaintiff Leonard's agreement with the defendant had terminated as to New England sales, then they must find for the defendant."

This request for an instruction presented the question as to whether the McNeill contract for the purchase of 250,000 tons was wholly made after the agreement of the defendant in error with the plaintiff in error as to New England sales had terminated. It is insisted by counsel for plaintiff below that there was no evidence upon which to base this instruction, and that, inasmuch as the plaintiff had testified that the contract for New England sales had not terminated at the time the McNeill contract was entered into the court acted properly in refusing to grant the same.

Witness Boswell, president of the defendant company below, among other things, testified as follows:

"Q. When did you notify Mr. Leonard that he could not sell coal any longer in the New England states?

"A. It was some time in March, 1902, or about the 1st of April. I would imagine it was about the 1st of March, just before the Murrell Coal Company was formed.

"Q. How did you communicate with him?
"A. I wrote him to his office in New York, and in a few days time Mr. Leonard came to my office in Baltimore and went over the matter fully.
"Q. Now, when you say you went over the matter fully, what was said?
"A. That we couldn't allow him to sell in the New England states any longer; that we were going to appoint the Murrell Coal Company as our representative, but that I would allow him a certain figure per ton for looking after the shipments of coal in New York Harbor; also, so much per ton for coal that was furnished on our bunker contracts in New York. I think the price for looking after the shipments in New York Harbor was 2 cents per ton, the same as we were allowing Mr. John Wills in Philadelphia at that time, and said that in not allowing him to sell coal in the New England states would not be such a great loss as I thought could be made up by bunker business.
"Q. What is bunker business?
"A. It is supplying coal to foreign steamers for steam purposes, stating at the same time that the Murrell and Crocker agents had contracted for bunkering a large number for foreign steamers.
"Q. Well, what did he say to that?
"A. He seems to be satisfied with it, and accepted it right along, as statements will show.
"Q. Your company received statements after that covering the items as you have testified to?
"A. Yes; each month he was paid promptly, and often in advance.
"Q. Now, Mr. Boswell, was that conversation you had with him before you visited Mr. Archibald McNeill at Bridgeport?
"A. Yes, sir."

Later on the witness testified as follows:

"Q. I show you a paper, and ask you if you can fix the exact date?
"A. Yes, sir; on the 16th day of April, 1902. Yes, sir; that's right.
"Q. Had Mr. Leonard prior to that ever told you Mr. McNeill wanted 250,000 tons of coal?
"A. Mr. Leonard has had up with me I suppose, and at different times, about supplying Mr. McNeill with large quantities of coal.
"Q. I mean as to this particular shipment, was anything ever said?
"A. No, sir; nothing ever said about 250,000 tons, because I didn't know anything about it when I went to Bridgeport to see Mr. McNeill."

This evidence flatly contradicts the evidence of the plaintiff as to the time when the contract for New England sales was terminated, and tends to show that the contract for the large purchase of coal by McNeill was made some time after the contract between the plaintiff and defendant had terminated. If, as the defendant contends, the contract under which plaintiff had been acting as agent of the defendant for the sale of coal had terminated, we are of opinion that, in the absence of a new contract authorizing the plaintiff to act as its agent in procuring sales, the plaintiff would not be entitled to recover for any services which he may have rendered under such circumstances. It appearing that the evidence as to this point was conflicting, it became important for the jury, among other things, to determine as to whether the contract in question was entered into before or after the termination of the contract for New England sales. In view of the evidence, we think the court should have granted this instruction, and that its refusal to do so was prejudicial to the rights of the defendant.

We think that the other assignments of error, which relate to the refusal of the court below to grant the special instructions tendered by the defendant, are without merit. We do not wish to be under-

stood as holding that the defendant was not entitled to have the court instruct the jury on the points involved therein; but we are of opinion that the instructions in question were not framed so as to fairly present the issues sought to be raised. These intructions, as requested, were calculated to confuse and mislead, rather than aid the jury in arriving at a just conclusion.

The decision of the lower court is reversed, and the case remanded, with directions to grant a new trial, and for further proceedings in accordance with the views herein expressed.

Reversed.

ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA v. BELL et al.

(Circuit Court of Appeals, Fifth Circuit. January 10, 1911.)

No. 2,140.

APPEARANCE (§ 9*)—JUDGMENT (§ 419*)—GENERAL APPEARANCE.

The filing of a demurrer to the declaration on the merits by attorneys authorized to represent a defendant constituted a general appearance, and gave the court jurisdiction over the defendant, which was not affected by the subsequent striking of the demurrer from the files and the entering of a default by the court, so as to afford ground for enjoining the enforcement of the judgment for want of jurisdiction.

[Ed. Note.—For other cases, see Appearance, Dec. Dig. § 9;* Judgment, Cent. Dig. § 794; Dec. Dig. § 419.*]

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

Suit in equity by the Order of United Commercial Travelers of America against Mary Bell and others. Decree for defendants, and complainant appeals. Modified and affirmed.

Alex. St. Clair-Abrams, for appellant.

A. H. King, Alston Cockrell, and A. W. Cockrell, Jr., for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This is an appeal from a decree dismissing a bill in equity brought to enjoin the enforcement of a judgment rendered in the Eighth judicial circuit court in and for the county of Alachua, state of Florida. To maintain the bill it must show either (1) that the state court rendering the judgment complained of was without jurisdiction ratione materia or ratione persona; or (2) that the said judgment was obtained by fraud.

The bill shows that the state court as one of original jurisdiction had jurisdiction ratione materia. The jurisdiction ratione persona depends on the sufficiency of the service of the summons and the character of the appearance made by the defendant, the Order of United Commercial Travelers of America. The said order was an Ohio corporation, doing business in the state of Florida, and its only agent within the said state was the Jacksonville Council, No. 292, located at Jacksonville, in Duval county, state of Florida, which council, so far as this

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

record goes, had no other business officer known to the public than Coyne, the secretary-treasurer. The amended return of December 17, 1908, on the original summons, shows as follows:

"Received this summons on the 2d day of November, A. D. 1908, and served the same on the corporation defendant on the 5th day of November, A. D. 1908, by delivering a true copy thereof to H. F. Coyne, the secretary of the Jacksonville Council, No. 292, of the within-named defendant corporation, a business agent of said corporation residing in the county of Duval, and an agent transacting business for said corporation in said county, in the absence of the president, vice president, or other head of said corporation, or cashier, or treasurer, or secretary, or general manager of said corporation, or director of said corporation, and at the same time showing this original and explaining the contents thereof.

"R. F. Bowden, Sheriff of Duval County, Fla.,
"By Geo. W. Thomas, Deputy Sheriff."

Under the peculiar circumstances of the agency, it would seem that the service of the original summons was sufficient. Whether process of the Eighth judicial circuit court in and for Alachua county, Fla., ran outside of Alachua county and into the county of Duval, where the service was made, is a question which, in the light of the authorities cited in the briefs, we think should be answered affirmatively, but which we do not decide, because the case shows an appearance by attorneys of the said order which in our view waives all irregularity of service.

The case shows that, after the amended return on the original summons as above given, Harwick & Jennings, attorneys for the order, etc., to wit, on December 31, 1908, entered their third limited appearance in a motion to quash the returns of service on the alias and pluries summons, but made no mention of the amended return of service then on file on the original summons. This third motion to quash was on the 22d day of January, 1908, overruled, and defendant was given until February 10, 1909, "to plead as it may be advised." On February 8, 1909, the said attorneys, Harwick & Jennings, filed and entered the following:

"In Circuit Court, Eighth Judicial Circuit, of the State of Florida, in and for Alachua County.

"Mary Bell, Plaintiff, v. The Order of United Commercial Travelers of America, a Corporation, Defendant.

"Comes now the defendant, by its attorneys, Harwick & Jennings, and demurs to each count of plaintiff's declaration, and says that each count thereof is bad in substance.

"Points of Law to be Argued.

"(1) Each of said counts fail to set up a cause of action.

"(2) Each of said counts fail to show the alleged promise to pay plaintiff the sums alleged can in any way be construed from the alleged certificate of membership.

"(3) Each of said counts fail to set up the constitution or such parts thereof as would show that the alleged certificate could in any manner be construed into a promise to pay plaintiff the alleged sums of money.

"(4) Each of said counts fail to show any consideration for the alleged promise.

"(5) Each of said counts fail to show that said gunshot wound was accidentally inflicted. ....., Attorney for Defendant.

"I hereby certify that in my opinion the foregoing demurrer is well founded in point of law. ....., Attorney for Defendant.

"State of Florida, County of Duval.

"State of Florida, County of Duval.

"Personally appeared Frank E. Jennings, who, being first duly sworn, says that he is attorney for the defendant; that there is no agent in this county on this date; that the foregoing demurrer is not interposed for purpose of delay. Frank E. Jennings.

"Sworn to and subscribed before me this 6th day of February, 1909.

"[Seal] O. E. Beerbower, Notary Public.

"Commission expires December 3, 1912."

That Harwick & Jennings were the attorneys of the order is not only not disputed, but is fully shown by the exhibits attached to the bill; the contention made by the bill being that Harwick & Jennings were not instructed to enter a general appearance, but solely to remove the case, when brought and service made, to the United States court, and that in filing the above-mentioned pleading they went beyond and outside of their authority.

It is further contended that the proceedings had thereafter, in ordering said pleading to be taken from the files, and in entering a default as though such pleading had been filed, deprived it of all effect as an appearance, so that this court ought to hold that the Order of United Commercial Travelers of America made no general appearance in the case, and that the order had no legal notice of the suit, and therefore the subsequently rendered judgment was without due process of law.

This contention is not sound. The said attorneys appeared for the defendant, and they pleaded, and the subsequent action of the court in overruling, disregarding, or striking the plea did not obliterate the appearance. After these proceedings in the state court it would be absurd to hold that the defendant had no notice of the suit, and had not submitted the sufficiency of the plaintiff's declaration to the arbitrament of the court.

In filing the alleged demurrer, the defendant may have acted under compulsion and in ignorance of its legal rights; but it had notice, and cannot complain in this court of want of due process of law, so as to give this court jurisdiction to enjoin the judgment of the state court subsequently rendered.

As to relief on the ground of fraud in obtaining the judgment in the state court, we find no allegations of specific facts showing any fraud or collusion of parties or attorneys sufficient to warrant relief. Whatever ignorance there was on the part of the plaintiff Mary Bell as to the exact extent of her rights, and whatever inexperience or neglect of instructions was shown by attorneys, singly or taken together, make no case of fraud sufficient to warrant the interference of the Circuit Court.

The decree entered below, dismissing the bill, is "without prejudice to the complainant instituting such suits or proceedings as it may desire in the state court in the state of Florida to test the allegation of the legality or sufficiency of the judgment obtained against it in the state court."

We think that this decree should be amended by striking the limitation, so as to read that the bill is dismissed "without prejudice to the complainant," and, as so amended, it should be affirmed, with costs.

And it is so ordered.

LORAIN STEEL CO. v. NEW YORK SWITCH & CROSSING CO.

(Circuit Court of Appeals, Third Circuit. January 24, 1911.)

No. 1,362.

PATENTS (§ 311*)—SUIT FOR INFRINGEMENT—RIGHT TO RECOVER PROFITS AND DAMAGES—VARIANCE BETWEEN ALLEGATIONS AND PROOF AS TO NOTICE.

The owner of a patent who alleges in a bill for its infringement that he has put his patented improvement to practical use, and has always been ready to supply it to the public, and that except for the infringement complained of he would be in the receipt of the profits therefrom, and, further, that defendant continued infringement after notice, cannot be allowed, after his patent has been sustained and an injunction to restrain further infringement awarded, to shift his ground of complaint on the accounting before the master by claiming that he had never made nor sold the patented article, and therefore it had never been marked as required by Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388), and to recover profits and damages notwithstanding the want of such notice.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 311.*]

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

Suit in equity by the Lorain Steel Company against the New York Switch & Crossing Company. From a decree (124 Fed. 548) awarding complainant nominal damages only, it appeals. Affirmed.

Clarence D. Kerr, Charles MacVeagh, and Charles C. Linthicum, for appellant.

A. G. N. Vermilya, for appellee.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

LANNING, Circuit Judge. The Moxham patent, No. 539,878, for railway switch work, dated May 28, 1895, was adjudged valid and infringed, and an accounting for profits was ordered, in this suit, by an interlocutory decree entered in the Circuit Court September 14, 1903. The opinion on which the decree was based is reported in 124 Fed. 548. The accounting having been taken, exceptions were filed, and several of them sustained in an opinion reported in 153 Fed. 205. The exceptions sustained were to the effect that there was no proof of such notice as is required by section 4900 of the Revised Statutes (U. S. Comp. St. 1901, p. 3388), and, consequently, no proof of infringement after notice. The court, however, closed its opinion with the statement that if the complainant desired to submit proof upon the question of notice, the matter would be referred back to the master not only for that purpose, but also for the purpose of taking such other and further proofs as should thereby be rendered necessary to show any loss of profits sustained by it after notice. Thereupon an order was entered "that the

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

case be referred back to the master to enable the complainant to submit proof in accordance with the decision of the court."

The further proof taken by the complainant did not relate to any notice. Its purport was to the effect that the complainant never manufactured or sold the patented devices, and, therefore, that the requirement of section 4900 concerning the marking of patented articles was inapplicable. The master, in a supplemental report, so concluded. On exceptions to the supplemental report, the Circuit Court decided that the additional evidence did not conclusively prove that the complainant had never manufactured or vended the patented devices, that it was not within the scope of the order permitting additional testimony to be taken, and that, in any event, the additional proofs were contrary to the allegations of the bill of complaint. Accordingly, a final decree was entered sustaining the exceptions, setting aside the findings of the master, and awarding nominal damages only to the complainant. This decree is now before us.

In its bill, the complainant, after setting forth the grant of the patent in suit to Moxham and its assignment to the complainant, alleges "that it has applied the said improvements to practical use, and has always stood ready and now stands ready to supply any and all demands of the public for said improvement, and but for the infringement herein complained of, and others of like character, your orator would still be in the undisturbed possession, use, and enjoyment of the exclusive privileges secured by said letters patent and in receipt of the profits of the same." It also alleges "that the respondent was notified of the said letters patent No. 539,878, and its infringement thereof, and said respondent continued thereafter to infringe said letters patent." Notwithstanding the first of these allegations, the only witness called by the complainant under the order to take supplemental proofs before the master declared that the complainant had never manufactured or sold a structure of the kind described in the patent. The pivotal question in the case, therefore, is, May the owner of a patent who alleges in his bill of complaint that he has put his patented improvement to practical use, that he has always been ready to supply it to the public, and that, except for the infringement complained of, he would be in the receipt of the profits therefrom, and who alleges, further, that the defendant continued infringement after notice, be allowed, after his patent has been sustained and an injunction to restrain further infringement awarded, to shift his ground of complaint on the accounting before the master by saying, in effect:

"The allegations of my bill are not true. I never made or sold my patented article. I never put it to practical use. I never gave the notice required by section 4900 because none of my patented articles have been in existence to be marked as that section prescribes. I stand now on the ground that section 4900 is inapplicable to my case, and that I am entitled to an accounting for profits and damages notwithstanding I have never made or sold my patented article or given any notice whatever."

We think such a contention cannot be sustained. It was well said by Judge Cross in his memorandum opinion sustaining the exceptions to the master's supplemental report that "the allegata et probata must agree." Doubtless, in the present case, the complainant was entitled

to an injunction restraining further infringement. It was entitled to that relief whether it made use of its patent or not. See Paper Bag Patent Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122. What right of recovery of profits or damages the complainant might have had, if in its bill it had substituted for the allegations above quoted allegations showing that it had locked up its patent and had not used it, we need not consider. It is sufficient for us at present to say that the defendant was not called on by the bill to defend against the complainant's present contention.

The decree of the Circuit Court will be affirmed, with costs.

PRATT v. NORTH GERMAN LLOYD S. S. CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 89.

1. SHIPPING (§ 166*)—LIABILITY FOR INJURY OF PASSENGER—CARE AS TO CONDITION OF DECK OF STEAMSHIP.

   The degree of care appropriate to boilers or to the sufficiency of the hull of a steamship is very different from the degree of care required with reference to the washing of the decks, and where a passenger on a steamship was injured by slipping and falling while walking on the wet deck, which she claimed was not kept in proper condition, the court, in an action to recover for the injury, properly refused to charge that defendant owed the plaintiff "very great care," and charged that it was bound to exercise reasonable care under the circumstances.

   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 538–552; Dec. Dig. § 166;* Carriers, Cent. Dig. § 1186.]

2. TRIAL (§ 45*)—OFFER OF PROOF—SUFFICIENCY OF OFFER.

   In an action by a steamship passenger to recover for an injury received by slipping and falling on the deck which it was alleged was not kept in proper condition, where plaintiff testified to having made other voyages, the exclusion of a general offer to show "what she noticed as to the decks of the vessels of these lines" was not error.

   [Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 110–114; Dec. Dig. § 45.*]

3. APPEAL AND ERROR (§ 1056*)—REJECTION OF EVIDENCE—DISCRETION OF COURT.

   Rulings of a trial court in excluding evidence *held* within its discretion and without prejudicial error.

   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193; Dec. Dig. § 1056.*]

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

Action at law by Emily L. Pratt against the North German Lloyd Steamship Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Duer, Strong & Whitehead (George A. Strong, of counsel), for plaintiff in error.

B. L. Pettigrew (Franklin M. Clark, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

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

WARD, Circuit Judge. Mrs. Pratt, the plaintiff, a passenger upon the defendant's steamship Princess Irene, while walking on the promenade deck before the steamship had left her dock, fell, sustaining a fracture of her right ankle. The result was most painful. She was confined to a hospital for 11 weeks, during nine of which she was unable to walk without crutches, suffered and still suffers great pain, and was put to an expense of between $700 and $800. The plaintiff observed that the deck was wet, but complains that it was slippery both for that reason and because it was old and worn, and apparently, also, because it was greasy or slimy. The trial judge having charged the jury very fully to the effect that the defendant was bound to exercise reasonable care under the circumstances, the plaintiff asked him to charge that the defendant owed the plaintiff "very great care." He declined to charge otherwise than he had charged. We think the charge was right. "Very great care" is an unmeaning phrase, and the jury in determining what was reasonable care with reference to the circumstances would necessarily determine whether it was great or very great. Such expressions as "the utmost care" or "the highest degree of care" and so forth are appropriate to the seaworthiness or roadworthiness of the vehicle of transportation, or to things inherently dangerous. Obviously the degree of care appropriate to boilers or to the sufficiency of the hull of a steamer or the body of a car or stage is very different from the degree of care required with reference to the washing of decks or the maintenance of a window sash or a curtain hook. Kelly v. New York & Sea Beach R. R. Co., 109 N. Y. 44, 15 N. E. 879. Such cases as The City of Panama, 101 U. S. 453, 25 L. Ed. 1061 (in which a concealed hatch was left open in a passageway), and Penna. R. R. Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141 (where a berth in a Pullman car which the company's servants knew to be out of order fell upon a passenger), have no application here.

The plaintiff having testified that she had been to Europe twice and once to Jamaica, offered to show "what she noticed as to the decks of the vessels of these lines," which testimony the court excluded. The better way to raise exceptions is to propound definite questions; upon these the court can pass more intelligently. This offer was very vague. What the plaintiff may have noticed in respect to washing decks on these six voyages would be no evidence of the defendant's care or lack of care on this particular occasion. The subject was one which the jury were entirely competent to pass upon with reference to the actual circumstances proved.

One of the defendant's witnesses having testified that the deck was not worn, wet, or slippery, was asked upon cross-examination two questions, which were excluded:

"Q. The plaintiff must have fallen on purpose, didn't she? Q. How do you account for her falling then?"

The first question was one calculated to ridicule the witness, and it was quite within the discretion of the trial judge to exclude it. The second was improper, as calling for the opinion of the witness upon the very question to be decided by the jury.

A witness from the United States Weather Bureau having testified

to the humidity of the air and the condition of the sky with respect to clouds on the day of the accident, was asked:

"Q. This is what you would call, if you were reporting it for a paper, a fair day, would you not?"

This was objected to as calling for a conclusion, and excluded. The jury were able to say from the facts testified to by the witness whether the day was fair or not. It is the sort of question which may or may not be admitted, largely within the discretion of the trial judge. This ruling, if error, was harmless.

There are some other exceptions, but we think them either without merit or unimportant because relating to the question of damages. Judgment affirmed, with costs.

HITCHINGS v. OLSEN et al.

(Circuit Court of Appeals, Third Circuit. January 24, 1911.)

No. 1,360.

1. MARITIME LIENS (§ 60*)—STATUTORY LIENS—JURISDICTION TO ENFORCE BY PROCEEDINGS IN REM.

A lien on a vessel for supplies given by a state statute cannot be enforced by a proceeding in rem in a state court if the vessel is one employed on the navigable waters of the United States, but such proceeding can only be maintained in a court of admiralty.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 98; Dec. Dig. § 60.*

Maritime liens created by state laws, see note to The Electron, 21 C. C. A. 21.]

2. MARITIME LIENS (§ 24*)—STATUTORY LIENS—NEW JERSEY STATUTE.

One furnishing coal to a domestic vessel in New Jersey, which is used by the vessel in the ordinary course of her business, is entitled to a lien therefor under the state statute which may be enforced by a court of admiralty, the presumption being that credit was given to the vessel.

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

3. MARITIME LIENS (§ 38*)—STATUTORY LIENS—EFFECT OF UNRECORDED CONVEYANCE OF VESSEL.

Under Rev. St. § 4192 (U. S. Comp. St. 1901, p. 2837), which provides that "no bill of sale * * * of any vessel * * * of the United States shall be valid against any person other than the grantor * * * and persons having actual notice thereof unless * * * recorded in the office of the collector of the customs where such vessel is registered or enrolled," a bill of sale of a vessel of New Jersey to a resident of New York not so recorded is invalid to defeat a lien for supplies furnished the vessel in New Jersey, by one having no actual knowledge of the sale, under the New Jersey statute giving a lien on domestic vessels.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 71-77; Dec. Dig. § 38.*]

Appeal from the District Court of the United States for the District of New Jersey.

Suit in admiralty by Nelson Olsen and others against the steam tug John T. Pratt and the Keystone Coal & Coke Company against the

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

same. Consolidated causes. From a decree in favor of libelants, Hector M. Hitchings, claimant, appeals. Affirmed.

Hector M. Hitchings, in pro. per.
Edward G. Benedict, for appellees.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

LANNING, Circuit Judge. Nelson Olsen and Clarence H. Downer filed their libel against the steam tug John T. Pratt to enforce their alleged lien for wages. The Keystone Coal & Coke Company filed its libel against the proceeds of the same vessel after it had been sold in the proceedings on the Olsen and Downer libel to enforce its alleged lien for coal furnished to the vessel. Decrees were entered in favor of the libelants. The two causes have been consolidated for the purposes of this appeal, which is brought by Hector M. Hitchings, the claimant.

It appears that the tug before its seizure by the marshal under the Olsen and Downer proceedings had been stripped of a large part of its equipment. The appellant contends that there is nothing due for wages to Olsen and Downer, and also that they aided in fraudulently stripping the tug. The District Court found against the appellant on both these points. Our conclusions, on an independent examination of the evidence, are the same as those of the District Court. The weight of the testimony is clearly in favor of Olsen and Downer as to the amount of wages due to them, and the evidence on which the charge of fraud is based fails utterly to support the charge. The decree entered on the libel of Olsen and Downer will be affirmed, with costs.

The libel of the Keystone Coal & Coke Company averred that the tug was owned by a resident of the state of New Jersey, was a domestic vessel in New Jersey, and that the libelant furnished the tug with coal in that state. The libelant contended in the court below, and has contended in this court, that it has a lien upon the tug under the New Jersey statute, and not under the general maritime law. The present case differs, therefore, from The Alligator, 161 Fed. 37, 88 C. C. A. 201. In that case this court said:

"The allegations of the libel are very meager, and are only such as go to support the assertion of a maritime lien. There is not in them a single statement that would bring the cases within the terms of the state statute. Neither the residence of the libelant, nor the place where the service was performed, is directly or indirectly alleged to be in the state of New Jersey. It may be added that no proof was offered by the libelant as to these matters, though it would have been immaterial if he had done so. Though courts will take judicial notice of state statutes, it is hardly necessary to say that they will not undertake to make rights under such statutes justiciable before them in the absence of the allegata and probata necessary to an issue and controversy in that behalf."

Here, while we do not have the statute of New Jersey expressly pleaded in the libel, we do have facts alleged which, if true, give to the libelant a lien upon the tug under the New Jersey statute. The evidence adduced tends to support such a lien. The New Jersey statute provides that:

"Whenever a debt shall be contracted by the master, owner, agent or consignee of any ship or vessel within this state for either of the following pur-

poses: * * * For such supplies, provisions and stores furnished within this state for the use of such ship or vessel at the time when the same were furnished, * * * such debt shall be a lien upon such ship or vessel, her tackle, apparel and furniture, and continue to be a lien on the same until paid, and shall be preferred to all other liens thereon, except mariner's wages." 2 Gen. St. 1895, p. 1966, § 46.

The lien thus given cannot be enforced by any proceeding in rem in a state court if the vessel be one employed on the navigable waters of the United States. In such a case the enforcement of the lien by a proceeding in rem, though it be given by a state statute only, must be in an admiralty court of the United States. The Roanoke, 189 U. S. 185, 23 Sup. Ct. 491, 47 L. Ed. 770; The Robert W. Parsons, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73. The evidence in the present case amply supports the finding of the court below that the libelant furnished the coal mentioned in the libel at Greenville, N. J., on the order of the master of the vessel, and that the coal was used by the vessel in the usual course of its business. This satisfies the statute, and under the rule applied by this court in The Vigilant, 151 Fed. 747, 81 C. C. A. 371, the libelant has a lien upon the tug, unless, indeed, the statute is inapplicable by reason of the next point to be considered.

On September 15, 1902, Louis Bloodgood sold the tug to George Hagerty, who had the bill of sale for it recorded on the same day in the custom house of New York. On August 8, 1905, George Hagerty entered into an agreement with Abner P. Downer to sell to Downer a half interest in the tug when Downer should pay $2,500 for such interest. This sum seems never to have been paid. On January 5, 1907, however, Abner P. Downer joined George Hagerty in executing a bill of sale for the tug to the appellant Hitchings, a resident of New York, as security for the payment by Hagerty and Downer of one-half of the damages and costs that might be recovered in two certain actions, then pending against Snare & Triest Company, and the fees of Hitchings who had been employed as counsel to defend those actions. On or about March 1, 1907, George Hagerty died. On February 6, 1908, Charles Hagerty, executor of the last will and testament of George Hagerty, without knowledge of the agreement of August 8, 1905, or of the bill of sale of January 5, 1907, which Hitchings had not recorded, executed a bill of sale for the tug to Abner P. Downer, a resident of Hoboken, N. J., which place is within the collection district of the city of New York. The bill of sale was immediately recorded by the collector of the collection district of the city of New York. On November 25, 1908, the Keystone Coal & Coke Company filed its libel against the proceeds of the sale of the tug, which sale had been made by the marshal on August 25, 1908, under the previously filed libel of Nelson Olsen and Clarence H. Downer for coal furnished to the tug in April, May, June, and July, 1908.

The question therefore is whether the bill of sale of January 5, 1907, to Hitchings, was valid as against the Keystone Coal & Coke Company. The court below held it was not. Manifestly that conclusion was correct. The bill of sale of Hitchings was not recorded until September 8, 1908, and Hitchings never had possession of the tug. Section 4192 of the Revised Statutes (U. S. Comp. St. 1901, p. 2837) provides:

"No bill of sale, mortgage, hypothecation or conveyance of any vessel or part of any vessel of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance is recorded in the office of the collector of the customs where such vessel is registered or enrolled."

It is not pretended that the Keystone Coal & Coke Company had any actual notice of the bill of sale to Hitchings. Whatever right Hitchings may have had as against Abner P. Downer, he cannot enforce his claim to the vessel, or to the proceeds of the sale thereof, as against the lien of the Keystone Coal & Coke Company who furnished the coal before the bill of sale to Hitchings had been recorded, and without knowledge of its existence.

Accordingly the decree entered on the libel of the Keystone Coal & Coke Company is also affirmed, with costs.

THE JOHN A. HUGHES.

THE SCRANTON.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 93.

COLLISION (§ 61*)—MEETING TOWS IN FOG—ERROR IN STEERING.

A collision occurred in a dense fog between the barge Powell in tow moving eastward in Long Island Sound and the leading one of three barges in tow of a tug going westward; the courses of the two being nearly parallel. The tugs were both sounding fog signals, and when some distance apart, although they could not see each other, exchanged signals for passing port to port, and each ported her helm. The tows also heard the signals and all ported except the Powell, whose master ordered the helmsman to port, but the latter, misunderstanding the order or not understanding the wheel, which was a ship's wheel, starboarded instead, throwing the bow to port when her hawser parted, and she was soon afterward struck by the leading barge of the other tow. *Held*, that the proximate cause of the collision was the error of the Powell, and that she could not recover from the tugs, which were not chargeable with any fault contributing to the collision.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 61.*

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

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

Suit in admiralty by the Baker Transportation Company, as owner of the barge Powell, against the steam tug John A. Hughes, James E. Hughes, claimant, and the steam tug Scranton, the Delaware, Lackawanna & Western Railroad Company, claimant. Decree for libelant (156 Fed. 879), and claimants appeal. Reversed.

Carpenter & Park (Samuel Park, of counsel), for the John A. Hughes.

William S. Jenney (William S. McGuire, of counsel), for the Scranton.

James J. Macklin (De Lagnel Berier, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

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

WARD, Circuit Judge. March 18, 1905, at about 9:30 a. m. in a dense fog the steam tug John A. Hughes at the eastern end of Long Island Sound was proceeding on a voyage from Philadelphia to Providence with the coal laden barge Powell astern on a hawser 125 fathoms long. At the same time and in the same water the steam tug Scranton was proceeding from Boston to New York with three light barges astern tandem; the towing hawser to the first barge, the Shickshinny, being 200 fathoms long. The fog had shut in about 7 a. m. Each tug was blowing at intervals of not more than one minute fog signals of one long followed by two short blasts as required by article 15 of the inland regulations (Act June 7, 1897, c. 4, 30 Stat. 99 [U. S. Comp. St. 1901, p. 2880]). The tugs were approaching each on the port bow of the other on almost opposite courses. The tide was ebb, running to the eastward about two miles an hour. The tugs were going at a moderate speed. The Scranton although hooked up, was bucking the tide and making about three miles over the bottom, and the Hughes with the tide was making about four miles.

When at a distance apart variously estimated and neither seeing the other, the Scranton blew one long blast and the Hughes answered with one. This signal is one not provided by the inland regulations, but is commonly used by tugs as a helm signal to their tows. On this occasion, it was used by the tugs for their own guidance, and each understood and acted upon it by porting. Although not blown to the tows, it was heard and understood by them, and, even if this had not been so, it was their duty to follow their tugs. The tow of the Scranton did so by porting, but the Powell starboarded. The master of the Powell gave the order to the man at the wheel to port and he rolled the wheel to port which, being a ship's wheel, threw the bow to port, instead of to starboard, as the master had intended. Thereupon the hawser parted. The barge sheered off under her starboard helm between the tug Scranton and the barge Shickshinny, parting their towing hawser and being struck on the starboard side about amidships by the Shickshinny, sustaining the damage complained of in this case.

The libelant admits the error of the wheelsman of the barge, but lays great stress upon the question whether his mistake occurred before or after the hawser parted. We do not appreciate the importance of this because the sheer would have taken place in either case. The hawser belonged to the Powell and is admitted to have been a good nine-inch manilla line, entirely sufficient for the towing. The libelant contends that it parted as the result of the tug's porting suddenly. This seems to us very unlikely. There was no need of sudden porting on the tug's part, and her witnesses say that she ported gradually and did not increase her speed. We think it much more likely that the excessive strain was caused by the barge's starboarding when the tug ported.

The district judge directed a decree in favor of the libelant against both tugs, and closed his opinion as follows:

"The question to be determined is, Was the barge responsible for the collision in view of the wrong maneuver made by her? I do not think she was, but that turning the wheel the wrong way was in consequence of the previous faults of the tugs in navigating during such weather, and in not stopping

when whistles were heard ahead. The fog was so dense that some of the witnesses said that they could not see more than 20 feet. While others made larger estimates, 200 to 300 feet, it is conceded by the tugs that the fog was very thick. I consider that the faults of the tugs were the proximate causes of the collision. When the mistake was made on the barge, the vessels were almost in collision, and the error of the barge should not prevent her from collecting the damages which she sustained in consequence of the tugs' manifest faults."

We do not concur in this conclusion. It seems to us perfectly clear that the proximate cause of the collision was the Powell's sheer, and that but for it there would have been no collision. There is no ground whatever for saying that the error of the Powell was caused by the tugs' navigating in fog, or by their not stopping when whistles were heard ahead. If these acts or either of them were faults and contributed to the collision, the decree of the court below would be justified. But it was not a fault for the tugs to continue in a fog which came on during the course of the voyage. In respect to stopping, article 16 of the inland regulations provides:

"Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

By good luck or by good management the tugs did ascertain their relative positions correctly and agreed upon a course of navigation which would have carried them and their tows clear of each other but for the Powell's sheer. If their tows had come into collision without the intervention of this independent cause, their failure to stop would have put them at fault. On the facts of the case we cannot agree that it contributed to the collision at all.

It is next objected that, as rule 9 of the inland regulations forbids the use of helm signals when vessels cannot see each other, the exchange of the long blast between the tugs was a violation of law which makes them liable. Conceding that this was a violation of law, it clearly did not contribute to the collision. On the contrary, it established an agreement which took the tugs and would have taken the tows clear of each other, but for the Powell's sheer. If the tows had come into collision without this intervening proximate cause, their navigation and reliance upon helm signals when they could not see each other would justify the decree of the court below.

Finally, it is said that the mistake of the wheelsman of the Powell was excusable as an act in extremis. We do not think so. There was nothing exciting in the situation. The master of the Powell knew that it was his duty to follow his tug, and he gave the natural and proper order to that end. The man at the wheel, either thinking that it was an order for the wheel as distinguished from the helm or being unaccustomed to a ship's wheel, did exactly the opposite. There is nothing to show that he did so because of any excitement or of any imminent danger.

The decree is reversed, with costs.

MAXWELL et al. v. McDANIELS et al.

(Circuit Court of Appeals. Fourth Circuit. December 6, 1910.)

No. 1,008.

1. APPEAL AND ERROR (§ 80*)—DECISIONS REVIEWABLE—FINALITY OF DECREE.
A decree which orders a judicial sale of all of the property involved in the litigation and fixes the time and place of sale is so far final as to be appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 494–509; Dec. Dig. § 80.*

Finality of judgments and decrees for purposes of review, see notes to Brush Electric Co. v. Electric Imp. Co. of San Jose, 2 C. C. A. 379; General Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co., 28 C. C. A. 482.]

2. COURTS (§ 508*)—GROUNDS FOR INJUNCTION—FEDERAL COURTS—ENJOINING PROCEEDINGS IN STATE COURT.
One contract creditor cannot maintain a suit in equity in a federal court to enjoin another creditor of the same debtor from prosecuting an action on his demand in a state court on the ground that the defendant will thereby secure a prior lien on the debtor's property, both because such a case presents no ground of equity jurisdiction and because such a suit is prohibited by Rev. St. § 720 (U. S. Comp. St. 1901, p. 581).

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

Enjoining proceedings in state courts, see notes to Garner v. Second Nat. Bank, 16 C. C. A. 90; Central Trust Co. v. Grantham, 27 C. C. A. 575; Copeland v. Bruning, 63 C. C. A. 437.]

3. FRAUDULENT CONVEYANCES (§ 241*)—RIGHT OF ACTION TO SET ASIDE—NECESSITY OF JUDGMENT.
A simple contract creditor whose claim has not been reduced to judgment cannot maintain a suit in a federal court of equity to set aside an alleged fraudulent conveyance of property by his debtor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 694–726; Dec. Dig. § 241.*]

4. RECEIVERS (§ 9*)—GROUNDS OF APPOINTMENT—SUIT BY SIMPLE CONTRACT CREDITOR.
A federal court of equity has no jurisdiction at the instance of a simple contract creditor, whose claim has not been reduced to judgment, to appoint a receiver for property on which he asserts no specific lien.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 15; Dec. Dig. § 9.*]

5. EQUITY (§ 324*)—JURISDICTION—CASE MADE BY BILL.
Where a bill presents no ground which gives the court jurisdiction to grant equitable relief, such jurisdiction cannot be sustained on the ground that complainant was given a lien by a conveyance made by his debtor, which the bill alleges was fraudulent and void as to him.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 324.*]

6. RECEIVERS (§ 29*)—GROUNDS OF APPOINTMENT—INSOLVENCY OF DEFENDANT.
A court of equity is without jurisdiction to appoint receivers to administer the assets of an individual on the ground of his insolvency, at suit of a simple contract creditor, and such jurisdiction cannot be conferred by the consent of the debtor.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 38–42; Dec. Dig. § 29.*]

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

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Philippi.

Suit in equity by Isaac McDaniels against Charles D. Gillaspie, Isaac C. Woodford, and others. Decree for complainant, and defendants Woodford and Claude W. Maxwell, trustee in bankruptcy for defendant Gillaspie appeal. Reversed.

W. B. Maxwell, B. M. Hoover, D. H. Hill Arnold, and Samuel T. Spears, for appellants.

J. P. Scott, A. M. Cunningham, and A. R. Stallings, for appellees.

Before PRITCHARD, Circuit Judge, and McDOWELL and ROSE, District Judges.

ROSE, District Judge. There are 21 assignments of error. We find it unnecessary to consider any of them except the first which denies that the court below had any right to entertain the cause. It may be assumed that the allegations of the bill of complaint as to diversity of citizenship and as to the amount in controversy are prima facie sufficient to sustain the jurisdiction of the court below as a court of the United States. Does the bill allege anything which can invoke its jurisdiction as a court of equity?

In his bill of complaint the complainant says that some three years before three of the defendants, Gillaspie, Jenkins, and Harr, were engaged in building and equipping the Gassaway Hotel in Elkins, W. Va. In so doing they became indebted to many people, the complainant among the number. He lent them $10,000 for which they gave him their promissory note payable one year after date. At the time the bill was filed this note was overdue and unpaid. After he lent his money the complainant went to Arkansas, and when he came back he found that his debtors had mortgaged the hotel, and that suits had been brought against them in the state courts upon debts incurred in connection with the hotel enterprise. Judgments recovered in these suits he says, will be made liens upon the hotel property. He nowhere says that he has any lien upon that property or upon any of it. His complaint is that others have or shortly will have and that he has not. He seems to think that those facts give him a right to have all suits against his debtors enjoined, and the hotel property placed in the hands of receivers appointed by a court of equity. He goes on to say that Jenkins and Harr some time before had conveyed their interest in the hotel property to Gillaspie and the latter's wife. He charges that the conveyance to Mrs. Gillaspie was in fraud of creditors. The bill further alleges that suits have been and will be instituted against Gillaspie and that his estate will be largely wasted in litigation. It says that Gillaspie cannot realize upon his investments because of the stringency of the money market. It charges that the Gillaspies had made a lease of the hotel to the defendant Woodford. It is said that this lease which had about three months yet to run was to the disadvantage of both Gillaspie and the creditors, because the rent agreed to be paid was less than it should have been, and because Woodford had not paid what he agreed to pay. The bill uses many more words in telling its story than we have employed in sum-

marizing its allegations, but the substance of them has been stated. The bill prays that the conveyance to Mrs. Gillaspie of a third interest in the hotel property shall be set aside as fraudulent. It asks for the appointment of temporary receivers to take charge, manage, control, and conduct the hotel; that all suits against Gillaspie, Jenkins and Harr upon debts contracted in erecting the hotel or which in any wise involve such property be enjoined, and that the plaintiffs therein be inhibited from further prosecuting them or from instituting any new suits; that the complainant's claim be declared a lien upon the hotel property, that all liens and their relative priorities be ascertained, and if the property cannot be rented for a sum sufficient to pay them all off within five years, that it shall be sold. Upon this bill of complaint receivers were appointed December 5, 1907. They took possession of the hotel property at once, and have held such possession ever since. Within four months after the filing of the bill in this cause, creditors of Gillaspie instituted proceedings in bankruptcy against him. As a result he was on April 3, 1909, adjudicated a bankrupt.

As already stated, the bill of complaint referred to a conveyance from Jenkins and Harr to the Gillaspies, for the purpose and apparently for the sole purpose of asking that in so far as it purported to convey a third interest to Mrs. Gillaspie it should be set aside as in fraud of creditors. In this connection the complainant made the deed a part of his bill, describing it as "Plaintiff's Exhibit Deed No. 2." The record shows that their exhibit in point of fact was not filed with the bill. The receivers were appointed December 5, 1907. The exhibits were not brought into the clerk's office until December 14, 1907.

This deed shows that Jenkins and Harr conveyed their two-thirds interest in the hotel property to the Gillaspies in consideration of $6,000 to be paid September 1, 1907, and of $6,000 to be paid September 1, 1908, and of an agreement by the Gillaspies to assume and pay all the bonded and deed of trust debts against the hotel property, all notes outstanding executed by Jenkins, Harr, and Gillaspie for money borrowed by them used in the construction, purchase of material, the payment of labor and furniture and fixtures of said hotel, and all debts due for labor, material, furniture, and fixtures of every kind, character, and description used in the construction of said hotel or for furniture therein located. It was further covenanted and agreed that the grantors retain a vendor's lien upon the property conveyed to secure the payment of the considerations upon which the conveyance was made. On July 28, 1910, the court below—that is to say, the Circuit Court in the equity cause—decreed that all debts ascertained by the referee in bankruptcy against the Hotel Gassaway property or any debts which may hereafter be proved before said referee within the time prescribed by the bankruptcy act and which are secured by the vendor's lien reserved by Jenkins and Harr in their conveyance to the Gillaspies are decreed as liens upon the hotel property. The decree then ascertains the precise amount due the holders of a first mortgage on the hotel, and declares such sum to be a first lien thereon. It deals in the same way with a second mortgage, and then directs that, unless the debts thus far ascertained by the referee, the names of the creditors having such claims and the amount thereof be-

ing set forth, are not paid within 30 days, the property shall be sold by the special receivers and the trustee in bankruptcy who were appointed special commissioners to make such sale. It is from this decree that the pending appeal has been taken. The appellees have moved to dismiss alleging that the decree assailed is not final. This motion must be denied. The decree orders a judicial sale of all the property involved in the litigation. Under this decree the title will pass beyond the control of the court. It fixes the time and place of sale. Such a decree is so far final that it is appealable. 2 Street's Federal Equity Procedure, 1938; First National Bank v. Shedd, 121 U. S. 74, 7 Sup. Ct. 807, 30 L. Ed. 877; 2 Foster's Federal Practice, § 318.

We pass to the consideration of the jurisdiction of the court below as a court of equity to entertain the bill of complaint. The complainant had no right for two reasons to ask that the court should enjoin the prosecution of suits against his debtor in the state courts of West Virginia. If A. is indebted to both B. and C., it takes no citation of authority to show that B. cannot ask a court of equity to enjoin C. from suing A., merely because C. by beginning his suit first may get a lien upon A.'s property before B. does. In the second place if the complainant had any standing in a court of equity to ask that proceedings at law be enjoined, the statutes of the United States expressly prohibit a federal court of equity from granting that relief when the proceedings sought to be enjoined are pending in a state court. Rev. St. § 720 (U. S. Comp. St. 1901, p. 581).

There are exceptions to the applicability of this statute, but the case at bar is not among them. At the time the receivers were appointed the complainant's claim had not been reduced to judgment. A federal court of equity was therefore without jurisdiction to hear his complaint that his debtor had made a fraudulent conveyance of his property. Scott v. Neely, 140 U. S. 108, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804.

It necessarily follows that the court below derived no jurisdiction from the attack made in the bill upon the good faith of the conveyance to Mrs. Gillaspie. If what the complainant says about the lease by the Gillaspies to Woodford can be construed as an allegation that such lease was made in fraud of the rights of creditors the cases cited show that the complainant was not in a position to raise the question in the court below. If what was said about the Woodford lease was intended to charge merely that the Gillaspies had made a bad bargain and were getting the worst of it, to the immediate injury of themselves and the ultimate damage of their creditors, still less reason for equitable interference was disclosed. For centuries the right of every adult man to make as many bad bargains as he chooses has been recognized by the law. The fact that he and those with whom he has business transactions are dissipating what would be a splendid estate if it were only well managed makes no difference. So long as he is not an idiot or a lunatic, within the legal definition of those terms, his creditors who have no specific lien upon the property with which he has been dealing cannot successfully ask any court of equity to an-

nul what he has in good faith done. As we have seen such creditor cannot ask a federal court of equity to set aside his transfers even when they were made with the specific intent to defraud them. A court of equity of the United States has no jurisdiction at the instance of a simple contract creditor when claim has not been reduced to judgment, to appoint a receiver for property upon which he asserts no specific lien. 1 Street's Federal Equity Proced. § 66; Smith v. Railroad Co., 99 U. S. 398, 25 L. Ed. 437; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 377, 14 Sup. Ct. 127, 37 L. Ed. 1113.

No one allegation distinctly made in the bill of complaint, nor all of them when taken together, make out a case for any equitable relief which the court below had jurisdiction to give. In the brief filed by the appellee in this court, so much appears to be tacitly conceded. The attempt here is to sustain the jurisdiction upon a contention which was not set up in the bill of complaint at all, and upon that contention alone.

It is said that complainant was a creditor of Gillaspie, Jenkins, and Harr for money lent them for their hotel enterprise; that his claim was therefore included in the class of claims which the Gillaspies agreed in the conveyance from Jenkins and Harr to pay, and to secure the payment of which that conveyance reserved a vendor's lien. It is argued that this reservation by subrogation inured to the benefit of the complainant, and accordingly at the time of the filing of the bill the complainant had a lien upon an undivided two-thirds of the hotel property, and was therefore entitled to ask for a receiver for it. We have been referred to no case in which the holder of a vendor's lien upon an undivided interest in land is entitled to the appointment of a receiver for the whole land. Nor are we given any citations to show that such a right belongs to one who is not named in the deed reserving the vendor's lien, but who claims to be included in a class of persons not otherwise described than as creditors of the grantors for money borrowed, work done, or materials furnished in the improvement of the land, before the fact that he is included in such class and the amount of his claim has been in some way judicially ascertained. It would seem on principle that if such relief could ever be granted on the ex parte application of persons so situated, it would only be where the danger of irreparable damage to the property involved is far more serious than is alleged in the bill of complaint under consideration.

We need not pursue this branch of the subject farther. The existence of this alleged vendor's lien was not in the bill relied on as a ground for relief. We are not disposed under the circumstances of this case to allow the complainant now to say that while he was not entitled to any of the relief for which he asked in his original or amended bill for any reasons therein assigned, he was entitled to it in fact because of some provisions in a deed which in his bill he charged was as to him void because made in fraud of the rights of himself and other creditors. In Cates v. Allen, supra, it was suggested that the bill might be sustained under the prayer for general relief, as brought for the administration of the assets under the assignment for benefit

of creditors the validity of which a simple contract creditor had attacked. The Supreme Court held that such relief would not be agreeable to the case made by the bill, which was directed to the setting aside of that instrument.

The fact that Gillaspie was in court by his counsel when the bill was filed and made no objection to the granting of the relief asked for does not under the facts of this case in our judgment remove a barrier to the jurisdiction which as has been shown would otherwise have been insuperable. It is not questioned that when a simple contract creditor of a corporation files a bill against it, alleging its insolvency and praying that the court take charge of its assets through a receiver and distribute them among the creditors, and the corporation and such other defendants as were made parties to the bill answer admitting the facts and consenting to the granting of the relief prayed for, receivers may be appointed and retained in the absence at least of prompt attack upon the jurisdiction by some one in interest entitled to be heard. Vide discussion in Hollins v. Brierfield Coal & Iron Company, supra. An individual is not a corporation. The administration of the affairs of an insolvent individual is not a recognized head of equity jurisdiction as is the administraton of the assets of an insolvent corporation. The subject-matter in the former case is not one over which the court has jurisdiction. Mere waiver by the defendant of objections otherwise fatal to the capacity of the plaintiff to invoke the jurisdiction in the case of a corporation removes the only obstacle to the granting of the relief desired. In the case of an individual defendant it leaves untouched the most serious difficulty of all, viz., that the subject-matter is not one within the province of the court. England v. Russell (C. C.) 71 Fed. 818; 1 Street's Federal Equity Practice, § 69.

It is true that in this case no receiver for Gillaspie's general assets was asked for nor was any appointed. The bill, however, did pray that various persons, firms, and corporations, who were creditors of Gillaspie and whose claims were undisputed, should be enjoined from suing him at law, and they were so enjoined. A debtor in embarrassed circumstances may have reasons which appear to him sufficient for consenting to the appointment of receivers for one particular piece of his property, if by so doing he can have many of his creditors enjoined from proceeding at law to secure judgments against him which would bind his other property.

In this case Woodford was an indispensable party defendant to any bill asking for the relief prayed for and granted. In his answer he objected to the jurisdiction of the court, and he is here at this bar insisting on his objection. The decree must be reversed at the cost of appellee McDaniels and the cause remanded with directions to dismiss the bill for want of jurisdiction.

Reversed.

UNITED STATES v. ONE TRUNK (McNALLY, Claimant).

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 51.

CUSTOMS DUTIES (§ 63*)—SUFFICIENCY OF DECLARATION—TIME OF MAKING ENTRY—"MENTIONED."

At the time of the arrival of claimant at the port of New York as a passenger from a foreign country, a treasury regulation provided that merchandise intended for sale and of the value of $500 or over could not be examined on the pier, but must be regularly entered at the custom house and appraised. Claimant in her declaration made on landing listed certain articles and "one trunk for public stores"; that being the place where imported merchandise goes for examination and appraisal. Later she filed regular written entry at the custom house, and with it duplicate consular invoice of the contents of the trunk, which consisted of dutiable merchandise of over $500 in value. *Held*, that the description in claimant's declaration was sufficient, and that her filing of the invoice at the custom house later was a compliance with Rev. St. § 2802 (U. S. Comp. St. 1901, p. 1873), which requires all dutiable articles to be "mentioned to the collector" "at the time of making entry."

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 169; Dec. Dig. § 63.*

For other definitions, see Words and Phrases, vol. 5, p. 4476.]

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

Libel by the United States against one trunk and contents, Anna McNally, claimant. Judgment for claimant (171 Fed. 772), and libelant brings error. Affirmed.

This cause comes here upon a writ of error to review a judgment of the District Court, Southern District of New York, in favor of defendant in error, who was defendant below.

Henry A. Wise, U. S. Atty. (W. L. Wemple, Asst. U. S. Atty., of counsel), for the United States.

W. Wickham Smith and John K. Maxwell, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The case arises upon a libel filed by the United States against a trunk containing gowns, the property of defendant, praying that the same be forfeited to the United States for various causes set forth in the libel. We are concerned here, however, with a single cause only, viz., that on or about March 12, 1908, the merchandise was found in the baggage of the claimant and was not at the time of the making entry of said baggage by said claimant or prior thereto mentioned to the collector before whom said entry was made, and that thereby under section 2802, Rev. St. (U. S. Comp. St. 1901, § 1873), said merchandise became subject to forfeiture. The case was tried on an agreed statement of facts and the trial judge directed a verdict for defendant.

The section relied on reads as follows:

"Sec. 2802. Whenever any article subject to duty is found in the baggage of any person arriving within the United States, which was not, at the time

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

of making entry for such baggage mentioned to the collector before whom such entry was made, by the person making the entry, such article shall be forfeited. * * *"

This section was fully discussed by this court in the two cases U. S. v. One Pearl Necklace, 111 Fed. 164, 49 C. C. A. 287, 56 L. R. A. 130, and One Pearl Chain v. U. S., 123 Fed. 372, 59 C. C. A. 499; Dodge v. United States, 131 Fed. 849, 65 C. C. A. 603; United States v. One Pearl Chain, 139 Fed. 513, 71 C. C. A. 500. We reached the conclusion that:

"If at any time while the entry is being made, and before it is completed, there is a disclosure by the passenger, which is sufficient to put the customs officers upon inquiry as to the dutiable character of any of the contents of the packages, we think that within the meaning of the statute it is to be deemed that the articles were mentioned to the collector before whom such entry was made."

We are referred to no decision which in any way qualifies this construction; on the contrary, it is quoted at length in the case mainly relied on by the government. Harts v. U. S., 140 Fed. 843, 72 C. C. A. 255. The court in that case indicated in what respects it thought the claimant had failed to bring himself within the rule announced.

What happened in the case at bar is this: The claimant, a dressmaker, arrived at the port of New York by steamer, bringing with her three trunks and a valise. Two of the trunks and the valise contained only her own wearing apparel and personal effects, including some articles purchased abroad, none of which was intended for sale. One of the trunks contained a large number of gowns, valued at nearly $4,000, which were not intended for her personal use, but were to be sold.

A treasury regulation then in force provided:

"Art. 615. Merchandise, that is articles not of a personal nature, intended for sale, over $100, and less than $500 in value, accompanied by consular invoice, may be examined and appraised on the pier. If not accompanied by consular invoice, regular entry at the custom house and appraisement will be required. Merchandise * * * of a value of $500 or over, whether accompanied by consular invoice or not, must be regularly entered at the custom house and appraised."

Claimant had with her the consular invoice covering the merchandise in the one trunk, which was intended for sale. Being of a value over $500, it could not be examined and appraised on the pier, and could be regularly entered only at the custom house.

Claimant, upon arrival March 10, 1908, filled up the usual passenger's declaration stating that she had with her three trunks and one valise. In the place for listing articles obtained abroad she wrote:

2 hats, 100 Fr.
2 pairs corsets, 10 Fr.
1 lace linen cover, 50 Fr.
3 Petticoats, 165 Fr.
2 pairs rehlin corsets, 50 Fr.
1 trunk for public stores

—and signed the declaration.

The trunk was sent to the "public stores" which is the place where imported merchandise goes for examination and appraisal. On March

12th she filed regular written entry at the custom house, and with such entry filed duplicate consular invoice. On March 18th the contents of the trunk were seized and this libel subsequently filed.

Claimant's declaration certainly disclosed to the government officers that one of her trunks contained articles of such character as required its being sent to the public stores. What more they needed to put them on inquiry as to the dutiable character of its contents we find it difficult to understand. We concur with the district judge in the statement that, if it be claimed that the word "trunk" is not equivalent of "effects in a trunk," the point is too trivial for notice; and also concur in his conclusion that claimant brought herself within the rule announced in the Pearl Necklace Cases, supra. Unlike the claimant in the Harts Case, supra, who gave the government officers no information whatever and was, for that reason, condemned, Mrs. McNally furnished a consular invoice covering every article (so far as this record shows) and she furnished that at the place where the regulations told her she must enter the goods. Being over $500 in value, they could not be examined and appraised on the pier. To contend that her merchandise should be forfeited, because she did not copy the items of the consular invoice upon her declaration, when the officer to which it was to be handed was forbidden by the regulations to examine and appraise on the pier, seems to us wholly unreasonable.

The judgment is affirmed.

NEW YORK & NEW JERSEY TRANSP. CO. v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 68.

COLLISION (§ 153*)—VESSEL MOORED AT NIGHT IN FOG—IDENTITY OF MOVING VESSEL.

Libelant's coal barge, which formed one of a tow of 20 boats moored to one of a number of piers at South Amboy, N. J., at night in a fog was struck and injured by some steam vessel or tow which entered the slip. The piers were owned by respondent and used by it exclusively in its coal business, and none except its own tugs were shown to have been around the piers that night; but there was testimony that two or three of its tugs were there, one of which made up the tow. The master of the barge also testified that the tug which did the injury had respondent's distinguishing mark on her funnel, although he was unable to make out her name in the fog. *Held*, that a finding of the district judge that the injury was done by a vessel of respondent and holding it liable for the damage would not be disturbed by the appellate court.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 153.*]

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

Suit in admiralty by the New York & New Jersey Transportation Company against the Pennsylvania Railroad Company. Decree for libelant, and respondent appeals. Affirmed.

The action is in personam, the libelant being unable to name the respondent's tug which did the injury.

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

Robinson, Biddle & Benedict (O. D. Duncan and W. S. Montgomery, of counsel), for appellant.

Wray & Callaghan (Albert A. Wray, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The libelant's coal barge, the Stickney & Conyngham—hereafter called the Stickney—was, on the night of the 15th of February, 1909, lying at South Amboy, New Jersey, waiting for a heavy fog to lift in order that she might be towed to New York. The Stickney was one of a tow of twenty boats made up in five tiers of four boats each. She was the port boat in the third tier, having been placed there by a tug belonging to the respondent. The tow was made fast to pier B in such a manner that it swung diagonally towards pier A, the next pier to the north. The Stickney's port side was from 30 to 60 feet from the latter pier. While lying in this position a collision occurred about 11 p. m. between her and a tug which struck her on the port side near the bow and caused the injury complained of.

The sole question is one of fact—was this tug owned by the Pennsylvania Railroad Company?

The following propositions may be considered as established:

First.—The Stickney received a blow at about 11 o'clock on the night of February 15th while lying between piers A and B at South Amboy. The blow was sufficiently severe to break one of her fenders and the 12 by 6 yellow pine top-piece on her port bow.

Second.—These piers are the property of the Pennsylvania Railroad Company and are used exclusively by it in conducting its coal business. Occasionally a tug owned by others goes in there to tow out a schooner or similar vessel, but never at 11 o'clock at night. There is no proof that a stranger tug was at or near the piers at any time in controversy.

Third.—At the time of the collision a dense fog existed, but the piers were lighted by electricity, there being an electric light about 100 feet from the end of pier A.

Fourth.—All of the tugs of the respondent have the keystone painted on their funnels, which is their distinguishing mark.

Fifth.—The blow must have been struck by a tug or by a boat in control of a tug.

Starting with these established propositions, it must be conceded that a strong presumption exists that one of the respondent's tugs caused the damage complained of. There is a total failure to prove any other cause. If the respondent's tugs be eliminated, the collision must be regarded as miraculous.

We are not, however, left to presumption. There is direct proof that a Pennsylvania tug struck the blow. Undoubtedly there are inconsistencies and contradictions in the testimony of the master of the Stickney, but this is not astonishing, in view of the darkness and the heavy fog. It is not at all surprising that he should be unable to give the name of the tug. He testifies positively that the tug he saw backing away from his boat had a keystone on her funnel.

If this be true, it matters not what else she had or omitted to have. The master says that when he first felt the shock he opened the door and saw that the tug was just lying "like a shadow with her bow to my side backing out. I couldn't see her name at all, for it was too dark and foggy, but I could see just like a shadow or picture of a boat in a fog. The electric light threw a light on the top of the funnel. Down below I could see the keystone mark, half the funnel down, and I could see the top of the wheel house." It is conceded that respondent's tug No. 33 was at the piers that night, she being the tug that brought the Stickney there and located her in the tow. The tug's master says that this was done between nine and ten o'clock in the evening, that about eleven it got foggy and that he kept control of the tug until about 1:40 a. m. He says:

"I was picking up a load of boats, shifting boats around the slips that night in the immediate vicinity of pier B. I was in that general neighborhood during the whole time. The space between the tow and the south of pier A was, I should judge, about fifty feet. I went through that space that night."

It thus appears that one of the respondent's tugs was in the vicinity of the Stickney, moving about and must have passed at one time within a few feet of her if the tug, as she says she did, went through the fifty-foot space, with a coal barge. She may have collided with the Stickney or her tow barge may have done so without her knowledge. It is true that the master of the Stickney says that the tug which struck him had a white band on her funnel and No. 33 has no such band. The master also testifies that No. 33 was not the guilty tug and that at the time he thought it was the Linden or the Morion. We attach very little importance to the statement of the master in saying that No. 33 had a white band around her funnel. Such a mistake might easily occur in describing objects seen on a foggy night and, as the tug was admittedly present, the testimony was wholly inconsequential.

Again, he may have been mistaken in exculpating the No. 33. He says he could not see the name of the tug and did not know which of the tugs it was. How then can he be sure that it was not No. 33?

There is testimony that other Pennsylvania tugs were at the head of pier A and in the immediate vicinity on the night in question, and the circumstance that their connection with the collision is explicitly denied does not eliminate the question of fact presented.

Although there is a sharp conflict upon the testimony, there was sufficient proof to sustain the conclusion of the district judge. There is no doubt as to the injury to the Stickney, which was inflicted by some human agency. Upon the proof no boats except those controlled by the respondent could have inflicted the injury, it is conceded that one tug of the respondent was in the immediate vicinity, moving about during all the time in question and the libelant's testimony points to the presence of two other tugs. In such circumstances, we are not justified in setting aside the decree of the trial judge who heard the testimony of most of the important witnesses.

It is argued that the respondent is liable for having moored the tow in so careless a manner that instead of lying along pier B it drifted

diagonally across the slip until a passage of only about 50 feet remained. Although there is force in this contention it is unnecessary to decide the question.

Decree affirmed with costs.

In re NICOLA. WILLIAMS, Immigration Com'r, v. UNITED STATES ex rel. GENDERING. SAME v. UNITED STATES ex rel. HOHANESSIAN.

(Circuit Court of Appeals, Second Circuit. January 16, 1911.)

Nos. 52, 78, 83.

CITIZENS (§ 7*)—MARRIAGE OF ALIEN WOMAN TO CITIZEN—EXCLUSION UNDER IMMIGRATION LAWS.

Under Rev. St. § 1994 (U. S. Comp. St. 1901, p. 1268), which provides that "any woman who is now or may hereafter be married to a citizen of the United States and who might herself be lawfully naturalized shall be deemed a citizen," the wife of a citizen of the United States, who, although then an alien, might have been lawfully naturalized at the time of her marriage, and without regard to where the marriage took place, cannot be excluded from entry into the United States under the immigration laws, although she might be subject to exclusion if an alien.

[Ed. Note.—For other cases, see Citizens, Cent. Dig. § 6; Dec. Dig. § 7.* Citizenship of married women, see note to Hopkins v. Fachant, 65 C. C. A. 5.]

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

Habeas corpus proceedings by Thakla Nicola, by Bertha Gendering, and by Paris Der Hohanessian, respectively, against William Williams, Commissioner of Immigration. From an order granting the writ in each case, respondent appeals. Affirmed.

For opinion below, see 173 Fed. 626.

Henry A. Wise, U. S. Atty. (Addison S. Pratt, Asst. U. S. Atty., and Robert Stephenson, of counsel), for appellant.

F. J. Bishop, J. S. Galland, and H. E. Brown, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. It is conceded that the principal question involved is the same in each of these appeals. That question is whether the relators are citizens of the United States. If they are citizens it is manifest that they cannot be refused admission to this country under the laws relating to aliens. In each of these cases the relator is the wife of an American citizen and section 1994 of the Revised Statutes (U. S. Comp. St. 1901, p. 1268), which is as follows, is applicable:

"Any woman who is now or may hereafter be married to a citizen of the United States and who might herself be lawfully naturalized shall be deemed a citizen."

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

In the recent case of United States v. Henrietta Cohen, 179 Fed. 834, 103 C. C. A. 28, decided June 14, 1910, we held that the alien wife of an alien man who had resided here for 30 years could not herself become an American citizen for the reason that she took the nationality of her husband and this remained until the marriage relation was legally terminated. This decision is only important as it asserts the importance of maintaining an undivided allegiance in the family relation. It is inconsistent with the policy of our law that the husband shall be a citizen and the wife an alien. In the cases at bar the relators are the legal wives of American citizens. This is abundantly established by the proof and we understand that it is not disputed by the district attorney.

It is not necessary to state the facts in all these cases; that of Bertha Gendering will serve as an illustration. She arrived at the port of New York September 28, 1909, from Rotterdam. In 1898 she was married to Magnus Gendering by proxy in Holland and subsequently she came to this country alone, was examined and admitted and soon thereafter a church marriage ceremony was performed in this country. At this time there was not a breath of suspicion against her moral character and she and her husband lived together for seven years, when he deserted her. He became an American citizen September 17, 1908. She supported herself for some time by dressmaking and then went to live with one Maurice Citroen, intending to marry him as soon as she obtains a divorce from Gendering. She has two brothers residing here, speaks English and, on arrival, had $200 in her possession. She is charged with coming here for immoral purposes.

The other women are alleged to be suffering from trachoma. Although we have been presented with learned briefs on both sides reviewing the history of the legislation on the subject of naturalization from the earliest times, it seems to us, as before stated, that the real question is a simple one and is within exceedingly narrow limits.

At the time the relators became citizens by marriage with American citizens, they might have been lawfully naturalized. Even if we assume the contention of the district attorney to be correct, that marriage will not make a citizen of a woman who would be excluded under our immigration laws, it does not affect these relators. There is no pretense that when their husbands' nationality was conferred upon them by law, they were not healthy, physically, mentally, and morally. If at that time they gained American citizenship, how did they lose it? What law deprives a citizen of his citizenship because he is so unfortunate as to have contracted a contagious disease?

The fact, if it be so, that these relators are undesirable citizens, is not germane to the present controversy. As pointed out by Judge Hand (173 Fed. 626), a woman does not lose her citizenship because her health is bad or her moral character open to criticism. These relators are not citizens of the countries from which they came, as those countries by the mere act of marriage with an American citizen, terminate their allegiance. They are American citizens or they are without a country. That they are citizens is affirmed, we think, by the great weight of authority, several of the leading cases being cited

in the opinion of the District Judge. Being citizens they cannot be excluded as aliens.

The decrees of the District Court are affirmed.

CONVERSE v. SPARGO.

(Circuit Court, D. Connecticut. February 21, 1911.)

No. 697, Law.

1. CORPORATIONS (§ 259*)—STOCKHOLDER'S PERSONAL LIABILITY—JURISDICTION.
Power to fix the statutory personal liability of a stockholder in a suit adjudging the corporation insolvent exists on the theory that presence of the corporation carries with it presence of the stockholders.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1050–1067; Dec. Dig. § 259.*]

2. CORPORATIONS (§ 245*)—STOCKHOLDER'S PERSONAL LIABILITY—EXECUTORS.
For the purpose of assessment against a deceased stockholder of an insolvent corporation under personal liability fixed during her lifetime, her executor is deemed a stockholder.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 978; Dec. Dig. § 245.*]

3. CORPORATIONS (§ 245*)—STOCKHOLDER'S PERSONAL LIABILITY—EFFECT OF STOCKHOLDER'S DECEASE.
It is no defense to a suit against an estate of a deceased stockholder of an insolvent corporation for an assessment made in receivership proceedings, under her personal liability, fixed before her death, that she was dead when the call was made, and no call was made upon her executor.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 978; Dec. Dig. § 245.*]

Action by Theodore R. Converse, as receiver, against Edward C. Spargo, as executor. On demurrer to a defense. Demurrer sustained.

Wm. W. Hyde and Charles Welles Gross, for plaintiff.

J. C. Chamberlain, for defendant.

PLATT, District Judge. The defense criticised by the demurrer is, in substance, that Armenia H. Simmons, a stockholder in the Minnesota Thresher Manufacturing Company, was dead at the time the second call was made on account of her stockholdings, and that no call was made upon the defendant executor. To reach a proper decision about this defense, it is necessary to understand the exact nature of the suit against which it is entered.

From the date of the insolvency of the corporation which the plaintiff represents, until her death, Armenia H. Simmons was the owner of stock therein to the amount of $4,000. Under the law of Minnesota her contract of subscription carried with it a further contract to be liable for any indebtedness of the corporation, in case of deficiency, to the amount of the par value of her stockholdings. The corporation was found to be insolvent in August, 1907, by a Minnesota court, and a way was fixed by which the deficiency could be collected. Her liability as a stockholder was therefore fixed by the court during her lifetime, and the law under which the court acted has been found to be constitutional by the Supreme Court in Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163.

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

The power of the court to fix her personal responsibility grows out of the accepted theory that the presence of the corporation carried with it the presence of the stockholders who were its component parts. She was to pay this fixed liability by calls based upon the number of shares of stock held by her. The second assessment called for the payment of a certain proportion of the liability already incurred. It was in no sense a personal judgment. The personal judgment had long before that, and in her lifetime, been entered up. This second call is for 64 per cent. on each share of the capital stock of said corporation, and against the persons liable on account of said shares. It is true that in the call such person is named in the alternative as a stockholder, but I am of the opinion that the defendant herein is a stockholder in the sense of that call.

I appreciate the harshness of the situation which mulcts the unfortunate subscribers to this fateful enterprise, and am tempted to be critical in definition; but they made their own bed with eyes wide open, and creditors have some rights which the unwary investor is bound to respect. The mere fact that Armenia H. Simmons was dead at the time the last call was made seems entirely immaterial in a suit by the receiver against her estate to recover upon the liability which had been fastened upon her during her life.

Demurrer sustained. Let the second defense to the second count be stricken out.

MOSS et al. v. CITY OF PITTSBURG.

(Circuit Court of Appeals, Third Circuit. December 12, 1910.)

No. 1,431 (63).

JUDGMENT (§ 256*)—VALIDITY—VARIANCE FROM RECORD.

A judgment, which purports to have been entered on the verdict of a jury, is not supported by the record, where that discloses no verdict, but shows a compulsory nonsuit.

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

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

Action at law by Frank H. Moss and others against the City of Pittsburg. Judgment for defendant (178 Fed. 605), and plaintiffs bring error. Reversed.

Asa Leroy Carter, for plaintiffs in error.

Charles A. O'Brien, C. Elmer Bown, and Lee C. Beatty, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

PER CURIAM. The final judgment in this case in the court below purports to have been entered upon the verdict of the jury in favor of the defendant, the city of Pittsburg, against the plaintiffs. The record discloses no verdict, and in fact the trial court ordered a compulsory nonsuit. Accordingly the judgment is not supported by the record.

The judgment will therefore be reversed, and a new trial awarded.

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

LORAIN STEEL CO. v. WHITE MFG. CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 46.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—RAILWAY SWITCH STRUCTURE. The Moxham patent, No. 536,734, for a railway switch structure, claim 1, is void for lack of invention. Claim 6, conceding it valid as showing invention, must be limited to the precise structure described. As so limited, *held* not infringed.

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

Suit in equity by the Lorain Steel Company against the White Manufacturing Company. Decree for defendant (158 Fed. 413), and complainant appeals. Affirmed.

On appeal from a decree of the Circuit Court for the Southern District of New York dismissing the bill of complaint which was founded upon claims 1 and 6 of letters patent No. 536,734, granted April 2, 1895, to Arthur J. Moxham for an improvement in railway switch work.

The opinion of the Circuit Court was filed December 30, 1907, and is reported in 158 Fed. 413.

Linthicum, Belt & Fuller (Charles MacVeagh, Charles C. Linthicum, and D. Anthony Usina, of counsel), for appellant.

H. D. Donnelly, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The Moxham patent in suit relates to frogs, mates, crosses or similar structures in railway tracks in which the part subject to most wear may be made more durable than the other parts of the switch-pieces and easily removable therefrom.

The crossing points of the two rails is subject to greater wear than the rest of the track and is a source of much trouble and expense. The object of the patentee was to provide a switch-piece in which is inserted at the point of excessive wear a plate of more durable quality than the remainder of the track and one which may easily be removed for realignment or replacing. The central portion of the frog is cast with a pocket adapted to receive the more durable plate which may be forged, rolled or cast. The central casting has formed upon it short projections conforming to the shape of the abutting rails and in alignment therewith. To these projections the abutting rails are secured.

The plate may be secured in place in the pocket by the following method. In the bottom of the plate, bolts, having washers at their lower ends, are screwed. Around the inside of the pocket is a ledge. After the plate is placed in the desired position the space beneath it is filled with cement or some similar substance which will flow around the bolts and bond the whole in place, the ledge holding it in position.

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

The plate can be removed easily by applying force sufficient to break the bonding material.

The claims in issue are the first and sixth. They are as follows:

"1. A railway switch structure which consists of a metallic structure provided with a pocket in which a plate is grooved so as to form the flangeway and point is removably secured, the rails of the remainder of said switch being secured to said metallic structure."

"6. A railway switch piece consisting of a body portion having a pocket adapted to receive a plate, a plate in said pocket having track surfaces and depending holding down members, projecting downward from the plate into the space beneath, said space below the plate being filled with a material adapted to support the plate and bond the holding down members substantially are described."

This patent was before the Circuit Court of Appeals of the Sixth Circuit in Johnson Co. v. Toledo Traction Co., 119 Fed. 885, 56 C. C. A. 415. Three of the patent drawings are there reproduced and the essential features of the description are quoted. The claims involved were the first five, which were held invalid for lack of invention, the court conceding that the claims were not anticipated as the Moxham device was not shown by any structure of the prior art. It held, however, that when the demand for a removable wearing center became general, owing to the tremendous growth of electric railways, it required only the skill of the mechanic to produce such a structure. The two claims of patent No. 540,796 to Moxham were also involved in the decision of the Sixth Circuit. This was a patent for the method of retaining the switch plate in the pocket by pouring in molten zinc, or other soft retaining metal, in the space between the plate and the walls of the pocket.

The first claim of this patent sufficiently describes the invention and is as follows:

"1. A railway switch structure comprising a body portion having the diverging rails secured thereto and having a pocket adapted to receive a plate, a plate in said pocket having flangeways and the point formed thereon and a retaining material between the plate and sides of said pocket whereby the plate is held in position in said pocket."

Speaking of this patent the court says:

"It is abundantly shown that in various branches of machine and foundry work soft retaining metal has been long used as a cheap device for fastening parts together and also for holding parts in alignment."

The court reached the conclusion that, at best, Moxham used a well known method of securing two parts rigidly together in such a manner that they might be separated without being destroyed. That although the particular parts had not been previously so fastened, it did not require an exercise of the inventive faculty to use an old and well known retaining material for this purpose. In other words, the fact that the parts had never before been so fastened did not impart novelty to the old method of fastening. The court, citing Potts and Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275, says:

"It is merely the case of a new use, without any change in the method of using the old element to adapt it to the new use or any new mode of application."

The Circuit Court for the Northern District of Ohio, and the Circuit Court of Appeals for the Sixth Circuit having held that the first claim of the patent here in suit is invalid, we think that an orderly administration of the patent law demands that we should follow these decisions unless clearly persuaded that they are erroneous. We are not persuaded. The claim is a broad one designed to cover any metallic switch structure, provided with a pocket in which a grooved plate is removably secured, the rails of the remainder of said switch being secured to said metallic structure. We are not prepared to hold, in view of the prior art, that it involved invention to produce such a structure.

The sixth claim of the patent in suit remains to be considered. Though this claim was not involved in the Ohio action, the two claims of No. 540,796 were involved, and the language of the court, as we have seen, is as applicable to the claim now under discussion as to those which the court was considering. It cannot be doubted that the court was of the opinion that the use of any well known retaining material for fastening the parts together and holding them in position involved not invention, but mechanical skill only.

In the case of Lorain Steel Co. v. Barbour-Stockwell Co., 170 Fed. 79, 95 C. C. A. 361, the Circuit Court of Appeals for the First Circuit had the Moxham patent No. 539,878 under consideration. The court says:

"The particular arrangement described for uniting and securing the structural connection between the hardened center piece and the rails through a scheme for a shrinkage grip under the cooling process of a separate body of molten metal poured into the mould which surrounds the center plate and rail ends, thus firmly uniting the whole together without the external fastenings of bolts and plates, taken in connection with the idea of presenting a solid center piece with a hardened surface, involved invention of some degree of merit, and as such entitled to protection commensurate with the degree of the actual invention involved."

We would find little difficulty in agreeing with this statement were it applicable to the claim we are now considering. This claim (the sixth of No. 536,734) is for a railway switch piece having the following elements:

First.—A body portion having a pocket adapted to receive a plate.

Second.—A plate in said pocket having track surfaces and depending holding down members projecting downward from the plate into the space beneath.

Third.—The space below the plate being filled with a material adapted to support the plate and bond the holding down members.

It will be observed that nothing is said in the claim as to the general plate being harder than the body portion. Indeed, the complainant's expert expressly disclaims the idea:

"That Moxham was the first man to suggest a railway switch structure provided with a wearing piece, inserted at the point of intersection or crossing, harder than the rest of the casting."

Manifestly, invention cannot be predicated of this feature. It is possible that it involved invention to secure the plate to the body portion by the use of depending members, the space below the plate being

filled with material adapted to support the plate and bond the holding down members. But the defendant does not use this method, if the claim be limited, as we think it must be, to what is described and shown. The defendant's structure is a "crossing"; it does not have the downwardly projecting members of the patent, viz., the bolts having washers at their lower ends, and the space beneath the plate is not filled with cement, melted sulphur or a similar substance which is fractured and broken up when sufficient force is applied to pull up the plate.

The defendant's structure, in principle and operation, is substantially similar to the alleged infringing structure in the Ohio case. The central plate is cut away at its ends so that about half of the end wall is vertical and below this portion the plate is cut away so as to form under-cut shoulders. The space below the plate and between it and the body portion is filled with molten cast iron, babbitt metal or spelter. Such metal would, it seems, not be broken up and disintegrated by the lifting strain as described in the patent.

Even if it be assumed that the sixth claim is valid as showing a limited invention, we think it must be confined to what the patentee describes, and, as so limited, the defendant does not infringe.

The decree is affirmed.

UNDERWOOD TYPEWRITER CO. v. TYPEWRITER INSPECTION CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 119.

1. PATENTS (§ 328*)—INFRINGEMENT—TYPEWRITERS.
The Wagner patent, No. 559,345, for improvements in typewriting machines, relating to means for locking the key levers at a predetermined point in the travel of the carrier across the page, claims 17, 18, and 20 *held* infringed, and claim 19 not infringed by the mechanism of the Schneelock patent, No. 852,400.

2 PATENTS (§ 328*)—INFRINGEMENT—TYPEWRITERS.
The Wagner patent, No. 633,672, for improvements in typewriting machines, *held* not infringed by the mechanism of the Schneelock patent, No. 852,400.

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

Suit in equity by the Underwood Typewriter Company against the Typewriter Inspection Company. Decree for defendant, and complainant appeals. Modified.

See, also, 180 Fed. 726.

The patents are numbered 559,345 and 633,672, and are referred to respectively as senior and junior. The opinion at circuit is found in 177 Fed. 230. The dismissal was upon a finding of noninfringement.

Arthur von Briesen and Eugene Eble, for appellant.

Alfred Wilkinson and J. Edgar Bull, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

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

LACOMBE, Circuit Judge. The patents have to do with means for locking the key-levers of a typewriting machine instantaneously at a predetermined point in the travel of the carriage to prevent the operator from printing superposed letters at the end of a line, whose length is predetermined by the adjustment of the carriage. The locking is effected by the engagement of a locking-bar with hooks on the tops of the keys near their forward end, and does not involve any straining, locking, or otherwise manipulating the universal escapement bar or any portion of the escapement mechanism. Provision is also made for sounding a warning bell to apprise the operator shortly before the keys are locked. The junior patent further provides means for releasing the keys after they are locked so as to allow the operator to print two or three more letters if needed to complete a syllable.

The patents are very fully set out, the alleged infringing machines described and the claims recited and analyzed in the opinion below, where will also be found a sufficiently full review of the prior art. The claims involved are 17, 18, 19, and 20 of the senior patent, and 25, 27, and 28 of the junior patent. We shall undertake to do no more than indicate briefly the reasons which induce us to modify the decree.

The Circuit Court held that utility and novelty cannot be denied, and that there was no anticipation. Nevertheless the art was a crowded one, which circumstance and the action of the Patent Office, requiring amendment of some of the claims, preclude any broad range of equivalents. We may turn at once to the claims themselves. Of the senior patent claim 17 is for—

"17. A paper-carriage and an actuating-key provided with a catch or shoulder located at the forward or power-receiving portion of the key, combined with a forwardly-oscillating bar adapted to engage or lock said catch, a forwardly-oscillating actuating-arm for said bar normally free from said bar, and an actuating-shoulder for said arm, said carriage being provided with a lip adapted to engage said actuating-shoulder to actuate said arm substantially as described."

We concur with the Circuit Court in the conclusion that infringement is not avoided by oscillating the bar backward to lock and forward to unlock. We find a fair equivalent of the forwardly-oscillating arm in the bell-crank lever of defendant, one arm of which, carrying a forwardly-projecting extension, reciprocates forward and backward pushing a pin against the depending tail which communicates motion to the oscillating locking-bar. The circumstance that there are connections between the arm and the source of motion and between the tail and the locking-bar seems unimportant. The claim, however, expressly provides that the actuating-arm shall be "normally free from said bar." It must equally be normally free from the connections through which motion is imparted to the oscillating bar. Whether in defendant's machines it is thus normally free or not is a question which is in dispute upon the evidence, and we find it difficult to reach a conclusion as to what is the correct solution. Inasmuch, however, as the defendant owns the Schneelock patent, in general conformity to which its machines are built and that patent

shows the pin on the arm and the part with which it engages normally apart and states in the specifications that the "pin is moved forward to engage the tail," we may infer that some of defendant's machines have been thus constructed. If defendant is correct in the contention that its machines are so organized that they will operate when this arm, or rather the pin or its extension, is not normally free from but is coupled to the tail so that as soon as the extension arm begins to move forward it will press upon the tail, they are free to sell such machines; they will not come within the language of this claim. We find in the shoulders 86 and 87 on the swinging lever of defendant a fair equivalent of the "actuating-shoulder" of the claim; and in the dog or pawl 78 of defendant's machine a fair equivalent of the "lip" on the carriage.

Claim 18 reads as follows:

"18. A paper-carriage and an actuating-key, combined with a bar adapted to engage or lock the key, a swinging arm having its free end placed in proximity to and normally out of contact with the bar, a bell-hammer placed in advance of the bar in the path of the free end of the arm, and a lip on the carriage for actuating the arm so as to make its free end successively strike the bell-hammer and the bar substantially as described."

Defendant's device has in reality two forward extensions of the reciprocating or oscillating arm of the bell-crank lever, one to engage the bell-hammer, the other to engage the "tail," and they come successively into operation. This seems to be a fair equivalent of the single oscillating arm of the claim striking the two other parts successively. Since we are satisfied that some of defendant's machines have been made with the end of the extension "free—in proximity to and normally out of contact with" the tail it strikes—we conclude that infringement of this claim is shown.

Claim 19 reads as follows:

"19. A paper-carriage and an actuating-key, combined with a bar adapted to engage or lock the key, an actuating-arm for the bar, a rock-shaft for said arm, a shoulder on said rock-shaft, said carriage being provided with a lip to engage the shoulder for actuating the shaft, and a bell-hammer provided with an inclined movable projection along which the arm rides in its forward stroke to actuate the bell-hammer, said arm on its return stroke being made to pass under or lift the projection independently of the bell-hammer substantially as described."

This is a very specific claim. We find in defendant's structure no inclined movable projection along and on top of which the arm rides on its forward stroke and under which it passes on its return stroke. We cannot read these qualifications of the inclined movable projection out of the claim, and with them in there is no infringement.

Claim 20 reads as follows:

"20. A paper-carriage and an actuating-key, combined with a bar adapted to engage or lock the key, an actuating-arm for the bar, a rock-shaft for said arm, a shoulder on said rock-shaft, a lip on the carriage for engaging the shoulder, and a bell-hammer actuated by said arm, said shoulder being step-shaped so as to be intermittently actuated by the carriage lip for separately actuating the bell-hammer and the locking-bar substantially as described."

Defendant seeks to differentiate its device from this claim by the circumstance that it does not have a rock-shaft for the swinging arm, but we find in its upper lever a fair equivalent for such rock-shaft. It is conceded that in defendant's machine there is a step-shaped part, but it is contended that it does not infringe because it is not located on a rock-shaft. Since, however, it is located on the equivalent of the rock-shaft, infringement is not thus avoided.

In finding noninfringement of the claims of the senior patent the Circuit Court relied on the self-imposed limitations of the claims, especially such as were written in after rejection by the Patent Office. Judge Ray says:

"I think the claims in issue call for a forwardly-swinging arm having one end free to engage and carry forward and hold the locking-bar or rod under the hooks and consequently in locking position. This is not the mode of operation of the defendant's device. In the one case the locking-rod is pushed forward by the free end of a forwardly-oscillating bar. In the other case the one end of the cam surface lever is depressed—thereby—lifting a bar, neither end of which is free, etc."

This qualification—"a free end"—is found in claims 17 and 18 as we have seen, but there is no such qualification in this claim, which was original claim 38 and was never rejected or amended. We think defendant's device is within its terms.

The junior patent is a very lengthy document and deals with several different improvements, for shifting from upper to lower case, for detachable envelope guide, etc. The specifications relating to hand-operated means for releasing the type bar lock of the senior patent, which is the only matter before us, extend from page 5, line 39, to page 6, line 39. We do not find in these specifications nor in the patent drawings sufficient warrant for the "drawing" upon which argument was had. That drawing shows the locking-rod 127 cut off so as to facilitate its being thrust back by the button. The patent expressly states that it "projects the entire length of the machine."

The patent is a narrow one in a crowded art, and not entitled to any broad construction, nor to any liberal application of the doctrine of equivalents. What the patent shows is a button which projects through the casing or framing of the machine, the shank of which button is attached directly to the locking-bar itself. By pressing the button the locking-rod is forced out of the path of the catches of the type keys.

As to the patentability of such an addition to the combination of the prior patent, we need express no opinion, since we are satisfied that infringement of the three claims relied upon is not made out. The claims need not be restated here. They will be found in the opinion below. No. 27 includes as one element, "a releasing-button, connected with said universal locking-bar," which is what the patent shows, a device whereby the locking-bar is pushed back out of engagement with the hooks by main strength, and held there by the hand while the additional characters are printed. We concur with the court below in the finding that:

"In defendant's machine a releasing-button operates to remove from action that part of the mechanism, which presses the locking-bar into locked position so that it no longer engages to keep the locking-bar in locking position and, by means of a spring the locking-bar is at once restored, on pushing the button, to its normal or unlocked position."

Infringement of this claim is not shown.

Claim 25 includes as an element "hand-operated means for releasing the lock-bar," a phrase broad enough to cover any and every means, if only it be operated by hand. The patentee was entitled to no such broad claim, and it can be saved only by reading into it the particular means shown in the patent, which defendant's structure does not infringe. The same may be said of claim 28, which enumerates as one element, "intermediate mechanism between the line-stop and the universal locking-bar to throw the same out of engagement."

The decree is reversed as to the senior patent and cause remanded with instructions to decree in favor of complainant on claims 17, 18, and 20, and to dismiss as to claim 19. The decree is affirmed as to the junior patent. No costs to either side in either court.

WINCHESTER REPEATING ARMS CO. v. PETERS CARTRIDGE CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 111.

PATENTS (§ 328*)—INFRINGEMENT—PAPER-SHELL CARTRIDGE.

The Gardner patent, No. 563,157, for a paper-shell cartridge, as voluntarily narrowed by the patentee to meet objections of the Patent Office, and limited by the language of the specification, *held* not infringed.

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

Suit in equity by the Winchester Repeating Arms Company against the Peters Cartridge Company. Decree for defendant (173 Fed. 86), and complainant appeals. Affirmed.

The bill alleged infringement by the defendant of claims of letters patent No. 563,157 granted to John Gardner, June 30, 1896, for an improvement in paper-shell cartridges.

Edmund Wetmore and George D. Seymour, for appellant.

Frank T. Brown and Francis A. Hopkins, for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. The patentee states that his invention relates to an improvement in paper-shell cartridges having a paper tube and a drawn sheet-metal cap applied to one end thereof. He says his object is to prevent the tube from breaking at or near the inner edge of the metallic cap, when the cartridge is in the gun. He thus prolongs the life of the paper tube and removes the necessity of extracting it manually from the barrel of the gun. In order to accomplish

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

the desired result, he provides the cartridge with a sheet-metal cap continuously upset around its circumference, so as to be yielding at or near the point where the paper tube enters it. The result is that this portion of the cap yields sufficiently to take the strain from the tube.

The drawing shows a cap, the inner end of which is formed with several annular circumferential grooves extending continuously around the cap, the convex sides of the grooves press into the paper of the tube. These grooves are located in planes at right angles to the longitudinal axis of the tube. The patentee asserts that they permit the cap to yield sufficiently to prevent the paper from being broken or torn at or near the point where it enters the cap. The grooves would not yield sufficiently if they were interrupted—viz., ceased to be continuous. If crimps, letters or characters be substituted for grooves, they will not perform the desired function unless they are all connected together so as to preserve the effect produced by the continuous upsetting of the metal.

The patentee says:

"My observation is that the chief yielding of the caps is longitudinal, for the firing of the cartridges straightens out the grooves enough to increase permanently the length of the caps."

The claims are as follows:

"1. A paper-shell cartridge having a paper tube, and a drawn sheet-metal cap which is continuously upset around its circumference, whereby the said cap is permitted to yield when the cartridge is exploded, so as to prevent the paper tube from breaking at or near the point where it enters the cap, substantially as described."

"2. A paper-shell cartridge having a paper tube, and a drawn sheet-metal cap which is constructed with one or more annular circumferential grooves located in a plane or in planes at a right angle to the longitudinal axis of the cartridge, substantially as described, and whereby the said cap is permitted to yield, when the cartridge is exploded, so as to prevent the paper tube from breaking at or near the point where it enters the cap."

It will be observed that the first claim makes it essential that the cap shall be continuously upset around its circumference. If upset in the manner illustrated by the description and drawing and specifically referred to in the second claim, the upset portion must extend entirely around the cap. The grooves, crimps or letters must not be interrupted or intermitted, for if they are, they cease to be continuous.

On this subject the specification says:

"If I employ crimps or letters or characters in the place of such grooves they must all be connected or joined together, so as to have the effect of a continuous upsetting of the metal."

As before stated, an essential element of the first claim is a paper cartridge having a metal cap which is continuously upset around its circumference. This, as we understand it, means that by reason of said continuous circumferential upsetting, the metal is permitted to yield. This language cannot be construed to mean a substantially continuous upsetting. It does not mean an upsetting which is partly or intermittingly continuous. The complainants ask to have the claim construed as if the word "continuously" were "discontinuously."

The second claim is limited to annular circumferential grooves. The claim certainly would not cover a cap where the grooves are not annular, circumferential or continuous. Indeed the patentee distinctly says:

"The grooves b, it will be noted, extend continuously around the cap, which would not yield, as described, if they were interrupted."

As originally filed, the specification contained two claims broad enough to cover any means by which the metal cap was made sufficiently yielding at or near the point where the paper tube enters it. These claims were rejected by the examiner and thereupon the description was amended by striking out the broad claims and inserting the claims now in controversy. The description was also amended to conform to the limited claims. It is not necessary to inquire whether the inventor was entitled to broader claims than he has received. The fact that he acquiesced in the ruling of the examiner and accepted the limited claims here in issue estops him from now claiming what he formally abandoned. The courts are precluded from construing the narrowed and limited claims as having the same meaning as the broad claims originally presented.

The defendant's shell is provided with a band of diagonal crimps forming a band around the cap near its inner end. There are also two rows of interrupted circumferential depressions located on opposite sides of, and equidistant from, the band of diagonal crimps. The interruptions are so arranged that the continuous part of one depression is opposite the interrupted part of the other; in other words, the depressions are staggered.

We agree with the judge of the Circuit Court in thinking that these shells do not infringe for the reason that the cap is not continuously upset around its circumference and that the depressions in the defendant's cap are not the annular or circumferential grooves of the claims located in a plane or planes at right angles to the longitudinal axis of the cartridge.

In our view the question is a simple one. The patentee in order to secure the patent, acquiesced in the decision of the Patent Office that broad claims could not be allowed, in view of the prior art. He accepted claims substantially limited to the precise structure shown in the drawing and described in the specification. The defendant's structure is not within these claims unless a construction be given them which the law does not permit.

The subject is carefully considered in the opinion of the judge of the Circuit Court and we deem it unnecessary to add anything further to his decision. Our conclusion as to infringement renders a consideration of the other defenses unnecessary.

The decree is affirmed.

UNITED STATES v. WESTERN & A. R. CO.

(District Court, N. D. Georgia. December 1, 1910.)

1. RAILROADS (§ 229*)—REGULATION—INTERSTATE COMMERCE—SAFETY APPLIANCE ACT—APPLICATION—"CONNECTION THEREWITH."

Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act Cong. April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), declares that it shall apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and to all other locomotives, tenders, cars, and similar vehicles used in "connection therewith." *Held* that, where a car not properly equipped is moved in a train containing cars carrying interstate commerce, there is a violation of the act, notwithstanding the defective car is not immediately connected with that carrying the interstate shipment.

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

For other definitions, see Words and Phrases, vol. 2, pp. 1432–1434.

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

2. RAILROADS (§ 229*)—REGULATION—SAFETY APPLIANCE ACT—VIOLATION—TERMINATION OF CARRIAGE.

A declaration against a railroad company for violating Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), alleging that on a specified date defendant hauled a certain car with a defective coupler, so that it could not be coupled by impact, "in and around Atlanta in the state of Georgia," was not demurrable as showing that the interstate shipment had already reached its destination, under the rule that whenever a car is loaded in one state with a commodity which is destined for another state, and begins to move, interstate commerce is begun, and does not cease until the car has arrived at its point of final destination.

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

Action by the United States of America against the Western & Atlantic Railroad Company to recover a penalty for a violation of the safety appliance act. Demurrer to the declaration. Overruled.

F. C. Tate, U. S. Atty., and Jno. W. Henley, Asst. U. S. Atty.

Tye, Peeples & Jordan, for defendant.

NEWMAN, District Judge. This is a suit under the safety appliance act. The declaration, after certain formalities, proceeds as follows:

"That said defendant is a common carrier engaged in interstate commerce by railroad among the several states and territories of the United States, particularly the states of Tennessee and Georgia. Plaintiff further alleges that in violation of the act of Congress known as the 'Safety Appliance Act,' approved March 2, 1893 (contained in 27 Statutes at Large, p. 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, p. 85), and as amended by an act approved March 2, 1903 (contained in 32 Statutes at Large, p. 943), said defendant on April 17, 1909, hauled on its line of railroad one car, to wit, S. A. L. 30309, said car being one regularly used in the movement of interstate traffic, but at the time of said violation being

empty and hauled in a train containing interstate traffic, one car in said train, to wit, P. F. W. & C. Ry. 823210, containing pipe consigned from Richmond, in the state of Virginia, to Atlanta, in the state of Georgia. Plaintiff further alleges that on said date defendant hauled said car S. A. L. 30309, as aforesaid, over its line of railroad in and about Atlanta, in the state of Georgia, within the jurisdiction of this court when the coupling and uncoupling apparatus on the 'B' end of said car was out of repair and inoperative, the chain connecting the lock pin or lock block to the uncoupling lever being broken on said end of said car, and the eye bolt being broken off of the lock block on the said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by section 2 of the safety appliance act, as amended by section 1 of the act of March 2, 1903."

Then follows the claim that defendant is liable in the sum of $100, and a prayer for judgment. To this declaration a demurrer was interposed, which, as developed on argument, makes two points: First, that the declaration fails to show that the car containing interstate commerce was immediately connected with—that is, next in—the train of cars to the one on which it is alleged there was a defective appliance.

The intent of the amendatory act of 1903 (Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1909, p. 1143]) is that Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended in 1896 (Act April 1, 1896, c. 87, 29 Stat. 85), "shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce and in the territories or the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith." It seems perfectly clear to me, and such, I think, is the effect of all decisions that have been rendered, that it is immaterial whether the car which is engaged in interstate commerce, carrying an interstate shipment, is immediately connected with the car having the defective appliance or not, so long as it is in the same train of cars. This is clearly alleged in this declaration.

In United States v. Railroad Co., 174 Fed. 638, 98 C. C. A. 392, decided by the Circuit Court of Appeals for this Circuit, Judge Shelby, in delivering the opinion of the court, says:

"The effect of the amendment (act of 1893) is to apply the provisions and requirements of the act to all cars used on any railroad engaged in interstate commerce and to all other cars used in connection therewith. If it is so used it makes no difference if the defective car was empty or how it was loaded at the time. The act, as amended, applies to all cars and trains operated by a railroad carrier of interstate commerce over an interstate railway, irrespective of whether the defective car is being hauled from one point to another in the same state or not; it being part of a train engaged in interstate commerce."

The next point is that the interstate shipment contained in car P. F. W. & C. Ry., 823210, was consigned from Richmond, in the state of Virginia, to Atlanta, in the state of Georgia, and, according to the declaration, it had already reached its destination. The meaning of the declaration would seem to be that the train in question was passing through or around Atlanta, and presumably being

switched from one railroad yard to another in order to be delivered at its final destination. This being true, and if the interstate shipment had not reached its final destination, it would come within the safety appliance act.

Judge Brawley, in charging the jury in United States v. Atlantic C. L. R. Co., in the District Court in South Carolina, used this language (Kent's Index-Digest of Decisions Under the Federal Safety Appliance Act, Appendix, 267):

"Wherever a car is loaded in one state of the Union with a commodity which is destined for another state, and begins to move, then interstate commerce has begun, and does not cease till the car has arrived at its point of final destination."

In his charge Judge Brawley cites the charge of Judge Landis to the jury in United States v. Belt Ry. Co., in the District Court for the Northern District of Illinois (Kent's Index-Digest of Decisions Under the Federal Safety Appliance Act, Appendix, 244). In the latter case Judge Landis says this:

"If, therefore, between the point of origin of this shipment and the point of destination, the car in which it is being vehicled passes over a line of track wholly within a city, within a county, within a state, the railway company operating that line of track while moving such car is engaged in interstate commerce."

I think that the declaration is sufficient, and that the demurrer upon both points should be overruled, and it is so ordered.

In re CRIBLIER.

(District Court, D. Connecticut. January 5, 1911.)

No. 2,299.

1. BANKRUPTCY (§ 314*)—SALE OF BUSINESS—NONCOMPLETION OF CONTRACT—DAMAGES.

Where, after a sale of a bankrupt's saloon business for $1,400 as a going business, the trustee delivered the keys to the attorney for the landlords, who refused to give possession to the purchaser pursuant to a notice given at the sale that they would not lease the premises to any purchaser except L., and, after the purchaser had failed to get possession, he sold the property so purchased to L. for $2,000, he was not entitled to the allowance of a claim against the bankrupt's estate for a cash disbursement made in his endeavor to secure possession of the property purchased.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

2. BANKRUPTCY (§ 272*)—DISBURSEMENT BY TRUSTEE—REMOVAL OF GOODS.

Where, after a sale of a bankrupt's business, the trustee turned over the keys to the attorney for the landlords, who were hostile to the purchaser, and refused to give the purchaser possession, and the landlords then notified the trustee to remove the property from the building within 48 hours, which he proceeded to do, while the purchaser was endeavoring to get possession, the trustee was not entitled to an allowance for the cost of removing the property and in storing it in another place.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 272.*]

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

3. BANKRUPTCY (§ 314*)—CLAIM—PAYMENT FOR WATER BY LANDLORD.
Where the landlords' payment of a water bill for the premises which a bankrupt had occupied was made after they were in undisputed possession to avoid having the water shut off from the premises, and such payment was of benefit to themselves and their succeeding tenant, they were not entitled to an allowance thereof as a claim against the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

4. BANKRUPTCY (§ 318*)—CLAIM—LANDLORDS' RIGHT TO RENT.
Where a bankrupt's trustee gave up the keys to the bankrupt's place of business almost immediately after he received them to the attorney for the landlords, the trustee incurred no liability for rent which accrued before he took possession.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 318.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Paul E. Criblier. On certificate of referee with reference to certain claims allowed and disallowed. Reversed in part, and affirmed in part.

The bankrupt, Criblier, who had been carrying on a saloon business in Waterbury, was adjudged a bankrupt November 12, 1909. At the hearing of a petition for the appointment of a receiver before the referee, it was stated that an application for a license had been made by Criblier, that the business was still going on, and that the place would sell for more if the business was continued than if it was closed. A receiver was appointed, the property appraised and advertised, a trustee was elected at the creditors' first meeting, and the creditors directed that the property, consisting of the stock, furniture, and implements on hand, and the good will of the business, and whatever right to possession or lease Criblier had in the building wherein the business was carried on should be immediately sold. The referee also announced that the sale included whatever right in the application for a license and right to a license the trustee could convey. At the sale one Cassidy, who had been attorney for the bankrupt, also appeared for a Mr. Lindermann and the owners of the property leased to the bankrupt, and announced at the sale that no purchaser except Mr. Lindermann would be given a lease of the premises, and that the owners had agreed to lease to Lindermann. Claimant John J. O'Neill, who desired to purchase, stated that the question of the lease would have to be determined thereafter, and expressed his intention if he obtained the property of maintaining that the bankrupt had a lease, although he did not claim that it was in writing. No written notice to quit had been given the bankrupt, and on the bidding the property was sold to O'Neill for $1,400; all the creditors present and their representatives, including Mr. Cassidy, agreeing that O'Neill's bid should be accepted. The trustee then qualified in order to convey the property to O'Neill, and, the receiver having turned over the keys to the trustee, the latter delivered them to Cassidy for the owners, on Cassidy's guaranty that the estate would not suffer, that if Mr. O'Neill did not pay the $1,400 some one else would, and that he would hold the trustee harmless from liability on his bond. O'Neill before 4 o'clock on the day of the sale offered to pay the $1,400 and demanded the keys, but was informed that they had been given to Cassidy as attorney for the owners of the building. O'Neill was refused possession, and, while he was taking proceedings before the referee in Hartford to recover the property, a large part thereof was taken away from the bankrupt's place of business and stored in property belonging to one Blakeslee, the trustee having been notified by the owners of the building to remove the property within 48 hours, and the bill of the trustee for $48 is for the cartage and storage of the property. Thereafter, and on February 10, 1910, Lindermann paid O'Neill $2,000 for the property, and his efforts to enforce his alleged rights under the purchase were withdrawn. O'Neill thereupon filed a claim for alleged cash disbursements amounting to $456, and testified that he

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

would have bid up to $2,000 for the busines if Lindermann had continued to bid against him and in his opinion the property was worth $3,500. Murphy, the trustee, testified that he thought O'Neill meant to get hold of the property and tie it up so that no one else "could get in there," and for this reason delivered the keys to Cassidy. He also testified that he was not informed that there was any order that he should transfer any right to the license which he could convey. Cassidy testified that he had acted jointly for Ohmeis & Co. and for Lindermann, and that it was the desire of Ohmeis that Lindermann should be the purchaser, and he was afraid O'Neill, with the aid of Criblier, the bankrupt, would keep possession of the property.

Wm. E. Thoms, for O'Neill.
John H. Cassidy, for trustee and owners.

PLATT, District Judge. These are the disputed points:—

1. John J. O'Neill filed a claim for cash disbursements amounting to $456. Some of this was paid out and some was not, but the referee makes no distinction in that respect. He allowed $75 of the claim, because, he says, O'Neill had a right to think, and did think, that he was buying a going business at the sale which took place at the time of the first meeting of creditors, November 22, 1909. Whether that sale was made by the receiver who had held possession prior to the election of the trustee, or by the trustee himself, cannot be easily determined; but it will be taken for granted that the trustee made the sale.

From the facts found by the referee his conclusion does not logically follow. Notice was given that the owners protested against the sale of the lease to any one except Mr. Lindermann, and Mr. O'Neill obviously bought a pig in a poke when the property was knocked down to him. Mr. O'Neill bought some property and took a chance, to keep it where it was, despite the owners' wishes about the matter. He made $600 on the trade, and the referee adds $75 to that. That is inequitable, and the order is revoked.

2. The trustee asks $48 for moving the property purchased by O'Neill away from the premises, but the circumstances of the case are such that he ought not to have it. The referee's order therein was right and is sustained.

3. The owners of the property paid the water bill in December, after they were in undisputed possession, to avoid having the water shut off from the premises. This was to benefit themselves and their new tenant, and they surely cannot expect the bankrupt's creditors to reimburse them for that outlay. In respect of that matter the order of the referee was right and is affirmed.

4. The trustee gave up the keys about as soon as he got them, and therefore incurred no liability for rent which had accrued before he took possession. If the owners had limited their claim to the time the bankruptcy receiver was in charge, the situation might be different; but this court has nothing to do with the treatment of the property by the state officer, and furthermore the position occupied by the owners in this matter is not one which entitles them to invoke the equity powers of the court.

The order of the referee disallowing that claim is affirmed.

UNITED STATES v. BROOKE et al.

(District Court, S. D. New York. November 21, 1910.)

COURTS (§ 346*)—FEDERAL COURTS—JURISDICTION—ADOPTION OF STATE PRACTICE—ATTACHMENT.

Since common-law actions can only be brought in a federal court in the district in which the defendant is an inhabitant, or in which he is found at the time of the serving of the process, unless he voluntarily appears, an action cannot be maintained by the United States against a nonresident in a federal court by attaching defendant's property within the jurisdiction, without personal service of summons, notwithstanding Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), providing for conformity to state practice in actions at law, and section 915 providing that such remedies by attachment are authorized in the federal court as are provided by the laws of the state in which the court is held, since an attachment cannot take the place of initial process, but is merely an incident of the suit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 918; Dec. Dig. § 346.*

Conformity of practice in common-law actions to that of state courts, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

Action by the United States of America against Fred A. Brooke and another, doing business as Joseph Brooke & Co. On motion to vacate an attachment. Granted.

Curie, Smith & Maxwell, for the motion.

Henry A. Wise, U. S. Atty. (Wm. L. Wemple and Carl E. Whitney, of counsel).

HAZEL, District Judge. The attachment granted herein must be vacated on the ground that jurisdiction has not been obtained over the person of the defendants. According to the moving papers, the defendants are residents of Huddersfield, England, and are not residents of the state of New York, and cannot after due diligence be found therein or within the United States. The return of the marshal certifies that he is unable to find the defendants or either of them within the Southern district of New York.

The authorities uniformly hold that to merely find property of a defendant in the district does not mean finding the defendant therein, for the purpose of bringing suit against him. By section 914 of the statutes of the United States (U. S. Comp. St. 1901, p. 684) it is provided that the practice and mode of procedure in federal cases, other than equity and admiralty cases, conform to those of the respective states wherein such actions are brought, and by section 915 the same remedies by attachment are authorized in this court as are provided by the laws of the state in which the court is held. But such provisions do not expressly or impliedly give a United States District Court jurisdiction of proceedings in rem against the property of a nonresident defendant who has not been personally served. The Supreme Court has held that the attachment is only an incident of the suit. Ex parte Railway Company, 103 U. S. 794, 26 L. Ed. 461; Laborde v. Ubarri, 214

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

U. S. 173, 29 Sup. Ct. 552, 53 L. Ed. 955. And common-law actions can only be brought in the United States Circuit and District Courts in the district of which the defendant is an inhabitant or in which he is found at the time of serving the process, or, to give the court jurisdiction, he must voluntarily appear. Toland v. Sprague, 12 Pet. 300, 9 L. Ed. 1093; Anderson v. Shaffer, 10 Fed. 266; Erstein v. Rothschild, 22 Fed. 61; Lovejoy v. Hartford Ins. Co. (C. C.) 11 Fed. 63; Boston Electric Co. v. Elec. Gas Ltg. Co. (C. C.) 23 Fed. 838; Noyes v. Canada (C. C.) 30 Fed. 665; Harland v. United Lines Tel. Co., 40 Fed. 308, 6 L. R. A. 252. Several of the cases cited squarely hold that remedies by attachment do not give United States courts jurisdiction unless such jurisdiction was first obtained by proper service of process or the voluntary appearance of the defendant.

It is urged by the government that the cases cited are inapt for the reason that they are litigations between individuals, and not, as here, a suit by the United States against a nonresident doing business in this district. A sufficient answer is that this court possesses no power except such as the Constitution and acts of Congress confer, and, in the absence of a statute permitting the United States to maintain an action in this court irrespective of whether the defendant is an inhabitant of the district or is found therein, or empowering this court in an action arising out of violations of the customs laws to levy upon or seize property by warrant of attachment without personal service, it is difficult to perceive any merit in the contention, though it must be conceded that the inability of the United States to obtain relief in the courts of its creation presents an anomalous situation.

An order vacating the attachment on two days' notice to the United States may be entered.

BETTES v. BROWER.

(District Court, E. D. Oklahoma. January 6, 1911.)

No. 1,101.

(Syllabus by the Court.)

1. ABATEMENT AND REVIVAL (§ 3*)—UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY—METHOD OF RAISING QUESTION.

   In a suit in equity, the question of the jurisdictional amount involved should be raised by special plea rather than in the answer. And where the question is raised by denials in the answer, the cause will not be dismissed for want of jurisdiction unless evidence is sufficient to create a legal certainty against the jurisdiction.

   [Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 7–24; Dec. Dig. § 3.*]

2. INJUNCTION (§ 52*)—CUTTING GROWING TREES—INSOLVENCY.

   Where a suit is brought to restrain the cutting and removal of growing trees, a court of equity will take jurisdiction regardless of the question of the insolvency of the defendant.

   [Ed. Note.—For other cases, see Injunction, Cent. Dig. § 105; Dec. Dig. § 52.*]

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

3. EVIDENCE (§ 15*)—JUDICIAL NOTICE—DEGREE OF INDIAN BLOOD OF CITIZEN OF FIVE CIVILIZED TRIBES.
A federal court will not take judicial notice of the degree of Indian blood of a citizen of the Five Civilized Tribes; and will not presume, in the absence of proof, that such citizen was of such degree of Indian blood as to render his lands inalienable under existing acts of Congress.
[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 15.*]

4. GUARDIAN AND WARD (§ 44*) — POWER OF GUARDIAN TO LEASE WARD'S LAND.
Under sections 5489 and 5491, of Snyder's Laws of Oklahoma 1909, a guardian may lease the land of his ward for agricultural purposes for a term of years not exceeding the minority of the ward without an order of the probate court.
[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 192–195; Dec. Dig. § 44.*]

5. GUARDIAN AND WARD (§ 44*)—POWER OF GUARDIAN TO LEASE WARD'S LAND.
While standing timber is a part of the realty, yet a guardian may lease the land of his ward for agricultural purposes, without the order or approval of the probate court, where such land is well adapted to cultivation, with the right in the lessee to cut and remove the standing timber therefrom, that being merely incident to the lease.
[Ed. Note.— For other cases, see Guardian and Ward, Cent. Dig. §§ 192–195; Dec. Dig. § 44.*]

6. GUARDIAN AND WARD (§ 42*)—SALE OF WARD'S STANDING TIMBER—VALIDITY OF DEED.
Standing timber is a part of the realty, and an instrument executed by a guardian without the order and approval of the probate court, the sole purpose of which is the granting and selling the growing timber of his ward's land, is void under sections 3502 to 3511 of Mansfield's Digest of the state of Arkansas (Ind. T. Ann. St. 1899, §§ 2398–2407).
[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 175; Dec. Dig. § 42.*]

7. GUARDIAN AND WARD (§ 42*)—SALE OF WARD'S STANDING TIMBER—VALIDITY OF CONVEYANCE.
In a bill of sale by guardian of timber growing on his ward's land, an arbitrary declaration in the timber bill of sale that the growing timber shall be considered personal property, will not be given effect.
[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 182, 184; Dec. Dig. § 42.*]

In Equity. Bill by Joseph M. Bettes against J. M. Brower. Decree for complainant.

Ramsey & Thomas, for complainant.
Robert Crockett and A. H. Ferguson, for defendant.

CAMPBELL, District Judge. In this case the complainant, a citizen of Texas, claims the right to cut and sell certain timber standing upon lands which he holds under certain leases executed to him by the guardians of certain minors, owners of respective portions of the land. He alleges in his bill that the defendant, a citizen and resident of this district, with notice of his rights under the said leases and in violation thereof, and without license or authority, has entered upon the land and is cutting and removing the said timber therefrom, and threatening to and will continue to trespass upon said land and cut, destroy, and remove the timber growing thereon, unless enjoined from

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

doing so, to the complainant's great and irreparable injury and damage. He further alleges that the matter and amount in dispute in this case, exclusive of interest and costs, exceeds the sum of $2,000, and "that the value of the said wood, trees, and timber growing and being upon said land exceeds the sum of $2,500." In his answer the defendant denies that the matters and amount of money in dispute in this case, exclusive of interest and costs, exceeds the sum of $2,000, but says that the same is less than the said sum of $2,000, and that therefore this court is without jurisdiction to try this cause. He further pleads certain bills of sale from the guardians of said minors, under which he claims the right to cut and remove the timber in controversy, and denies the right of the complainant to such timber under the leases pleaded by him. Upon issue joined, the parties have taken proof upon the various branches of the case, and it is now submitted to the court for decree. No plea to the jurisdiction was filed. The defendant answered and in his answer denied the jurisdictional amount. In Street's Federal Equity Practice, p. 210, § 365, it is said:

"Before a suit containing proper jurisdictional averments will be dismissed for lack of jurisdiction on the facts shown by the whole record, those facts must create a legal certainty against the jurisdiction; and every reasonable intendment will be made in favor of the jurisdiction, specially where a plea is not separately put in on the question of jurisdiction."

In Wickiffe v. Owings, 17 How. 47, 15 L. Ed. 44, it is said:

"The doctrine of this court is settled that when the jurisdiction of the Circuit Court appears by proper averments on the record, the defendant can only impugn it in a special plea. The thirty-ninth rule of practice for courts of equity in the United States, adopted by this court, excludes matters of abatement, objections to the character of parties, and to matters of form from the answer, and confines its operation to matters in bar, or to the merits of the bill."

In Stockyards Company v. L. & N. R. Co., 67 Fed. 35, 14 C. C. A. 290, Judge Taft, speaking for the court, said:

"We think a liberal consideration of the bill must be given in order to sustain the jurisdiction of the court at this time, in view of the fact that no plea to the jurisdiction was made below, and no question of the jurisdiction seems there to have been raised. But it is said that the averment of the jurisdictional amount is denied by the answer and is not sustained by the proof."

He then cites Wickiffe v. Owings, supra, and proceeds:

"By pleading to the merits, the defendant admits the averments in the bill, which state facts sufficient to establish the jurisdiction of the court. * * * The objection to the jurisdiction of the Circuit Court, therefore, is not sustained."

This being an equity cause, the defendant should have raised this jurisdictional question by special plea, rather than in the answer. The evidence in the record is not sufficient to create a legal certainty against the jurisdiction, and the cause will not therefore be dismissed on that ground. If this were an action at law, a different rule might apply.

It is contended by the defendant that the complainant's case is without equity, and that he has an adequate remedy at law. In Big Six

Development Co. v. Mitchell (8th Circuit) 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332, it is said:

"The trespass here complained of as disclosed by the record is not an ordinary case of trespass upon lands of temporary duration, but, as we think, the evidence shows was a continuous trespass which threatened to destroy the character of the property as a mine, and would render the plaintiff's interest therein valueless. Threatened and continuous injuries to mines, quarries, timber growing upon lands, buildings located thereon, or other improvements of a permanent character, are enjoined because, as has been said, such acts alter the character of the property, and also tend to destroy it and occasion irreparable loss and damage. * * * If the only relief sought by the bill in this case was to remove the cloud upon plaintiff's title, it might be well doubted whether the bill could be sustained, * * * but the bill goes further and seeks to enjoin the defendant from committing waste and destroying the property as a mining property. In such a case, jurisdiction in equity attaches, even where the plaintiff is not in possession."

In Oolagah Coal Co. v. McCaleb (8th Circuit) 68 Fed. 86, 15 C. C. A. 270, Judge Thayer speaking for the court said:

"It is now well settled by many adjudications, beginning with the case of Mitchell v. Dors, 6 Ves. 147, that an injunction may be granted to restrain a trespasser from entering into a mine and removing the minerals therefrom. Trespasses of that kind, as well as those which consist in cutting down and removing timber, or in removing buildings or other improvements of a permanent character, standing upon lands, are readily enjoined, because, as has sometimes been said, such acts alter the character of the property, and also tend to destroy it, and to occasion irreparable loss and damage."

Judge Goff, in Wood v. Braxton (C. C.) 54 Fed. 1005, says:

"The jurisdiction of courts of equity by way of injunction to restrain waste, to prevent the cutting of timber, and the mining of minerals, is one of comparatively recent origin, but it is now fully recognized and well established in this country as well as in England. A leading case, in which the question of equity jurisdiction in such controversies was fully considered and previous authorities discussed, is that of Jerome v. Ross, 7 Johns. Ch. [N. Y.] 315 [11 Am. Dec. 484]. This is the last decree rendered by that illustrious chancellor, whose able, clear, and erudite opinions, not only charm, but instruct and convince us—Kent; and it is replete with the wisdom of the English and American decisions on that question. See, also, Anderson v. Harvey, 10 Grat. [Va.] 386; McMillan v. Ferrell, 7 W. Va. 223; Moore v. Ferrell, 1 Ga. 7; Erhardt v. Boars, 113 U. S. 537, 5 Sup. Ct. 565 [28 L. Ed. 1116]. If the nature of the injury complained of goes to the substance of the estate, thereby producing irreparable mischief, equity will interfere in limine, and not require the party to resort to an action at law, and this independent of the question of the insolvency of the defendant. The chief value of the land in the bill mentioned is charged to be in its timber, and this the defendants, it is conceded, have made extensive arrangements to remove, having expended many thousands of dollars for that purpose. This removal goes to the very substance of the inheritance, to the destruction of that which is the main element of value to it. The fact that the value of timber can be estimated, that it can be determined by the thousand feet, or by the car load, does not deprive a court of equity of the right to interfere by way of injunction, in cases where it is being cut and removed or destroyed, and where the ownership is in controversy. The products of mines and forests have a value that can generally be fixed, yet it was in prevention of trespasses to property of that character that the jurisdiction in question had its origin, and is now most frequently exercised. While it is true that, when this jurisdiction for equity was first claimed, 'Lord Thurlow hesitated' and 'Lord Eldon doubted,' it is now well determined—the decisions coming from courts of such character as to command our respect and of such grade as to compel our approval—that the jurisdiction not only exists, but that it

is absolutely essential for the preservation of right and the suppression of wrong."

It follows, then, that while the proof of insolvency of the defendant is far from convincing, there is jurisdiction here, regardless of that question.

The defendant contends that the leases under which complainant claims are invalid. If that be true, then he had no standing in court, and we need go no further. I find nothing in the pleadings or proof indicating the degree of Indian blood of the various allottees of the lands in controversy. Nor do I find anything in the record from which it may be determined what portion, if any, of the lands involved are the homesteads of the said minors. All the leases held by the complainant were executed subsequent to the act of Congress approved May 27, 1908 (Act May 27, 1908, c. 199, 35 Stat. 312). By the provisions of that act, if these minor allottees were less than half-blood, all their lands were free from restrictions; if of the half-blood or more, and less than three-quarter blood, then all their lands, except the homesteads, were free from restrictions. There being no showing in the record that these minors are of the class of Indians whose lands are still subject to restrictions, that will not be presumed. The leases under which the complainant claims were made by the guardian of the respective minors. They are agricultural leases, and have this clause, regarding the cutting, use, and sale of timber by the lessee or complainant herein:

"The lessee shall have the right to cut such timber growing on said premises for building and repairing on said premises of fences, buildings, or other improvements said lessee shall desire to make, and for the fuel for the occupants of said land, and to cut and sell and use all timber necessary to clear up and prepare for cultivation any and all land thereon; to break out, and to cultivate all land by lessee deemed desirable for farming; to sublease and lease said land, and to assign this lease."

The foregoing provision of the lease only applies to the cutting, use, and selling of such timber as is necessary to clear up and prepare the land for cultivation. The record shows that approximately 75 per cent. of the land is tillable, and that it is well adapted for cultivation after being cleared. While therefore the cutting and removing of the timber, under the terms of the leases, is the taking away and disposing of that portion of the realty which the standing trees necessarily removed represent, still it is a necessary and proper incident to the lease, rather than the sale of the timber; and if the guardian may make the lease without a court order, he may, under the circumstances developed by the record as to the character of the land, incorporate as a part of the lease such a provision regarding the cutting, using, and sale of the timber by the lessee. The general rule is that except where an order of court is required by statute, a general guardian regularly appointed and qualified may, without order of court, lease the lands of his ward during infancy, if the guardianship so long continues, and may reserve the rents to the ward or to himself. 21 Cyc. 85. By the laws of Oklahoma at the time these leases were made, it was provided (Snyder's Compiled Laws of Oklahoma of 1909):

"Sec. 5489. Every guardian appointed under the provisions of this article, whether for a minor or any other person must pay all just debts due from the ward out of his personal estate and income of his real estate, if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the same in the manner provided by law for the sale of real estate of decedents."

"Sec. 5491. Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward, and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining an order of the county court therefore, as provided, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any."

The sections of the statute above quoted clearly contemplate that the guardian shall so manage the estate of the ward as that it shall be productive of revenue, and one of the necessary incidents of such management is the leasing or renting of the real estate. This he may do without order of court. Only in case of a sale of the realty is the order of the court necessary. It was within the authority of the guardian to make the leases under which complainant claims, without order of the court. Now, turning to the bills of sale under which the defendant claims, the granting clause reads:

"The parties of the first part do hereby grant, bargain, sell, transfer, set over, and deliver to the parties of the second part, the following described property, to wit: All of the trees and timber of any description felled, wind-fallen, standing, and growing upon the following described lands, to-wit: (Here follows description of property.)"

This clause, together with the other terms of these instruments, clearly indicates a sale of the standing timber, except the third paragraph, which reads:

"And in making this agreement for the sale, bargaining, granting, transferring, delivering, to the said party of the second part the said trees and timber as hereinbefore described, it is understood that the parties of the first part have by their own proper and legal acts severed the said trees and timber in such a way as to create a personalty, and it is no longer to be considered a part of the realty and by this instrument the parties of the first part covenant that heretofore, by legal declarations and proper acts the said timber has been designated and severed in such a way as to create it personal property, and not to be a part of the realty, and with such understanding the sale of said trees and timber by the parties of the first part to the party of the second part has herein been made. And it is understood that if any clause in this contract is invalid, that the clauses or portions that are valid shall still remain and be in full force and effect."

In view of the manifest intention appearing both from the other terms of the instruments and in the light which the record throws upon them, that the defendant was to go upon the land and cut the standing timber, these instruments cannot be viewed in any light other than the sale or conveyance of that timber, and the legal effect of the transaction as determined from those circumstances cannot be changed by any arbitrary declaration such as is apparently attempted in paragraph 3. So far as this standing timber is concerned, it is simply a sale of that portion of the realty, not as an incident to or result of a leasing or rental of the land for any purpose, but as a

separate and independent contract of sale. That the standing timber is a part of the realty is elementary. At the time these bills of sale were executed by the guardian on behalf of his wards, the laws of Arkansas, relating to the leasing and sale of real estate of minors by their guardians (Mansfield's Digest of Arkansas), were in force in this jurisdiction. Sections 3502 and 3511, inclusive (Ind. T. Ann. St. 1899, §§ 2398–2407), provide in detail the steps which must be taken, first by filing of the necessary petition or application, and the showing to be made thereon; the entry of an order by the court; the giving of bond by the guardian; the advertisement, etc. In these bills of sale there is no recitation indicating that any of the formalities prescribed by the foregoing sections of the statutes were observed, and the record shows that no such steps were taken. It is true there is noted on each bill of sale "approved Thomas C. Humphrey, Judge." This was after the contract of sale was made, and the instruments were executed. No petition appears to have been filed; no hearing had upon said petition, as is clearly contemplated by the statute; no bond required on the part of the guardian, as the law provides, and no formal order made by the court. In Freeman on Void Judicial Sales, § 9, at page 41, it is said:

"Except where authorized to do so by a will, or by some statute, neither an administrator, an executor, nor a guardian, can sell real estate without a license or order of sale from the court. A sale made without such license or order of court is not a mere error or irregularity which must be objected to by some proceeding in the court where the license ought to have been sought and granted; and, which, if not so objected to, is waived or ratified. It is a proceeding without any legal support. A conveyance made in pursuance of it has no force whatever. It may be shown to be void when collaterally attacked. In fact no attack, collateral or otherwise, need be made. The claimant under the sale could not show a prima facie case."

And section 11, at page 53 of the same work, says:

"As in an action at law, the declaration should aver the facts entitling the plaintiff to judgment, so in a petition in probate, for authority to sell property, the matters necessary to justify the sale must be set forth. In truth, this necessity seems to be more imperative in the case of the petition than in that of the declaration. The judgment of a court of law can rarely, if ever, be treated as void, because pronounced upon an insufficient complaint. An order in probate must be supported by a petition sufficient in substance to show a legal cause for the order. A license to sell, granted without any petition therefor, is void. But a mere petition is not enough. The statutes of each state designate the contingencies in which the real estate of a deceased or incompetent person may be ordered to be sold. The probate court have no power to license a sale in the absence of these contingencies. The statute prescribes the limit of the judicial authority. Action beyond this limit is not irregular or erroneous merely—it is nonjudicial."

The defendant insists that these bills of sale cannot be collaterally attacked, and cites Currie v. Franklin, 51 Ark. 338, 11 S. W. 477, the syllabus of which reads:

"An order of the probate court for the sale of minors' lands will be presumed to have been regularly made, where nothing to the contrary appears in the record, and its validity cannot be questioned in a collateral proceeding."

An examination of the case shows that the sale involved was made pursuant to an order of the court, based upon a petition filed by the

guardian, the question being as to whether it was verified or supported by such testimony as the statute required. It appeared from the recitals made in the court's order that it was made upon the written application of the guardian, and that the court found that a sale was necessary for the purposes stated in the petition, and it was upon this showing that the court sustained the order. In the case at bar, no order of court was made. This is not, therefore, a collateral attack upon the order of the court directing the sale, but upon the instrument of sale itself, which, as we have seen, is a mere nullity. The bills of sale held by the defendant are of no effect. The guardian had no authority to sell the standing timber or any other portion of the realty of his minor wards, except upon order of court, based upon a petition, and showing, which the statute requires. The mere approval by the judge adds no validity to the instruments. The defendant's counsel, in their brief, contend that the leases under which the complainant holds are void, under the laws of Oklahoma, relating to champerty and maintenance. No such defense is made in the pleadings, nor does it appear from the record that the defendant was in adverse possession of the land at the time the leases under which complainant claims were made. This defense therefore fails. Huston v. Scott, 20 Okl. 142, 94 Pac. 512; Powers v. Van Dyke, 111 Pac. 939.

Let decree be entered for complainant, as prayed in the bill.

ERIE & WESTERN TRANSP. CO. v. GREAT LAKES TOWING CO.

(District Court, D. New Jersey. December 29, 1910.)

1. ADMIRALTY (§ 65*)—PLEADING—EXCEPTIONS TO INTERROGATORIES.
   Exceptions to interrogatories propounded to a party in an admiralty suit in their purpose and effect correspond to special demurrers and pleas in bar at common law, and the objectionable part of each interrogatory should be specifically pointed out that a clear and definite issue may be presented. Exceptions to a large number of interrogatories "for the reason that they are each and all open to one or more of the following objections," followed by a statement of a number of objections, do not produce a single issue and are bad.

   [Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 65.*]

2. ADMIRALTY (§ 64*)—PLEADING—INTERROGATORIES.
   Admiralty rule 32, which authorizes interrogatories in an answer "touching any matters charged in the libel or touching any matter of defense set up in the answer," permits very comprehensive questions for the purpose of narrowing the issues. The extent to which the process of interrogation may properly be carried will necessarily vary according to the circumstances of each case, and must be regulated, when in dispute, by the court in its discretion.

   [Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 512; Dec. Dig. § 64.*]

3. ADMIRALTY (§ 64*)—PLEADING—INTERROGATORIES.
   It is not ground for exception to interrogatories in the answer of a respondent in admiralty, propounded under admiralty rule 32, that they call for detailed information which will involve considerable labor and time, or that incidentally information may be elicited which the respondent would not be entitled to call for, if the main information sought is

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

proper under the rule, and to obtain it is the only purpose of the interrogatories.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 64.*]

4. ADMIRALTY (§ 64*)—PLEADING—INTERROGATORIES.

Where a libel sought to recover damages from a salvor under contract for rescuing a stranded vessel and her cargo, on the ground that the service was negligently performed, and in consequence there was a loss of a considerable part of the cargo and injury to the vessel, the allegations in regard to such matters being general, and it appeared that the contract was not made for some two weeks after the stranding and after the vessel had been abandoned by her crew, interrogatories in the answer requiring specific statements as to the guarding of the vessel, the kind and value of the cargo claimed to be lost, etc., *held* permissible, although very comprehensive and far reaching in character.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 64.*]

In Admiralty. Suit by the Erie & Western Transportation Company against the Great Lakes Towing Company. On exceptions by libelant to interrogatories annexed to respondent's answer. Exceptions overruled.

Interrogatories propounded to the libelant, which it is required to answer under oath:

First interrogatory: Of what did the cargo of the "Wissahickon" of "about 3,360 tons of general merchandise" consist, specifying the exact quantity and kind of each item, and the value thereof, with copies of bills of lading or invoices of each item attached?

Second interrogatory: Specify in detail into what holds and cargo compartments the vessel was divided, and state exactly how she was loaded, showing what merchandise was loaded in each cargo compartment and where each of such lots of merchandise was loaded on board of said vessel, and when.

Third interrogatory: The libel alleging that the cargo belonged to various persons, state the name and address of each person owning any part of said cargo, and specify exactly the part belonging to said person, and the value thereof.

Fourth interrogatory: It is alleged in the libel that C. H. Sinclair, "representing all the interests concerned," arrived at the wreck and posted notices, etc., on December 15, 1909. State what interests were concerned, giving the name of each person or corporation, and specifying the interest of such person or corporation, including value.

Fifth interrogatory: What authority did C. H. Sinclair have? From whom did he receive said authority, and in what form? If such authority were in writing, set out copy of same; if not in writing, state exactly what authority was given to C. H. Sinclair, and what he was expressly authorized to do.

Sixth interrogatory: When did C. H. Sinclair arrive at the wreck; what did he do on board the wreck; what notice did he post; and where did he post same? Were the master and crew on board the ship when C. H. Sinclair was? If not, when had they left the ship, and had they left with intent to return; and, if they had left with intent to return, when did they intend to return? What was the weather while Mr. Sinclair was at the wreck? How did he get to the wreck, and how did he get away? Did he make any examination of the vessel, its outfit or cargo, and, if so, what did he find? If he examined the outfit of the vessel, was it all there at that time, and at the time he left? What is the name of the man on Duck Island whom Mr. Sinclair employed to watch the steamer, and where did the man live with reference to the location of the wreck? Was the man employed, and did he stay on board the wreck?

Seventh interrogatory: Referring to page 2 of the libel, wherein it is stated one R. Parry-Jones, representing all the interests, wrote to the respondent a

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

letter—who is Mr. R. Parry-Jones; what interest did he represent; by what authority did he represent such interests, and each of them? If said authority was in writing, what was it from each interest which authorized him by writing; and, if said authority was not in writing, from whom did such authority come, and where was it received, and what was said?

Eighth interrogatory: Did R. Parry-Jones represent any of the owners of said cargo, and, if so, what owners, and what parts of the cargo?

Ninth interrogatory: Referring to second page of the libel, where it is alleged that, "thereafter said R. Parry-Jones in his representative capacity orally accepted the first proposition contained in respondent's letter of December 24th," etc., what did Mr. R. Parry-Jones say, where was the conversation, who was present, and when was the conversation?

Tenth interrogatory: When did Mr. R. Parry-Jones notify this libelant that he had accepted proposition of respondent; and, if such notice were by letter or telegram, set out copy of such notice.

Eleventh interrogatory: Had Mr. R. Parry-Jones general authority to represent libelant prior to December 12, 1909; if so, was such authority in writing (setting forth copy of the writing), and was such authority given pursuant to resolution of the board of directors of libelant? If so, set out copy of resolution, and the date at which it was passed.

Twelfth interrogatory: Was any such authority given Mr. R. Parry-Jones on or after December 12, 1909? If so, what was the authority; if in writing, setting forth a copy; if not in writing, state by whom and where and when such authority was given, specifying what was said. If any such authority were given, state whether or not it was given by any officer of the company, setting out what was said or written, as the case may be, and whether such officer were authorized by the board of directors; and, if authorized by the board, set out copy of the resolution with date it was adopted.

Thirteenth interrogatory: Did libelant by its western manager, or other representative, after the release of said vessel from its stranded position, state in substance that Mr. R. Parry-Jones was not authorized to contract for the release of said vessel on behalf or in the name of libelant, or that the bills for releasing said vessel should be sent to the underwriters, and that same had not been contracted by libelant, or that said bills should be paid by the underwriters, and not by libelant.

Fourteenth interrogatory: Referring to page 3 of the libel, wherein it is stated, "when delivered at Detroit the Wissahickon and the lighter Reliance had on board together about 2,300 tons of cargo," etc., what part of the cargo and how much of the cargo was on board the Reliance and what was done with such parts of the cargo at Detroit; what cargo was on board the Wissahickon when delivered at Detroit, specifying what cargo and the quantity there was in each cargo compartment?

Fifteenth interrogatory: Who unloaded the cargo from the Reliance, and was it checked over when unloaded, and what did the checking tally show; what was done with each item; what was the value of each item; and, if sold, state to whom and for what price. What was the condition of each item of the cargo delivered from the Reliance, and what was the quantity and condition of each item delivered from the Wissahickon? What was done with each part of cargo of Reliance?

Sixteenth interrogatory: Was any of the cargo delivered at Detroit from the Reliance damaged; if so, how and to what extent damaged? Was any of the cargo delivered on board the Wissahickon at Detroit damaged? What was the character of the damage, and what was the amount of the damage, and what was done with each item of damaged cargo?

Seventeenth interrogatory: What fittings and furnishings of the steamer had disappeared, specifying in detail; when were they taken from the boat; and by whom? Was any taken from the vessel before December 29, 1909?

Eighteenth interrogatory: Referring to article fifth, page 3, of the libel, wherein it is alleged that the difference in quantity of cargo and loss of the steamer's fittings, furnishings, etc., was due to the negligent and improper way in which the respondent or its employés had conducted said wrecking operations, in what way was the conduct of said wrecking operations negligent; in what way was it improper? Did libelant at any time have any

representative at the said wreck? If so, name said representative or representatives, and when and during what time each was present?

Nineteenth interrogatory: Did libelant receive a report in writing of the conduct of such wrecking operations from respondent, dated on or about February 16, 1910?

Twentieth interrogatory: Were the wrecking operations described in such report negligent or improper? If so, in what respect?

Twenty-first interrogatory: Did libelant have any other information concerning the method of conducting said wrecking operations than that contained in the report of reports and correspondence of respondent? If so, when and from whom were such reports received, and what were such reports?

Twenty-second interrogatory: How has libelant suffered damage in about the sum of $60,000? What damage was there to fittings and furnishings claimed to have been caused by the conduct of respondent or its employés in said wrecking operations? What was the improper conduct or manner of doing the work complained of, which caused loss of fittings or furnishings?

Twenty-third interrogatory: What, in detail, are the items and amounts of damage making up the alleged claim of $60,000?

Twenty-fourth interrogatory: Was libelant at time of filing said libel bailee of cargo laden on steamer "Wissahickon"? What part or parts of said former cargo of the "Wissahickon" had been sold before filing said libel, and by whom, and for what amount was it sold, and whether by public or private sale?

Twenty-fifth interrogatory: Was libelant authorized to bring this suit by owners of cargo? If so, what owners, and was such authority in writing? Set out copies of such writings.

Twenty-sixth interrogatory: Have any claims for cargo loss or damage been assigned; if so, what cargo owners have assigned their claims, and to whom; setting forth copies of such assignments.

Dated at Buffalo, N. Y., August 12, 1910.

Brown, Ely & Richards, Proctors for Respondent.

The libelant hereby excepts to the interrogatories numbered 1 to 26 inclusive, addressed to it by the respondent herein for the reason that they are each and all open to one or more of the following objections:

(1) In that they are improper, irrelevant, and immaterial.

(2) In that they attempt to force libelant to prepare respondent's case for trial.

(3) In that they attempt to force libelant to prematurely offer proofs which should properly be offered at the time of the trial.

(4) In that they attempt to obtain information as to the matter at issue before trial for use on the trial.

(5) In that they attempt to deny libelant the right to have issues tried.

(6) In that they attempt to obtain names of libelant's witnesses and to discover in advance the nature of their testimony.

(7) In that they attempt to bring out matter properly the subject of cross-examination at the time of the trial.

(8) In that they attempt to bring out matter which should properly be brought out by respondent calling his own witnesses.

(9) In that they cover matters exclusively within the knowledge of the respondent.

(10) In that they inquire as to matters of hearsay and declarations of third persons which are not competent evidence.

(11) In that they attempt to introduce improper documentary evidence.

(12) In that they attempt to pry into matters not properly the subject of interrogatories.

(13) In that they attempt to go into the question of amount of damages and other questions connected therewith which should properly be gone into by a reference after trial.

(14) In such other respects as will be pointed out at the time of the hearing of these exceptions.

Burlingham, Montgomery & Beecher, Proctors for Libelant.

Burlingham, Montgomery & Beecher, for libelant.
Brown, Ely & Richards, for respondent.

RELLSTAB, District Judge. The libel is filed by the libelant as owner of the steamship Wissahickon, and as bailee of its cargo.

The interrogatories, 26 in number, are all excepted to. Libelant, instead of assigning specific objections to each interrogatory, merely states that they are all open to one or more of 14 enumerated objections. The interrogatories and objections are hereinbefore set forth. This method of excepting to interrogatories is bad. Exceptions in their purpose and effect correspond with special demurrers and pleas in bar at common law. Ben. Adm. (3d Ed.) § 466. Thev should be carefully prepared, specifying in the simplest and clearest manner, in separate exceptions, the matter excepted to. Id., § 470. The objectionable part of each interrogatory should be specifically pointed out, that a clear and definite issue may be presented. To say that each interrogatory is open to one or more of any number of objections does not produce a single issue. The utmost that can be learned from such manner of stating exceptions is that each one of these 26 interrogatories is open to at least 1 objection, but which of the 14 objections is left to speculation. Such method suggests a misunderstanding of the function of exceptions. To meet exceptions thus framed the respondent would have to test each one of its 26 interrogatories with each one of the 14 objections. This is an unnecessary burden, could easily be made intolerable, and cannot receive judicial sanction.

On the argument and in the brief submitted by libelant, the specific objections to each interrogatory were pointed out, and as respondent has availed himself of the time given for said purpose, and submitted an argument in reply thereto, such exceptions will be considered on their merits; but this indulgence is not to be taken as a precedent for future cases. Hereafter exceptions that fail to clearly and definitely point out the objectionable matter in the particular interrogatory excepted to will not be considered by the court, and may be struck out on motion of the interrogating party.

Rule 23 in admiralty provides that:

"All libels in instance causes, civil or maritime, shall state the nature of the cause; * * * and the libelant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof."

And rule 32 provides that:

"The defendant shall have a right to require the personal answer of the libelant upon oath or solemn affirmation to any interrogatories which he may, at the close of his answer, propound to the libelant touching any matters charged in the libel, or touching any matter of defense set up in the answer."

The only exception is that referred to in rule 31, that the required answers do not expose libelant "to any prosecution or punishment for crime, or for any penalty or any forfeiture of his property for any penal offense."

"Touching any matters charged in the libel or touching any matter of defense set up in the answer" are comprehensive phrases. The prob-

ing for definite issues, and the searching of the conscience in aid thereof, here authorized, is of the very genius of admiralty pleading and practice. It does not take place after the issues are joined, as in the jurisdictions where the pleadings and practice are based on the common law, but before issue, and for the very purpose of narrowing the issues to save both time and expense in the trials.

As was said by Judge Brown in The Mexican Prince (D. C.) 70 Fed. 246, at page 248:

"In any rational system of pleading, it is essential that the subject of litigation shall be reasonably defined, in order that the parties may know what they have to meet, that the case may be presented with intelligence, and the record restricted within appropriate limits, and useless expense avoided. It is the duty of the court to promote this end in all appropriate ways, in furtherance of justice, in pursuance of rule 46 and section 918 of the Revised Statutes [U. S. Comp. St. 1901, p. 685]."

To the same effect, see Benedict's Adm. (3d Ed.) § 440, p. 297.

In view of the comprehensive information sought by the interrogatories, an extended reference to the libel and answer is necessary.

The third article of the libel alleges on information and belief that on December 12, 1909, the steamship, while bound on a voyage from Erie, Pa., to Duluth, with a cargo of about 3,360 tons of general merchandise belonging to various persons, stranded on Outer Duck Island in Lake Huron; that on December 16th the tug "General," owned by respondent, arrived near the wreck and arranged to take off its crew; that on the same day C. H. Sinclair, representing all the interests concerned, arrived at the wreck and posted notices that the ship and cargo were not abandoned, and that any one interfering therewith would be prosecuted, and that he employed a man on Duck Island to watch the steamer; that on the 22d day of December R. Parry-Jones, representing all the interests, wrote respondent a letter, to which respondent replied by letter dated the 24th of that month, copies of such letters being attached to the libel and marked "A" and "B," respectively; that thereafter R. Parry-Jones, in his representative capacity, orally accepted the first proposition contained in respondent's letter, making a contract with it to relieve such steamer from the strand, and to deliver her and her cargo on board or in lighters at Detroit or Milwaukee, for the consideration of $30,000.

In its fourth article the libel alleges on information and belief that on or about the 29th day of said December, in pursuance of such contract, respondent's tugs "General" and "Thompson" with the lighter "Reliance" began wrecking operations, transferring some of the cargo to the lighter; that on February 7, 1910, the Wissahickon was finally relieved from the strand; and that thereafter she and the "Reliance" were towed to Detroit by tugs "Favorite" and "F. S. Schanck," arriving there on or about April 2, 1910.

In its fifth article it alleges that, when delivered at Detroit, the "Wissahickon" and lighter "Reliance" had on board together about 2,300 tons of cargo; that the difference of cargo, about 1,060 tons, together with the steamer's fittings and furnishings, etc., had disappeared, due to the negligent and improper way in which the respondent had conducted said wrecking operations.

In its sixth article it alleges that by reason of the respondent's failure to conduct said wrecking operations in a proper manner, and to deliver the "Wissahickon" with her fittings, furnishings, etc., and cargo on board or in lighters, libelant had suffered damages of about $60,000; and that no part thereof had been paid.

In its answer to the third article of the libel, respondent admits that it sent to R. Parry-Jones a letter dated December 24, 1909, in reply to his letter of December 22d, but denies that the copy of the letter attached to the libel, marked "B," is an exact copy thereof; and avers that it has no knowledge or information sufficient to form a belief as to whether or not on the day that the tug "General" was near the "Wissahickon's" wreck, or any other time, C. H. Sinclair, or any other persons representing all the interests concerned, or otherwise, arrived at said wreck and posted the notices or employed the watchman referred to; and upon information and belief denies that said R. Parry-Jones accepted the so-called proposition contained in respondent's letter of December 24, 1909; and denies that the said Jones thereby made a contract with respondent to release said steamer from the strand, or to deliver her with her cargo, at Detroit or Milwaukee, for any fixed sum of money. It also avers that, as to every other allegation of said third article, it has no knowledge or information to form belief, and therefore denies the same.

As to the allegations of the fourth article of the libel, respondent, on information and belief, denies that, in pursuance of the contract alleged in the libel, its tugs and lighters proceeded to the "Wissahickon," but admits the other allegations of said article. It also denies on information and belief the allegations of the fifth and sixth articles of the libel.

Respondent, further answering the libel, alleges on information and belief that such steamship and cargo were stranded in December, 1909, on said island, in an exposed position on a rocky shore, at about the close of navigation; that the weather was, and continued, especially severe; that such place was many miles from a telegraph station, and on an almost uninhabited island; that, unless released and taken to shelter, said vessel and cargo would have been lost; that respondent, with a valuable equipment, which it maintained for wrecking purposes, released said vessel and saved the greater portion of its cargo, pursuant to the acceptance of its bid contained in its letter of December 24, 1909, to Mr. R. Parry-Jones, and delivered the same in Detroit, where such vessel and cargo were accepted by libelant without protest or objection, and thereby performed the salvage service which it had undertaken; that respondent performed said salvage services at great risk to its property, and with great efforts and much suffering on the part of its employés, and in all things performed its agreement and saved property of great value; that no claim was made on it for payment of any loss or damage on account of loss of cargo, or any alleged negligent or improper method employed in conducting said wrecking operations, except until the libel was filed herein; that respondent is not informed as to the basis of said claims of negligence and damage, and cannot ascertain them from the very general allegations of the libel, and therefore attaches and propounds interrogatories to said libel.

It is to be noted that the basis of the action is the negligent and improper conduct of the respondent in the wrecking operations, and that the damages are the loss of a part of the cargo and the vessel's equipment. The steamship was stranded on the 12th of December, 1909, and respondent's contract to release the vessel and deliver her and her cargo at Detroit was not entered into until after the 24th (the exact date not being mentioned), and the wrecking operations did not begin until the 29th. On the 16th, about two weeks before such operations began, one C. H. Sinclair, said by libelant to represent all the interests concerned, arrived at the wreck, posted warning notices, and employed a watchman. Arrangements were made on the same day with respondent's tug to take off the crew. The contract is said by libelant to have been made between respondent and one R. Parry-Jones, representing all the interests.

The damages are stated in the most general terms, viz., that when the steamer arrived at Detroit on April 2, 1910, there was missing about 1,060 tons out of the 3,360 tons of cargo said to have been shipped at Erie, Pa. The damages are stated at about $60,000. The exact contract is in dispute, and the time when it went into effect does not appear.

The scope of the interrogatories under the admiralty rules was passed upon in the following: Havermeyers, etc., v. Compania, etc. (D. C.) 43 Fed. 90; The Mexican Prince, supra; La Bourgogne (D. C.) 104 Fed. 823; Bock v. International Nav. Co. (D. C.) 124 Fed. 711; Dana & Co. v. Cosmopolitan Shipping Co. et al. (D. C.) 131 Fed. 158; In re Knickerbocker Steamship Co. (D. C.) 136 Fed. 956; The Baker Palmer (D. C.) 172 Fed. 154; Chirurg v. Knickerbocker Steam Towage Co. (D. C.) 177 Fed. 943. They uniformly allow great latitude in eliciting testimony from the adverse party. In the Baker Palmer, Judge Dodge, in considering the extent of claimant's right in the premises, used language so appropriate to the present case that I am justified in quoting him in extenso. He said, referring to the interrogatories excepted to:

"Some call for distinct allegations regarding matters about which the libel as filed is not sufficiently specific. These, which will be identified below, the libelants are clearly bound to answer, as they would have been bound to amend the libel, had exceptions been filed. But the claimant has the right to go further than this under rule 32. Touching any matters alleged in the libel or touching any matter of defense set up in the answer he is entitled to compel his adversary to amplify the allegations of the libel, even though not open to exceptions for insufficiency as filed, for the purpose of dispensing with the taking of proofs regarding them, or for the purpose of bringing distinctly before the court the points relied on in defense, or for the purpose of obtaining evidence in support of the defense from the personal answers of his adversary. The David Pratt, 1 Ware (495) 509, Fed. Cas. No. 3,597; The Serapis (D. C.) 37 Fed. 436, 442; The Mexican Prince (D. C.) 70 Fed. 246; Benedict, Adm. Practice (3d. Ed.) § 519.

"The extent to which the process of interrogation may properly be carried will necessarily vary according to the circumstances of each case, and must be regulated, when it is in dispute, by the court in its discretion. The purposes for which it is allowed, as above stated, are to be kept in view; and it is also to be remembered that the matters regarding which interrogatories may be put are, by the language of rule 32, only the matters alleged in the libel or set up in defense by the answer, and that interrogatories are not to

be used for such purposes merely as those of finding out in advance what the adversary's evidence will be, or who his witnesses are, or of obtaining the production of letters or documents not in issue, or of cross-examining the adverse party regarding the truth of the allegations made in his pleadings. The Intrepid (D. C.) 42 Fed. 185; Havermeyers, etc., Company v. Compania Transatlantica (D. C.) 43 Fed. 90; Bock v. Navigation Company (D. C.) 124 Fed. 711. It is, however, not necessarily an objection to an interrogatory, otherwise permissible under rule 32, that some of the purposes above referred to may be incidentally accomplished by it."

The condition of the steamer and the cargo at the time the wrecking operations were begun is not stated. Manifestly, on the libelant's representations, the respondent cannot be charged with the loss that occurred before contracting to take charge of the vessel. The quantity and value of the entire cargo when shipped, its condition and how stored at the time of such contract, the condition of the vessel at such time, and the condition and amount of its cargo on its arrival at Detroit, are material on the question of damages, if any are recoverable. The name, whereabouts, and conduct of the watchman in charge of the steamer before such contract was made; the general authority of Jones in the premises, and particularly as to the making of such contract; whom he represented on such occasion; and what was said in his oral acceptance of one of the alternate propositions submitted by respondent, the names of the owners of the cargo, and their several interests therein; in what respect the wrecking operations were negligent or improper; what the character of the damages—are also material and relevant in view of the nature of this controversy, and the matters set up in the libel and answer.

It is difficult to see the materiality and relevancy of the interrogatories relating to the authority and conduct of Sinclair; but the libel's reference to his authority and conduct makes it sufficiently so for the purpose of propounding interrogatories in relation thereto.

The libel lacks fullness in respect to several matters which would seemingly be within the knowledge of the libelant. This may be a mere inadvertence, but it opens the way for a very searching probe. Some of the interrogatories propounded relate to such and other matters touched upon in the libel; others more particularly touch matters of defense set up in the answer.

The drawing of the line between permissible and objectionable interrogatories is oft a difficult task. The interrogatories here propounded are comprehensively framed and call for considerable detail information. Much time and labor will be expended, the names of some of libelant's witnesses will be disclosed, and the introduction of undisclosed documents may take place by making full answer thereto. This, however, is no reason for disallowing the interrogatories, where the purpose is not to harass, and such disclosures are but a mere incident to the main information sought. The interrogatories in this case, while intrusive and far reaching, are well within the scope of those allowed in the cited cases.

I have carefully analyzed each of these interrogatories and so considered them in relation to the matters charged in the libel and set up as defense in the answer, and to the objections interposed, and while the scope of the probe might be curtailed here and there, yet, keeping

in mind the purposes served by the use of interrogatories, and the scant reference in the libel to some apparently important, if not controlling, matters in the controversy, I am constrained to allow them to stand as framed.

The exceptions are therefore overruled.

WOODSIDE v. TONOPAH & G. R. CO. et al.

SOUTHERN PAC. CO. v. RAILROAD COMMISSION OF NEVADA et al.

(Circuit Court, D. Nevada. February 2, 1911.)

Nos. 1,141, 1,142.

1. INJUNCTION (§ 146*)—GROUNDS FOR DENIAL OF PRELIMINARY INJUNCTION—EFFECT OF ANSWER.

Where the equities of a bill are fully and specifically denied by a sufficient answer under oath, the court usually denies an injunction pendente lite for the reason that such an answer is deemed to overcome the equities of the bill.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 319; Dec. Dig. § 146.*]

2. CARRIERS (§ 13*)—REGULATION OF RATES BY STATE—VALIDITY.

A rate fixed by a state railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by the railroad company for interstate traffic.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 21-24; Dec. Dig. § 13.*]

3. CARRIERS (§ 18*)—REGULATION OF RATES BY STATE—VALIDITY OF RATES FIXED—SUIT FOR INJUNCTION.

The showing made by complainants in suits on behalf of railroad companies to enjoin the enforcement of rates for the transportation of timber products between certain points in Nevada, fixed by the railroad commission of the state after a hearing, *held* not sufficient to support the claim that such rates are unjust and unreasonable and would not be remunerative, or to warrant the granting of a preliminary injunction.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 20, 24; Dec. Dig. § 18.*]

In Equity. Suits by George D. Woodside against the Tonopah & Goldfield Railroad Company, the Railroad Commission of Nevada, H. F. Bartine, Henry Thurtell, and J. F. Shaughnessy, as Commissioners thereof, Denver S. Dickerson, as acting Governor of the State of Nevada, and R. C. Stoddard, as Attorney General of the State of Nevada, and by the Southern Pacific Company against the same defendants, excepting the Tonopah & Goldfield Railroad Company, to enjoin the Railroad Commission from enforcing certain railroad rates fixed by the commission for the transportation of forest products between designated points in that state. On motions for preliminary injunction. Motions denied.

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

James F. Dennis, for complainant Woodside.

Charles R. Lewers and C. W. Durbrow, for complainant Southern Pacific Railroad Company.

Hugh H. Brown, for defendant Tonopah & G. R. Co.

Cleveland H. Baker and H. F. Bartine, for other defendants.

Before MORROW, Circuit Judge, and FARRINGTON and VAN FLEET, District Judges, convened under the provisions of Act June 18, 1910, c. 309, § 17, 36 Stat. 557.

MORROW, Circuit Judge (orally). These two actions are suits in equity brought by the complainants to restrain the railroad commission of Nevada from enforcing joint rates for the transportation of forest products in car load lots from Verdi, in the state of Nevada, to Tonopah and Goldfield, in the same state. The distance from Verdi to Goldfield is approximately 290 miles. For the distance of 190 miles from Verdi to Mina the transportation is over the main line of the Southern Pacific Railroad between Verdi and Hazen and over a branch line between Hazen and Mina. From Mina to Goldfield, a distance of about 100 miles, the transportation is over the Tonopah & Goldfield Railroad.

The present freight rate on forest products from Verdi to Goldfield is 65 cents per hundred pounds in car load lots, or $13 a ton, or the estimated equivalent of $19.50 for the thousand feet of lumber. The railroad commissioners have reduced this rate and prescribed, for lumber and articles taking lumber rates, joint rates from Verdi to Goldfield of 40 cents to the hundred pounds in car load lots, or $8 a ton, or the estimated equivalent of $12 for the thousand feet of lumber. The railroad commissioners have also made a classification for rough timber, for which they have prescribed a rate of 25 cents per hundred in car load lots, or $5 per ton, the equivalent of $7.50 per thousand feet. The latter rate appears to be the important one in these cases, as it includes mining timbers.

Complainants allege that the rates prescribed by the railroad commission for the transportation of forest products between the designated points are unreasonable and unjust, unremunerative, and confiscatory; that the authority of the railroad commission was to prescribe reasonable rates, rates that would be fair and just and yield a fair and just return; that they have no power to prescribe rates that are not reasonable and just; and that, in prescribing the rates they now propose to enforce, they have exceeded their powers under the law.

The jurisdiction of this court is invoked in both cases, on the ground of diverse citizenship. The complainant, Woodside, in the first-named case, is a citizen of the state of Pennsylvania, and a stockholder of the Tonopah & Goldfield Railroad, and the suit is brought by him against the railroad company, a corporation of the state of Nevada, and the railroad commissioners of Nevada, to prevent the enforcement of these rates.

In the second case, the Southern Pacific Company is a corporation organized under the laws of the state of Kentucky. And the action is likewise against the railroad commissioners of Nevada.

The defendants have answered as they are required to do under the statute, and have fully met and denied all of the equities of the complaints. The answers are specific and under oath. In equity practice this is usually deemed sufficient to dissolve a restraining order and prevent the issuance of an injunction pendente lite; that is to say, where the equities of the bill are denied fully and explicitly by a sufficient answer under oath, the court usually denies an injunction pendente lite for the reason that such an answer is deemed to overcome the equities of the bill.

We may, however, refer to some features of the controversy as shown by the bill and answer and supporting affidavits. The allegations of the bill of complaint are very general in their character. They charge the railroad commission with having, as I said before, exceeded their powers in unlawfully prescribing rates that are unreasonably and unjustly low and unremunerative and confiscatory, and, in the Woodside Case, it is charged that these rates will deprive the railroad company of its property without due process of law, in violation of the Constitution of the United States. In the Southern Pacific Case the charge is that the rates prescribed will result in discrimination against points outside of the state, and that the enforcement of these rates will interfere with interstate commerce.

It appears that there is a joint rate for the carrying of forest products from Truckee, Loyalton, and Fulda, in California, to Tonopah and Goldfield, which is the same rate now established by the railroads from Verdi to the same points, namely, 65 cents per hundredweight by the car load lots; and it is charged that, if the rates fixed by the railroad commissioners for the state of Nevada is enforced, it will make an unlawful discrimination with respect to the products transported from Truckee, Loyalton, and Fulda, in California, to Tonopah and Goldfield, in Nevada, as compared with the rates from Verdi, in Nevada, to Tonopah and Goldfield, in Nevada. That is the main feature of the Southern Pacific Case, that it interferes with interstate commerce. Ultimately this charge resolves itself into a constitutional question, whether the order of the railroad commissioners is an interference with the exclusive power of Congress to regulate commerce among the several states. The present rate for transporting forest products from points in California to points in Nevada has been fixed by the railroads and not by the authority of the Interstate Commerce Commission. The order of the railroad commission does not, therefore, interfere with any authority of the federal government to regulate commerce between the several states; that authority not having been expressed or declared. A rate fixed by a state railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by the railroad company for interstate traffic. Upon adjustment the latter rate must yield. This we think is a complete answer to the allegations of the bill in the Southern Pacific Case.

In the Woodside Case there is an allegation in the complaint to the effect that, if the rates prescribed by the railroad commission had been in effect for the seven months ending July 31, 1910, it would

have resulted in giving the railroad company a revenue of .0369 of a cent per ton per mile in the transportation of these forest products originating at Verdi; and it is said that the cost of all the freight, not the cost of transporting the forest products, but the cost of transporting all the freight over the line of road during that time was $.04065 per ton per mile. That is to say, the transportation would cost a sum in excess of the revenue per ton per mile as fixed by the order of the railroad commission.

The criticism of this allegation of the bill is, of course, primarily, that the cost of transportation is not stated with respect to the specific article transported. It is the cost of all the freight transported that is here alleged. And it is pointed out by the railroad commission that there is a great difference in carrying, transporting, and handling various kinds of freight; and that to say that the cost of transporting all kinds of freight for the amount named would be in excess of the amount received by the railroad company furnishes the court with no specific information as to the cost of transporting forest products. The allegation is, however, positively denied by the railroad commission, and it is denied specifically.

The railroad commission say that, while they admit the receipts of the railroad company on forest products would be as stated in the complaint, they allege that the cost of transportation was not the amount stated in the complaint, but was a very much less amount, and they allege that the cost of handling all freight over the line of the railroad was $.0289 per ton per mile, showing, according to this allegation that the railroad company would have received a remunerative return in transporting these forest products.

To the court this allegation of the answer appears to be reasonable, and within the knowledge of the court obtained in other cases. It is objected, however, that such a determination is by comparison and is inadmissible—still, as a matter of evidence, we know that the transportation of lumber for 290 miles at a rate of $8 per ton for the better class, and $5 for the inferior class, is, as compared to other rates throughout the United States and upon this coast, a high rate. The transportation of lumber, for example, from the Willamette Valley, in Oregon, to San Francisco, over the Siskiyou mountains, a distance of 700 miles, at $3.10 per ton, has been held to be a just and reasonable rate over the objection and protest of the railroad company, contending for a rate of $5 per ton. Other illustrations might be made, but it is not necessary. The present question is not to be determined by such considerations.

The real question presented to the court is this: Do the complaints state facts sufficient to warrant the court in believing that the railroad companies will sustain a loss in transporting these forest products at the rates fixed by the railroad commission? We think not. We think the showing is insufficient to justify the court in granting an injunction pendente lite as against the rates fixed by the commission. There is another feature of this case that the court cannot overlook, on this motion for a temporary injunction, and that is this: The railroad commission is a commission created by law, authorized to take testimony, and make examination into all the mat-

ters relating to railroad rates. Now it appears in this case that the railroad companies did have a hearing before the commission; that testimony was introduced on the part of the railroad company and presented to the commission; that there was a hearing upon the case upon the merits; and that the commission has reached the result as expressed in its order as a matter of judgment, after a full and fair hearing upon the evidence in the case. There is, therefore, a presumption provided by the statute that the rates fixed by the railroad commission shall be deemed just and reasonable, and it is further provided that such rates shall remain in full force and effect until a final hearing.

There is, however, an objection urged that the railroad commission fixed its judgment in this case upon testimony that, under the decisions of the Supreme Court of the United States, ought not to have been considered, namely, the comparisons made by the railroad commission with respect to transportation of lumber and other forest products by other railroads and under other circumstances and conditions.

We do not understand that the railroad commission fixed these rates upon a matter of comparison with other railroads and their traffic. We understand from their report that they fixed these rates upon a determination that they are in and of themselves reasonable and just; that the comparisons made in the report were merely matters of evidence which the railroad commissioners had before them in determining what would be a reasonable rate for the length of road, for the amount of equipment and for the amount of capital invested in the railroads, and the other matters pertaining to cases of that kind.

There is another feature of these cases that may be noticed, and that is the fact that the railroad commission has presented to us a statement of the expenses of the Tonopah & Goldfield Railroad as compared with the Nevada Northern Railway. The two roads are in Nevada and have many features in common. It appears that the Tonopah & Goldfield Road is under very expensive management as compared with the Nevada Northern Railroad, and that it is very much in excess for substantially the same service. Such expensive management, under the circumstances, will not justify higher rates to pay expenses and dividends to stockholders.

These facts which have been presented to the court convince us that, upon the cases as presented to us now, the rates fixed by the railroad commission are reasonable and just, and ought to be fairly remunerative, and that, upon this showing, the restraining order should be discharged, and a temporary injunction denied; and it is so ordered.

THE ALBATROSS.

(District Court, S. D. New York. August 3, 1910.)

1. COLLISION (§ 95*)—STEAMSHIP AND TOW—PASSING AGREEMENT—ERROR IN STEERING.

A collision in lower New York Bay at the lower junction of the Swash Channel with the Main Channel between a steamship and a barge in tow, both passing out, *held* due solely to the fault of the steamship, in that, after assenting by signal to the passing of the tug and tow across her bows, the wheelsman, instead of starboarding the helm as directed by the pilot, ported it, turning the vessel toward the tow and making it impossible for her to recover and pass under its stern.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*

Collisions with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

2. COLLISION (§ 11*)—CROSSING STEAM VESSELS—WAIVER OF PRIVILEGE.

A crossing vessel privileged under the starboard hand rule (Inland Navigation Rules, Act June 7, 1897, c. 4, art. 19, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]) waives her privilege by assenting to the crossing of the other vessel across her bows.

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

In Admiralty. Suit by the P. Dougherty Company, as owner of the barge Norfolk, against the Palace Shipping Company, Limited, as owner of the steamer Franklyn; the steamtug Albatross, impleaded. Decree against respondent Palace Shipping Company.

James J. Macklin, for libelant and The Albatross.
Convers & Kirlin, for respondent.

HAZEL, District Judge. This action in personam was brought by the P. Dougherty Company as owner of the barge Norfolk to recover damages amounting to $6,000, alleged to have been sustained through a collision in the Lower Bay of New York with the British steamer Franklyn. An answer was interposed by the claimant, Palace Shipping Company, Ltd., owner of the Franklyn, denying liability, and a petition was filed to bring in the steamtug Albatross. The material facts are as follows:

The Franklyn is 400 feet long, 52 feet beam, drawing 26 feet of water, and at the time of the collision was heavily laden with case oil. She was bound on a voyage to Tacu Bar, and in going out to sea came into collision with the barge Norfolk at the lower junction of the Swash Channel with the Main Channel, or about 700 feet east Xs. of the Junction Buoy No. 2½. At the time of the collision, the steamtug Albatross, which was 140 feet long, 26 feet beam, and drawing 15 feet of water, and which was owned by libelant, had in tow the three-masted barges Pocomoke and Norfolk, both light, bound for Norfolk, Va., and navigating at the rate of seven miles an hour. The tide was ebb, running southeasterly at the rate per hour of about 3½ knots. There was a strong wind blowing from the

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

northwest. When the vessels sighted each other, both were headed toward the junction of the channels; the steamtug and tow then being near Romer Shoal Buoy, while the steamer had just rounded the Southwest Spit. The tug blew two short blasts of her whistle when about ½ to ¾ miles from the steamer, which was not answered by the steamer, as she was clearing a wreck in the channel. After a short delay the steamer replied to a second signal of two blasts blown by the tug. She consented to the proposal that the tug and tow cross her bows. The Franklyn was in charge of local pilot McLaughlin. The master was on the bridge with the pilot, and also the third officer acting as lookout, and the wheelsman was in the pilothouse. The steamer was making about 8 or 8½ knots per hour with the tide. Immediately after clearing the wreck in the channel and blowing the answering signal, the pilot directed the wheelsman to starboard the helm of the steamer. He substantially testified that the steamer swung a little to the southward or to the right, instead of to the left or north, and he thereupon ordered the engine slowed and the wheel put hard astarboard. Following the last-mentioned order, he turned and looked at the wheelsman and observed that he rolled the wheel ½ to ¾ of a turn to starboard, which caused the vessel to sheer to the right and toward the tow, which was then 1,000 or 1,200 feet distant on her port bow.

The testimony of the pilot was to the effect that the wheelsman failed to promptly obey the starboard order, but, on the contrary, turned the wheel in the wrong direction, necessitating a hard astarboard order, which he likewise at the start improperly executed, and, although he quickly turned the wheel to port, it was too late to recover from the swing of her bow to starboard. In the sworn judgment of the pilot, if his order to the wheelsman to starboard had been properly obeyed, the vessel would have swung to the northward and to the stern of the Norfolk, as agreed, and clearing her by about 150 feet. The speed of the steamer was reduced to three knots as soon as the situation became threatening, and quick successive orders to "stop," "half astern," and "full speed astern" were given and obeyed. The testimony of the pilot McLaughlin is sharply contradicted by the master and third officer of the Franklyn; but the wheelsman gave no testimony. They state not only that the orders to starboard and hard astarboard were promptly and rightly executed by the wheelsman, but that the starboard order was followed by an order to steady, which clearly indicated to them a satisfactory headway. I am not satisfied, however, that the master and second officer noticed the headway of the steamer.

Danger of collision was imminent soon after the starboard and hard astarboard orders were given. The Albatross was proceeding in her course on the starboard bow of the steamer and the Norfolk on her port bow. The steamer reversed her engines quickly and cast her starboard anchor to arrest her headway and avoid collision; but the stern of the Franklyn, nevertheless, struck the Norfolk about 40 feet forward of her stern. Libelant claims that dropping the starboard anchor caused the Franklyn, which was then 150 to 200 feet distant

from the Norfolk, to swing to the right, and that the anchor chain was still paying out when the impact with the Norfolk occurred. Respondent's witnesses testified to the contrary. Their claim is that the chain was paid out 60 fathoms, and the headway of the steamer actually arrested before the collision, and, furthermore, that the hawser of the Norfolk was cut by one of her crew causing her to swing over across the channel and into the bow of the Franklyn. The witnesses Hickman, master of the steamtug, Harmon, master of the Pocomoke, and Tyne, master of the Norfolk, testified that the hawser was not cut or let go prior to the collision, but that it was let adrift after the collision and when by force of the impact the Norfolk swung around alongside the steamer.

The specific fault relied upon by the libelant is that the wheel of the Franklyn was wrongly turned, causing the vessel to head towards the Norfolk, thereby making it impossible for the vessel to comply with the agreement to pass under her stern. A fair preponderance of the evidence, in my estimation, establishes such fault. The wind and tide was not such as to appreciably interfere with her navigation, and her failure to promptly respond to the orders of the pilot was the decisive factor which caused her to swerve away from her true course and into the Norfolk.

The version of the pilot attributing the blame to the wheelsman is not above criticism, and it has been carefully scrutinized, together with his earlier statement explaining the occurrence; but the circumstances surrounding the situation of the vessels, their proximity when they became factors in each other's navigation, the testimony of libelant's witnesses that the steamer headed for the barges at a time when she should have been headed towards the stern of the Norfolk, certainly are corroborative of the claim that her course was deviated to the starboard side of the ship. Whether her course was deflected at the first order by the mistake of the man at the wheel or by the action of the tide is problematical; but the mistake when the hard astarboard order was given doubtless sufficiently turned the headway to embarrass her in her movements.

Respondent, disclaiming liability, asserts that the steamtug was in fault: First, for remaining on the westerly side of the channel after blowing the signal; second, for crossing the bow of the steamer; and, third, that the vessels were approaching each other on crossing courses, and that the tug violated the starboard hand rule. It is not thought that the starboard hand rule applied in the situation. The Franklyn, though not in fact overtaking the steamtug, was nearly on a parallel course as she approached the barge, and her position became analogous to that of an overtaking vessel. She was bound to keep out of the way and adopt all precaution to avoid collision, and this she failed to do.

The immediate cause of the collision was the negligent navigation of the steamer in swinging to starboard when she should have swung to port. It is true she was the privileged vessel having the right of way, but she surrendered this privilege to the steamtug and arranged with her that she and the barges were to cross her bows. Her con-

sent must be considered as a waiver of articles 19, 20, and 23 of the Inland Rules (Act June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2883]), which provides that the vessel which has the other on her starboard side should keep out of the way of the other. It became the positive duty of the Franklyn to direct her course astern of the Norfolk, and the reciprocal obligation upon the tug was to starboard and go to the left of the channel. On this point the proofs are that the Albatross steered to port on exchange of the two-blast signals as much as she dared, and was prevented from going farther to the eastward of the channel because of the close proximity of a schooner abreast of the Pocomoke, and sailing in the same direction. On the record I am unable to attribute negligent navigation to the Albatross, and the rule of sole responsibility may safely be applied. The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943; The Umbria, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053; The Lowell M. Palmer, 142 Fed. 937, 74 C. C. A. 107. Even though the steamtug was not navigated to the eastward as much as was possible to do, her failure did not contribute to the collision, as the Franklyn was neither prejudiced nor embarrassed in her movements by any such omission.

It is also claimed at the trial that if there was negligence it must be attributed to the pilot, McLaughlin, and not to the Franklyn, and that in an action in personam the respondent cannot be held liable for the acts or omissions of a compulsory pilot. Inasmuch, however, as the sole fault was primarily due to the mistake of the wheelsman, as has been indicated, this question need not be passed upon.

A decree may be entered for libelant, with costs, against the respondent, and a reference may be had to a commissioner to ascertain the damages sustained, while the petition of the Palace Shipping Co., Ltd., against the steamtug Albatross, must be dismissed.

THE ITALIA.

(District Court, S. D. New York. June 30, 1910.)

1. SHIPPING (§ 132*)—DAMAGE TO CARGO FROM SEA WATER—LIABILITY OF VESSEL—BURDEN OF PROOF.

A vessel has the burden of proof to show that damage to her cargo from sea water was caused by perils of the sea and within the exceptions in the bills of lading, and testimony that on the voyage she encountered gales which caused her to roll, and that rivets in her side were found loose on her arrival in port, is not alone sufficient, without showing that reasonable precautions had been taken to prevent the wetting of the cargo, and that the rivets were in place at the beginning of the voyage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 482; Dec. Dig. § 132.*

Losses by perils of the sea, see notes to The Dunbritton, 19 C. C. A 465; Southerland-Innes Co. v. Thynas, 64 C. C. A. 118.]

2. SHIPPING (§ 126*)—RESPONSIBILITY FOR GOODS AFTER UNLOADING.

A consignee of cargo has a reasonable time within which to remove the merchandise from the wharf on which it is unloaded, and during the in-

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

terim the carrier is bound to exercise reasonable care to protect it from injury from exposure to rain or water; the degree of care depending on the character of the goods.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 461–464; Dec. Dig. § 126.*]

In Admiralty. Suit by Philip W. Saitta against the steamship Italia. Decree for libelant.

Philip S. Saitta, for libelant.

Wing, Putnam & Burlingham (Everett Masten and Robinson Leech, of counsel), for claimants.

HAZEL, District Judge. There are two causes of action set forth in the libel; the first relating to the shipment of 116 boxes of macaroni from the port of Castellamare, Italy, to New York, which admittedly on delivery at the latter port on February 25th, was damaged by sea water. The claimants invoke the protection of the Harter act and of the bill of lading, which in terms exempts the carrier from liability arising from the perils of the sea. There was evidence tending to show that on the arrival of the vessel in New York an examination was made by the superintendent of the claimants and the master of the steamer, which disclosed that a few rivets in the upper beams just below the main deck had worked loose, and that said rivets were rusty and the deck water-stained; that on the previous voyage there had been no leakage or rust, and that the steamer had been duly inspected when in port. By the ship's log (Exhibit A), in evidence, it appears that on February 19, 1908, the Italia encountered a strong south gale. She pitched, and took on water fore and aft. She also shipped water and labored heavily on February 18th and 20th. Accordingly, it is claimed that, by reason of such pitching and straining of the vessel, the sea water got into the merchandise at the place where the rivets had worked loose. Neither the master nor any officer or seaman of the Italia was called as a witness, and whether the riveting was loosened by the straining of the vessel in the gales she encountered and the macaroni was damaged by leakage at that point is conjectural.

The burden of proof was upon the vessel in view of the delivery of the merchandise in bad condition to show that the damage was actually caused by sea perils, and not through the carelessness and want of precaution of the vessel, or of those in charge of her navigation. The Folmira, 212 U. S. 354, 29 Sup. Ct. 363, 53 L. Ed. 546. The testimony that the vessel on her voyage encountered gales causing her to roll and that the rivets were found loose is not thought sufficient standing alone to prove that the injury was caused by sea perils. The vessel was bound under the doctrine of the hereinabove cited case to show affirmatively that reasonable precaution had been taken to prevent sea water from wetting the cargo. Some evidence was given, it is true, to indicate that the Italia had been regularly inspected in port, but as to the character of the inspection, whether it was made with reasonable care, or whether the rivets were fastened in

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

place at the beginning of the voyage, the evidence is silent. I think, therefore, that it is not satisfactorily shown that the vessel was fitted to carry the macaroni at the beginning of the voyage without injury from sea water which in inclement weather was likely to roll over her. The Rappahannock, 173 Fed. 829; The Presque Isle, 140 Fed. 202.

The second shipment arrived at the wharf on May 2d, but concededly the unloading of the vessel was not completed until May 6th. The respondent claims that on May 7th during a severe rainstorm in the early morning a leader burst wetting 89 boxes in which the macaroni was contained. It is contended that, pursuant to the terms of the bill of lading, the responsibility of the vessel immediately ceased on unloading the cargo. The testimony is in conflict as to the date when the cargo was placed on the inclosed pier, but, in view of the claim of the respondent that the wetting was on the 7th day of May within 24 hours after the unloading was completed, the exact date is not of controlling importance. Under the terms of the bill of lading, it is unquestionably the law that the consignee had a reasonable time within which to remove the merchandise from the dock where it was unloaded (Liverpool & Great Western Steam Co. v. Suitter et al., 17 Fed. 695), and during the interim the carrier was bound as bailee or warehouseman to exercise reasonable care to protect the merchandise and to keep it from being injured by exposure to rain or water (The Titania, 124 Fed. 975). The libelant has shown by fair preponderance of the evidence that the shipment was not properly protected, in that it was placed under a leader which leaked. While ordinarily it would not be negligence to so place goods in warehouse, yet as the commodity, as is generally known, was easily damaged or spoiled by moisture, I think additional care should have been taken to protect it.

The evidence shows that on the first shipment libelant's damages amounted to $162.40, and upon the second to $669.45, and in the aggregate to $831.85. A decree may be entered for said amount, with interest and costs.

CALIFORNIA NAVIGATION & IMPROVEMENT CO. v. STOCKTON MILLING CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 14, 1911.)

No. 1,895.

1. SHIPPING (§ 140*)—CONTRACT—CONSTRUCTION—LIBELANT'S RISK.
Where a contract for the shipment of flour provided that, in consideration of a reduced freight rate, the flour was to be carried in open barges at libelant's risk, such provision did not relieve respondent from liability for loss and injury to a part of the cargo, resulting from respondent's negligent failure, for 16 hours after discovering that the barge on which the flour was being loaded was in a leaking condition, to take steps to save the cargo from injury.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 493; Dec. Dig. § 140.*]

2. SHIPPING (§ 123*)—INJURY TO AND LOSS OF CARGO—BAD STOWAGE.
The rule that a ship and its owners are exempt from liability for damages by bad stowage performed by stevedores selected by the owner of the cargo does not apply, where the loss was not caused by bad stowage or mischievous acts in handling the cargo, but by respondent's negligent failure to safeguard the same after it had been placed aboard and stowed.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 454; Dec. Dig. § 123.*
Liabilities of vessel owners for loss or injury from improper stowage, see note to The Gualala, 102 C. C. A. 553.]

3. SHIPPING (§ 120*)—INJURY TO CARGO—NEGLIGENCE.
Respondent contracted to transport flour for libelant in open barges and to load the same, but at libelant's request employed a warehouse company to do the loading. After a barge had been partly loaded, and while it was lying unattended, one end grounded at night at low tide, causing seams to open and the barge to leak. This was promptly discovered, and an unsuccessful attempt made to pump out the barge; but no effort was made for 16 hours to save or safeguard the flour that had been loaded, after which the barge sank, causing loss and injury to the flour. *Held*, that respondent, having no other representative in control of the barge, was liable for the negligence of the servants of the warehouse company in failing to exercise ordinary care to preserve the flour while in its custody for transportation.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 440; Dec. Dig. § 120.*]

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

Libel in admiralty by the Stockton Milling Company and another against the California Navigation & Improvement Company to recover for injuries to a cargo of flour. From a decree awarding damages (165 Fed. 356), respondent appeals. Affirmed.

Thomas H. Breeze and De Witt Clary, for appellant.

Charles Page, Edward J. McCutchen, Samuel Knight, and Ira A. Campbell, for appellees.

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

HANFORD, District Judge. With all surplusage and useless contentions of the litigants expurgated from this case, there remains to

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

be considered and decided only the simple question whether the loss complained of is a consequence of negligence, chargeable to the appellant. The admitted and indisputable facts are that the libelants, owners of a lot of flour stored in a warehouse at South Vallejo, made an oral contract with a transportation company (the appellant) to move the flour to Stockton, for compensation at an agreed rate, which was less than the usual freight rate; a reduction being made in consideration of a condition of the contract that the flour should be carried in open barges and at the libelant's risk. While a barge furnished for the service by the carrier was being loaded at South Vallejo, the ebbing of the tide left it bow aground and stern afloat, so that an undue proportion of the weight of the cargo, as it was put on board, was borne by the end having no other support than the water. In that situation the vessel was strained, as a piece of timber would be, if placed so that part of its length rested upon a solid support and the projecting end were weighted. The straining caused seams to open, through which water flowed into the barge. The men employed in loading discovered that the barge was taking in water before 3 o'clock p. m. of the second loading day. Nothing was done to change the position of the barge, and the strain upon her was increased by continuance of loading, until the end of working hours that day. An unsuccessful attempt was made to get an engine to pump the water out, and three men worked all night pumping; but the water came in faster than they could pump it out. At 8 o'clock the next morning the stern sank, and thereby a considerable part of the flour on board went into the water and was lost, and the part saved was damaged. Until within one hour before the sinking, no effort was made to save the flour on the barge by unloading it. It was the business of the warehouse company to move the flour from the place where it was stored to the loading place on the wharf alongside of the barge. On a request from the libelants, and for the mutual advantage of all concerned, the appellant employed the warehouse company to deliver the flour on the barge and stow it, instead of dumping it on the wharf.

The averments in the libel, that the appellant was employed to transport the flour in its character as a common carrier, and that the barge was unseaworthy, are superfluous, because another sufficient ground supports the decree of the District Court awarding damages to the libelants. Negligence of the appellant in failing to exercise due care for the safety and preservation of that part of the cargo which had been delivered into its custody is charged in the libel as a cause of the loss and ground of liability, and that charge is well sustained by proof of the facts recited in the foregoing narrative. No timely effort was made to save the flour, either by easing the strain on the barge, or by unloading, although more than 16 hours intervened between the time of discovering the leaking condition of the barge and the time of her sinking, and no excuse whatever for that negligence has been suggested.

The libelant is not shielded from responsibility for the consequences of its negligence by the agreement of the libelant to assume risks.

That agreement, according to the evidence, was vague and uncertain, and no ultra liberal construction of the contract to shift responsibility from a wrongdoer deserves judicial sanction. By its undertaking the appellant became obligated to exercise ordinary care and diligence in handling the libelant's property and to furnish seaworthy barges and competent servants, and certainly risk of loss by its failure to perform the contract in good faith was not contemplated as one of the risks assumed by the libelants.

It has been held in a number of decisions that a ship and its owners are exempt from liability for damages resulting from bad stowage, performed by stevedores selected by the owner of the cargo, and on that line of defense the following cases have been cited: Westray v. Miletus, Fed. Cas. No. 17,461, affirmed in 5 Blatchf. 335, Fed. Cas. No. 9,545; Blaikie v. Stembridge, 6 C. B. (N. S.) 899. The principle affirmed by those decisions, however, is not applicable to the facts of this case, for the reason that the loss was not caused by bad stowage, nor by mischievous acts in handling the flour. The duty of safeguarding the flour, after it had been placed upon the barge and stowed, was incidental to the carrier's undertaking, and distinct from the work which the libelants requested that party to intrust to the warehouse company. Having no other representative in control of the barge, the appellant must be condemned for absolute failure to provide for its safety, or else held responsible for the warehouse company's mismanagement as its agent. The respective duties and obligations of the parties furnish the criterion by which to determine whether negligence of an employé is to be imputed to one or the other of adverse parties, where each has a beneficial interest in the employé's work.

"It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become pro hac vice the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other, we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary co-operation, where the work furnished is part of a larger undertaking." Standard Oil Co. v. Anderson, 212 U. S. 221, 29 Sup. Ct. 254, 53 L. Ed. 480.

In this case the negligence causing damage was in failing to perform a duty which the appellant was obligated by its contract to perform, viz., the duty to exercise ordinary care for the preservation of

the flour while in its custody for transportation. For that breach of its contract the appellant is legally bound to render compensation, as decreed by the District Court.

Affirmed.

ROBERTSON et al. v. ALLEN.

(Circuit Court of Appeals, Fifth Circuit. Feb. 7, 1911.)

No. 2,104.

1. BROKERS (§ 49*)—CONTRACTS—CONDITIONS.

A contract with certain brokers provided that the owner of the land in question would convey the same to the brokers or their nominee within six months on certain conditions at $6.50 an acre, in which case there should be no commissions; that the brokers might sell the land to any responsible party or person at any price above $6.50 per acre, and retain the excess, or that they might sell within the time to a willing purchaser for $6.50 per acre, in which case they should receive 2½ per cent. commission. *Held* that, in case of a sale under such contract, the brokers were the agents of the owner, and were bound by the conditions contained in the option part of the contract.

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

2. BROKERS (§ 94*)—AUTHORITY—CONTRACT TO SELL AND CONVEY.

Where brokers were authorized to purchase and sell land at a specified price under certain conditions, or to find a purchaser, they had no power to bind their principal by a contract to sell and convey.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 136; Dec. Dig. § 94.*]

3. BROKERS (§ 54*) — SALE OF LAND — PROCURING PURCHASER — PECUNIARY ABILITY.

Commissions are not earned by a broker by his procuring a purchaser who is irresponsible and insolvent.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 75–81; Dec. Dig. § 54.*]

4. BROKERS (§ 49*)—CONTRACT—VALIDITY—VIOLATION OF INSTRUCTIONS.

Where brokers in executing a contract for the sale of land did not follow their instructions contained in an option contract between themselves and the owner, and also contracted with the purchaser for an interest in addition to their commissions, without the knowledge of the principal, the contract was void.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70–72; Dec. Dig. § 49.*]

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

Suit by A. B. Robertson and others against Sidney P. Allen to cancel a contract for the sale of land. Judgment for defendant, and plaintiffs appeal. Reversed and remanded, with instructions.

This suit was instituted by the appellants, complainants below, to cancel an alleged contract of sale of lands executed by Trammell & McCauley, purporting to act as agents of complainants, with the defendant.

The bill, after jurisdictional and ownership averments, contains among others not necessary to recapitulate the following averments:

"Third.

"Thomas Trammell and R. L. McCaulley are residents and citizens of Nolan county, Tex., and at the times hereinafter mentioned were assuming to

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

act as real estate brokers in buying and selling lands belonging to others for hire, and lying in the state of Texas, and have also been engaged in speculating in lands in the state of Texas upon their own account. Heretofore, to wit, on September 29, 1906, your orators, acting by and through A. B. Robertson, made and entered into a written contract with the said Thomas Trammell and R. L. McCaulley, which said written contract is substantially as follows, to wit:

" 'This agreement made and entered into this the 29th day of September, 1906, by and between Winfield Scott, of Fort Worth, Texas, and A. B. Robertson, of Colorado, Texas, parties of the first part, and Thomas Trammell and R. L. McCaulley, of Sweetwater, Texas, parties of the second part, witnesseth: That, whereas the parties of the first part are owners in fee simple of certain lands located in Lubbock, Lynn, Crosby, and Garza counties, state of Texas, known as the Scott & Robertson pasture, and further designated by list attached hereto, giving numbers of sections, etc., of above lands:

" 'Now, therefore, the said parties of the first part hereby agree to sell to said Trammell & McCaulley, or their nominees, the above-mentioned lands at the price of $6.50 per acre, one-fourth (¼) to be paid in cash upon the furnishing by said parties of the first part of a good deed, with proper abstract showing good title, balance of the purchase to be paid in 1, 2, and 3 annual payments to be secured by vendor's lien retained in the deed, and to draw interest at the rate of six per cent. (6%) per annum from date of notes, all interest on such deferred payments to be paid annually, and said notes for deferred payments to be made "on or before" maturity.

" 'Said parties of the first part further agree that they will release from the vendor's lien retained to secure the deferred payments any part of the above land upon the payment to them of the proportionate part due on the land to be released. The parties of the first part further agree to furnish abstract showing good and legal title to above property.

" 'It is agreed and understood by both parties that said Trammell & McCaulley are to have six (6) months time from the date of this agreement in which to dispose of this property, it being the purpose and intention of this agreement to give said parties of the second part an option on this land for a period of six months from the date hereof. It is further agreed and understood that said Trammell & McCaulley may sell said property at any price in excess of $6.50 per acre, and that such excess shall belong to said Trammell & McCaulley, and said parties of the first part hereby agree to make deed at the price furnished them by said Trammell & McCaulley.

" 'It is also agreed and understood by both parties hereto that said parties of the first part are to have the use of the said pasture and water thereon a necessary length of time in which to dispose of their cattle and that they are to pay to the purchasers of said land a reasonable or customary price as rental therefor.

" 'The above provision need not apply to lands situated on the plains except by agreement hereafter. In the event that the parties of the second part desire to sell, or do sell, some of this land for farming purposes, same is to be fenced off and not considered in the land leased.

" 'The parties of the second part hereby agreeing that they will devote effort and time, and by advertisement and personal work do all they can to effect a sale within the period designated.

" 'This contract is executed in triplicate.

" '[Signed] Scott & Robertson,
" 'Parties of the First Part.
" 'R. L. McCaulley, Thos. Trammell,
" 'Parties of the Second Part.'

"And upon said day and date your orators, acting by and through A. B. Robertson, made and entered into the further contract in writing with the said Thomas Trammell and R. L. McCaulley, which is, in substance, as follows, to wit: 'Whereas, we did, on the 29th day of September, 1906, enter into a contract with Thomas Trammell and R. L. McCaulley for the sale of certain lands located in Lubbock, Lynn, Crosby, and Garza counties, Texas, we hereby agree to pay to said Trammell & McCaulley a commission of two

and one-half per cent. (2½) on said price of $6.50 in case a sale is effected by said parties within the time specified in said agreement or any extension thereof.' Thereafter, and up to and including the 22d day of March, 1907, the said Thomas Trammell and R. L. McCaulley had not exercised their option to purchase said lands hereinabove mentioned, in accordance with their said option contract, and had not procured for your orators a sale of said lands, and upon the 22d day of March, 1907, Thomas Trammell, acting for said Trammell & McCaulley, from Dallas, Texas, sent to your orator, A. B. Robertson, a telegram, which was on said day received by your orator, A. B. Robertson, and which is in substance, as follows, to wit:

"'Dallas, Texas, March 22, 1907.

"'A. B. Robertson, Metropolitan Hotel, Fort Worth.

"'If you can extend time on land leave letter Metropolitan Hotel; we would like to have thirty days. Thomas Trammell.'

"And thereby the said Thomas Trammell meant if your orator would extend the said option contract hereinabove mentioned, and the other contract hereinabove copied on the land herein in controversy, for him to leave letter for Thomas Trammell at the Metropolitan Hotel, in Fort Worth, Texas, so showing, and thereby the said Thomas Trammell asked for a 30 days' extension of the said two contracts. Upon receipt of the said telegram herein mentioned, your orator A. B. Robertson replied thereto, and declined to extend the time of said contract as requested by the said Thomas Trammell.

"Fourth.

"Thereupon, as your orators charge on information and belief, the said Thomas Trammell and R. L. McCaulley entered into a conspiracy and collusion with the defendant herein to cloud the title of your orators to the lands hereinbefore mentioned, and, after being advised by your orator A. B. Robertson that your orators refused to extend the said contracts hereinbefore noted for 30 days as requested by them, or for any other time, the said Thomas Trammell went immediately to Kansas City, where he met the said R. L. McCaulley and the defendant Allen, and thereupon the said defendant Allen and the said Thomas Trammell and the said R. L. McCaulley entered into a conspiracy and collusion to cloud the title of your orators to the lands herein mentioned, and to that end the said Thomas Trammell drew a check for $1,000 upon the banking house of Thomas Trammell & Co., at Sweetwater, Texas, and delivered the same either to the said defendant Allen or to W. A. Rule, and procured in lieu of said check the cashier's check for $1,000 which the said Thomas Trammell delivered to your orator A. B. Robertson, as alleged herein; that the said defendant herein had no interest at all whatever in said money or said cashier's check, but the same was furnished by said Thomas Trammell and said R. L. McCaulley. And thereupon, and in pursuance of such conspiracy and collusion with the said defendant, the said Thomas Trammell and the said R. L. McCaulley, purporting to act for your orators, entered into a contract in writing with the defendant, which is substantially as follows, to wit:

"'This agreement, made and entered into on this the 22d day of March, 1907, by and between Thomas Trammell and R. L. McCaulley of Sweetwater, Texas, as agents for A. B. Robertson of Colorado, Texas, and Winfield Scott, of Fort Worth, Texas, parties of the first part, and Sidney P. Allen, of Kansas City, Jackson county, Missouri, party of the second part, witnesseth: That, whereas, Thomas Trammell and R. L. McCaulley made and entered into contract with A. B. Robertson and Winfield Scott on the 29th day of September, 1906, whereby the said R. L. McCaulley and Thomas Trammell did secure a contract from the said Scott and Robertson for the sale of certain lands located in the counties of Lubbock, Lynn, Crosby and Garza, state of Texas, said contract being and providing as follows:

"' "This agreement, made and entered into this the 29th day of September, 1906, by and between Winfield Scott, of Fort Worth, Texas, and A. B. Robertson of Colorado, Texas, parties of the first part, and Thomas Trammell and R. L. McCaulley, of Sweetwater, Texas, parties of the second part, witnesseth: That, whereas, the parties of the first part are owners in fee simple of certain lands located in Lubbock, Lynn, Crosby, and Garza counties, Texas,

known as the Scott & Robertson pasture, and further designated by list attached hereto, giving numbers of sections, etc., of above lands. Now, therefore, the said parties of the first part hereby agree to sell to said Trammell & McCaulley, or their nominees, the above-mentioned lands at the price of $6.50 per acre, one-fourth (¼) to be paid in cash upon the furnishing by said parties of the first part of a good deed, with proper abstract showing good title balance of the purchase to be paid in 1, 2, and 3 annual payments to be secured by vendor's lien retained in the deed, and to draw interest at the rate of six per cent. (6%) per annum from date of notes, all interest on such deferred payments to be paid annually, and said notes for deferred payments to be made, 'on or before,' maturity. Said parties of the first part further agree that they will release from the vendor's lien retained to secure the deferred payments any part of the above land upon the payment to them of the proportionate part due on the land to be released. The parties of the first part further agree to furnish abstract showing good and legal title to above property. It is agreed and understood by both parties that said Trammell & McCaulley are to have six (6) months' time from the date of this agreement in which to dispose of this property, it being the purpose and intention of this agreement to give said parties of the second part an option on this land for a period of six months from the date hereof. It is further agreed and understood that said Trammell & McCaulley may sell said property at any price in excess of $6.50 per acre, and that such excess shall belong to said Trammell & McCaulley, and said parties of the first part hereby agree to make deed at the price furnished them by said Trammell & McCaulley. It is also agreed and understood by both parties hereto that said parties of the first part are to have the use of the said pasture and grass and water thereon a necessary length of time in which to dispose of their cattle, and they are to pay to the purchasers of said land a reasonable or customary price as rental therefor. The above provision need not apply to lands situated on the plains except by agreement hereafter. In the event that the parties of the second part desire to sell, or do sell, some of this land for farming purposes, same is to be fenced off and not considered in the land leased. The parties of the second part hereby agreeing that they will devote effort and time, and by advertisement and personal work do all they can to effect a sale within the period designated."

"'Now, therefore, the said Thomas Trammell and R. L. McCaulley, acting through and by virtue of the above-recited agreement and also as agents therein for the said A. B. Robertson and Winfield Scott, do hereby sell to the said Sidney P. Allen the lands known as the Scott & Robertson lands, located in the above counties, and comprising 60,000 acres, more or less. For a description of the numbers of the sections comprising these lands, as well as the block numbers, etc., reference is hereby made to a plat of said property which is now in the office of the said R. L. McCaulley and Thomas Trammell in Sweetwater, Texas, and reference is also made for further description to the county records of the above-mentioned counties, where the above lands are located, said party of the second part hereby agreeing to accept and pay for said lands in accordance with the provisions and conditions above recited in the agreement heretofore recited. Said Sidney P. Allen agreeing to pay one-fourth of the purchase price at $6.50 per acre, upon the furnishing by the said Scott & Robertson of proper abstracts showing good title and making deed to the property to the said Sidney P. Allen, and the said Sidney P. Allen further agrees to execute vendor's lien notes to be paid in one, two, and three annual payments, said notes to be made payable on or before maturity and draw interest at the rate of 6% per annum from date of notes. All interest on deferred payments to be made annually. It is hereby agreed and understood that, when the said Scott & Robertson shall have furnished abstracts to the above property, said Sidney P. Allen shall have necessary and reasonable time in which to have said abstracts examined, and just as soon as said abstracts can be examined, after same have been furnished, as above provided, said party of the second part using reasonable diligence in causing said abstracts to be examined, and passed on, that he will then make payment of balance of the cash payment and execute notes as above provided. Said Sidney P. Allen paying the parties of the first

part upon the execution of this contract, the sum of one thousand dollars ($1,000), which said sum is to be deducted from the cash payment by him. In case the abstracts do not show, and cannot be made to show, good title to the property, then in that event the said one thousand dollars ($1,000) is to be returned to the said Sidney P. Allen.

" 'This contract is executed in triplicate.

" '[Signed] Scott & Robertson,

" 'Parties of the First Part.

" 'By Trammell & McCaulley.

" 'Sidney P. Allen,

" 'Party of the Second Part.'

* * * * * * * * * * * * * * *

"Sixteenth.

"Heretofore, and subsequent to the execution of the pretended contract by the defendant and said Thomas Trammell and R. L. McCaulley, assuming to act as the agents of your orators, the defendant and said Trammell & McCaulley, acting together, in pursuance of their collusion and conspiracy, caused the said contracts to be registered in each of the counties wherein said lands of your orators lie, to wit, the counties of Crosby, Lubbock, Lynn, and Garza, and thereby have cast a cloud upon the title of your orators, which cannot be removed without the aid of a court of equity, for that the introduction of parol testimony is necessary to show the want of authority in the said Trammell & McCaulley to execute said contracts as agents for your orators, which said want of authority is not apparent upon the face of said contract, and thereby the title of your orators to said lands being so clouded, your orators are hindered and embarrassed in the sale and possession thereof.

"Wherefore, for as much as your orators are remediless by the strict rules of the common law, and can only be relieved in a court of equity, your orators have brought this, their suit, and pray, the defendant having already been cited herein and having herein entered his voluntary appearance, that he be required to answer this bill, but not under oath (answer under oath being hereby waived), and that upon trial hereof your orator have judgment against the defendant canceling the said pretended contract executed by him and the said Thomas Trammell and R. L. McCaulley, assuming to act as agents for your orators, and that the cloud upon the title of your orators to the said lands described in this bill be removed, and for such other and further relief, general or specific, as your orators may show themselves to be entitled to in the premises, and as in duty bound your orators will ever pray," etc.

The defendants' answer, aside from general denials and pleas in confession and avoidance, is as follows:

"Defendants say the allegations in paragraph sixteenth of said bill of complaint herein are not true in whole or in part, as said allegations state that the registration in Crosby, Lubbock, Lynn, and Garza counties of the said contract of purchase made by this defendant, as aforesaid, was done in pursuance of a conspiracy and collusion between this defendant and Trammell & McCaulley. Defendant says there was no collusion nor conspiracy of any kind between this defendant and Trammell & McCaulley, or either of them, with reference to said lands or the registration of said contract; but the facts are that this defendant had said contract registered in said counties for the purpose of giving notice to the public of the right of this defendant in and to the lands mentioned in said contract, and for the protection of the rights of this defendant in the lands mentioned in said contract. Defendant admits that want of authority in Trammell & McCaulley to execute said contract as agents for complainants is not apparent upon the face of said contract, and defendant denies that there was any want of authority in said Trammell & McCaulley to so execute said contract as agents for complainants, but says said authority existed as shown by the written contracts made by complainants through said Trammell & McCaulley, which said contracts are set out substantially in paragraph third of complainants' bill herein.

"Defendant says he made the contract for the purchase of said lands mentioned in the bill of complaint herein, as aforesaid, in the utmost good faith

and with the purpose of carrying out and performing said contract, but complainants have refused to carry out any part of said contract to be by them performed, and have breached, and, inasmuch as this defendant on breach of said contract by complainants had a right to elect whether he would seek a specific performance of said contract or would seek a recovery from complainants for damages sustained by him by the breach of said contract by complainants, this defendant has elected to seek a recovery from complainants for his damages by reason of a breach of said contract, and to that end this defendant has instituted his suit for damages in the Circuit Court of the United States for the Northern District of Texas, at Abilene, which court has jurisdiction of said suit both as to parties and to subject-matter, and for that reason, and for the reason that defendant's suit against complainants for his said damages is an action at law and not cognizable in this court in this case, this defendant does not put at issue herein his rights under said contract, but expressly reserves same for assertion in his aforesaid action at law, and answers herein only as to the issue tendered herein by complainants, the validity of the contract of purchase made by defendant with complainants."

After much evidence and on hearing before the Circuit Court, the complainants' bill was dismissed, with costs, and the complainants sued out this appeal.

Edward J. Hamner, I. W. Stephens, and Geo. E. Miller, for appellants.

A. H. Kirby, M. A. Spoonts, Geo. Thompson, and J. H. Barwise, Jr., for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). The two writings made between Scott & Robertson for the one part and Trammell & McCauley for the second part on the 29th day of September, 1906, constitute the agreements between the parties. No present consideration is alleged or shown. Specifying and analyzing these agreements, we find: That Trammell & McCauley were given a right to purchase the land in question for themselves or their nominee at any time within six months at the price of $6.50 per acre, in which case there were to be no commissions. This might have ripened into a binding contract if accepted within six months. (2) That at any time within six months Trammell & McCauley had a right to sell the land to any responsible person at any price above $6.50 per acre, in which case the excess over $6.50 was to belong to Trammell & McCauley. Such a sale is not claimed. (3) That Trammell & McCauley might sell the land at any time within the six months to any willing purchaser at $6.50 per acre, in which case Trammell & McCauley were to receive as commissions 2½ per cent. on the amount of sale. In case of sale under this provision, Trammell & McCauley were the brokers and agents of Scott & Robertson for the sale of the land, their instructions being the conditions offered to Trammell & McCauley in the option part of the contract. In the matter of such sale, said Trammell & McCauley were interested only to the extent of their commissions. The record shows that, under this provision and treating the aforesaid agreement as a full and regular power of attorney, Trammell & McCauley entered into an agreement in the name of Scott & Robertson with the defendant Allen, who was insolvent, if not bankrupt, and who had never seen the land or had it described to him by

any person who had seen or was acquainted with the same, for the sale to said Allen of a tract of 60,000 acres, worth in the aggregate at least $400,000, the said Allen agreeing to accept and pay for said lands in accordance with the provisions and conditions recited in the option given by Scott & Robertson to Trammell & McCauley, but additionally providing that:

"When the said Scott & Robertson shall have furnished abstracts to the above property that said Sidney P. Allen shall have necessary and reasonable time in which to have said abstracts examined, and, just as soon as said abstracts can be examined, after same have been furnished as above provided, said party of the second part, using reasonable diligence in causing said abstracts to be examined and passed on, that he will make payment," etc.

And it further provided that:

"Said Sidney P. Allen paying the parties of the first part upon the execution of this contract the sum of one thousand ($1,000.00) dollars, which said sum is to be deducted from the cash payment by him," and "in case the abstracts do not show and cannot be made to show good title to the property, then the said one thousand ($1,000.00) dollars to be returned to the said Sidney P. Allen."

In the agreement between Scott & Robertson and Trammell & McCauley there was a stipulation that the parties of the first part were to have the use of pasture, grass, and water, in which to dispose of their cattle, and for which they were to pay a reasonable, customary rental, but reserving the application of said provision to lands situated on the plains, except by agreement thereafter made, and providing in the case of sale or resale of some of this land for farming purposes the same shall be fenced off and not considered in the lease, so that it may be said that the alleged contract made by Trammell & McCauley for Scott & Robertson was not in strict accordance with, but differed in certain respects from, the power claimed to have been given by Scott & Robertson to Trammell & McCauley. And it further appears from the evidence of Allen that Trammell & McCauley were to have an interest of 25 cents per acre in the land sold, and this was not communicated to Scott & Robertson. When the agreement with Allen was communicated to Robertson by wire on the 24th day of March and in person by Trammell on the 29th day of March, 1907, the said Robertson refused to ratify or confirm the same, declaring it was absolutely void for the want of authority on the part of Trammell & McCauley to execute the same. At the same time the said Scott & Robertson, expressing themselves willing to sell said land for the price and under the terms mentioned in the option contract, offered to enter into and execute a contract with any purchaser who would properly and reasonably protect their interests, and with the alleged consent of Trammell negotiations were at once entered upon to bring about such sale with defendant Allen; and thereupon the cashier's check for the sum of $1,000, said to have been accepted by Trammell from Allen, was deposited with Robertson, with the understanding, as Robertson claims, as a guaranty that said cashier's check for $1,000 so deposited with Robertson should apply as a part of the purchase money in case of sale to Allen, and, in case such sale failed, then to be applied to reimburse Scott & Robertson for expenses in preparing for the execu-

tion of said contract, procuring abstracts of title, and other expenses, etc. The negotiations under the new contract of sale to Allen failed possibly from the fact that Scott & Robertson insisted on several stipulations not mentioned in the original contract, such as that notes for deferred payments should be made payable at the Colorado National Bank, Colorado, Tex., and should provide for 10 per cent. attorney's fees in event of nonpayment; that the contract should contain a provision with regard to resale of part and fencing the same, and in regard to pasture and grazing during the time necessary to dispose of their cattle, not to exceed two years, and other minor provisions not necessary to specify. Thereupon, after some correspondence, Trammell & McCauley and Allen caused the agreement made between Trammell & McCauley, acting as agents of Scott & Robertson, to be registered in the several counties in Texas, where the lands were situated, and hence this suit alleging conspiracy to remove cloud from title.

The bill charges conspiracy between Trammell & McCauley and Allen and many other allegations of fact, making a case, if true, for complainants' relief. The answer denies generally and specifically; asserts the authority of Trammell & McCauley as brokers and agents of Scott & Robertson to make the contract and sale in question; avers good faith; alleges that complainants have refused to carry out any part of the contract of sale and have breached the same; that defendant had a right to elect whether he would seek specific performance or a recovery of damages by reason of the breach, and that the defendant has elected to seek a recovery from said complainants for his damages, and to this end has instituted a suit at law for damages in the Circuit Court of the United States for the Northern District of Texas, and for that reason does not put at issue herein his right for damages, but expressly reserves the same for assertion in said action at law, and answers herein only as to the issue tendered by complainants, to wit, the validity of the contract of purchase.

Trammell & McCauley had no power of attorney from Scott & Robertson, but they were, as charged in the bill and admitted in the answer, brokers and agents to sell the land in question. Their instructions, if any, were found in the option part of the contract. On principle and authority they had no right or power to bind their principals by a contract to sell and convey. 3 Wait, Actions & Defenses, 286, 287.

Hamer v. Sharp, L. R. 19 Eq. 108, on the following written instructions:

"I request you to procure a purchaser for the following freehold property, and to insert particulars of the same in your Monthly Estate Circular till further notice, viz., my beer house and shop, No. 4 and No. 6, Manchester Road. Tenant, No. 4, William Galloway, gilder; and No. 6, Albert Vaults, Henry Holmes, beer retailer, and work-rooms above. Present net rent, £150; price £2,800, when I will pay you a commission and expenses of fifty pounds. About six years' lease unexpired. [Signed] J. Sharp."

And the court in a well-considered opinion:

"Held, that the estate agent had no authority to enter into an open contract for sale, and, semble, that he had no authority to enter into any contract for sale."

In Halsey v. Monteiro, 92 Va. 581, 24 S. E. 258, the Supreme Court of Virginia decides:

"A real estate broker or agent is defined to be one who negotiates the sale of real property. His business generally is only to find a purchaser who is willing to buy the land upon the terms fixed by the power. He has no authority to bind his principal by signing a contract of sale. A sale of real estate involves the adjustment of many matters besides fixing the price. The delivery of the possession has to be settled, generally, the titles to be examined, and the conveyance, with its covenants, to be agreed upon and executed by the owner—all of which require conference and time for their completion. They are for the determination of the owner, and do not pertain to the duties, and are not within the authority, of a real estate agent. For obvious reasons, therefore, the law wisely withholds from him any implied authority to sign a contract of sale in behalf of his principal. 3 Wait, Act. & Def. 286, 287; Davis v. Gordon, 87 Va. 566, 13 S. E. 35; Kramer v. Blair, 88 Va. 456, 13 S. E. 914; Force v. Dutcher, 18 N. J. Eq. 401; Morris v. Ruddy, 20 N. J. Eq. 236; Duffy v. Hobson, 40 Cal. 240 [6 Am. Rep. 617] and Grant v. Ede, 85 Cal. 418, 24 Pac. 890 [20 Am. St. Rep. 237]."

The cases cited all support the text.

In Coleman v. Garrigues, 18 Barb. (N. Y.) 60, 67, the Supreme Court of New York said:

"It is well known that the general agency of brokers in real estate is limited to finding a buyer or borrower who will assent to the terms of the seller or lender, and then bringing the parties together. A lender on mortgage would be astonished to find his broker assuming to sign his name to a contract to loan on real estate; and the borrower would be no less and justly astonished to find that the broker had signed a contract in his name to mortgage his real estate. The owner of real estate who authorizes a broker to sell his land would be surprised to find the broker assuming to sign a contract for the sale; and the buyer would be no less surprised to find his name fixed by a broker to a contract to buy. In dealing in real estate, the authority to sign the contract is never understood to be granted from a mere authority to make a bargain. The proposed purchaser may be very objectionable. He may be one who would erect nuisances to annoy the neighbors, or who would contract to pay cash and then cause delays, which on slight grounds a court of chancery would excuse, and so make the nominal cash payment a long credit; so, too, the borrower on mortgage may be one with whom the lender would be unwilling to have any dealings. For such reasons, the power of the broker is thus practically limited; and he does not exercise, and is not understood to possess, the power to use the name of either of the principals."

Glentworth v. Luther, 21 Barb. (N. Y.) 145, 146, is to the same effect.

In Duffy v. Hobson, 40 Cal. 244, 6 Am. Rep. 617:

"This is the settled construction to put upon the employment of professional brokers 'to sell' or 'to close a bargain,' concerning real estate, and we know of no reason why the same language employed to express the authority of any other agent 'to sell' should have a more extended meaning. Besides, a sale of real estate involves the adjustment on many matters in addition to fixing the price at which the property is to be sold. The deed of conveyance may be one with full covenants of seizin and warranty, or only those covenants imported by the use of the words 'grant, bargain and sell' under our statute, or it may be by quitclaim merely. The vendor may be unwilling to deal with a particular proposed purchaser on any terms. He may consider him pecuniarily unable to comply with the contract, even if the title prove satisfactory, and he may decline to bind himself to convey to such a purchaser at the end of the time necessary to examine the title, because he might thereby in the meantime lose an opportunity to sell to some other person who

might desire to purchase, and in whose good faith and ability to pay he reposed entire confidence. All these and many other like considerations might, and usually do, arise in the mind of the vendor. Now a mere authority 'to sell' can hardly confer power upon the agent to determine all these matters for his principal, so as to bind him by his determination. And yet, unless the agent do have such power, he cannot make a definitive contract, or one that could be said to have the certainty requisite to deprive the principal of his option to ultimately decline to make the sale. To give to the mere words 'to sell' such a broad signification as that would be to invest the agent with powers of that ample and discretionary character usually only conferred with caution and by means of a general letter of attorney, where the terms are distinctly expressed. While it is true that a power to sign the name of a principal to a contract of sale may be given verbally, we think that the words used for the purpose should be distinct and clear in their meaning and import, and should, with the requisite degree of certainty, manifest the intention of the principal to do something more than merely to employ a broker."

To the same effect are Treat v. De Celis, 41 Cal. 202, and Armstrong v. Lowe, 76 Cal. 616, 18 Pac. 758, in each of which a price and terms were fixed and there was a written power.

Apropos of the subject, see Mechem on Agency, § 966, to the effect that it is incumbent upon a broker to show that the purchaser was produced and was able pecuniarily to complete the purchase; citing McGavock v. Woodlief, 20 How. 221, 15 L. Ed. 884; Iselin v. Griffith, 62 Iowa, 668, 18 N. W. 302; Coleman's Ex'r v. Meade, 13 Bush (Ky.) 358, sustaining the text. Allen, the proposed purchaser, was an irresponsible insolvent, and it is no answer to this phase of the case to say that one Rule was interested with Allen as purchaser; but the evidence shows that Rule was not in much better condition pecuniarily, and, besides, it is shown that Rule was in no wise bound to Scott & Robertson as a purchaser.

Passing this point and assuming for this case that Trammell & McCauley as agents had authority to bind Scott & Robertson by contract of sale, then I think it is clear that they exceeded their power, and therefore Scott & Robertson are not bound. In Henry v. Lane, 128 Fed. 243, 252, 62 C. C. A. 625, in which a sale had been made under a regular power of attorney, this court said and held:

"The power of attorney was the sole measure of the agents' authority. It specified in detail the terms upon which appellant was willing to sell, and, whether wise or unwise, beneficial or prejudicial, they were the terms which appellant chose to name; and Trueheart & Co. and appellee were powerless to change them. It was appellant's land. As the owner he had the right to specify the terms upon which he would sell his own property. No matter how absurd or unreasonable his terms might be, it was, in the very nature of things, his right as owner of the property to fix his own terms, and Lane had either to assent thereto or decline to buy."

And the adjudged cases in Texas and elsewhere settle the proposition that, where the contract of sale made by the agent varies from the authority granted by the principal, the same is void and unenforceable. De Sollar v. Hanscome, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. Ed. 956; Gough v. Coffin (Tex. Civ. App.) 120 S. W. 210; Shirley v. Coffin (Tex. Civ. App.) 121 S. W. 181, and other cases in brief of counsel.

Now in the option part of the agreement it was provided that "one-fourth to be paid in cash upon the furnishing by the parties of the first part of a good deed with proper abstract showing good title," evidently

intending that the option acceptor should determine at once and without delay whether the title was acceptable.

The contract made for Scott & Robertson in detail is as follows:

"It is hereby agreed and understood that, when the said Scott & Robertson shall have furnished abstracts to the above property, said Sidney P. Allen shall have necessary and reasonable time in which to have said abstracts examined, and just as soon as said abstracts can be examined, after same have been furnished, as above provided, said party of the second part using reasonable diligence in causing said abstracts to be examined, and passed on, that he will then make payment of balance of the cash payment and execute notes at the rate of six per cent. (6%) per annum from date of notes, all interest on such deferred payments to be paid annually, and said notes for deferred payments to be made 'on or before' maturity."

Why was this inserted if the option was sufficient? Evidently to give more time than the option contract gave for delay in holding the abstract for examination, to the end that the irresponsible bankrupt purchaser might have time to raise money to purchase land he had never seen nor had even been described to him by any person who ever had seen the land. It is no answer to this that the law would have given the purchaser reasonable time to hold and examine the abstract. The law would only have given time, if upon construction of the option limit it were found that time was therein granted, and it would have left no scope for the delay—as seems to have been carefully provided for in elaborate details set forth in the alleged contract. Again, the option contract provided for the right reserved to pasture after sale, the exact extent of which was to be agreed thereafter, and evidently to be settled with the purchaser before the consummation of the sale. The alleged contract of sale makes no provision in regard to this proposed reservation on the part of the vendor. These are variations from the power on which under Henry v. Lane, supra, and the other cases cited, Scott & Robertson had a right to reject.

And there is another matter developed by the evidence that should entitle Scott & Robertson to relief. Trammell & McCauley, as admitted agents to sell, reserved and retained an interest with the alleged purchaser of 25 cents per acre in the land proposed to be sold, and thus were interested on both sides of the transaction without the knowledge of Scott & Robertson, and this of itself is sufficient to vitiate the alleged sale. The trial judge views it as a suspicious matter requiring Trammell & McCauley's actions to be closely scrutinized, but falling back on the option contract under which Trammell & McCauley were not acting, and although it would allow the agents' commissions from both vendors and vendee, holds it to be immaterial. The authorities are overwhelmingly against such holding. Mechem on Agency, §§ 643, 798. In Armstrong v. O'Brien, 83 Tex. 635, 648, 19 S. W. 268, 274, it is said:

"It is well settled that a person cannot act in the capacity of agent for both the buyer and seller, and receive commissions from both; and from principles of public policy such an agent would not be allowed to recover compensation from either party, unless he should so act with the full knowledge and consent of both principals; and about this exception there is a conflict of authority. It makes no difference that the principal was not in fact injured, or that the agent intended no wrong, or that the other party acted in good faith."

That such conduct of the agent, unless known and assented to by both parties, avoids the contract on principle and on grounds of public policy, see authorities collated. Section 643, Mechem on Agency. So that whether we consider the power of the agents to bind Scott & Robertson in the contract with Allen, or the variations from the power, or the conduct of the agents, the alleged contract was void and unenforceable, and decree should go for complainants.

And it is further manifest that, even if there were any doubt as to the correctness of each and all of the above conclusions, then, considering that Allen has elected to abandon any demand for specific performance, and that the public policy being that no such large tract of land should be and remain for an indefinite period out of commerce, the complainants should have a decree removing cloud from title. We have some doubt as to whether the complainants should be allowed to retain the thousand dollars received by them in the after-negotiations as to the sale of the land.

The decree of the Circuit Court is reversed, and the cause is remanded, with instructions to enter a decree in favor of the complainants substantially as prayed for, with all costs to be taxed, but conditioned that the complainants shall pay into the registry of the court for the use of the defendant the sum of $1,000, with interest from April 1, 1907.

GEE CUE BENG v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 7, 1911.)

No. 2,119.

1. ALIENS (§ 32*)—CHINESE EXCLUSION—REVIEW BY CIRCUIT COURT OF APPEALS.

   Where a Chinese alien, arrested in deportation proceedings, is ordered deported, and the order is affirmed on an appeal to the District Court, the order is again reviewable on a further appeal to the Circuit Court of Appeals.

   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. § 32.*]

2. ALIENS (§ 32*)—CHINESE PERSON—EXCLUSION—CITIZENSHIP—EVIDENCE.

   In Chinese exclusion proceedings, evidence *held* to require a finding that defendant was a native-born citizen of the United States, and therefore not subject to deportation.

   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. § 32.*

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

3. ALIENS (§ 32*)—CHINESE EXCLUSION—CITIZENSHIP—BURDEN OF PROOF.

   Where in Chinese deportation proceedings defendant claims to be a natural-born citizen, never to have left the United States, he was entitled to rely on his constitutional right to remain, and the burden was on the government to prove noncitizenship.

   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. § 32.*]

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

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

Deportation proceedings by the United States against Gee Cue Beng. From an order of deportation, affirmed by the District Court, defendant appeals. Reversed and remanded, with instructions to discharge.

On April 2, 1910, an affidavit was made by Alfred W. Brough, Chinese inspector, before the United States commissioner, charging the appellant, Gee Cue Beng, to be a Chinese person unlawfully in the United States without a legal certificate, in violation of the Chinese exclusion laws. A warrant was issued and appellant arrested, and furnished recognizance in the sum of $1,500 with a reputable white citizen and freeholder as surety for his appearance before the commissioner. Appellant was tried before the commissioner on the said charge. The note of evidence first shows that a stenographer and then a Chinese interpreter were sworn. Whether the interpreter was called for by the government or by the appellant does not appear. On the trial the government introduced three witnesses, Alfred W. Brough, Chinese commissioner, Gee Fawn, and Gee Ling.

Mr. Brough testified that he had no previous acquaintance with or knowledge of the appellant. He arrested him on Rampart street in the city of New Orleans April 4, 1910; that his occupation at the time was that of a laundryman; that on request for his certificate he claimed he had none, said he was a merchant.

Gee Fawn testified that he did not know where appellant was born, but that he did know that he had been residing in New Orleans for the last 10 years, and that the appellant and Gee Ling were not brothers.

Gee Ling testified as follows: "Q. What is your name? A. Gee Ling. Q. What is your married name? A. Gee Cue Toy. Q. Where were you born? A. Canton, China. Q. Do you know this man here [indicating]? A. No. Q. Never saw him before? A. No; I don't know him. Q. Isn't this man your brother? A. No. Q. Has your father got any brothers? A. No. Q. Have you got any brothers? A. Yes; I have got a big brother in China. Q. What is his name? A. Gee Cue Dep. Q. What other name has he got? A. Gee Loon and Gee Cue Dep. Q. What is your father's name? A. Gee Kit. Q. What is your mother's name? A. Chin See. Q. What village do you come from in China? A. Sen Woo. Q. Has your father ever been in this country? A. No. Q. Has your mother ever been in this country? A. No. Q. Your father and mother never came to this country? A. No. Q. Are they still living? A. No; they are dead. Q. When did they die? A. More than 10 years ago. Q. How old are you? A. I am 45 years. Q. How old is your other brother? A. I don't know how old he is. Q. Do you know a boy by the name of Ah Sim? A. No. Q. Do you know Ah Ha? A. No. Q. Aren't those the children of this man? A. No." Cross-examination: "Q. Is your mother the prisoner's mother? A. No. Q. Is your father the prisoner's father? A. No."

The appellant, Gee Cue Beng, testified in his own behalf that he was born on Virginia street, San Francisco, Cal.; that his father was named "G Gee Kit," and that his mother was "Chin See"; that he was the only child; that his father kept a place of business on Clay street between Commerce and Washington streets, San Francisco, Cal., and resided about two or three blocks away; that his father and mother are both dead; that he himself never left the United States; that he left San Francisco for New Orleans when he was 14 years of age, and has been continuously residing in the city of New Orleans for the last 17 years. If an interpreter was used in taking his evidence, it does not appear at whose request. The appellant was corroborated as to his birth in the United States, as to his age when he left San Francisco, to come to New Orleans, and the death of his father and mother by the evidence of Chue Sing and Gee Pon Son. He was corroborated as to his residence in the city of New Orleans by the evidence of Gee Hing Wo, Jee Bon Poy, and by Edward Boetner, a white man born in Chicago and residing in the city of New Orleans since 1878. These witnesses, some of whom

testified in English, were all cross-examined without eliciting any material contradiction.

The commissioner ordered the appellant to be deported. An appeal was taken to the United States District Court, where, on the evidence taken and reduced to writing before the commissioner, the order of deportation was affirmed.

Chandler C. Luzenberg, for appellant.

W. J. Waguespack, Asst. U. S. Atty.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). It seems to be settled that the appellant has a right to this appeal. See United States v. Hung Chang, 134 Fed. 19, 67 C. C. A. 93; Tsoi Yii v. United States, 129 Fed. 585, 64 C. C. A. 153; United States, Petitioner, 194 U. S. 194, 24 Sup. Ct. 629, 48 L. Ed. 931. And, if this be so, then he has a right to our conscientious judgment on the law and facts.

It must be conceded that on the evidence submitted the appellant establishes by sworn witnesses a strong affirmative case showing that he is a citizen of the United States under the decision of the Supreme Court in United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890. Against the case thus made, there is nothing advanced but suspicion founded on race prejudice, a statement by counsel not borne out by the record that the appellant cannot speak English, and the evidence of Gee Ling, above given, which, it is argued, contradicts the appellant in that Gee Ling's father and mother who never came to America bore the respective names of Gee Kit and Chin See, almost identical with the names of appellant's father and mother, "G Gee Kit" and "Chin See." The inference of brotherhood drawn from the identity of Chinese names is far-fetched in a country where John Smiths and Mary Browns are so common, and, if otherwise good, it should have no place here, for both Gee Fawn and Gee Ling, produced by the government, of course, as credible witnesses, positively deny the relationship.

Counsel for the United States, citing United States v. Chu King Foon (D. C.) 179 Fed. 995, contend that the commissioner need not believe a Chinese witness in a Chinese deportation proceeding when he sees him, and has an opportunity to judge of his credibility. Even if we were disposed to agree with counsel that United States commissioners may disregard evidence in cases where only the liberty of a Chinese person is involved, it would be of no avail here unless we should go further and impute perjury, not only to the appellant, but to some five unimpeached witnesses, including a white citizen, and at least one government witness; and we are not disposed to here indorse such contention.

So far, we have treated this case as one where the burden is on the appellant to prove his exemption from arrest and deportation. See United States v. Hoy Way (D. C.) 156 Fed. 247; Kum Sue v. United States, 179 Fed. 370, 102 C. C. A. 648; Yee King v. United States, 179 Fed. 368, 102 C. C. A. 646. As to this doctrine, however, and in relation to the appellant's claim in this case, we fully concur with the views and reasoning of the Circuit Court of Appeals for the Seventh

Circuit as expressed in the opinion of Judge Grosscup in Moy Suey v. United States, 147 Fed. 697, 78 C. C. A. 85, and we quote as follows:

"But the government claims that, under section 3 of the deportation act, any Chinese person or person of Chinese descent shall be adjudged to be unlawfully within the United States, unless such person shall establish 'by affirmative proof, to the satisfaction of the judge or commissioner, his lawful right to remain in the United States,' and that this provision in some way nullifies the weight that would otherwise be given to the evidence referred to. Unquestionably Congress has power to exclude from our shores aliens of any birth, including the Chinese; and, having that power, has the power also to prescribe the conditions on which such exclusion shall be exercised. That the conditions prescribed may be hard would in a judicial inquiry be of no moment, for under such circumstances the question is not one of constitutional right, but of national policy. Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; The Japanese Immigrant Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721. But when a person physically and politically present in the United States at the time he is arrested for deportation claims that he is an American-born citizen, and resists deportation on the basis of his rights of citizenship, the case is an entirely different one. Nativity gives citizenship, and is a right under the Constitution. It is a right that Congress would be without constitutional power to curtail or give away. It is a right to be adjudicated in the courts in the usual and ordinary way of adjudicating constitutional rights. No rule of evidence may fritter it away. When such right is in court asking for the protection of the law, no question of public policy can affect it. The citizen deported is banished, and banishment is a punishment that can follow only a judicial determination in due process of law. Black's Law Dictionary, 4 Blackstone Commentaries, 377. True, it was held in United States v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917, that a person asserting his right to enter the country on the ground that he is a citizen is not entitled to a writ of habeas corpus in the absence of an appeal to the Secretary of the Treasury from the order of the inspector denying his entry; and subsequently (United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040) that even after such appeal to the Secretary of the Treasury, and a denial of his right to enter, a person whose right to enter the United States is questioned under the immigration law may not obtain entry by writ of habeas corpus, even though the right claimed is in virtue of American citizenship; a very vigorous dissenting opinion by Justices Brewer and Peckham having been filed in the latter case. These cases proceed upon the principle that the person applying for the writ is not within the United States, but is seeking to enter or re-enter; and that, as against such right of entry or re-entry, the government constitutionally may make the political department the final judges. But there is a fundamental distinction between the case of a citizen of the country who has left the country and is asking to re-enter it and a citizen of the country who has never left it, but whom the government is asking to deport; and, while it is true now that the Supreme Court has so decided that the political power of the government may say whether a citizen of the country who has gone away shall be allowed to return or not, it seems to us uncontrovertible that a citizen of the country, who has not gone out, may not be deported or banished until the right of the government to deport or banish has been judicially determined. And, approached from this point of view, the case made out by appellant entitles him to a reversal of the order of the District Court."

See, also, Pang Sho Yin v. United States, 83 C. C. A. 484, 154 Fed. 660.

The order appealed from is reversed, and the cause is remanded, with instructions to discharge the appellant.

SMITH v. BOSTON ELEVATED RY. CO.

(Circuit Court of Appeals, First Circuit. January 31, 1911.)

No. 899.

1. ESTOPPEL (§ 69*)—GROUNDS OF EQUITABLE ESTOPPEL—INCONSISTENT TESTIMONY OF PARTY IN SUCCESSIVE TRIALS.

A party testifying under oath is more than a mere witness. He is an actor, seeking the intervention of the judicial power in his behalf, and a plaintiff, after having sworn to facts resting in his own observation and knowledge before one jury, should not be permitted to swear to facts directly inconsistent, and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 170–172; Dec. Dig. § 69.*]

2. APPEAL AND ERROR (§ 1213*)—REVERSAL—NEW TRIAL—DIRECTION OF VERDICT.

Plaintiff recovered a judgment against a street railroad company for an injury received by being thrown down by the starting of a car as she was passing from the vestibule through the doorway, which judgment was reversed by the appellate court; one of its holdings being that the evidence was insufficient to show that the car started with an unusually violent jerk as alleged. Plaintiff had testified that, as the car started, she tried to catch hold of the door, but could not. On the second trial she testified that, when thrown, she was holding to the door, and leaning heavily against it, which testimony was uncorroborated. *Held*, that her testimony was so inconsistent with that given on the former trial as to discredit her, and to justify the court in directing a verdict for defendant; the other testimony being no more favorable to her than on the first trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4714; Dec. Dig. § 1213.*]

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

Action at law by Pauline A. Smith against the Boston Elevated Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Julian C. Woodman, for plaintiff in error.

M. F. Dickinson and Walter Bates Farr, for defendant in error.

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

BROWN, District Judge. This is a writ of error brought after the direction of a verdict for the defendant on the second jury trial of an action of tort for personal injuries.

A verdict for the plaintiff at the first trial was set aside for reasons set forth in our opinion of March 16, 1909. 168 Fed. 628. At the second trial, though the plaintiff made changes in her testimony, a verdict was directed for the defendant.

At the first trial it appeared that the plaintiff fell while entering the defendant's car. At the argument before us on the former writ of

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

error it was contended that the testimony showed negligence of the defendant in two particulars: That the car was started with unusual violence, and that the conductor was guilty of negligence in starting the car too soon.

The charge of negligence in starting the car too soon was based upon the contention that the plaintiff "was just in that unstable equilibrium which would make a start very dangerous for a woman in her situation, and that the conductor knew it or recklessly took the chances."

Upon the hearing of the present writ of error it was contended in her behalf:

"She was holding her umbrella and small handbag and skirt in her left hand, and had a good hold on the side of the framework of the doorway with her right hand, and was leaning hard against it with her shoulder."

While the present record hardly justifies this version of the plaintiff's testimony, it does contain testimony of the plaintiff to the effect that her right hand and right shoulder were braced against the facing of the door.

Having found in our previous opinion that under the authorities cited the car was not started prematurely though the plaintiff was not braced against the door, it follows that the changed testimony to the effect that she was braced can have no effect to modify our opinion as to the insufficiency of the testimony to show negligence in giving the starting signal too soon. As the present testimony upon this point is less favorable to the plaintiff than her previous testimony, our former opinion is conclusive upon this question.

As to the charge that the car was started with unusual violence, the changed testimony is apparently directed to meet that part of our former opinion which said that her position was such that any ordinary jerk of the car in starting would be likely to throw her down, and that the plaintiff's testimony as to the manner in which she fell was consistent with the ordinary jerk of the car in starting and inconsistent with any sudden or violent jerk.

It is now urged that although the plaintiff was holding on to the side of the framework of the door, and bracing herself against it with her shoulder, the start was so violent as to throw her down. The following Massachusetts cases are cited: Nolan v. Newton St. Ry. Co., Banker & Tradesman (September 7, 1910) 206 Mass. 384, 92 N. E. 505; Lacour v. Springfield St. Ry. Co., 200 Mass. 34, 85 N. E. 868; Black v. Boston Elevated Ry. Co., 206 Mass. 80, 91 N. E. 891; Cutts v. Boston Elevated Ry. Co., 202 Mass. 450, 89 N. E. 21.

In the former trial the plaintiff's whole testimony, as well as the argument of counsel thereon, shows that she was not braced. Her former statement—

"I tried to reach forward to catch the door or something to hold myself, but I couldn't,"

—is directly inconsistent with the statement that:

"I held on to the side of the door and leaned against it, and I leaned hard against it with my shoulder."

Upon a consideration of her testimony in the two trials, it is apparent that there is a complete departure from the original claim that the plaintiff was in such unstable equilibrium that it was negligent to give a starting signal, to the present claim that she was so well braced and had such a good hold that only a violent jerk of the car of an unusual character could have caused her to fall.

We have before us two inconsistent versions given by the plaintiff of the same occurrence.

As the inconsistency is in the testimony of a party, a stricter rule is applicable than where the inconsistency is in the testimony of an ordinary witness. Previous inconsistent statements of a witness other than a party ordinarily go merely to the credit of the witness, and upon a second trial it may be left to a jury to decide which of the inconsistent statements is to be credited. The sworn testimony of a party, who has control of his case, with power to bind himself conclusively by pleadings, stipulations or admissions, as to facts resting upon his own knowledge, is of such solemn character that, in the absence of a clear showing of mistake, inadvertency, or oversight, it should ordinarily be regarded as precluding him from seeking to establish before another jury an inconsistent state of facts. While it is true that upon a second trial the plaintiff's case may be changed or strengthened by new testimony, yet the right of a plaintiff at a second trial to make by his own testimony a complete departure from the case presented at the first trial is not unlimited.

A plaintiff, we think, after having sworn to facts resting in his own observation and knowledge before one jury, should not be permitted to swear to facts directly inconsistent and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false. A party testifying under oath is more than a mere witness. He is an actor seeking the intervention of the judicial power in his behalf, and thus subject to the rule "allegans contraria non est audiendus," which, as stated in Broom's Legal Maxims, p. 130, "expresses in technical language the trite saying of Lord Kenyon that a man should not be permitted to 'blow hot and cold' with reference to the same transaction, or insist at different times, on the truth of each of two conflicting allegations according to the promptings of his private interest." This principle is illustrated in Harriman v. Northern Securities Co., 197 U. S. 244–294, 25 Sup. Ct. 493, 49 L. Ed. 739; Davis v. Wakelee, 156 U. S. 680, 689, et seq., 15 Sup. Ct. 555, 39 L. Ed. 578; Sturm v. Boker, 150 U. S. 312–334, 14 Sup. Ct. 99, 37 L. Ed. 1093; National Steamship Co. v. Tugman, 143 U. S. 28–32, 12 Sup. Ct. 361, 36 L. Ed. 63; Pope v. Allis, 115 U. S. 370, 6 Sup. Ct. 69, 29 L. Ed. 393; Railway Co. v. McCarthy, 96 U. S. 267, 24 L. Ed. 693.

In the present case, the plaintiff upon the former writ of error had a full hearing upon the question of her legal rights upon the state of facts upon which she rested before a jury and before this court. If, after an adverse decision of this court she is at liberty to change her own testimony at will, then there is no practical limit to litigation. In Hamilton v. Frothingham, 71 Mich. 616, 40 N. W. 15, it was said:

"* * * The plaintiff cannot be permitted to take a position wholly inconsistent with that taken on the former trials. The contract now claimed under is wholly inconsistent with that claimed upon the former trials. If this contract was made, then the one upon which the former recovery was had did not exist, and no recovery could have been had thereunder. If the contract was to pay all over $8000, then an express contract to pay a certain and specific sum did not exist."

"If such inconsistent positions were allowed to be taken in courts of justice, there would be no end to litigation. Parties finding that contracts upon which they have relied for recovery cannot be upheld in the courts are not permitted under the same pleadings and bills of particulars to retry their case upon an entirely different contract, and one entirely contradictory to the one first claimed under, even for the purpose of meeting the opinion of this court, and squaring their case with it."

As the plaintiff was not corroborated, and as she was discredited by her former inconsistent testimony, we are of the opinion that, in the absence of any substantial explanation of this inconsistency, the trial judge was justified in concluding that, if the plaintiff should have a verdict, it would be his duty to set it aside, and therefore in directing a verdict for the defendant.

We have considered, of course, whether the testimony at the two trials is reconcilable upon the view that the changes were merely in supplying details inadvertently omitted upon the first trial, but are unable to avoid the conclusion that the statements are directly inconsistent and cannot be reconciled.

Recognizing the rule that upon a new trial a party should be afforded a large and liberal opportunity for supplying omissions and for explanations, this does not avail the plaintiff in error, since the most liberal application of this rule cannot justify the present substitution of a new and inconsistent case by the uncorroborated testimony of a party.

Upon the whole it seems apparent that at the second trial the plaintiff's testimony was directed to meeting the statement in our former opinion that the plaintiff was in such a position "that any ordinary jerk of the car in starting would be likely to throw her down, unless she braced herself in some way against the side of the door," by showing that she did this by bracing her shoulder heavily against the door, and also by showing that she had a good hold with her hand, thus bringing herself within those cases above cited in which it was held that the fact that a good hand hold was broken is evidence of a violent and negligent starting of the car.

The plaintiff also assigns error in the exclusion of expert testimony, but, as each of the questions excluded was predicated upon the plaintiff's changed testimony and upon an assumption that the plaintiff was braced or leaning against the frame of the door when the car started, we need not consider them, since our finding that the plaintiff is precluded from asserting these facts cuts under all questions which assume the existence of these facts.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers its costs of appeal.

TOLEDO S. S. CO. v. ZENITH TRANSP. CO.

(Circuit Court of Appeals, Sixth Circuit. January 27, 1911.)

No. 2,058.

1. ADMIRALTY (§ 1*)—NATURE OF JURISDICTION—RULES OF DECISION.
A court of admiralty is not bound by the rigid rules of the common law, but deals with causes on equitable principles and according to the rules of natural justice.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 2; Dec. Dig. § 1.*]

2. ARBITRATION AND AWARD (§ 16*) — SUBMISSION OF ADMIRALTY CAUSE — RIGHT TO REVOKE.
Two steamships were in collision, and to avoid going into court the respective owners entered into an agreement for arbitration, which provided that the arbitrators should proceed in accordance with the course and practice of such causes in admiralty and should first determine the question of fault for the collision, and if counsel for the parties could not then agree on the damages the arbitrators should determine the same; the award, concurred in by two of the three, to be binding. After full hearing and argument of counsel, a decision was rendered, concurred in by two of the arbitrators, finding one of the vessels solely in fault, whereupon the defeated party gave notice that it revoked the submission to arbitration, and its counsel and the arbitrator selected by it refused to further participate, and an award of damages was thereafter made against it by the two remaining arbitrators after due notice. The arbitrators were all lawyers of standing learned in the admiralty law, and the good faith of the proceeding was not questioned. *Held*, that the defeated party would not be permitted to repudiate the arbitration under such circumstances and to maintain a suit in a court of admiralty to have the other party adjudged in fault and held liable for the collision.
[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 64; Dec. Dig. § 16.*]

3. ARBITRATION AND AWARD (§ 16*)—SUBMISSION—RIGHT TO REVOKE.
The decision by the arbitrators of the question of fault and liability for the collision was final as to the principal question and the only one of a judicial nature submitted, and after its publication neither party could, even under the technical rules of the common law, revoke the submission as to the matter of damages which was not strictly an arbitration but merely an appraisement to follow the determination of the question of liability; that being the only one in dispute when the agreement was made.
[Ed. Note.—For other cases, see Arbitration and Award, Dec. Dig. § 16.*]

4. ARBITRATION AND AWARD (§ 3*)—NATURE OF PROCEEDING—MATTERS SUBJECT TO "ARBITRATION."
To constitute an arbitration, the matter submitted must be one in dispute between the parties, and not some matter which it is expected may arise between them or a matter of accounting or appraisal.
[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 12; Dec. Dig. § 3.*
For other definitions, see Words and Phrases, vol. 1, pp. 487–489.]

5. ARBITRATION AND AWARD (§ 35*)—AWARD—AWARD BY LESS THAN FULL NUMBER OF ARBITRATORS.
Where an agreement for arbitration by three arbitrators provided for an award by two, the fact that one refused to sign the award or to

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

participate in a further ascertainment of damages which the submission required did not invalidate the award nor the subsequent proceeding for ascertaining damages.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 189, 190; Dec. Dig. § 35.*]

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

Suit in admiralty by the Toledo Steamship Company against the Zenith Transportation Company. Decree for respondent, and libelant appeals. Affirmed.

The appellant, Toledo Steamship Company, filed a libel in the District Court of the United States for the Western District of Michigan, against the steamer Saxona, and appurtenances, in a cause, civil and maritime, alleging a collision between the steamer Saxona and the steamer Eugene Zimmerman upon the waters of the St. Mary's river, whereby the steamer Eugene Zimmerman was so damaged that she immediately sank; setting forth also the various particulars in which the steamer Saxona was at fault, the cost of repairing the Eugene Zimmerman, and the loss of her use, and praying that process might issue against the Saxona and her appurtenances, that the court would be pleased to pronounce for libelant's demand, and that the Saxona might be condemned and sold to pay the same.

Zenith Steamship Company, a corporation, owner of the Saxona, filed its answer denying, among other things, liability, and setting forth matters in bar. It is these and their effect which are called into controversy; the case being heard on exceptions thereto. They are, quoting from the answer:

"(3) And your respondent says that on or about the 16th day of April, 1906, in the St. Mary's river, the said steamers Eugene Zimmerman and Saxona were in collision, as a result of which both of said steamers were damaged; that the damage to said steamer Saxona and to this respondent as her owner amounted to the sum of $34,051.56; that the said steamer Eugene Zimmerman was also damaged. And respondent says that the said libelant and this respondent did on the 26th day of October, 1906, for themselves as owners, for the insurers on their respective vessels and all parties interested through the said parties, enter into an agreement in writing by which they agreed to submit to the arbitration of Hermon A. Kelley and Harvey D. Goulder of Cleveland, Ohio, and William B. Cady, of Detroit, Mich., the question of fault for the collision referred to in said libel to be first determined, and also to determine the amount of damage as the case might require under their finding as to fault for said collision, said arbitration to proceed under the course and practice of such causes in admiralty, with right to apply the principle of division of damages obtaining in such courts in case of mutual fault, and further providing that all questions as to the time and place for hearing and the manner of taking proof and any and all questions of procedure not in said agreement specifically defined should be determined by said board of arbitrators, and the decision of any two thereof on any point of procedure or other matter arising was to be final and binding upon the parties, and the decision and determination as to fault and of the amount of damages due, as the case might require, was to be made in writing in quintuplicate, two copies thereof to be served upon the Toledo Steamship Company in care of Messrs. Hoyt, Dustin & Kelley of Cleveland, Ohio; and two copies upon the Zenith Steamship Company in care of Messrs. Goulder, Holding & Masten, of Cleveland, Ohio. A copy of said agreement is hereto attached marked 'Exhibit A.'

"This respondent says that in pursuance of said agreement the said board of arbitrators met, and on request of the parties as to the procedure to be followed said board by unanimous action, and in accordance with said agreement, determined that in conformity with the procedure and practice in admiralty they should first hear, try, and determine the question of fault

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

and liability, and, if counsel for the parties should not agree upon the items and amount of bills, this board would thereafter, in accordance with the procedure in admiralty and their agreement as to procedure so made, take such statements and testimony as might be necessary regarding the same and make such finding as to the amount of damages as the case might require, all which procedure and course was agreed to by the parties. And said board did, after such determination and agreement as to procedure and course, fully consider all of the testimony given by the parties and arguments of counsel for the respective parties and the briefs filed by counsel for the parties, and found and determined and awarded that the libelant's steamer, the Eugene Zimmerman, was solely at fault for said collision and resulting damage, and two of said arbitrators, to wit, William B. Cady and Harvey D. Goulder, did on the 16th day of March, 1908, communicate said finding and award in writing to the parties in the manner provided by said agreement and heretofore set out. A copy of said award of fault and liability for said collision is hereto attached marked 'Exhibit B.'

"Thereafter, to wit, on the 15th of April, 1908, after said award of fault and liability for said collision had been so determined and communicated in accordance with said agreement, the said the Toledo Steamship Company, libelant herein, served upon said arbitrators and respondent herein notice that it revoked the submission to arbitration of the controversy between that company, libelant, and respondent herein, arising out of the collision between the steamers Saxona and Zimmerman, which occurred in St. Mary's river April 16, 1906, and 'requested' that the arbitrators take no further action and hear no further evidence and make no award in the matter as said company, libelant herein, withdrew from further participation in the submission or hearing and declined to have anything more to do with it; a copy of said notice being hereto attached marked 'Exhibit C.'

"And respondent says that the insurers of said company's steamer Eugene Zimmerman who had the largest interest in said claim did not join in or authorize said alleged notice of revocation, and have and do repudiate the same and abide by and accept the award made under said agreement as aforesaid.

"Respondent says that said arbitrators having theretofore, under said agreement of arbitration and in pursuance of the procedure adopted by said board of arbitrators as authorized by said agreement of arbitration and the further agreement of said parties thereto at the time of submission, and in accord with the course and procedure obtaining in the admiralty in causes of collision, heard, considered, and determined the issue of fault and liability for the damage resulting from said collision submitted to them, and having communicated the award in writing to the parties, and counsel for the parties having failed to agree upon the amount of damage sustained by this respondent, for which libelant herein was answerable under the award as to liability theretofore made, by reason of the refusal of counsel for libelant to act further in the matter on account of said notice, two of said board, the third declining to act further by reason of said notice, did on July 1, 1908, after due notice to the parties and to the other arbitrator, and hearing and examination and consideration of proof offered, determine that the damages to this respondent for which libelant was answerable under the award on question of fault theretofore made and communicated, amounted to the sum of $34,051.56, which sum, with interest at the rate of 6 per cent. (6 per cent.) per annum from June 1, 1906, to the date of said award, to wit, July 1, 1908, amounting at said date to $38,307.80, on which interest was allowed from July 1, 1908, until the same should be paid, and did further fix and allow to this respondent, in accordance with the terms of said agreement, its costs, taxed as in courts of admiralty under said agreement, in the sum of $397.90; and did fix and determine the fees of the arbitrators at $3,000 and apportioned the same $1,500 to Mr. Cady and $750 each to the other arbitrators, together with their expenses. * * * A copy of said determination is hereto attached, marked 'Exhibit D.'

"And respondent says that the insurers on said steamer Eugene Zimmerman who had the greatest interest in the damage claim asserted by her own-

er, and were solely responsible for the damages sustained by this respondent, accepted said award and abide by the same.

"And your respondent says that said libelant by said agreement, the procedure therein authorized, duly adopted and acted upon, and by the finding and award as to fault under said agreement and the procedure adopted as therein authorized and agreed to by the parties, is estopped and concluded on the question of fault and liability for damages resulting from said collision, and by the finding and award as to the amount of damages, as aforesaid, is concluded and estopped as to the amount of damages due this respondent as a result of said collision, and is estopped and debarred from further proceedings on account of said collision or the damages resulting therefrom, and from maintaining this action.

"(4) Your respondent, on information and belief, says that at the time of said collision the said steamer Eugene Zimmerman was insured for the sum of $225,000 on an insurance valuation of $225,000 against the ordinary risks covered by maritime insurance and including liability for collision damage done to other vessels; that such insurance was intended to and did cover all and every part of the damage sustained by this respondent as owner of the steamer Saxona and all the damages sustained by said steamer Eugene Zimmerman and the owner thereof, excepting the item of loss of use claimed to be about $38,000, and have paid to libelant its said damages excepting said claim for loss of use, and thereby became subrogated to all the balance of said claim embraced in said agreement and award and set up in the libel herein; that, in making said agreement of arbitration referred to, the said the Toledo Steamship Company was acting for and on behalf of said insurers; and that said insurers have accepted liability for the damages sustained in said collision in conformity with the award of said arbitrators, and abide by said agreement and the award so made, and have, your respondent is informed and believes, refused to permit the Toledo Steamship Company to make any claim for the damages sustained by the Zimmerman for which the said insurers have indemnified libelant."

The facts are so minutely detailed in the answer that the exhibits need not be set out at length. To this answer Toledo Steamship Company filed exceptions, of which the third raises all of the questions at issue. It reads:

"That all matters and allegations contained in the said answer in any way or in any manner referring to or alleging that the said steamer Zimmerman was insured, and that the matters in controversy in this cause were submitted to arbitration, are matters beside the issue, do not constitute a defense, and therefore are improperly pleaded in the answer of the said Zenith Steamship Company."

The Toledo Steamship Company filed an amendment to its libel which was also a reply to the answer, setting forth that the Saxona was insured against loss or damage done by her to another steamer and also against loss or damage sustained by the Saxona by reason of collision, in the sum of $190,000, and that the Zimmerman was similarly insured in the sum of $250,000 and showed that most of the insurance companies named were insurers of both vessels.

The amendment alleged also that the damage to the Zimmerman was the cost of raising and repairing her, and that the loss to the Toledo Steamship Company of the use of the Zimmerman was $37,000, and that the loss of the use of the Saxona was $8,337.42.

It was held in the District Court that the answer stated a defense to the libel. The exceptions were, accordingly, overruled, and the libel dismissed. Toledo Steamship Company appealed to this court.

Charles E. Kremer, for appellant.

Frank S. Masten and Tracy H. Duncan, for appellee.

Before WARRINGTON, Circuit Judge, and DENISON and HOLLISTER, District Judges.

HOLLISTER, District Judge (after stating the facts as above). The libelant bases its claim that the award is invalid on certain ancient rules of the common law that an arbitration may be revoked at any time before the award is made and published; that an award to be good must be final and must cover all of the subjects embraced in the submission; and that all of the arbitrators must join in it.

The law in its general application is not disputed, but the respondent contends that this particular arbitration was complete and final; that the revocation came too late; that the rights of the parties had become fixed by the award as to fault; that the function of the arbitrators with respect to the damages was ministerial and not judicial in character; that the duties of the arbitrators on that subject made them appraisers rather than technical arbitrators; that in any event the award as to fault was final on that subject; that the parties to the submission were acting not only for themselves, but expressly for the underwriters, cargo owners, and others in interest; and that therefore neither party could revoke the submission without the consent of the others jointly interested on the same side of the controversy.

In view of the conclusion we have reached, it is not necessary to determine the relation of the insurers and others in interest to the parties to the submission, or to decide the question whether either party could revoke without the consent of the others jointly interested on the same side, if indeed they were; for we are of opinion that, under the circumstances of this particular case, the attempted revocation of the submission was futile.

We are brought to this conclusion by a number of considerations, the chief of which is that justice and fair dealing between man and man require it.

Two steamships were in collision. To avoid going into court, the respective owners entered into an agreement for arbitration. The arbitrators and the respective counsel for the parties are all lawyers known to the court to be learned in the law of admiralty. There was only one real controversy. That was the question of fault. What the damages might be, while in one sense distinct from the question of fault, was necessarily incidental to that question, grew out of it, was dependent upon it, and followed it as a matter of course. The parties adopted the practice of admiralty courts in that it was agreed that the first question to be heard and determined was that of fault. So subordinate and incidental was the subject of damages that it was expected and intended that counsel, zealous as they are for the interests of their respective clients, would nevertheless agree upon the amount. It was only in event of their disagreement that the arbitrators would be called upon to take any further steps The arbitrators met, counsel for the parties appeared, evidence on the subject of fault was submitted, and elaborate report was made in writing finding the Eugene Zimmerman at fault. The arbitrator for the Saxona concurred, but the arbitrator for the Eugene Zimmerman did not. It is clear that by this award the question actually in controversy between the parties was acted upon and decided in the manner the parties had agreed upon. About a month thereafter the defeated party attempted to re-

voke the submission, repudiated it, and declined to have anything further to do with it. Counsel for the defeated owner, the appellant, by reason of its action made no attempt to agree with counsel for respondent, and for the same reason the arbitrator appointed by the defeated owner declined to go on with the submission. Thereupon the other two arbitrators, after notice to the parties and their counsel, and to the other arbitrator, proceeded to determine, and did determine, the amount of damage to which the owners of the Saxona were entitled.

It is to be gathered from the contract of submission and the subsequent agreements that the parties intended a bona fide determination of the question of fault and, as incidental thereto, the amount of damages the defeated party should pay. What kind of arbitration would it be, if each party, solemnly in writing pledging himself to its terms, could nevertheless destroy it by revocation after the real question in controversy were decided against him? If he could do this once, he could do it on resubmission, and, if on resubmission the question were decided the other way, the then defeated party might revoke.

The ethical impropriety of the defeated owner's revocation at such a stage in the proceedings is obvious and will not be sanctioned by a court except under the compulsion of rules of law clearly applicable.

Granting the rigidity of the rule at common law giving the right to revoke at any time before the final award is made, and that no award is final unless it embraces all of the subjects of submission, yet it may be said that the strictness of the rule grew out of the jealousy of the common-law judges in early times of their jurisdiction, and of their fear lest encroachments might be made upon it (Morse on Arbitration, 436), while in the modern view and practice the settlement of disputes by arbitration are encouraged by the courts; every reasonable intendment and presumption being in favor of their finality. Morse on Arbitration, 437; 3 Cyc. 586, 604.

The reason given for the rule is that:

"A. man cannot by his act make such authority, power, or warrant not countermandable, which is by the law and of its own nature countermandable." Vynior's Case, 4 Coke (part 8) 302.

And hence he may revoke the power. This is a highly technical rule, and the enforcement of it against the purposes of parties who have sought a settlement of their disputes out of court by a tribunal of their own choosing has at times provoked protest from common-law judges.

In Mills v. Bayley, 2 H. & C. 36, 41, Baron Martin expressed his views as follows:

"I regret that the law is so, and that the Legislature, when they were dealing with the subject of arbitration, did not in all cases prohibit the revocation of references."

And in Northampton Gaslight Co. v. Parnell, 15 C. B. 630, 645, Maule, J., is reported to have said:

"The old rule upon which it was held that the power of an arbitrator was revocable was that a power not coupled with an interest was revocable—revocable by the authority which created it. From that rule it was inferred

—erroneously, as I think—that one of the parties to a submission might revoke without the other. It seems to me that was allowing one man to affect the interests of another. But it was an inveterate error."

In cases even at common law when the circumstances of the revocation were of such a character as to make the revocation unconscionable, the courts have held the rule of revocation inapplicable under the particular circumstances of the case.

Such a case was Mitchell v. Newman, 4 Penny. (Pa.) 443. The action was assumpsit. There was there an agreement of submission to arbitration by two partners of matters in dispute between them which contained, in addition to the submission, a stipulation that one partner should give to the other possession of the books and papers of the firm, and that the latter should become the liquidating partner with full power to dispose of its assets and pay its indebtedness therewith. Mitchell, having learned before the final meeting of the arbitrators that the award would be against him, gave notice of revocation. It was held first that the agreement was for something more than a mere submission, and that this was a sufficient consideration to make the submission irrevocable, and the court say:

"An attempted revocation just as the award is about to be announced, and when there is persuasive evidence that the party had substantial knowledge of the conclusion at which the referees had arrived, is not entitled to much favor. It cannot be asserted except under a clear claim of right. Such right did not exist in this case."

The same principle is involved in Carey v. Commissioners of Montgomery County, 19 Ohio, 245, and Commissioners of Montgomery County v. Carey, 1 Ohio St. 463. Carey and the commissioners submitted to arbitration all differences, damages, claims, and demands existing between them relating to the building of a courthouse. The arbitrators proceeded, made, and published their award in Carey's favor. Carey filed in court the award and arbitration bond and moved for judgment. The commissioners answered that they had prior to the making and publishing of the award revoked the submission. The Supreme Court of Ohio held that the commissioners had no right to revoke the submission after the arbitrators were sworn. In the first case the court, after referring to the rule in Ohio that the courts will adopt the principles of the common law as rules of decision, so far only as those principles are adapted to the circumstances, state of society, and form of government in Ohio, say that, pursuing the spirit of that rule and in their view of the whole subject, they would not adopt the common-law principle of revocation and allow it to operate upon arbitrations conducted under the statute, and further:

"But if the general right of revocation were to be acknowledged it might still be questioned, looking at all the facts and circumstances disclosed, whether it should be decided whether the defendants had, in this case, accomplished the revocation which they designed."

Now it is to be observed that the arbitration statute had no provision on the subject of revocation. This left that subject as open for consideration as it would be in case of submission not governed by statutory proceedings.

In the other case it was said:

"There the parties had fully and fairly submitted their controversy to arbitration under the statute, all the proofs and arguments had been fully and patiently heard, the deliberations of the arbitrators had been continued for nearly one month, and an award had been substantially agreed upon; and then the commissioners of the county were secretly informed by one of the arbitrators of the conclusions to which a majority of the board had arrived. A deed of revocation was made out by the commissioners, and placed in the hands of the auditor, who was not to serve the same, and did not serve it, until an attempt was made to induce the arbitrators to change the award, and until he was notified by the minority that they could not get the award to suit them.

"To allow a revocation by one party at such a time, and under such circumstances, instead of accomplishing the objects of an arbitration law, the speedy and final adjustment of the controversies of parties, by a tribunal amicably constituted for that purpose, would make it a mere means of mischief, trickery, and fraud."

These cases show an inclination on the part of the courts, even in common-law cases, to avoid the operation of this ancient rule of the common law.

Cases in equity have arisen in which the party seeking relief has been denied it because of the character of the revocation made by him.

In Morse v. Merest, 6 Madd. 26, the plaintiff and defendant had entered into a written agreement for sale by defendant to plaintiff of real estate at 25 years purchase at an annual value to be fixed by three persons, named in the agreement, on or before a certain day. The valuation had not been made because the defendant had prevented it. "The vice chancellor held that in the case of a reference time was essential in equity as at law; but that in equity a defendant was not permitted to set up a legal defense which grew out of his own misconduct." And it was decreed that the defendant should permit the valuation to be made, and, when made, a supplemental bill must be filed for specific performance.

Harcourt v. Ramsbottom, 1 Jac. & Walk. 505, 511, is a case in which one of the parties to a submission sought an injunction to restrain the exercise of a power of sale given to secure a balance to be ascertained by an arbitrator. The injunction was refused, although the award was made after the plaintiff had revoked the submission. The Lord Chancellor, Eldon, in refusing the injunction, said, among other things:

"It is said the award is not good because the authority was revoked. My answer is that, if it is revoked at law, I could not have considered it as revoked in equity, whether it was made a rule of court or not. If the award was not enforced, this court would leave the parties to deal with the matter at law; and, if at law you can restrain them from selling these estates, do it; but you have no equity to come here. Supposing the revocation to be good in law, this is a case in which a court of equity would not act. I am not saying it is good at law, but I agree entirely that it is bad in equity, under these circumstances."

The Lord Chancellor was of opinion that equity would not permit the party who had attempted to revoke the submission to have relief because he could not restore the parties to where they were before the submission was made, and therefore it was inequitable to permit the

plaintiff to proceed as if there had been no agreement of submission between him and the defendant.

Pope v. Lord Duncannon, 9 Sim. 177, 179, is much to the point The defendants, the commissioners of woods and forests, were empowered by act of Parliament to purchase a wharf on the banks of the Thames to complete the site for the new Houses of Parliament. The commissioners agreed with the plaintiffs who owned the wharf for the purchase of it at a price to be fixed by three referees or any two of them. There was no provision that the submission should be made a rule of court. Before the referees had come to a decision the plaintiffs revoked the submission. The referee named by the plaintiffs withdrew, but the other two fixed the valuation. Thereupon the plaintiffs filed a bill to restrain the defendants from taking possession of the wharf and pulling down the buildings on it. It was held that equity would not restrain the defendants from acting on the award unless the plaintiffs had good grounds for revoking the submission. The vice chancellor said, among other things:

"I observe that, in Morse v. Merest, Sir John Leach, Vice Chancellor, states that, in equity a defendant is not permitted to set up a legal defense which grows out of his own misconduct; so, varying the terms of the proposition, I say that a plaintiff is not at liberty to ask the aid of a court of equity in respect of an act done by him against good faith. And as, in this case, there is nothing whatever to show that the power which the plaintiffs had given to the arbitrators was revoked upon any just or reasonable grounds, I am bound to conclude that the revocation was a wanton and capricious exercise of authority on their parts, and, consequently, the motion (for an injunction) must be refused."

But this suit is in admiralty, a branch of the law not hampered by the rigid rules of the common law and which deals with causes upon considerations even more elastic than pertain to the broad jurisdiction of Courts of Chancery. In The Juliana, 2 Dods. Ad. 503, 521, it is said:

"A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case. This court certainly does not claim the character of a court of general equity, but it is bound, by its commission and constitution, to determine the cases submitted to its cognizance upon equitable principles, and according to the rules of natural justice."

It is said in The Harriett, 1 W. Robinson Ad. 183, 192, by Lushington, Judge of the High Court of Admiralty:

"If a court of equity would relieve, and a court of law could not, I consider that it would be my duty to afford that relief under the circumstances of the present case. The jurisdiction which I exercise is an equitable as well as a legal jurisdiction, and I must relieve the parties in this suit, if they are entitled to be relieved in law or in equity. It is therefore unnecessary for me to enter into a distinction whether the relief is at law or in equity."

Mr. Justice Story, in The Virgin, 8 Pet. 537, 549, 8 L. Ed. 1036, speaking of the considerations which control courts sitting in admiralty, says:

"Such courts in the exercise of their jurisdiction are not governed by the strict rules of the common law, but act upon enlarged principles of equity."

So broad are the powers of a court of admiralty, and so extensive the considerations which impel its action, that it has been called, as distinguished from a court of law or a court of equity, "a court of justice." Benedict's Admiralty, § 329.

The appellant invokes the aid of this court to fix the fault of the collision upon the respondent. He sets at naught, as if it never existed, the solemn agreement he made that the question of fault should be decided by arbitration. That question was settled against him by his own tribunal. He would have this court declare the arbitration a futility. If it is a futility it is only because he has made it so. He will not, in a court of admiralty, be permitted to take such advantage of his own wrong.

But if we are mistaken in this, and the submission is to be regarded as subject to revocation before final award, under the technical rules of the common law, we are of opinion that the award, as a common-law award, was final, and that, after the publishing of the conclusion as to fault, neither party could revoke. The reason for this lies in the character of the subjects submitted for determination. The question of fault necessarily involves the exercise of judicial functions, and lawyers learned in the law of admiralty were appropriately made the arbitrators to determine the question. The subject of damages, however, in this particular instance, required no exercise of such functions. What constituted the damages? In the one case the raising and repairing the Zimmerman and the loss of her use while out of commission; in the other, the cost of repairing the Saxona and the value of her use while out of commission. Herein what the parties intended by their agreement becomes of the first importance. It was agreed that, if counsel for the parties should not agree upon the "items and the amount of bills," the arbitrators would thereafter, in accordance with the procedure in admiralty, "take such statements and testimony as might be necessary regarding the same and make such finding as to the amount of damages as the case might require." Apparently the agreement contemplated only such damages as might be shown by the items and amounts of bills. What was contemplated by this language? Of course the cost of raising a vessel and the cost of her repair would be included in bills. It is well settled that the loss of the use of the vessel, "demurrage" as it is called, is also an element of damage. Cannon v. The Potomac, Fed. Cas. No. 2,386. Does this language include demurrage? If it does not, then presumptively the damages agreed to be considered would be ascertained by adding the bills together. If it does, then the proper amount of demurrage could be easily found by multiplying the average daily value of the use of the vessel, as presumptively shown by her books, by the number of days of detention. This is a proper way of dealing with the subject and involves no greater judicial function than the adding of the bills together.

In the case of Cannon v. The Potomac, supra, Mr. Justice Bradley said:

"The amount of damages allowed for the time the respective vessels were laid up seems to have been reached in a proper manner. The average net

earnings of the Lee for a certain period of time, embracing that of her detention for repairs caused by this collision, were taken as the basis for ascertaining the amount due to each trip, and the number of trips lost was a subject of very simple calculation."

It has been frequently decided that an agreement to submit to the decision of others a question involving only calculation or appraisement or the fixing of values, and the like, or something ministerial in character, does not constitute an arbitration under the strict rules of the common law. The distinction between the submission of such a question and one involving judicial functions is of vital importance, because the latter may be revoked at common law, while the former cannot be. So, in this case, while the submission might have been revoked before award as to fault, the agreement as to the method of ascertainment of damages could not be broken by either party, and, as the attempted revocation came after the award as to fault, the defeated party was bound to permit the submission to proceed and could not revoke as to damages.

In Mills v. Bayley, 2 H. & C. 36, there was an agreement between the parties covering two distinct things to be done. One was the emptying of the defendant's millpool upon the promise that the defendant should pay the plaintiff for every cubic yard of mud taken out of the pool, and that the admeasurement of the mud removed should be settled by a third person; and the other, that if any dispute arose it should be referred to him for decision. Plaintiff alleged that the defendant prevented him from completing the work by flooding the pool, and the matter was referred to the third person, who awarded the plaintiff a certain sum in respect to the quantity of mud then removed, and another sum in respect to damage occasioned by defendant's flooding the pool. The judges all agreed that the third person acted in the one instance as the measurer and certifier of the mud removed, in which character his authority was irrevocable, and in the other as an arbitrator for the settlement of any disputes which might arise between the parties, in which respect the arbitration was revocable.

In Palmer v. Clark, 106 Mass. 373, 389, it is said:

"A reference to a third person to fix by his judgment the price, quantity, or quality of material, to make an appraisement of property and the like, especially when such reference is one of the stipulations of a contract founded on other and good considerations, differs in many respects from an ordinary submission to arbitration. It is not revocable."

In Northampton Gaslight Company v. Parnell, 15 C. B. 630, an agreement had been entered into between the parties for the construction of a gas holder tank, and a bond was given for performance, in which it was agreed that, in case default should be made by the one who was to do the work in the completion of it within the time agreed upon, he should pay the other party such sum as damages as that party's engineer "should in his opinion adjudge to be reasonable and proper to be paid for such default," not to exceed a certain sum.

In an action for the sum found due by the engineer, the defendants pleaded in bar that before the decision of the engineer notice was given by the one who had undertaken the work and the other defendants,

his sureties, that they revoked the submission. The plea was held to be bad on the ground that the adjudication of the engineer was a mere appraisement and not an award. Maule, J., said:

"The duty imposed upon Mr. Eunson here was, not to determine whether or to what extent the covenants of the deed had been broken by John Parnell, but simply what sum would in his opinion be a reasonable compensation to the company, for John Parnell's default in the performance of the work. It was never intended to give him power to determine any matter in dispute between the company and John Parnell or the defendants. But, assuming a default to have been made, he is to ascertain or measure the amount of compensation."

In Locke v. Filley, 14 Hun (N. Y.) 139, it appears that a disagreement had arisen between partners who, in pursuance of the terms of their partnership agreement which provided:

"In case of any disagreement between the said parties as to any matter arising out of this agreement, the parties hereto agree to refer such and all matters of difference between them to the decision of three persons, one to be selected by each of the three said parties, the award of whom, or any two of them, shall be final,"

—entered into an agreement of dissolution, various differences having arisen, and provided that these should be submitted to the "arbitrament and award" of three persons named. Among other things, the agreement provided:

"In determining the matters so submitted, the arbitrators are to have submitted to them the articles of partnership executed between the partners, the partnership books, and any inventories, balance sheets and other statements appertaining to the partnership business, and also such books and papers of the former firms of John D. Locke & Co. as may be required in the premises, and may act upon their own judgment as to the values, or may take testimony, and after hearing the statements of the parties and their counsel, they shall make their determinations and award upon a full consideration of all the claims, questions and differences of and between the parties."

The submission appeared to be, and was held to be, made for the purpose of a full settlement of all questions between the parties connected with the partnership. It is said in the opinion of the court:

"When an award furnishes a substantial basis by and through which the parties can, by calculation or otherwise, work out the contemplated result, in accordance with the principles settled by and the rights of the parties declared in the award, it will be regarded sufficient."

And, when an award leaves nothing to be done to carry it into effect but ministerial acts of computation and measurement, it is not technically an arbitration. Parker v. Dorsey, 68 N. H. 181, 38 Atl. 785.

In James v. Schroeder, 61 Mich. 28, 27 N. W. 850, the parties to a suit entered into a written agreement for the settlement of the matters of difference, specifying fully the terms and conditions, and providing for an appraisal, by a third party and two other persons to be selected by him, of the value of a pier, the ownership of which was involved in the suit. Campbell, C. J., speaking for the court, said:

"This so-called reference was nothing more or less than an appraisal by appraisers on their own inspection, and, in our opinion, there was no occasion for the presence of any one else."

It appears in Atkinson v. Whitney, 67 Miss. 655, 7 South. 644, that, contemporaneously with the execution of a trust deed, the grantee agreed that in case of default he would prevent a sacrifice of the land by purchasing it at a valuation to be fixed by appraisers mutually chosen. This was held to be an appraisement; Wood, C. J., saying:

"Whatever are the rules governing submission to arbitration, this case can be no way affected thereby, inasmuch as this was in no proper sense an arbitration but simply an appraisement of the value of the lands by persons mutually selected for that purpose."

Norton v. Gale, 95 Ill. 533, 35 Am. Rep. 173, involved an agreement under a lease to pay rent yearly at 6 per cent. on the appraised value of the premises, to be ascertained by the selection of property holders. This was held to be an appraisement and not an arbitration.

In Green, etc., Ry. Co. v. Moore, 64 Pa. 79, a railway company accepted a charter on the condition that they should purchase, at the option of the owners, the horses, etc., of an omnibus line at a price to be assessed by appraisers. It was held that this was not an arbitration.

In Leeds v. Burrows, 12 East, 1, there was an agreement between an outgoing and an incoming tenant that the latter should buy the hay and spike-roll of the former upon the farm, and that the former should allow to the latter the expense of repairing the gates and fences of the farm, and that these questions should be settled by a third person. In the report of the case it is said:

"Leblanc, J., observed that it was only left to the persons to whom the matter was referred, to put a value upon the articles which the parties had already agreed should be paid for; and therefore it seemed more properly to be a valuation or appraisement than an award, within the meaning of the stamp acts."

There are many other cases of similar import, and the principle is supported by the great weight of authority.

There is also a class of cases analogous to the case under consideration in which fire insurance policies are involved, of which the Royal Insurance Company v. Ries, 80 Ohio St. 272, 88 N. E. 638, is an example. The second headnote, which in Ohio states the law of the case, reads:

"The provision in a standard insurance policy that: 'In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the other two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally all expenses of the appraiser and umpire'—is a provision for an appraisement and not for an arbitration, and such submission is not to be judged by the strict rules applicable to arbitration and award, and where the appraisers and umpire have before them a list of the property destroyed, and the insured's statement in detail in respect to his loss, it is not ground for setting aside the appraisement that they refuse to hear evidence.

"'The distinction,' says Judge Summers, 'between an agreement for appraisement and an agreement to submit to arbitration, may not always be plain. But when the question of the liability of the company under the policy, and every other question, is reserved, and the only submission provided for is an appraisal of the property at and after the time of the fire to determine the single question of the amount of the loss, it would seem to be an agreement for an appraisement and not an arbitration.'"

It is to be borne in mind that the only subject actually in dispute between the parties was that of fault. At the time the agreement was made, there was no dispute on the question of damages, and there might never be any dispute. This is important in considering the nature of the submission as to damages because it has frequently been held that an arbitration, strictly speaking, has to do with the settlement of existing differences between parties. If there is no matter in dispute, there is no question to be arbitrated. The great weight of authority is in the affirmative of this proposition.

Bouvier adopts Worcester's definition of an arbitrator:

"A private extraordinary judge, to whose decision matters in controversy are referred by consent of the parties."

Mr. Justice Grier quotes Bouvier as reading:

"A private extraordinary judge chosen by the parties who have a matter in dispute, invested with authority to decide the same." Gordon v. U. S., 7 Wall. 188, 194, 19 L. Ed. 35.

In Memphis Trust Co. v. Brown-Ketchum Iron Works, 166 Fed. 402, 93 C. C. A. 166, Judge Knappen states the rule of revocation in this way:

"It is the rule that a naked executory agreement (not under authority of a statute or rule of court), made after the arising of a dispute, to submit the same to arbitration, is revocable at will by either party in advance of the actual carrying out of the agreement to arbitration and award therein."

In a note to Leeds v. Burrows, supra, Lord Ellenborough is reported to have said:

"That it was only appointing persons to settle an account of what was due between the parties for the value of the different articles. The parties had no contemplation of submitting any differences to the award of arbitrators, and no such terms ought to be imposed upon them against their own meaning and the meaning of the stamp acts."

In Collins v. Collins, 26 Beavan, 306, the parties had entered into a contract to purchase a brewery and plant at a price to be fixed by arbitrators who were to choose an umpire before entering upon the valuation. The arbitrators could not agree on an umpire, and it was held that the court had no authority under the arbitration acts to appoint an umpire for such a purpose. In reaching this conclusion it became necessary to determine whether the agreement was for an arbitration, strictly speaking. It was held that it was not; the Master of the Rolls saying with much else that was pertinent:

"An 'arbitration' is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties. It is very true that in one sense it must be implied that, although there is no existing difference, still that a difference may

arise between the parties; yet I think the distinction between an existing difference and one which may arise is a material one, and one which has been properly relied upon in the case. If nothing has been said respecting the price by the vendor and purchaser between themselves, it can hardly be said that there is any difference between them. It might be that, if the purchaser knew the price required by the seller, there would be no difference, and that he would be willing to give it. It may well be that the decision of a particular valuer appointed might fix the price and might be equally satisfactory to both; so that it can hardly be said that there is a difference between them. * * * Undoubtedly, if two persons enter into an arrangement for the sale of any particular property, and try to settle the terms, but cannot agree, and after dispute and discussion respecting the price they say, 'we will refer this question of price to A. B.; he shall settle it'—and thereupon they agree that the matter shall be referred to his arbitration, that would appear to be an 'arbitration,' in the proper sense of the term. * * * It appears to me that the case of Leeds v. Burrows draws the proper and fit distinction between an arbitration, in the proper sense of the term, and an appraisement or valuation, for valuation undoubtedly precludes differences, in the proper sense of the term; it prevents differences, and does not settle any which have arisen. That is the distinction which, in my opinion, exists between those cases of appraisement and those cases of arbitration."

It appears in Bos v. Helsham, L. R. 2 Exch. 72, that at a sale by auction one of the conditions was that if any mistakes were made in the description of any of the properties offered for sale, or if any error whatever appeared in the particulars of sale, such mistake or error should not annul the sale, but a compensation in such case should be given, to be settled by two referees, one to be appointed by either party to the sale, or an umpire.

The court could not distinguish the case from Collins v. Collins, supra; Pigott, B., saying:

"There is no matter in difference between these parties. This appears clear by noticing what it is which is meant to be referred, namely, the amount of compensation if there was any error. The language of the condition assumes that the parties are in agreement as to there being an error, and the only question remaining would be one of amount."

Many of the cases are reviewed in Norton v. Gale, 95 Ill. 533, 35 Am. Rep. 173. Mr. Justice Scholfield said in that case:

"There was, here, no matter in controversy when the leases were executed, or, for that matter, when the appraisers were selected, and the object was to preclude or prevent the arising of differences, and not to settle differences which had arisen."

In Green, etc., Ry. Co. v. Moore, supra, Sharswood, J., has much to say on the subject; among other things that:

"An award is the judgment of a tribunal selected by the parties to determine matters actually in variance between them—not merely to appraise and settle the price of property contracted for under the stipulation that this term of the contract was to be so ascertained. Had the parties made the contract, and afterwards, on a dispute arising, chosen arbitrators to determine what was due upon it, that might have been an award. The case is entirely different where the parties originally agree to buy and sell at a sum to be fixed by an appraisement to be made by a third person or persons."

He says further:

"It would not be necessary that the appraisers should decide upon evidence heard in the presence of the parties. They could decide, and indeed

would be expected to fix the value of the articles, upon their own knowledge of the subject, though doubtless they might seek information from other quarters."

This language is particularly applicable because the arbitrators and counsel were experts in admiralty law; but, even if they were not, yet it was only probably necessary to call the custodian of the bills and of the books of the steamer found not to be in fault.

Strong analogy is presented by the case of Garr v. Gomez, 9 Wend. 649. Without setting forth the voluminous facts in the case, it will be sufficient for our purpose to say that it was there held:

"That there is a distinction between the reference of a collateral or incidental matter of appraisement or calculation, and the submission of matters in controversy for the purpose of a final determination; that the latter, and not the former, is a submission to arbitration."

In Cothran v. Knox, 13 S. C. 496, 507, it is said:

"As to the alleged arbitration, we think it lacks one essential feature, which deprives it of the character claimed for it. It seems to us to be essential to the very idea of an arbitration that there should have been an antecedent dispute or controversy between the parties."

But the character of the submission as to damages seems to us fixed by the Supreme Court of the United States in Kelly v. Crawford, 5 Wall. 785, 18 L. Ed. 562. There one party had been and was the agent of the other and had become indebted to the other. They agreed that an accountant should examine the books of account and ascertain from them the exact amount due; "the amount so found to be due and owing to be final." It was held that this agreement was not a "submission to arbitration," neither was the amount found to be due an "award" within the strict rules governing arbitrators and awards. In considering the nature of this agreement, Mr. Justice Field said:

"The principal objections urged for a reversal of the judgment rest upon the idea that the agreement of September 13, 1861, was a submission to arbitration, and the report or statement of Quigg was the award of an arbitrator, and that both are to be judged by the strict rules applicable to arbitrations and awards. This is, however, a mistaken view of the agreement and report. As observed by counsel, there was no dispute or controversy between the parties to be submitted to arbitration; nor was anything to be submitted to the judgment or discretion of Quigg. The books of account of the defendants were to determine the amount due; about these there was no controversy. The only duty of Quigg was to examine them as an accountant and to state what they exhibited."

And further:

"The object of submitting the books to him for examination was to ascertain the exact amount of the indebtedness of the defendants to the plaintiffs. For this purpose it was in his power to write up the books, to correct errors discovered, and make entries of what had been omitted by oversight or mistake. It is to be presumed that the parties desired to arrive at a just result, not to have a balance struck from the books without regard to their correctness."

The conclusion is that this agreement constituted an arbitration only on the subject of fault; that the revocation came too late, and the de-

feated party could not even at common law prevent the arbitrators from proceeding further to ascertain the amount the one at fault must pay. There would seem to be no reason why the parties should not include within the same agreement a subject for arbitration and a subject for appraisement, as was done in Mills v. Bayley, 2 H. & C. 36, 41.

Boston & L. R. Corp. v. Nashua & L. R. Corp., 139 Mass. 463, 31 N. E. 751, and Nashua & L. R. Corp. v. Boston & L. R. Corp., 157 Mass. 268, 31 N. E. 1060, which should be read together, are instructive on the point.

A. & B., each the owner of a railroad, had entered into a joint traffic agreement. "Disputes and differences had arisen between them concerning their rights under and growing out of the agreement," and the claims of each party against the other were submitted to arbitrators. Afterwards the parties agreed that certain claims of A. should be heard and determined first. On these claims the arbitrators made and published their award against A., who, thereupon, attempted to revoke the submission in toto. The effect of the two decisions is that A. was bound by the award on the claims submitted, but could revoke as to the other claims. That he could so revoke has no bearing on the propriety of our conclusion, for the other claims were all of the same character and quality as those upon which the award was taken. Each was entirely independent of the other, and in no way necessarily following the determination of any particular question to which it was incidental, and all were of a character to be the subject of arbitration, the question of appraisement or ascertainment of value or damage not being involved, and all of the questions submitted were in fact in dispute between the parties. But, even so, the award as to part of them was held to be a bar to an action on the claims arbitrated.

But it is urged by the appellant that, in any event, these arbitrators constituted a board of three, and that the questions were submitted to only two. Having found that revocation came too late in this particular case, we have no difficulty in holding that the proceedings cannot be made a futility for the reason of the failure of the appellant's arbitrator either to sign the award or to participate in the ascertainment of damages, when his failure was caused by the appellant himself, and due notice was given of the further proceedings. Under the circumstances, we have no doubt of the validity of the award or the propriety of the two arbitrators proceeding without the other to determine the damages.

The question was before the Justices of the King's Bench in the reign of James I. The action was debt upon an obligation conditioned to stand to the award of A., B., C., and D. of all actions and demands between the parties, "so as the said arbitrators, or any three or two of them, did make the said award under their hands and seals before such a day." It appeared that two of them made the award under their hands. "The question was whether this award by two is good (because the first part of the condition is that all the submission is to four, and not to three or two of them, which only comes under the 'so as'). And all the justices conceived it to be good enough." A writ of error was brought in the Exchequer Chamber; "but it was resolved to be

well enough, for the words subsequent explain it, that it may be made by two or three of them." Sallows v. Girling, 3 Cro. Jac. 277.

A few years later a similar case arose in the same court, Sir Edward Coke, Chief Justice. The defendant claimed the arbitrament to be void because it was not made by all of the four arbitrators. "The court at first inclined to that opinion; but, after several arguments at the bar, they all seriatim delivered their opinions that the arbitrament was good. * * * And they relied upon a former judgment in this court, betwixt Sallows and Carling." This judgment was affirmed in the Exchequer Chamber by all the judges and barons. Berry v. Penring, 3 Cro. Jac. 399.

In Dalling v. Matchett, Willes' Reports, 215, the submission was to three arbitrators, "so that they or any two of them might make an award." One did not attend, although he might have done so, and he had notice of the meeting. The other two arbitrators were held to have had authority to meet, hear, and award. "If," say the court, "either by obstinacy, or at the desire of the defendant, or being hindered by business, (the third arbitrator) absented himself from such meetings, having had due notice thereof, we are of opinion that the award is good."

The Court of Appeals of New York say on this subject:

"There can be no doubt that at common law, before the Revised Statutes, under such a submission, two arbitrators might lawfully meet and hear the proofs and allegations of the parties, where the third had notice and refused to attend and take part in the proceedings; and that an award made by the two who heard the matters submitted, under such circumstances, was a valid and binding award. This was settled in England at an early day, and upon full deliberation." Bulson v. Lohnes, 29 N. Y. 291, 293.

To the same effect are Goodman v. Sayers, 2 Jac. & Walk. 249, 261; Carpenter v. Wood, 1 Metc. (Mass.) 409; Crofoot v. Allen, 2 Wend. (N. Y.) 494; Kile v. Chapin, 9 Ind. 150; Doherty v. Doherty, 148 Mass. 367, 19 N. E. 352; Shores v. Bowen, 44 Mo. 396, 401; Mullins v. Arnold, 36 Tenn. 262, 266; Green v. Miller, 6 Johns. (N. Y.) 39, 41, 5 Am. Dec. 184.

The case of The Nineveh, Fed. Cas. No. 10,276, presents some features of resemblance to the case at bar, and is claimed by counsel for appellant to be exactly in point in his favor. An examination of it shows, however, a number of differences, and especially that the sole subject of the submission was the question of damages. The determination of that question involved, no doubt, a finding as to fault; but, if it did, the two questions were submitted as one, and the submission to three arbitrators was without express power to the majority to decide the dispute if the whole should be unable to agree.

From these considerations we are of opinion that the award as alleged in the answer is a complete bar to appellant's action, and that the exceptions to the answer should be overruled.

The judgment of the District Court overruling the exceptions and dismissing the libel is therefore affirmed.

HOBBS v. HEAD & DOWST CO. In re NEW ENGLAND BREEDERS' CLUB. Ex parte HEAD & DOWST CO.

(Circuit Court of Appeals, First Circuit. January 3, 1911.)

Nos. 873, 896.

1. BANKRUPTCY (§ 215*)—PROCEEDINGS IN STATE COURT—JUDGMENT—VALIDITY.

Where proceedings in the state court to foreclose a mechanic's lien were continued after bankruptcy of the property owner, and the judgment was affirmed by the Supreme Court of the state after the bankrupt's trustee had been heard therein, the judgment would not be regarded as void by the bankruptcy court on account of the pending bankruptcy proceedings, though the bankruptcy court might exercise certain revisory powers in reference thereto.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 215.*]

2. BANKRUPTCY (§ 196*)—DECISION OF STATE COURT—JUDGMENT—REVIEW OF BANKRUPTCY.

Where an action to foreclose a mechanic's lien was permitted to go to judgment in the state court notwithstanding bankruptcy proceedings against the owner of the property, such judgment, when filed as a claim in bankruptcy, was not reviewable as to minor amounts involved, or as to whether minor portions of the property were or were not parts of the parcel to which the lien attached.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 196.*]

3. MECHANICS' LIENS (§ 93*)—CONTRACT—WAIVER OF COMPLETION—QUANTUM MERUIT.

Where a contractor claiming a lien was prevented from completing a building as required by the contract by the owner's failure or refusal to make payments as they matured, according to the contract, the contractor was entitled to sue on the contract for the amount due, and to foreclose its lien therefor, and was not limited to its remedy on quantum meruit. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, applied.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 93.*]

Appeal from the District Court of the United States for the District of New Hampshire.

In Bankruptcy. In the matter of the New England Breeders' Club, bankrupt. From an order denying the petition of Nathaniel W. Hobbs, trustee, to disallow an alleged mechanic's lien claim, reduced to judgment of foreclosure in the state court in favor of Head & Dowst Company, petitioner appeals, and also brings a petition to revise. Affirmed.

See, also, 175 Fed. 501.

Henry F. Hollis, for appellant.

Robert L. Manning, George H. Warren, and Burnham, Brown, Jones & Warren, for appellee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This case relates to an alleged mechanic's lien under the statutes of New Hampshire on the real estate of the New England Breeders' Club, now in bankruptcy. To avoid

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

all uncertainties, the proponent proceeded both by an appeal and also by a petition to revise under the bankruptcy statutes. There were proceedings in the courts of the state of New Hampshire and in the United States District Court for the District of New Hampshire, which we will describe, concluding in the latter court with the following rescript and decree:

Opinion of the District Court.

March 19, 1910.

ALDRICH, District Judge. In view of what appears from the various opinions in the state court in respect to the Head & Dowst Company proceeding, as supplemented by arguments and by the facts found by Burns P. Hodgman, master, I am disposed to accept the result reached in the state court as sufficiently establishing the amount and validity of the Head & Dowst Company lien, and therefore decline to independently consider and adjudicate the local lien question further than to accept as conclusive the result reached in the state court.

The trustee having signified a desire to have my decision in this regard reviewed by the Court of Appeals, I wish, so far as I may properly do so, to send that court all questions of discretion. Pending this review the Head & Dowst Company should not move the state court to perfect its lien.

Decree.

March 19, 1910.

At Concord, in said district, on the 19th day of March, A. D. 1910, upon the petition of Nathaniel W. Hobbs, trustee in bankruptcy, filed June 10, 1908, that the alleged lien of the Head & Dowst Company be adjudicated in said District Court, and renewed by motion filed March 15, 1910,

Now, therefore, after hearing arguments of counsel, and after due consideration of the same, and of the facts reported to the court by Burns P. Hodgman, master, It is hereby ordered and decreed that said petition of Nathaniel W. Hobbs, trustee, be and hereby is dismissed and denied.

The alleged lien is based upon a written contract between the bankrupt and the Head & Dowst Company, dated August 31, 1905, for the erection of the buildings on the premises in question here. On December 24, 1906, the contract, on which payments were only to be made on certificates of the architect, with the usual reserve, and on which, at the time, a very considerable amount was awaiting an architect's certificate, was put in suit in the superior court of the state of New Hampshire, for the purpose of enforcing the lien claim referred to; the bankrupt's realty to which the lien related having been properly attached. At that time the entire amount reserved in the contract had been earned, except a matter of about $1,000 for some shutters. It was determined in the suit in the state court that the sum of $46,748.08 had thus been earned, and was unpaid, and judgment was entered for that amount, as we will state further on. There is no claim, and never was any claim, that the Head & Dowst Company was in any way in default, nor any claim that the proper certificates from the architect were not due it, and would not be given it at the time or times provided for by the contract. Except for the matter of the $1,000 and except also for the absence of the architect's certificate, the whole amount reserved by the contract was due and payable at the time the suit was brought.

Immediately preceding or immediately after the suit the bankrupt became actually and notoriously insolvent, and proceedings in insolvency were had in the courts of the state of New Hampshire, by which, on April 15, 1907, Hobbs, the present trustee, was appointed assignee under the insolvency laws of the state. The record shows that the suit was tried without a jury by the presiding judge of the superior court, and that the assignee in insolvency appeared in defense thereof by his counsel, who were present throughout the entire trial, and who defended the action with care, and that, so far as can be observed, a full, complete, and impartial trial was had. There was no substantial variance between the proofs offered in the superior court and those afterwards presented in the District Court as shown by the present record. Certain exceptions were reserved; but, subject to those exceptions, judgment was entered for the Head & Dowst Company in the superior court on December 18, 1907, awarding the amount we have already stated, with a judgment in rem against the real estate attached. Meanwhile, on April 29, 1907, a few days more than four months after the lien suit was commenced, an involuntary petition in bankruptcy was filed in the District Court for New Hampshire against the New England Breeders' Club, which was contested several months, so that an adjudication was not entered until December 31, 1907. It appears, therefore, that during the entire period covering the suit in the superior court, from the time it originated on December 24, 1906, until the judgment on December 18, 1907, there was no representative of any interests in bankruptcy competent to interpose in the litigation in the state court, and no attempt was made by the District Court to interfere therewith until after the judgment was entered. Hobbs was qualified as trustee on the 1st day of February, 1908. He delayed until April 14th, when he filed a petition in the District Court asking that further proceedings in the New Hampshire courts might be stayed, whereupon, on May 15, 1908, a temporary restraining order was issued as follows:

"Temporary Restraining Order.

"May 15, 1908.

"Whereas, in the above cause, a motion for the issuance of a permanent restraining order has been filed and it having appeared that there is danger of irreparable injury being caused to the petitioner before the hearing of said application for the permanent restraining order unless said Head & Dowst Company is, pending such hearing, restrained as herein set forth,

"Now, therefore, take notice that you, the Head & Dowst Company, defendant herein, your agents, servants, attorneys, and counselors, and each of you, are hereby specially restrained and enjoined from taking further action in the suit of Head & Dowst Company v. New England Breeders' Club, now pending in the superior court and the Supreme Court for the state of New Hampshire, to enforce a lien upon the real estate of said New England Breeders' Club, until further order of this court in the premises. I will hear the Head & Dowst Company under special appearance, and without prejudice as to any question of jurisdiction upon reasonable notice to the other side, upon an application to dissolve this order. It is intended that the party restrained need not necessarily resort to a motion to dissolve, but may at once exercise the right of appeal. In the meantime, and without prejudice to the right of either party, the trustee has leave to co-operate with the Head & Dowst Company with a view of selling the property in dispute, and in case

of sale upon joint consent the proceeds will be safeguarded and held until the rights of the parties are established by law. Edgar Aldrich,
"U. S. District Judge.

"Done at Chambers May 15, 1908."

The trustee also filed a petition in the District Court on June 10, 1908, alleging that the claim of the Head & Dowst Company constituted a cloud on the title of the real estate of the bankrupt, praying that the District Court in bankruptcy might adjudicate the validity and amount of its lien if it had any. This petition clearly asked the District Court to take full and independent jurisdiction over the entire topic of the validity and amount of the alleged lien, and it is the alleged refusal of the District Court to do this by its decree of March 19, 1910, which brings the matter to this court in the manner which we have pointed out.

There were other applications to the District Court which we need not refer to except incidentally. There was a reference to a master of August 10, 1909, covering the entire case, which also we need not further state except as hereinafter specially referred to.

When the trustee in bankruptcy was appointed, the case was pending on the exceptions in the Supreme Court of the state of New Hampshire. After the trustee was appointed—that is, on January 6, 1910—the District Court entered the following order, having reference to the restraining order issued on May 15, 1908, which we have already set out, namely:

"The injunction is so far modified as to permit the Head & Dowst Company to go before the proper court of New Hampshire, and take necessary steps to have all questions relating to the amount and validity of the alleged lien upon the bankrupt estate of the New England Breeders' Club determined upon their merits under the New Hampshire law; and the trustee in bankruptcy has leave, and is directed, to make all reasonable effort in the direction of having such questions established by that court. The motion of the trustee that the lien claim be adjudicated by this court is stayed for the present, and will await the result reached in the state court."

Meanwhile the Supreme Court of New Hampshire had made a formal order dismissing the exceptions we have referred to, on the ground that there were no proper responding parties before it; the trustee not having then appeared. But, as we understand the proceedings in that court, as soon as the trustee appeared in accordance with the order of the District Court of January 6, 1910, the Supreme Court restored the case, and heard his counsel. It is evident from the record that counsel for the trustee did make all the efforts required by the order of January 6, 1910, and sought a review by the Supreme Court of the entire merits of the case. The Supreme Court found itself unable formally to do further than consider the exceptions. In this, so far as we understand the New Hampshire practice, the Supreme Court was right. It did, however, hold that all the facts essential to the creation and preservation of the lien had been found for the plaintiff in the superior court.

It is sufficient to say that on the whole we have no reason to doubt that the trial in the superior court was properly conducted and full defense made by the assignee in insolvency. Nevertheless the trustee

in bankruptcy urged upon the District Court that the questions of the amount and validity of the lien had never been fully considered or adjudicated by any court authorized so to do; and he urged on the District Court that it should take up these questions de novo. This as we understand, the District Court by the decree of March 19, 1910, declined to do.

It is true that as to that decree there may be possible claims of interpretations of it in three directions, though to us the third possible interpretation seems, under all the circumstances, to be the correct one. First. It may be claimed that the District Court accepted the conclusions of the state courts as final. Second. It may be claimed that the District Court reviewed the whole case de novo, and intended only to decide that its conclusions on such a review were in harmony with those of the state courts. We do not understand this to be a correct interpretation. Third. It may be that the District Court was of the opinion that, as the proceedings in the state courts affected the disposition of the property of the bankrupt and a determination of the liens existing thereon, the District Court had a right to review it so far as on the face of the record it saw any occasion so to do, in this case placing itself in the substantial position of a court in equity asked to enforce the decree of another court sitting in equity, or of itself sitting in equity at some prior stage of the litigation, where the court so far investigates the proceeding as to satisfy itself that equity will be done in enforcing the prior decree; in other words, that the District Court looked into the proceedings of the state courts so far as to satisfy itself that they were fairly conducted, in accordance with the reasonable and just fundamental rules as to litigated questions, and, finding that they were so conducted, accepted the result as its own. The latter interpretation seems to us to be the reasonable one. Therefore we will first undertake to ascertain the powers of the District Courts in bankruptcy with reference to litigation pending in a state court.

The counsel have not submitted to us their views on the effect of the appearance of the trustee in the Supreme Court; and therefore, as, if that fact has any effect, it would only be to strengthen the result we have reached, we have not considered it.

We are of the opinion that the state courts, under the circumstances, had the right to proceed to the judgment entered in December, 1907. When the superior court assumed jurisdiction, it had undoubted jurisdiction over all the parties interested in the controversy. It did not lose its jurisdiction because those parties subsequently changed. Although, at the time the judgment was entered in the superior court, to which time all subsequent proceedings in the Supreme Court must relate, there was no trustee who in law was authorized to take up the defense, while it may have been within the power of the District Court to restrain further proceedings in the state court until the bankruptcy proceedings had further developed, there was, however, no interference in this direction until after the judgment in the superior court in December, 1907, was entered. Therefore that judgment was valid and effectual, subject perhaps to the right of the District Court after-

wards to review the same on account of the powers given it under the bankruptcy statutes, if such right did exist.

We have seen that exceptions were reserved for the Supreme Court of the state, and that the trustee, in accordance with the order of January 6, 1910, was secured by the Supreme Court an opportunity to be heard thereon. The Supreme Court did pass upon the exceptions, so that, neither as to the superior court nor the Supreme Court, can it be said that the result came from any substantial default.

There can be no question on the general rules of law and the decisions of the Supreme Court of the United States that the judgments of the state courts were not void. By this we mean not absolutely void, postponing for the present the question of the power of the court in bankruptcy to examine into them to some extent. The superior court having had entire jurisdiction over the parties when the suit was brought, it never lost its jurisdiction in the absence of the fact that the parties did not decease, either by natural death as in the case of individuals, or by dissolution as in the case of corporations. Therefore that the judgment was not void on account of the pending proceedings in bankruptcy or the result thereof, in view of the dates we have given, has been settled by a continual series of decisions of the Supreme Court, beginning with Ex parte Christy, 3 How. 292, 11 L. Ed. 603, and Peck v. Jenness, 7 How. 612, 12 L. Ed. 841, coming down through a line of cases cited and reaffirmed in Davis v. Friedlander, 104 U. S. 570, 26 L. Ed. 818, Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128, and other cases which it is not necessary to refer to.

In view of these decisions, it would be impossible to maintain successfully that the result in the District Court appealed against could be questioned, if they represent the ultimate state of the law. Nevertheless this particular case illustrates the necessity of conceding to the courts in bankruptcy a certain revisory power. It was only by the grace of the state Supreme Court that the final judgment was delayed, and a hearing of any kind given the trustee. This is only one illustration of many conceivable cases where a limited revision by a bankruptcy court should justly be permitted. Even in Re Christy, already referred to, at page 314, Mr. Justice Story, speaking in behalf of the court, said that it was demonstrated that Congress did not intend to limit the jurisdiction of the District Court to the class of cases specifically enumerated in the statute, and that its purpose was to bring within its reach all adverse claims.

Likewise the Circuit Court of Appeals for the Fourth Circuit, in New River Coal Company v. Ruffner (decided on December 1, 1908) 165 Fed. 881, at page 885, 91 C. C. A. 559, at page 563, shadows out a general rule in the following language, which has reference to the stay of a suit in the state court, instituted prior to the bankruptcy proceedings:

"It is our opinion that, notwithstanding this action of the state court, the judge of the District Court, sitting in bankruptcy, had full power upon the application of the bankrupt itself, of creditors, or of the trustee, in case one had been appointed, to take such action as in the discretion of the court was necessary for the preservation of the bankrupt estate, the determination

of existing liens, if such there were, and the collection, custody, and distribution of the bankrupt's estate in the manner and to the ends contemplated by the bankruptcy law. In the act forbidding courts of the United States to stay proceedings in a state court, the courts of bankruptcy are specifically excepted, and the bankruptcy law of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) expressly confers upon these courts the power to issue injunctions to stay proceedings within this exception."

In the same line the Circuit Court of Appeals for the Eighth Circuit, in Re Dana, 167 Fed. 529, 93 C. C. A. 238, decided on February 23, 1909, in a case where the District Court, acting as a court of bankruptcy, restrained the proceedings in the state court in a suit commenced before the petition in bankruptcy was filed, sustained the jurisdiction. This must have been the view taken by the District Court in the case at bar when it issued its restraining order on May 15, 1908, which we have already described. Without undertaking in all respects to adopt all the phraseology used by Judge Aldrich, we thoroughly commend its general views, and regard them as looking to a result such as we have explained:

"An examination of the state and federal cases decided in the periods covered by the various bankruptcy acts discloses a vast field of discussion, and quite a degree of confusion and conflict, as to the respective powers and duties of the two courts; but, after all, it would seem to be safe to assume that there is no hard and fast rule which requires that all litigation pending in the state courts at the time of the adjudication in bankruptcy in respect to the property of the bankrupt estate shall be left for determination in that forum; neither, as it would seem, is there a hard and fast rule which requires a federal court to draw unto itself all litigation in respect to a bankrupt estate and as to property in the possession of the bankrupt trustee. As the federal bankruptcy law is supposed to be the paramount insolvency law, and as the estate upon adjudication is understood to become an estate in custodia legis, it is quite possible that in the last analysis it might be found (except as to situations within the doctrine of Eyster v. Gaff, 91 U. S. 521 [23 L. Ed. 403], and other cases cited in notes, section 1582, Remington on Bankruptcy) that the right or power to assume the responsibility of all litigation in respect to the assets of the bankrupt estate resides in the federal bankruptcy court. Still, if such extreme power exists, reasonable consideration of comity between the two governments and the two courts, and a reasonable consideration of convenience to suitors, would doubtless, under reasonable judicial discretion, often require that it should not be exercised, and in the great majority of cases would leave local property rights, involved in litigation pending in state courts of general jurisdiction at the time of the adjudication in bankruptcy, to be ascertained and established in the state tribunal as the one most appropriate and best suited to the interests of all parties concerned."

On the other hand, the Supreme Court, in the case covered by our general citation which is most positively expressed, namely, Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403, rendered an opinion which, if unqualified, would shut out all jurisdiction of the bankruptcy court in the case at bar. There, however, it said at page 523 of 91 U. S., 23 L. Ed. 403, that the proceedings in the state court were claimed to be absolutely void. The position taken here, either in the District Court or before us, does not go to that extent. Expressions to the same effect as in Eyster v. Gaff are found in Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, and in Louisville Trust Company v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413. Ex-

pressions apparently otherwise are found in Re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933. Perhaps all can be reconciled by what is found on page 32 of 190 U. S., on page 726 of 23 Sup. Ct. (47 L. Ed. 933) as follows:

"The distinction between the exclusive jurisdiction of the court in bankruptcy, proceeding as it were in rem. to determine the status of a debtor and his assets, and the jurisdiction over property subjected to particular liens, and the like, exercised by courts of concurrent jurisdiction, was probably thought by them not to apply in the circumstances existing here, and advice based on that opinion could not in itself constitute contempt."

Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555, which relates to the control taken by the District Court sitting in bankruptcy over moneys in the hands of a sheriff collected on execution out of a state court, is not applicable here, because it is settled law that federal and other courts having general equitable jurisdiction may control, under some circumstances, moneys collected by a sheriff, or other proceeds of a judgment, without violating any rules applicable as between different courts while the proceedings in litigation are pending.

However, we need not pursue this topic further, as we are able to affirm the final conclusion of the District Court in any view to be taken of the relations between that court and the local tribunals. As the superior court had original jurisdiction, which was at least not so far divested that any judgment it rendered was absolutely void, and as it was careful at the crucial stage of the proceedings to have before it parties who could, at least informally, represent adverse interests, parties who, in a broad sense, are the same as those now before us, it cannot be fairly claimed that it proceeded against common right, or in violation of any of the fundamental rules of the law. It had sufficient before it to enable it to dispose understandingly of the questions involved. It is certain, therefore, that in no view would we be justified in reviewing its proceedings or determinations with regard to minor matters, like questions of minor amounts involved, or questions whether certain minor portions of the property were or were not parts of the parcel to which the lien attached, all of which are now brought before us by the trustee. There would be no end to litigation if courts in bankruptcy should undertake to revise the proceedings of the state courts in such matters of detail, and no value to the judgments of those courts if the federal courts had jurisdiction to do so, and assumed to exercise it. We, moreover, do not hesitate to declare on the main question presented to us, which was also presented to the state tribunals, that the Head & Dowst Company was substantially entitled to the judgment for the lien claim which it received.

The trustee has with great diligence and much ability cited to us authorities to the effect that the contract for the construction of the buildings on the premises of the bankrupt was never completed, so that the remedy of the Head & Dowst Company was merely on a quantum meruit, for which under the local decisions it is maintained a lien does not lie. None of them require examination by us, because

they are all met by Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, wherein it is held that, after the renunciation of a continuing agreement by one party, the other is at liberty to consider himself absolved from any future performance, and secures a right to recover for all consequences of the breach of it, and that, under such circumstances, the suit is on the contract itself, and not at all on a quantum meruit. We have given so much of the substance of this decision as is necessary to establish our propositions, although independently of it, under the proper understanding of the law as it existed prior to the announcement of Roehm v. Horst, we should apply here the same rule, and hold that, under the circumstances, the Head & Dowst Company had entitled itself to proceed on the contract for the entire amount of the work done by it, and consequently, notwithstanding the decisions cited by the trustee, to maintain its statutory lien for whatever remained unpaid.

Roehm v. Horst was affirmed in The Eliza Lines, 199 U. S. 119, 129, 26 Sup. Ct. 8, 50 L. Ed. 115, though probably it is unnecessary to state this. The application here of the rule announced therein is very simple. Miller, the president of the bankrupt corporation, was for the purposes of this case practically the corporation. He executed the contract sued on, and his authority to execute it was never questioned. The directors met only at infrequent intervals, and the management of the ordinary affairs of the corporation was left in the hands of the president, who, as the case shows, "really had actual charge of the club's business." The record also adds that he was "the man with whom the Head & Dowst Company did its business, and carried on its correspondence." Miller's own testimony was to the effect that his assumption to exercise all the powers of the bankrupt corporation was never objected to. Taking the record as a whole, it is apparent that the entire subject-matter of the work contracted for by the Head & Dowst Company had by acquiescence come under his sole charge. On September 26 and December 14, 1906, the following correspondence between him and the Head & Dowst Company occurred:

"September 26, 1906.

"Messrs. Head & Dowst Co., Manchester, N. H.

"Gentlemen: I have talked with our principal stockholders about paying you in cash as per your request of the twenty-third and twenty-fifth inst., but my efforts have been unavailing. I am afraid that we can do nothing except send you notes in any convenient amounts you may suggest for the amount that Mr. Rice will include in your certificate. I am awfully sorry but I do not see any way of arranging payment.

"Yours very truly, Andrew Miller, President.

"December 14, 1906.

"Messrs. Head & Dowst, Manchester, N. H.

"Gentlemen: I beg to advise you that the New England Breeders' Club will not be able to meet the note given you for $28,000, due December 18, 1906, and most respectfully request that you allow us to renew the same under the same term for a period of four months from December 18th, 1906.

"We will be pleased to send you a note at four months in settlement of the balance due you.

"Kindly communicate with the New England Breeders' Club at once.

"Yours truly, Andrew Miller, President."

On December 19, 1906, Miller sent the following telegram to the Head & Dowst Company:

"New York, Dec. 19.

"To Head & Dowst Co., Manchester, N. H.

"Owing to inability to secure the consent of a majority of the creditors of the New England Breeders' Club we will not renew the note given you as per letter written you, the New England Breeders' Club has no funds to meet the note given you. Andrew Miller."

The record shows that there was no question that at this time the New England Breeders' Club was hopelessly insolvent; and on December 29, 1906, its president, Miller, told the attorney of the Head & Dowst Company, who had been sent to him by the Head & Dowst Company regarding its claims, that the former corporation had no funds; that its stockholders had refused to pay in any more money; that the directors would not personally indorse the obligations to the Head & Dowst Company; that they would pay nothing; that the Head & Dowst Company must look to its lien to support its claim; and that this is what he meant by his telegram above quoted. Therefore there can be no doubt that both the state court and the District Court held, and that also we on appeal should hold, that the New England Breeders' Club had abandoned the contract with the Head & Dowst Company, so that the case is fully and clearly within Roehm v. Horst. The consequence is that in any event the Head & Dowst Company was entitled to proceed to enforce its lien for the balance due it, and that in any view the adjudication of the state courts with reference to this, which is the substantial question in the case, cannot be disturbed.

In No. 873, Hobbs, Trustee, Appellant, v. Head & Dowst Company, Appellee, the judgment is:

The decree of the District Court is affirmed, and the appellee recovers its costs of appeal, so far as they can be paid out of the estate in bankruptcy.

In No. 896, Hobbs, Trustee, Petitioner, the judgment is:

The petition is dismissed, and the respondent recovers its costs, so far as they can be paid out of the estate in bankruptcy.

VAN BOSKERCK et al. v. TORBERT.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 103.

1. FRAUDS, STATUTE OF (§ 158*)—LOST MEMORANDUM OF SALE—PROOF OF CONTENTS.

The contents of a written memorandum of sale required by the statute of frauds, which has been lost, may be proved by parol, and proof of a statement by a defendant that an order for merchandise sent by letter had been accepted by mail is sufficient to establish such a written memorandum of sale, although the acceptance was not received by plaintiff.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 374; Dec. Dig. § 158.*]

2. FRAUDS, STATUTE OF (§ 115*)—SUFFICIENCY OF WRITING—SIGNATURE.

An unsigned statement given by defendants to plaintiff, purporting to show the number of barrels of flour sold by defendants to plaintiff and remaining undelivered, which included a certain number of barrels sold on a certain date, is not a sufficient memorandum to take such sale out of the statute of frauds of New York, which requires contracts of sale of goods for the price of $50 or more not delivered to be evidenced by some note or memorandum in writing subscribed by the party to be charged or his agent.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 242–250; Dec. Dig. § 115.*]

3. FRAUDS, STATUTE OF (§ 90*)—SALES OF GOODS—PART DELIVERY.

Where plaintiff sent orders by mail from time to time to defendants for flour for future delivery, the most of which were accepted in writing, but one was not, deliveries afterward made without any designation of the particular contract on which they were applied were presumptively intended to apply and were applied on the contracts in their chronological order, and, where there was not sufficient to fill the orders prior to the one not accepted, there is no ground for claiming a delivery thereon to take the sale out of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 174–179; Dec. Dig. § 90.*]

4. APPEAL AND ERROR (§ 1140*) — DISPOSITION OF CAUSE — REDUCTION OF AMOUNT OF JUDGMENT.

Where a judgment is excessive, but capable of correction by computation merely, it will not be reversed by an appellate court if the defendant in error files a remittitur of the excess.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462–4478; Dec. Dig. § 1140.*]

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

Action at law by Edward A. Torbert against George W. Van Boskerck and another. Judgment for plaintiff, and defendants bring error. Affirmed on condition of filing of remittitur.

Tyler & Tyler (William S. Tyler, of counsel), for plaintiffs in error.

M. S. Lynch, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

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

WARD, Circuit Judge. The complaint sets up seven separate and independent purchases on different dates of flour by the plaintiff from the defendants for future delivery aggregating 6,250 barrels, all of which were at the price of $3.75 per barrel except the last of April 30, 1907, which was at $3.90 per barrel:

October	29, 1906	1,250	bbls.	at	$3.75	per	bbl.
November	7, 1906	750	"	"	3.75	"	"
November	13, 1906	250	"	"	3.75	"	"
November	15, 1906	1,000	"	"	3.75	"	"
November	26, 1906	500	"	"	3.75	"	"
December	26, 1906	1,500	"	"	3.75	"	"
April	30, 1907	1,000	"	"	3.90	"	"

It is admitted that the defendants delivered only 3,500 barrels, as follows:

November	16, 1906,	250	barrels.
December	7, 1906,	250	"
December	21, 1906,	250	"
January	11, 1907,	250	"
February	2, 1907,	250	"
February	16, 1907,	250	"
March	12, 1907,	250	"
March	19, 1907,	250	"
March	25, 1907,	250	"
April	13, 1907,	250	"
May	6, 1907,	250	"
June	22, 1907,	250	"
June	28, 1907,	250	"
July	2, 1907,	250	"

The jury gave the plaintiff a verdict for the damages resulting from the failure to deliver 2,750 barrels. The contest in this court is as to the alleged sales of 1,000 barrels November 15 and 1,500 barrels December 26, 1906; the defendants denying that any such contracts were made and contending that, if made, they are void because not evidenced by a memorandum in writing as required by the statute of frauds, the relevant provisions of which are as follows (section 31 of the personal property law [Consol. Laws, c. 41]):

"Agreements required to be in writing. Every agreement, promise or undertaking is void unless it or some note or memorandum thereof be in writing and subscribed by the party to be charged therewith or by his lawful agent, if such agreement, promise or undertaking * * * (6) is a contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, and the buyer does not accept and receive part of such goods, or the evidences, or some of them, of such things in action; nor at the time, pay any part of the purchase money."

The plaintiff testified that, not having received any written confirmation of the sale of November 15th, of 1,000 barrels, at $3.75, he complained to Thomas Van Boskerck, who replied that he had mailed the usual confirmation. It is contended that the case should be treated as if this had been done and the letter had miscarried. The contents of a written memorandum of sale which has been lost, required by the statute of frauds, may be proved by parol testimony. Reed on Statute of Frauds, § 326; Jackson v. Livingston, 7 Wend. (N. Y.) 136. This testimony, which must have been believed by the jury, seems to us sufficiently to establish the memorandum.

The plaintiff further testified that he bought 1,500 barrels December 26th, for which he received no written confirmation, and that on or about January 10, 1907, he asked Thomas Van Boskerck, one of the defendants, for a statement of the amount of flour due him, who turned to his books and wrote off the following:

October	29, 1,750	sacks.
November	7, 1,250	"
November	13, 350	"
November	15, 1,400	"
November	26, 700	"
December	26, 2,100	"
	7,550	"
	5	
	7)37,750	
	5,390	
	1,250	
	3,140	

This memorandum is of sacks (of the same quantity) instead of barrels, and contains a mistake in subtraction; but its importance is that it recognizes the sales alleged by the plaintiff to have been made November 15th and December 26th. That in view of it the jury found such contracts had been made is not to be wondered at. The plaintiff contends that this memorandum satisfies the statute of frauds; but this is clearly not so, because it does not pretend to state a contract and is not signed. Next he says it is to be regarded as an account stated; but, if there can be an account stated of a balance of goods, it is a sufficient answer that the complaint is not upon an account stated.

Finally, the plaintiff relies upon the following confirmation of sale:

Plaintiff's Exhibit 1-F.

New York, December 26, 1906.

We have this day sold to Daniel Mapes, Jr., one thousand bbls. flour branded King Patent $3.95 to be delivered in Jute sacks for account of E. A. Torbert, Jr. George W. Van Boskerck & Son, Per T. R. Van B.

Terms cash.

This, instead of being a memorandum of a sale by the defendants to the plaintiff, is a memorandum of a sale by the plaintiff to Mapes through the defendants, as his agents.

The only remaining question is whether the contract of December 26th was saved by the acceptance and receipt by the plaintiff of goods under it. The burden lay upon him to prove deliveries on the particular contract. Williams v. Morris, 95 U. S. 444, 456, 457, 24 L. Ed. 360. Both parties agree that the last three deliveries made were on the contract of April 30, 1907, which was for $3.90 per barrel. All the other contracts were for $3.75 per barrel, and there is no proof whatever of how deliveries were applied upon them. If we indulge the presumption that they were applied to the contracts in their chronological order, there was a delivery of 500 barrels on the contract of

November 15th and no delivery on the contract of December 26th. This leaves no ground for the plaintiff's recovery on that contract. We are compelled to the conclusion that there was error at least in the refusal of the defendants' request to charge that there was no evidence upon which the jury could find a contract of sale of the date of December 26th.

The presumption we have indulged as to the application of deliveries being the most favorable possible to the defendant, and the error being capable of correction by computation merely, there need be no new trial if the judgment is reduced by the proper amount. Hansen v. Boyd, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746.

Ordered, if the defendant in error within 10 days after this opinion is handed down file a remittitur of $1,500 with interest from May 22, 1907, to the date of the verdict, in the office of the clerk of the Circuit Court of the United States for the Eastern District of New York, and a certified copy thereof in the office of the clerk of this court, the judgment, less the amount so remitted, will be affirmed, with costs of this court to the plaintiffs in error. But, if this is not done, judgment will be reversed, with costs of both courts to the plaintiffs in error.

PENNSYLVANIA R. CO. v. STOCKTON.

(Circuit Court of Appeals, Third Circuit. January 19, 1911.)

No. 39.

1. CARRIERS (§ 318*)—INJURIES TO PASSENGERS—STARTING TRAIN AT STATION WITHOUT WARNING.

   In an action for injury to a passenger when attempting to board a railroad train at a station, negligence may fairly be inferred by the jury from the starting of the train without warning when a large number of passengers were attempting to enter.

   [Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1313; Dec. Dig. § 318.*]

2. CARRIERS (§ 286*)—RAILROADS—DUTY OF CARE TO PASSENGERS AWAITING TRAIN.

   A railroad company is under obligation to take due care to secure the safety of a passenger who is on its platform to board its train.

   [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142, 1152; Dec. Dig. § 286.*]

3. CARRIERS (§ 320*)—RAILROADS—ACTION FOR INJURY TO PASSENGER IN BOARDING TRAIN—NEGLIGENCE.

   Plaintiff's intestate was killed when attempting to board a train on defendant's railroad at Newark, N. J., by being pushed against or under the moving cars by the crowd which was waiting for the train. It was Saturday afternoon at the height of the season for week-end summer travel to the seaside, where the train was bound, and there were 800 or 900 persons on the platform and nearly 200 who sought to board this particular train, which was 10 minutes late. Such crowd, however, was not exceptional for the time, day, and season. There were no gates, and there was testimony that there was no one representing defendant on the platform when the train came in. *Held*, that the question of de-

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

fendant's negligence in failing to have adequate arrangements to control the crowd and protect the passengers from injury was properly submitted to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1167; Dec. Dig. § 320.*]

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

Action at law by Richard Stockton, administrator of William L. Stockton, deceased, against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 182 Fed. 282.

Vredenburgh, Wall & Carey, for Pennsylvania R. Co.

Frank S. Katzenbach, Jr., for Stockton.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Richard Stockton, a citizen of New Jersey, and administrator c. t. a. of Wm. L. Stockton, deceased, recovered a verdict against the Pennsylvania Railroad Company, a corporation of Pennsylvania, for damages for its alleged negligence in causing his decedent's death. On entry of judgment thereon the railroad sued out this writ.

The case concerns the duty of a railroad to a passenger about to board a train at a station. The testimony on behalf of the plaintiff tended to show that Mr. Stockton, having purchased a ticket on defendant's road to Mantaloking, a New Jersey seaside resort, went to the platform of its Market Street Station in Newark, N. J., to await the arrival of his train. It was about 4 o'clock on Saturday afternoon in the height of the season of week-end, excursion summer travel. There was proof there were 800 or 900 persons on the platform, some 195 of whom, or enough to fill three cars, desired to board the Mantaloking train. One witness said the crowd reached from the tracks back to the station door, and that it was so dense he was unable to get out at one of the doors. Another witness said:

"When I had bought my ticket, I walked upstairs and went out on the platform; but there was a big crowd there right back to the doors, and I managed to squeeze out, and I squeezed around the edge of the crowd. Then I went along down the rickety zigzag fence that comes in and goes down. Crowds of people were crowded around down back in there. * * * Everybody was pushing. It was a very hot day. I skirted the crowd and got around where the platform was narrow."

Another witness, without objection, said:

"The platform station at that time was thronged with people. There was a crowd. It seemed to me at that time that the station was insufficiently protected; that is to say, that, for a mass of people that was there attempting to take the train, it seemed to me that the protection of the public was very limited, because there was a crowd there without any restraint on them whatever. The train rolled into the station, and instantly the crowd surged toward the train. There was no railroad official around there at that time."

The train in question was ten minutes late, and the evidence on the part of the railroad was that Mr. Stockton was pushed under the

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

train by the crowd as the train ran into the station and before it came to a stop. The very decided weight of the proof, however, was with the plaintiff that the train came to a full stop, and the crowd then pushed to enter. Whereupon, the train was, without signal, moved forward, and it was then that Mr. Stockton, while attempting to get upon it, was pushed under. A witness thus described his own and Mr. Stockton's actions as the train approached:

"Our position was about six feet from the tracks on the platform. There was a big crowd of people there. But we were not closer than six feet from the rails; from the edge of the platform, in other words. The train was late, and it came in with a rush, came in very fast. The train stopped, and everybody commenced to push forward to get on the train. Mr. Stockton was a little ahead of me. He started to get on. The train started to go ahead again. I think it moved 20 or 25 feet after it came to a stop; but meanwhile Mr. Stockton was pushed under the train, and his left foot was cut off by the first truck."

The case was submitted on two counts, one charging negligence in starting the train, whereby Mr. Stockton was killed while trying to get aboard; the other, negligence in not controlling the crowd and taking proper precautions for decedent's safety. The court submitted the case to the jury on both counts, and, as the verdict was general and may be attributed to either, the question arises whether there was error in submitting both to the jury.

We have no difficulty in justifying the verdict under the first count, for, from the starting of the train without warning when a crowd of passengers was attempting to enter, negligence might be inferred. Kulman v. Erie R. Co., 65 N. J. Law, 243, 47 Atl. 497.

The crucial question is as to the other count. Assuming that Mr. Stockton was pushed under or against the approaching train before it stopped, was there evidence of negligence on the part of the railroad to submit to the jury? No contention is made that the station platform was inadequate. Indeed, a count charging negligence in that regard was abandoned; but the question is as to the alleged failure of the railroad to control its use. The obligation of a railway to take due care to secure the safety of a passenger who is on its platform to board its train is generally recognized. McGearty v. Manhattan Railroad Company, 77 N. Y. St. Rep. 1086, 15 App. Div. 2, 43 N. Y. Supp. 1086; Buck v. Manhattan Railroad Co., 15 Daly (N. Y.) 48, 2 N. Y. Supp. 718. It has been so held in New Jersey, in Exton v. Central R. R. Co., 62 N. J. Law, 15, 42 Atl. 489, and the general principle there established that:

"Carriers of passengers are bound to exercise the utmost care in maintaining order and guarding those they transport against violence from whatever source arising, which might be reasonably anticipated or naturally expected to occur. Flint v. Norwich Transportation Company, 34 Conn. 554 [Fed. Cas. No. 4,873]. * * * The general rule is clear that from whatever source the danger may arise, if it be known or should have been known, care must be exercised to protect the passenger from that danger."

Now the situation at this station was not an unusual one, or one which the railroad company had no reason to anticipate. The principle, therefore, of such cases as Cannon v. Midland, L. R., vol. 6, Ireland, 205, and Pittsburgh, etc., Co. v. Hinds, 53 Pa. 512, 91 Am.

Dec. 224, which are urged to control this case, are not here applicable. There the situation was unusual and not to be expected; here it was in no way out of the ordinary. The crowd was not exceptional for such a day, hour, and season. Indeed, the railroad itself showed the situation that day was one to be expected. Thus one of the incoming trainmen, in answer to the question whether there was "anything out of the ordinary with the persons who were waiting there to get on the train," said:

"Nothing more than the Saturday afternoon travel, a few more than the week-day travel; that was all."

Mr. Kramer, a Newark business man, called as a witness by the railroad, in speaking of the crowd, said:

"On the afternoon of August 1st, about 4 o'clock, I reached the depot and found the usual large afternoon crowd there, * * * and, as is usually customary on days of this kind, the crowd surged forward, kept walking along with this train as it was moving forward."

The engineer of the incoming train, in answer to the question whether he noticed anything unusual about the crowd, said:

"No, not any more than any other Saturday. Of course, Saturday is a little busy at that time of the year at the seashore."

And the station master said it was "just the ordinary summer travel, Saturday travel."

Seeing, then, that the situation was not out of the ordinary, and that the railroad was not confronted by any extraordinary conditions, what was its duty with reference to this crowd awaiting this incoming, belated train?

There was no doubt such a crowd called for oversight and control to prevent danger from the train. The conductor, Neill, testified:

"They seemed to be very impatient; made a rush for the train."

That was to be expected. Indeed, the railroad proved by the station master that his duty was "to see that, if confusion arises, the people are handled properly." Presumably a fair proportion of the 33 persons who made up the station master's night and day force were at his command. There was also a policeman on duty, who was paid by the railroad; but he was downstairs in the waiting room at the time, and the testimony on behalf of the plaintiff was that no official of the railroad was on the platform when the train came in. Under the facts proven in this case—the size of the crowd, the absence of gates, the lateness of the train, the number of the passengers boarding it, and the absence of any officials whatever to safeguard such a surging throng of people, selfishly intent, as experience shows such a crowd is, to board the cars and get seats and apt to move forward by common impulse as a train, and especially a late one, approaches—all these are facts from which a fair-minded man might infer that the railroad had failed to exercise that supervising control over a large, inconsiderate crowd, which a due regard for the safety of passengers demanded; for, as said in Cannon v. Midland, supra:

"When a railway company, for an excursion or other special purpose, invites numbers to its station, it is not unreasonable to require more than the ordinary attendants to perform the same duties which devolve upon the usual staff at other times."

We are therefore of opinion the court, under these proofs, was bound to submit them to the jury on the question of negligence under the first count. The crowd was not extraordinary. It was one from which, uncontrolled, an accident might result, and the railroad, although equipped to control it and proving it was its duty to handle the crowd properly, simply left it to take care of itself. Under this situation a jury might fairly infer that absence of any care was a lack of due care, and negligence is the lack of due care under the circumstances. In the light of these facts, we think the court below would have been in error in withdrawing the second count from the jury.

The judgment of the court below is therefore affirmed.

TRAVELERS' INS. CO. v. GREAT LAKES ENGINEERING WORKS CO.

(Circuit Court of Appeals, Sixth Circuit. January 3, 1911.)

No. 2,065.

1. PLEADING (§ 48*)—SUFFICIENCY OF PETITION—OHIO STATUTE.

A petition considered, and *held* to state a cause of action as against a demurrer under the provisions of Rev. St. Ohio 1908, § 5096, which provides that the allegations of a pleading shall be liberally construed with a view to substantial justice between the parties, and of section 5088, which provides for requiring pleadings to be made more specific and certain by amendment, and under which, as construed by the Supreme Court of the state, defects of allegation which do not amount to such an absolute omission of fact as to constitute no ground of action or defense can only be taken advantage of by motion.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 48.*

Following state practice, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

2. INSURANCE (§ 606*)—SUBROGATION OF INSURER—EMPLOYER'S LIABILITY INSURANCE.

In fire and marine insurance, the rule is well settled that the insurer, on paying to the assured the amount of a loss on the property insured, is subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss, and such doctrine of subrogation is equally applicable to cases of employer's liability insurance, in which the insurer's contract is also one of indemnity.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1504–1516; Dec. Dig. § 606.*

Subrogation of insurer under assignment of rights of insured, see note to The Livingstone, 65 C. C. A. 15.]

3. INSURANCE (§ 606*)—SUBROGATION OF INSURER—EMPLOYER'S LIABILITY INSURANCE.

While the defendant was engaged in installing a refrigerating plant, including an engine, in a brewery, a cylinder head of the engine blew out, and one employé of the brewing company was killed and another injured. Actions were brought against the brewing company by the in-

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

jured employé and on behalf of the next of kin of the deceased employé under the Ohio statute, and damages were paid by plaintiff, which had issued to the company an employer's liability policy covering such losses and containing a provision that, in case of payment of a loss thereunder, plaintiff should be subrogated to the extent of such payment to all rights of recovery for such loss by the assured against persons, corporations, or estates. *Held* that, assuming that the brewing company was not itself negligent, but that its liability for the injury and death of its employés arose from its responsibility for the negligence of defendant in installing a defective and dangerous machine on its premises, it had a right of action to recover over against defendant, to which right plaintiff succeeded by subrogation, and that such right of action was not affected by the fact that the brewing company's liability in one case was statutory and to certain persons only.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1504–1516; Dec. Dig. § 606.*]

4. PARTIES (§ 6*)—PLAINTIFFS—REAL PARTY IN INTEREST—RIGHT OF ACTION OF INSURER BY SUBROGATION.

Under Rev. St. Ohio 1908, § 4993, which requires actions to be prosecuted in the name of the real party in interest, an insurer, who by payment of a loss has been subrogated to a right of action of the assured against a third person, may maintain an action at law thereon in its own name.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 6–8; Dec. Dig. § 6.*]

5. INSURANCE (§ 606*)—SUBROGATION OF INSURER—RIGHT OF ACTION AGAINST THIRD PERSON—PAYMENT OF CLAIM BEFORE JUDGMENT.

In an action by an employer's liability insurer, which has paid a loss incurred by the assured through the death of an employé, to recover in right of subrogation from a third person whose negligence caused such death, it is not essential to the right of recovery that a judgment should have been recovered against the assured before the claim was paid, since the only effect of such a judgment would be by way of evidence establishing liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1504–1516; Dec. Dig. § 606.*]

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

Action at law by the Travelers' Insurance Company against the Great Lakes Engineering Works Company. Judgment for defendant, and plaintiff brings error. Reversed.

Robertson & Buchwalter (C. D. Robertson, of counsel), for plaintiff in error.

Louis J. Dolle and James B. O'Donnell, for defendant in error.

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

KNAPPEN, Circuit Judge. The writ of error in this case is brought to review the judgment of the Circuit Court sustaining a demurrer to plaintiff's petition and dismissing the same. The petition alleges, in substance, that through the negligence of the defendant engineering company with respect to the construction and installation of a refrigerating machine and steam engine, which it was engaged in

manufacturing, furnishing, and installing in the place of business of the Herancourt Brewing Company, and while the engine was being operated by the permission and direction of the engineering company, the cylinder head of the engine blew out, "causing the almost instant death of Joseph Leinhart, an oiler in the employ of the Herancourt Brewing Company, and wounding and seriously injuring Edward Wund, another employé of said brewing company, while said employés were in the discharge of their duty," and without negligence or fault on their part; that the brewing company "had no knowledge of, and in the exercise of ordinary care had no means of knowledge of, the said defects, negligent construction, and assembling of said engine, or of the careless and negligent manner in which it was installed"; that by reason of said injuries, due to the negligence or fault of the engineering company, the brewing company became liable to the injured parties and their legal representatives by way of damages as compensation for such injuries; that the brewing company was at the time indemnified, under plaintiff's policy of employer's liability insurance, "against loss by reason of liability imposed by law upon it for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered by reason of the operation of its business, by any person employed by it at its place of business," the policy containing a provision that plaintiff "shall be subrogated in case of payment of loss under this policy to the extent of such payment to all rights of recovery for such loss by the assured, against persons, corporations or estates"; that plaintiff, in compliance with its insurance contract, "as it was in duty bound," "was required, and did at great expense, appear for, defend, and settle the suit of Margaret Leinhart, administratrix," against the brewing company on account of damages for such alleged wrongful death, "having to pay in satisfaction thereof the sum of $2,750 and court costs in the sum of $15; and having to pay in satisfaction of the claim of Edward Wund, a minor, the sum of $75 and court costs, in the sum of $15." The petition prayed judgment for these amounts, as well as for attorney's fees "in the litigation and settlement of said claims," and for the time and services of plaintiff's officers and employés "in connection with and given to the said litigation and adjustment of said claims."

The ground of demurrer to the petition generally, as well as specially to so much of it as seeks recovery on account of the Leinhart claim was that it failed to state facts sufficient to constitute a cause of action; it being also assigned that the cause of action is below the jurisdictional amount, this objection being directed to the fact that the claimed recovery aside from the Leinhart claim did not amount to $2,000. The court below held that the brewing company could have no right of action against the engineering company for damages which it had to pay growing out of the wrongful death of Leinhart, for the reason that only the administratrix of the deceased could have recovered against either or both wrongdoers, and, as the insurance company could recover against the engineering company only in the right of the brewing company, the action could not be sustained.

It is over the correctness of this ruling that the important question arises.

Before proceeding, however, to its discussion, reference must be made to certain objections urged against the sufficiency of the petition in other respects, but not passed upon by the court below. It must be admitted that if the petition were to be tested by the rules applicable to common-law pleadings, which require that they be construed most strongly against the pleader, it would be subject to some, at least, of the criticisms made against it. The Ohio statute, however (Rev. St. 1908, § 5096), provides that:

"The allegations of a pleading shall be liberally construed, with a view to substantial justice between the parties."

And under this statute it has been held that the rule of the common law above referred to has been abrogated (Hall v. Plaine, 14 Ohio St. 417, 422; Crooks v. Finney, 39 Ohio St. 57, 58); and that pleadings under the present system must be fairly and reasonably, not strictly, construed (McCurdy v. Baughman, 43 Ohio St. 78, 1 N. E. 93). By section 5088 provision is made for requiring pleadings to be made more definite and certain by amendment, and it has been held that defects of allegation which do not amount to such an absolute omission of fact as to constitute no ground of action or defense must be taken advantage of or objected to by motion. Trustees, etc., v. Odlin, 8 Ohio St. 293, 296. We think that under this liberal rule the petition may, for the purposes of demurrer, fairly be construed as intended to charge that the accident occurred through the negligence of the engineering company; that as between it and the brewing company the latter was not negligent; that the brewing company, however, became legally liable through its relations with the engineering company, which are not definitely alleged to be those of an independent contractor; that the injuries in question were accidentally suffered by reason of the operation (within the meaning of the indemnity contract) of the brewing company's business by persons employed by it thereat; that the brewing company, as between it and the injured employés or their representatives, was bound to make the payments here sued for, the plaintiff, as between it and the brewing company, being liable thereto.

It is to be remarked, in passing, that the question whether the relation of the engineering company toward the brewing company was or was not in fact that of independent contractor is, of course, open for determination upon the evidence as it shall appear upon the trial.

We are thus brought to the question whether the insurer, by reason of a contract of indemnity against employer's liability, such as exists here, can maintain an action against a third party whose negligence has caused liability to the insured employer for injuries resulting in the death of its employé.

The rule is well settled, in fire insurance as well as in marine insurance, that the insurer, upon paying to the assured the amount of a loss on the property insured, is subrogated in a corresponding amount to the assured's right of action against any other person re-

sponsible for the loss; this right of the insurer against such other person not resting upon any relation of contract or of privity between them, but arising out of the nature of the contract of insurance as a contract of indemnity derived from the assured alone, and enforceable in his right only. Hall v. Railroad Cos., 13 Wall. 367, 20 L. Ed. 594; Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; Phœnix Ins. Co. v. Erie Transp. Co., 117 U. S. 312, 320, 6 Sup. Ct. 1176, 29 L. Ed. 873; Liverpool, etc., Steam Co. v. Phœnix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; St. Louis, etc., Ry. Co. v. Commercial Union Ins. Co., 139 U. S. 223, 235, 11 Sup. Ct. 554, 35 L. Ed. 154; Cooley's Briefs on the Law of Insurance, vol. 4, p. 3893; Newcomb v. Insurance Co., 22 Ohio St. 382, 387, 10 Am. Rep. 746. In United States Casualty Co. v. Bagley, 129 Mich. 70, 87 N. W. 1044, 55 L. R. A. 616, 95 Am. St. Rep. 424, the plaintiff, which had paid a damage resulting to the tenant by an accidental discharge or leakage of water from an automatic fire extinguishing apparatus, was permitted to recover against the landlord, as the one liable to the tenant therefor.

But it is insisted by defendant that the brewing company could have no right of action against the engineering company for causing the death of Leinhart, for the reason that there is no common-law right of action for causing the death of a human being, the right of action being purely statutory—in Ohio the action being required to be brought in the name of the personal representative of the deceased, and for the exclusive benefit of the wife, husband, children, parents, or next of kin of the deceased (Rev. St. Ohio 1908, §§ 6134, 6135)—and that the injury to the insurance company from the death of Leinhart is thus too indirect and remote to give a right of action to the insurance company. The cases of Insurance Co. v. Brame, 95 U. S. 754, 24 L. Ed. 580, and Connecticut Mutual Life Ins. Co. v. N. Y. & N. H. Ry. Co., 25 Conn. 265, 65 Am. Dec. 571, are among the most important of the cases relied upon in support of this proposition. It was upon the former of these cases that the learned district judge rested his denial of plaintiff's right to relief. In our opinion, none of the cases cited support the proposition referred to. In the Brame Case the insurance company sought to recover against Brame for the wrongful killing of one McLemore, on whose life the plaintiff had issued a policy of insurance which it was thereby compelled to pay. It was held that as there was at common-law no right of action against Brame for the killing of McLemore, and as the statute creating the right of action gave it only in favor of the minor children or widow, or other relatives of the deceased, the fact that the killing of McLemore "happened to injure the plaintiff was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting from the act of killing," and so gave the insurance company no right of action. The question of subrogation was not referred to, as the insurance contract there involved was not one of indemnity to those injured by the death, but was a wagering contract. The principle of subrogation could have no application to that case, because rights thereunder must have been

asserted in the name of the insured, and whatever right of action he may have had abated with his death. In the New York & New Haven Railroad Case, the insurance company sought to recover damages for the negligent killing of Dr. Beach, whose life was insured by plaintiff's policy, which it was thereby compelled to pay, and the denial of relief was put upon substantially the same ground as in the Brame Case. In this case, likewise, the doctrine of subrogation was not involved. On the contrary, the court distinguished the case before it from one involving the right of subrogation in this language:

"The cases in which insurers have been permitted to recover against the authors of their losses are not in contravention of this principle. They have recovered, not by color of their own legal right, but under a general doctrine of equity jurisprudence, commonly known as the doctrine of subrogation, applicable to all cases wherein a party who has indemnified another in pursuance of his obligation so to do succeeds, and is entitled to the cession of all means of redress held by the party indemnified against the party who has occasioned the loss."

The case before us is readily distinguished from both the cases we have referred to. It is a general rule of law that a principal or employer is civilly responsible for wrongs committed by his agent or servant while acting within the scope of the employment of the agent or servant. 1 Thompson on Negligence, §§ 518, 520, 526. The rule of law is likewise general that where a principal or employer is not in fault, but has nevertheless been compelled to pay damages to a third person for the negligence of his agent or employé, he may maintain an action over against such servant or employé to recover what he has been compelled to pay. Story on Agency (9th Ed.) § 217; 4 Thompson on Negligence, § 3870. The brewing company thus had, by virtue of its alleged relations with the engineering company, a right of action over against the latter for negligence on its part which caused legal damage to the brewing company. The injury to the brewing company resulting from that negligence was direct and immediate.

With respect to injuries not causing death, as in the case of Wund, we apprehend this proposition would not be questioned. With respect to the damage resulting from Leinhart's death, the fact that Leinhart had no right of action is immaterial. There is no attempt to recover here in any right of his. The ground of the recovery sought is that the engineering company failed in its primary and positive duty toward the brewing company, whereby the latter company sustained a loss. It can make no difference with its right of action over that the original recovery against it belonged to one person rather than another; to the widow and children rather than to the representative of Leinhart's estate. Under the allegations of the petition, the negligence of the engineering company was the direct and sole cause of Leinhart's death, and thus of the damages suffered by the brewing company. The injury to the insurance company was thus not indirect or remote, but was direct and immediate, because it stands in the shoes of the brewing company. We know of no reason, either upon principle or authority, why the doctrine of subrogation, which has been expressly held applicable to indemnity

by way of fire and marine insurance, and by at least necessary implication in the case of casualty insurance, should not be held to extend to employer's liability indemnity. State v. Ætna Life Ins. Co., 69 Ohio St. 317, 69 N. E. 608, is cited by defendant to the proposition that employer's liability insurance is really accident insurance, and so should be classed with ordinary life and accident policies as not being indemnity insurance. The case is not authority for that proposition. The fact that the original right of action against the brewing company was statutory is certainly immaterial. For one example, out of many: In Hart v. Western Railway Corporation, 13 Metc. (Mass.) 99, 46 Am. Dec. 719, the insurance company was held entitled to recovery on account of a fire loss which it had paid and for which the railroad company was made liable by statute.

But it is contended that this right of subrogation, if it exists, can, in a court of law, be enforced only in the name of the insured. In several cases (including Phœnix Ins. Co. v. Erie Transp. Co., 117 U. S. 321, 6 Sup. Ct. 1176, 29 L. Ed. 873, and Connecticut Mutual Life Ins. Co. v. N. Y. & N. H. Ry. Co., 25 Conn. at page 277, 65 Am. Dec. 571) it is said that the insurer may enforce his right of subrogation in equity or in admiralty in his own name, but that in the courts of common law the right can be enforced only in the name of the insured. In St. Louis, etc., Ry. Co. v. Commercial Union Ins. Co., 139 U. S. at page 235, 11 Sup. Ct. at page 557, 35 L. Ed. 154, it was said (speaking of the right of subrogation):

"By the strict rules of the common law, it must be asserted in the name of the assured; in a court of equity or of admiralty, or under some state codes, it may be asserted by the insurer in his own name."

See. also. Norwich Union Fire Ins. Co. v. Standard Oil Co., 59 Fed. 984, 987, 8 C. C. A. 433; Insurance Co. v. Strong, 18 Ohio Cir. Ct. R. 464.

Turning to the statutes of Ohio (Rev. St. 1908, § 4993), we find that "an action must be prosecuted in the name of the real party in interest," with certain exceptions not applicable here. In several cases statutes similar to that in Ohio have been expressly held to give the right of action at law in the name of the assured (Marine Ins. Co. v. St. Louis, etc., Ry. Co. [C. C.; Caldwell, D. J.] 41 Fed. 643, 645; Norwich, etc., Ins. Co. v. Standard Oil Co., 59 Fed. 984, 987, 8 C. C. A. 433; Swarthout v. C. & N. Ry. Co., 49 Wis. 625, 6 N. W. 314; Connecticut Fire Ins. Co. v. Erie R. R. Co., 73 N. Y. 399, 405, 29 Am. Rep. 171), although the rule would be different when the insurer had paid a part only of the loss, for in such case the principle forbidding the splitting of an action would forbid a suit by the insurer for a part only of the loss claimed. Norwich Ins. Co. v. Standard Oil Co., supra; Continental Ins. Co. v. Loud, 93 Mich. 139, 53 N. W. 394, 32 Am. St. Rep. 494. In United States Casualty Co. v. Bagley, supra, the recovery was in the name of the insurer. We find nothing in Hall v. Railroad Co., 13 Wall. 372, 20 L. Ed. 594, or in Memphis, etc., R. R. Co. v. Dow, 120 U. S. 301, 302, 7 Sup. Ct. 482, 30 L. Ed. 595, opposed to the conclusion that

under the statutes of Ohio the action for subrogation is properly maintainable by the insurer who has paid the entire loss.

It is further urged against plaintiff's right of recovery that the petition does not show that judgment was actually taken against the brewing company; the implication being that the liability was settled without judgment. We see no merit in this contention. Assuming that no recovery could be had in advance of actual payment of the liability, the only effect of a judgment would be by way of evidence establishing liability. If the insurance company saw fit to pay the claimed liability without judgment, and without warning in the engineering company, so as to bind it by that judgment, the burden rests upon it of establishing in this suit, by proof, not only that Leinhart's death occurred through the negligence of the engineering company, but also the extent of the damages recoverable by his relatives on account of that death.

It follows, from the views we have expressed, that the court below erred in sustaining the demurrer.

The judgment is, accordingly, reversed, with directions to take such further proceedings in the case as are not inconsistent with this opinion.

LEARY v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. December 7, 1910.)

No. 889.

EQUITY (§ 114*)—INTERVENTION—LACHES.

In a suit by the United States to establish its equitable ownership of certain securities, leave to file a petition of intervention setting up a pledge of the securities to intervener's intestate was rightfully denied on the ground of laches, where application was not made until more than four years after the suit was commenced and after all the testimony had been taken, and no reason for the delay was given, and also for want of equity where the petition did not allege that intervener's intestate did not have knowledge of the rights of the United States, which were established by the proofs, when the alleged pledge was made.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 277; Dec. Dig. § 114.*]

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

Suit in equity by the United States against Benjamin D. Greene, Luther Lofflin Kellogg, and the Norfolk & Western Railway Company. From an order (United States v. Greene, 163 Fed. 442) denying the application of Mary C. Leary, administratrix of James D. Leary, deceased, for leave to file a petition of intervention, she brings error. Affirmed.

J. T. Coleman and A. E. Strode (David McClure, on the brief), for appellant.

Marion Erwin, Special Asst. Atty. Gen. (Thos. L. Moore, U. S. Atty., on the brief), for the United States.

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

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

ROSE, District Judge. The appellant filed in the court below a petition for leave to intervene and a bill of intervention in the cause of the United States v. Benjamin D. Greene, Luther Lofflin Kellogg, and the Norfolk & Western Railway Company.

The original bill of the United States was filed December 13, 1903. It set forth with much detail the government's version of the conduct of Oberlin M. Carter, John L. Gaynor, and the defendant Greene in connection with public contracts for the improvement of Savannah Harbor and neighboring waters. Much litigation has made this story a familiar tale. It suffices here to say that the bill alleges that upwards of $2,000,000 was fraudulently obtained from the United States by Carter, Gaynor, and Greene. Subject to certain minor adjustments, this sum was equally divided among them so that Greene's share was in the neighborhood of $700,000. The bill further charged that, in order to prevent the United States from recovering this money, Greene put it in the name of other people to be held for his benefit. Among those who undertook to hold property for Greene was the defendant Kellogg. The bill alleges that $113,926.55 of the money so fraudulently obtained by Greene was placed by him in Kellogg's hands. A part of such money ultimately was invested in 400 shares of the stock of the Norfolk & Western Railway Company, which at the time the bill was filed was represented by certificates 5,896, 5,897, 5,898, 11,077, and 74,200. The bill alleged that such stock was still held by Kellogg for the use and benefit of Greene. It says that Kellogg had been counsel for Greene, Gaynor, and Carter during much of the protracted litigation, civil, criminal, and military, which had grown out of the Savannah frauds. Among other things, the bill prayed that such stock should be declared to be the property of the United States, and that pending the final hearing of the case made by the bill the defendant should be enjoined from disposing or transferring such stock.

The Norfolk & Western Railway Company answered that all it knew about the matter was that the stock appeared on its books in the name of Kellogg. It disclaimed all interest in the controversy and submitted to whatever decree the court might pass. Greene, though personally summoned, never appeared or answered, and as against him the bill was taken pro confesso. Kellogg demurred to the bill and filed with his demurrer a supporting affidavit. The court overruled the demurrer and treated the affidavit as an answer. In view of the subsequent course of the case, only a small portion of his answer had any relevancy to the questions raised on this appeal. It stated that when in December, 1899, Greene was first arrested in connection with these alleged frauds, Kellogg induced one Leary, a client and friend of his, to become bail in the sum of $25,000 for Greene's appearance before the United States commissioner in New York. Kellogg personally, so he said, gave Leary a written guaranty to protect the latter from loss or damage in consequence of becom-

ing such bail. Kellogg's answer further says that at about the same time Greene deposited with Kellogg some securities for the purpose of indemnifying Kellogg on this guaranty, with the understanding that Greene might at any time withdraw the deposited securities or dispose of them and substitute others in their place. Such securities it alleged were to be held by Kellogg to secure him and his firm for fees and disbursements in connection with the litigation then pending. Kellogg's answer states that the original securities were disposed of, and that the Norfolk & Western Railway Company stock in controversy was substituted for some of them. He says he held that stock as security to protect him for loss under his guaranty to Leary before mentioned or because of Leary having become surety in the sum of $40,000 for Greene's appearance in Georgia, Kellogg's agreement to indemnify Leary having been extended, the answer alleges, to said last-mentioned bond, and that he also held the stock to secure to himself and his firm the payment of their fees and disbursements.

The record shows that on June 2, 1904, the court below granted an order pendente lite restraining the transfer of the stock and the payment of dividends thereon. The case was put at issue by the general replication of the government filed in July, 1904.

Testimony was taken on both sides, and at the time of the filing of the petition for intervention the case was ready for final hearing. It is stipulated in the record that the United States had taken a large amount of evidence to sustain all its allegations, and that, although Kellogg testified in his own behalf, he did not take or offer any evidence to establish the contract of indemnity spoken of by him in his answer, nor did he take or offer any evidence that either he or his firm had any claim upon such stock for fees. It was further stipulated that in support of the motion for an injunction pendente lite the United States had offered evidence sufficient to establish that the 400 shares of Norfolk & Western Railway Company stock in controversy had been purchased March 26, 1900, by Kellogg in his own name but for the account of Greene with part of the funds derived from the sale of certain stocks of the Delaware, Lackawanna & Western Railway Company and of the Canada & Southern Railway Company sold by Kellogg March 23 and 26, 1900, and that the stocks so sold had been purchased by Greene in the name of Kellogg prior to December, 1899, the date of his first arrest, and that the money with which they had been purchased was a part of Greene's share of the funds coming from the Savannah contracts. It was further stipulated that, as evidence to be used at the final hearing, the government had offered testimony to prove the same facts, and that no evidence to contradict it had been offered, and that all the testimony was on file in the record of the cause prior to the presentation to the court on April 18, 1908, of the intervener's petition.

The petition for leave to intervene and the bill of intervention offered therewith alleged that the intervener was the administratrix of James D. Leary; that on December 11, 1899, Greene had been arrested in the Southern district of New York on a United States com-

missioner's warrant based upon an indictment found in the United States District Court for the Southern District of Georgia and was held in $25,000 bail; that either Greene or Kellogg applied to Leary to furnish this bail; that Leary became bail; that at the same time Greene placed in Kellogg's hands, as trustee and depositary to secure Leary against loss by reason of his having become bail, 300 shares of Delaware, Lackawanna & Western Railway Company stock upon the "condition and understanding that Kellogg should hold such shares of stock in trust for Leary until Leary was released from the bail bond, or, in case Leary's liability thereon should be established, that said shares of stock should be applied in payment of the obligation assumed by Leary"; that Greene withdrew the Delaware, Lackawanna & Western Railway Company stock and substituted the 400 shares of Norfolk & Western Railway Company stock upon the same terms and conditions; that on May 28, 1901, a warrant was issued for Greene's removal to Georgia; that he was admitted to bail in the sum of $40,000 for his appearance in Georgia for trial; that Kellogg applied to Leary to give such bail; that Leary did so on January 20, 1902, upon the condition and understanding that the securities held in trust and deposited by Kellogg should remain and continue in the hands of Kellogg as security and indemnity to Leary; that Greene did not appear for trial in the United States District Court for the Southern District of Georgia according to the terms of the recognizance, and therefore on March 7, 1902, the recognizance was forfeited, and the said District Court adjudged that the United States should recover from Greene and Leary $40,000, unless by the next term of the court they should show cause why such order should not be made final; that on January 12, 1903, the said judgment was made final and execution thereon awarded; that on September 10, 1903, the United States brought suit against the intervener in the United States District Court for the Southern District of New York to recover the amount of such recognizance; and that in said suit on January 6, 1908, judgment against the intervener was entered for $35,377.46, which judgment has not been paid, set aside, or reversed. The petition alleged that Kellogg holds the stock and its dividends as trustee and depositary and for the benefit and protection of the intervener, and that the intervener's claim upon, and right to, the stock is not liable to the claim of the United States "except to the extent of any surplus remaining after making full indemnity to the intervener."

The court below ordered that notice of the filing of the petition be given to the other parties to the cause. The United States objected to the granting of the leave prayed for. In so doing it said that the decree pro confesso established as against Greene the government's title to the stock, and that the government's title was good as against any person claiming under Greene and not a purchaser for value without notice, which in said petition the intervener did not allege herself to be. It further asserted that the petition did not allege that the contract under which the intervener claims was in writing, and therefore under the statute of frauds it was not

enforceable; that, whether in writing or not, such contract was against public policy; that the intervener was barred by laches in not presenting the petition at an earlier stage of the proceeding; and that in form and substance the intervention was without equity. The intervener did not offer to amend. The government's objections to granting leave to the petitioner to intervene were set down for hearing. The learned judge below was of the opinion that the bill was fatally defective in that it nowhere alleged that the petitioner's intestate at the time of giving bail was ignorant of the facts alleged in the original bill which imposed upon the securities in question a trust in favor of the government, and because it was not possible from the allegations of the petition to make out whether the contract of indemnity was express or implied. He pointed out that it is settled that the law does not imply an obligation upon the part of one charged with a criminal offense to indemnify his bail for any loss which the latter may suffer by reason of the former's failure to appear in accordance with the terms of his recognizance. United States v. Ryder, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. Ed. 308. The learned judge was of the opinion that even an express contract made by a criminal to indemnify his bail is against public policy and is unenforceable. Leave to file the bill of intervention was therefore denied.

The intervener says that an express contract by one accused of crime to indemnify his bail is not against public policy. The government says it is.

A person held to bail in a civil case may indemnify his bail. United States v. Ryder, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. Ed. 308; Cripps v. Hartnoll, 4 Best. & S. 414; Green v. Cresswell, 10 A. & E. 453; Perley v. Spring, 12 Mass. 297.

A contract, by one not accused of crime, to indemnify the bail of one who is, is enforceable. Cripps v. Hartnoll, 4 Best. & S. 414; Holmes v. Knights, 10 N. H. 175; Anderson v. Spence, 72 Ind. 315, 37 Am. Rep. 162; Keesling v. Frazier, 119 Ind. 185, 21 N. E. 552.

When the state by statute has provided for the acceptance of cash bail, contracts to indemnify bail are not against public policy. Maloney v. Nelson, 144 N. Y. 189, 39 N. E. 82; Moloney v. Nelson, 158 N. Y. 352, 53 N. E. 31.

When the bail at the time of receiving the indemnity knows that it is the intention of the accused not to present himself for trial, no recovery can be had on the contract to indemnify. Ratcliffe v. Smith, 13 Bush (Ky.) 172.

The Supreme Court has decided that the law does not imply a contract that one held to bail in a criminal case will indemnify his surety. United States v. Ryder, 110 U. S. 737, 4 Sup. Ct. 196, 28 L. Ed. 308.

In the case at bar the intervener relies upon an express contract of the accused to indemnify his bail.

In England such contracts are unenforceable. Wilson v. Strugnell, L. R., 7 Q. B. Div. 548; Herman v. Jeuchner, L. R., 15 Q. B. Div. 561. The English rule has been approved in Littleton v. State, 46 Ark. 413; United States v. Simmons (C. C.) 47 Fed. 577. On the other hand, the highest courts of South Carolina, Georgia, and West

Virginia have held such contracts valid. Reynolds v. Harral, 2 Strob. 87; Simpson v. Robert, 35 Ga. 180; Carr v. Davis, 64 W. Va. 522, 63 S. E. 326, 20 L. R. A. (N. S.) 58. The text-writers are as divided as the courts. Highmore on Bail, 202, 3 Am. & Eng. Ency. 684, and 16 Am. & Eng. Ency. 172, hold such agreements to be against public policy. Pingrey on Suretyship, § 416, argues they are not. Brandt on Suretyship, § 610, is frankly in doubt.

The question is important. There is much difference of opinion about it. We should not pass upon it unless it is necessary to the decision of the case before us. In our view there is no such necessity.

Whether a contract by one accused of crime to indemnify his bail is or is not against public policy, the action of the court below in refusing the intervention was right and should be affirmed. "An intervention that savors of laches and is of doubtful equity will not be permitted." 2 Street's Federal Equity Practice, § 1373.

Where a petition for intervention was filed three years after it might have been, Judge Taft held that it was affected by laches. Continental Trust Company v. Toledo, St. Louis & K. C. R. Co. (C. C.) 82 Fed. 642.

In the case before us the petition for intervention was not filed until more than four years and three months after the institution of the suit. The facts disclosed by the record make it hard to believe that the appellant did not know of its pendency for years before she sought to intervene. She does not say that she was ignorant of its pendency. If she could have truthfully said so, it must be presumed she would. She gives no reason why she waited so long before seeking to come in. This she is bound to do. She incidentally states that judgment was not recovered against her by the United States on the forfeited recognizance in the United States Circuit Court for the Southern District of New York until January 8, 1908. The petition for leave to intervene was filed April 18, 1908, three months and ten days thereafter. She does not assign the date of the New York judgment as the reason why she did not seek to intervene at an earlier date. Legally it could not have been, and that for two reasons. The forfeiture of the recognizance for the appearance of Greene was made final and execution awarded thereon by the United States District Court for the Southern District of Georgia in January, 1903, more than five years before the filing of the petition in intervention in this case. Had the appellant had property in that district, it could and doubtless would have then been levied upon. She certainly then knew of what had happened and of the liability under which she had come. In the second place, the whole theory of her claim in this case is that she and her intestate have held a right in the securities at all times since the execution of the recognizance in 1902. Such rights were assailed so soon as the government filed the original bill in this cause. It sought in disregard of them to have itself declared the beneficial owner of the shares of stock in controversy. If her present contention is sound, she was legally entitled to intervene so soon as she learned of the pendency of this cause. Suit was brought against her in the United States Circuit Court for the Southern District of New

York more than four years before she asked to come into the here pending controversy. She waited until all the testimony in the latter cause had been taken and until after it was ready for final hearing, and then for the first time sought to assert the rights she claims. If she be permitted to intervene, there will be further delay in determining the rights of the parties who have been so many years before the court. She does not say why she did not come in, when she had a right to come in as she now asserts and when her coming in would have saved so much time and money. Her unexplained delay, under all the circumstances of this case, requires the denial of her petition. This is especially true when it is borne in mind that she does not in her bill of intervention question that the United States was in truth and in fact the equitable owner of the securities at the time she says her intestate bargained with Greene and Kellogg for an interest in them, and that she does not allege that her intestate was without knowledge or notice of the rights of the United States to them. She has no possible case on any theory unless her intestate was a purchaser for value and without notice. When, more than four years after the suit was begun, she seeks to be let into it, she does not say that her intestate was without notice.

For all that is said in the petition to intervene and in the proposed bill of intervention submitted with it, the appellant's intestate when he went bail and bargained for indemnity may have known that Greene intended to fly to Canada, and that the securities in Kellogg's hands represented money fraudulently obtained from the United States, the appellant herself may have known of the pendency of the present suit years before she sought to intervene and may be now intervening because the defense set up by Kellogg therein has apparently broken down.

It is of course possible that no one of these things is true; but it was the duty of the appellant, when at this late day she asked permission to come into the case, to allege distinctly that they were not.

The petition for leave to intervene was properly refused.

Affirmed.

CENTRAL VT. RY. CO. v. ROBBINS & PATTISON.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 117.

1. RAILROADS (§ 249*) — FIRES — STATUTE GIVING RIGHT OF ACTION — CONSTRUCTION.

Gen. St. Conn. 1902, §§ 3779, 3780, giving a right of action against a railroad company to recover damages for its destruction of property by fire without the contributory negligence of the owner, although in derogation of the common law, is not penal, but beneficial and remedial, and is to be construed accordingly.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 730; Dec. Dig. § 249.*]

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

2. RAILROADS (§ 473*)—FIRES—ACTION FOR DAMAGES UNDER CONNECTICUT STATUTE—LIMITATION BY NOTICE.

Under Gen. St. Conn. 1902, §§ 3779, 3780, giving a right of action against a railroad company to recover for loss by fire caused in the operation of its road, but providing that no action shall be brought thereunder "unless written notice of the claim is given to such company within 20 days after the fire, specifying the day and time of the fire, the property injured and the amount claimed as damages," and under the decisions of the Supreme Court of the state construing that and cognate statutes, a considerable latitude is allowable to a claimant in stating the amount of his loss in the notice, and where such amount was difficult to estimate at the time, his recovery is not limited to the amount so stated, if his estimate was an honest one.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 473.*]

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

Action on the case to recover damages from Central Vermont Railway Company, for partial loss by fire of six icehouses and contents belonging to Robbins & Pattison. Fire caused by flying sparks from an engine of the railway company. Verdict and judgment for plaintiff, $31,866.22. Defendant took this writ. Affirmed.

C. B. Whittlesey, Ernest Chadwick, and Michael Kenealy, for plaintiff in error.

John T. Robinson and C. W. Comstock, for defendants in error.

Before LACOMBE and WARD, Circuit Judges, and HOUGH, District Judge.

HOUGH, District Judge. A statute of Connecticut provides that when, under the circumstances above stated,

"property is injured * * * without contributory negligence on the part of the person entitled to the care and possession of such property, such [railway] company shall be held responsible in damages to the extent of such injury to the person so injured." Gen. St. 1902, § 3779; chapter 92 of 1881.

The act further declares that:

"No action shall be brought under section 3779 unless written notice of the claim is given to such company within 20 days after the fire, specifying the day and time of the fire, the property injured and the amount claimed as damages." Id. § 3780.

The plaintiffs below gave a notice within the required time, satisfactorily described the property injured, and assigned the date of fire, but stated "the amount claimed" as follows:

"We hereby claim of your company compensation to the extent of the injury to said property which we have sustained by reason of said fire, to wit, $21,500."

Some four months after notice, this action was begun, the declaration laying the damages at $25,000. The suit was not tried for over 3½ years from date of summons, and shortly before trial an amendment raised the damages to $40,000.

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

The record reveals no objection ever made to the original declaration, nor any exception to the allowance of the tardy amendment above noted. The only exception taken and urged is that the court below, instead of charging the jury, as requested, that "plaintiffs must be bound by the amount which they set forth as their damage in the notice," did charge that they were not necessarily "bound by that statement and confined to that amount," and left the statement or notice itself, as an early and important admission, to be regarded by the jury with all the other material and relevant testimony in the case.

Therefore the substance of the only point raised by this exception is that, as the action did not lie at common law, it must rest on the statute alone; that any statutory creation in derogation of common law must be strictly construed; and that this statute requires as a condition precedent to bringing any action "a written notice * * * specifying * * * the amount claimed as damages." Wherefore no action will lie for a greater amount than that specified, or in this case $21,500, with lawful interest.

The history of litigation affecting railway liability for spark emission is fully traced in St. Louis & San Francisco Ry. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611, and this Connecticut statute and its predecessors especially considered. It may then be assumed that this and other similar acts are not penal (Newton v. N. Y. & N. E. R. R., 56 Conn. 21, 12 Atl. 644), and are beneficial and remedial (Grissell v. Housatonic R. R. Co., 54 Conn. 462, 9 Atl. 137, 1 Am. St. Rep. 138; Martin v. N. Y. & N. E. R. R. Co., 62 Conn. 340, 25 Atl. 239).

This is true, notwithstanding the statute be regarded as in derogation of common law; for in respect of railway sparks the ancient rule that "if my fire by misfortune burns the goods of another man he shall have his action on the case against me" has not become general American law, and certainly has not been received in Connecticut. Burroughs v. Housatonic R. R., 15 Conn. 124, 38 Am. Dec. 64; Grissell's Case, supra. The cause narrows, therefore, to an inquiry as to what shall be regarded as a substantial compliance with the statute, in respect of the terms of a notice precedently required by an act which intends "that when railroad companies destroy bridges or other property they should pay for it," and authorizes a statutory action only; i. e., not dependent on negligence or other tortious act by defendant. Martin's Case, supra, at pages 339 and 341 of 62 Conn., at page 241 of 25 Atl.

The state decisions nearest the point have not arisen under the statute here involved, but under somewhat similar acts requiring notices as conditions precedent to actions against railways for death by tortious act (Gen. St. 1902, § 1130), and to suits against towns or other municipal corporations for damages from defective roads or bridges (Id. § 2020). The first of these familiar actions is obviously unknown to the common law, and the second has been held to rest only on an act penal in its nature, and, independent of the statute, not maintainable by a private person (Bartram v. Sharon, 71

Conn. 686, 43 Atl. 143, 46 L. R. A. 144, 71 Am. St. Rep. 225), but apparently otherwise of bridges in an early case (Lewis v. Litchfield, 2 Root [Conn.] 436). Obviously the statutes just referred to are no more beneficial, nor more entitled to favorable consideration, than is the act at the bottom of this case.

The rule announced is that "the sufficiency of the notice is to be tested with reference to the purpose for which it is required. If sufficient for that purpose it is a good notice." Breen v. Cornwall, 73 Conn. 312, 47 Atl. 323, and cases cited. The notice is not a pleading. Its function is to put defendants in possession of such facts as will enable them to investigate understandingly. Budd v. Meriden Electric R. R. Co., 69 Conn. 285, 37 Atl. 683.

Tested by these utterances of the highest state court, it would on reason seem plain that a notice which fully described the nature, situation, and extent of the property burned, the time of loss and name of owner, and also estimated the pecuniary damage from a fire furnishing so strange a survival of value as piles of half-melted ice, gave defendant everything it could reasonably expect for purposes of investigation.

The sole reliance of plaintiff in error seems to be Gardner v. New London, 63 Conn. 267, 28 Atl. 42, wherein a mistake in stating the time of injury (in a highway case) was held fatal, although defendant was confessedly not misled nor injured thereby. That decision, however, was specifically based on the proposition that "the time element in any transaction is always simple and can be easily and definitely stated" (page 273 of 63 Conn., page 44 of 28 Atl.), and since time is required by the act it must be true time. Yet the learned court showed by abundant citation of earlier cases that the other components of a notice under the highway act—i. e., the place, cause, and nature of the injury—were "clearly susceptible of being stated with greatly varying degrees of accuracy" (page 272 of 63 Conn., page 44 of 28 Atl.), and that notices had often been upheld, even when falling far short of exactness. In our judgment a statement of unliquidated damages should be assigned to that category of requirements wherein some considerable latitude must be allowed, rather than ranked with a matter absolutely measurable by clock and almanac.

In this case the record reveals a kind of loss difficult of reduction to exact amount, the notice lays it with a videlicet, and plaintiff in error admits that the amount of the notice, with interest to judgment, reaches nearly $27,000.

We are satisfied that under the act in question it is not necessary to do more than give an honest estimate of pecuniary loss, and there is nothing to show that this was not done. Indeed, the verdict of the jury is a finding to that effect, unless one who cannot, within about 15 per cent., guess what his loss on six piles of melting ice will be, is to be suspected for a rogue. We doubt whether plaintiff in error goes as far as that.

We may add that Noble v. Portsmouth, 67 N. H. 183, 30 Atl. 419, upholds exactly what was done here, in a case resting on a high-

way statute requiring the notice to state "the amount of damages claimed"; and Eggleston v. Chautauqua, 90 App. Div. 314, 86 N. Y. Supp. 279, affirmed 183 N. Y. 514, 76 N. E. 1094, justifies a highway claimant, required by statute to furnish the town supervisors with a "verified statement of the cause of action," in serving a statement claiming $1,000,—suing for $5,000 and recovering $4,500, largely on evidence (seemingly) of injuries not revealed by the original statement. See, also, Penna. Steel Co. v. Lackkonen, 181 Fed. 325.

We are convinced that the action of the lower court was in accord with the decisions of Connecticut, and far within the cognate rulings of other jurisdictions.

Judgment affirmed, with costs and interest.

THE CAR TRUST INV. CO. v. METROPOLITAN TRUST CO. OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 120.

1. CORPORATIONS (§ 89*)—STOCKHOLDERS—CALLS ON UNPAID STOCK.

In the absence of fraud the courts cannot review the action of a corporation, taken in accordance with its charter, in ordering an assessment on its unpaid stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 368, 369; Dec. Dig. § 89.*]

2. CORPORATIONS (§ 89*)—STOCKHOLDERS—LIABILITY FOR CALLS ON UNPAID STOCK—ENGLISH COMPANIES ACTS.

The English Companies Act 1862, § 161, provides that the liquidators of a limited company being voluntarily wound up may, when authorized by a special resolution of the company, on a transfer of all or a part of its business or property to another company, receive in full or part payment therefor shares in the purchasing company to be distributed among the members of the selling company, and that such arrangement shall be binding on the members of the company being wound up, subject to the right of any dissenting member by giving written notice to the liquidators within seven days after the passage of such special resolution to require them to purchase his shares at a price to be determined as therein provided. Companies Act 1879, § 5, provides that a limited company by special resolution may declare that any portion of its capital not already called up shall not be capable of being called up except in the event of and for the purpose of the company being wound up, and thereupon it shall not be capable of being called up except in such event and for such purpose. *Held*, that the two provisions must be construed together, and that so construed a company which had appointed liquidators who by authority conferred by special resolution had contracted to sell all the property to a new company, taking shares of the purchaser in part payment, had authority to make a call on its unpaid stock for the payment of a portion of its indebtedness although it had passed the resolution provided for in the act of 1879 and that the fact that the company was not insolvent was not a defense to an action to recover such call from a shareholder who had not given the required notice of dissent, the presumption being, in the absence of any charge of fraud, that the arrangement made for the sale of the property was for the best interest of the shareholders.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 89.*]

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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 New York.

Action by the Car Trust Investment Company against the Metropolitan Trust Company of the City of New York. Judgment for defendant, and plaintiff brings error. Reversed.

Sullivan & Cromwell (E. B. Hill, of counsel), for plaintiff in error.

Parsons, Closson & McIlvaine (Herbert Parsons, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The plaintiff was incorporated July 27, 1888, under the English Companies Acts 1862 to 1886, having a capital of £1,000,000 divided into 50,000 preference shares of £10 each, all issues full paid, and 50,000 ordinary shares of £10 each, all issued, only £2 10s. paid. The plaintiff's indebtedness at the times under consideration was substantially £470,000 of debentures. The defendant trust company is a corporation of the state of New York into which was duly merged another trust company of the same state, called the Atlantic Trust Company, and is the owner and holder of 2,856 of the plaintiff's ordinary shares standing on the plaintiff's books in the name of the Atlantic Trust Company. In accordance with section 5 of the Companies Act of 1879, the plaintiff by a special resolution of shareholders passed at an extraordinary general meeting April 16, 1891, and confirmed at a like meeting May 14, 1891, provided that the unpaid balance of capital could only be called "in event of and for the purpose of the company being wound up." These words are taken from section 5 which reads as follows:

"A limited company may by a special resolution declare that any portion of its capital which has not been already called up shall not be capable of being called up, except in the event of and for the purpose of the company being wound up; and thereupon such portion of capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up."

The amount due on the ordinary shares could not be charged by the plaintiff, nor transferred to another company, nor called for use in the plaintiff's business as a going concern, nor for any purpose other than winding the plaintiff up. Stanley's Case, 4 D. J. & S. 407; In re Streathan & Co., 1 Chan. Div. (1897) 15; In re Mayfair Property Co., Law Rep. 2 Chan. Div. (1898) 28. June 7, 1905, extraordinary resolutions were adopted at separate meetings of the ordinary and preferred shareholders for the appointment of liquidators and the winding up of the company, in accordance with a scheme of arrangement agreed upon. November 3, 1905, the plaintiff, in pursuance of said resolutions and to carry out the scheme of arrangement, entered into an agreement with a purchasing company organized for the purpose, whereby the plaintiff agreed to transfer all of its property except uncalled capital and enough assets together with a call of £2 10s. on the ordinary shares to raise £230,000 for the purpose of paying £220,000 of the plaintiff's debentures, its other debts and the expenses of the proceeding. The purchasing company agreed to pay the balance

of the debentures amounting to £250,000, and to give £12 5s. of its income bonds and 5s. of its ordinary shares full paid for every preferred share of £10 and £10 par of income bonds and 5s. of ordinary shares full paid for every £10 paid on the ordinary shares. December 11, 1905, resolutions were passed at an extraordinary general meeting confirmed at a like meeting held December 28th requiring the plaintiff to be voluntarily wound up, appointing liquidators and directing them to make a call of £2 10s. on the ordinary shares. January 13, 1906, the liquidators notified the Atlantic Trust Company in writing that they would on January 31st settle the list of contributories including it as holder of 2,856 ordinary shares, unless cause were shown to the contrary. January 31, 1906, the liquidators notified the Atlantic Trust Company that the list had been so settled and called upon it to pay £2 10s. per share in certain specified installments running through the year 1906. May 23, 1907, the defendant having made no payments, this action was brought to recover the amount of the call with interest, $34,746.81. The defense mainly relied on is that the call of £2 10s. was not necessary to pay the plaintiff's debts. The contention of the defendant is, and the view of the court below evidently was, that if the plaintiff's assets were sufficient to pay its debts they must be so applied.

Section 161 of the Companies Act (1862) is as follows:

"161. Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other agreement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefits from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up; subject to this proviso, that if any member of the company being wound up who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer; that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution; no special resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to or concurrently with any resolution for winding up the company, or for appointing liquidators; but if an order be made within a year for winding up the company by or subject to the supervision of the court, such resolution shall not be of any validity unless it is sanctioned by the court."

Section 5 of the act of 1879, supra, is to be read in connection with the above section of the act of 1862. It will be noticed that the latter does not confine the winding up to the realization of assets by sale, but when the whole or a portion of the business and property is sold to another company, authorizes the liquidators, with the sanction of a special resolution, to exchange the securities of the company being wound up for those of the purchasing company in lieu of cash. A way is provided in which dissentient shareholders may recover the value of their shares instead of taking securities. Conceding that the assets were sufficient to pay the plaintiff's debts, we discover nothing in the contract of November 3, 1905, inconsistent with the provisions of section 161 of the Companies Act of 1862, or section 5 of the Companies Act of 1879. Under the former the plaintiff had the right to wind up by disposing of its property to a new company in exchange for the new company's securities and by the latter to make calls of unpaid capital for the purpose of winding up. The plaintiff is being wound up under the arrangement agreed upon, and the call on the ordinary shares was necessary to carry the arrangement out. Under it the plaintiff's assets could be nursed and prevented from sacrifice, and as all the new company's securities except what were necessary to pay the plaintiff's indebtedness were to go to the plaintiff's shareholders without liability for further calls, it may well have been better for all concerned to take these securities than to sell the assets and pay the plaintiff's debts.

The defendant did not take steps as a dissentient shareholder to prevent the execution of the scheme unless the value of its shares, if they had any value, were first ascertained and paid in the manner provided for in section 161 of the act of 1862. The shareholders and the liquidators having resolved upon winding up in the manner proposed and upon the call on the ordinary shares for the purpose of doing so, the Circuit Court was not required, nor indeed in a position, to determine the contrary. Oglesby v. Attrill, 105 U. S. 605, 609, 26 L. Ed. 1186. Mr. Justice Brown, in Nashua Savings Bank v. Anglo-American Co., 189 U. S. 222, 230, 23 Sup. Ct. 518 (47 L. Ed. 782), said:

"In the absence of fraud the necessity for an assessment upon the capital stock cannot be made the subject of inquiry by the courts. As was said by Mr. Justice Field in Oglesby v. Attrill, 105 U. S. 605, 609 [26 L. Ed. 1186]: 'As to the wisdom of an assessment, of its necessity at the time, or the motives which prompt it, the courts will not inquire, if it be within the legitimate authority of the directors to levy it, and the objects for which the company was incorporated would justify the expenditure of the money to be raised. They will not examine into the affairs of a corporation to determine the expediency of its action, or the motives for it, when the action itself is lawful.' Bailey v. Birkenhead, etc., Railway Co., 12 Beav. 433. See, also, Cook on Stockholders, § 113; Great Western Telegraph Co. v. Purdy, 162 U. S. 329 [16 Sup. Ct. 810, 40 L. Ed. 986]. Whether such assessment could be impeached by showing that the corporation was not a bona fide enterprise, or had never actually engaged in business, or become a going concern, or that the assessment was made unnecessarily and in bad faith, or that a discrimination was made against foreign stockholders, it is unnecessary to determine, since no evidence to that effect was offered on behalf of the defendant. Certainly, under the cases above cited, it would be unnecessary in order to make a prima facie case to negative these facts. There is a presumption of good faith attaching as well to foreign as to domestic corporations."

In the absence of fraud, and none is alleged, we must presume that the contract of November 3d was the best way, in the interest of all concerned, to wind the plaintiff up and the call upon the ordinary shares was necessary to carry it out. If fraud were alleged, the defendant might have relief in equity, but not in an action at law in the federal courts, where jurisdiction at law and in equity is kept entirely distinct. Goodyear v. Dancel, 119 Fed. 692, 56 C. C. A. 300.

If, as in Clinch v. Financial Corporation, L. R. 5 Eq. 450, or in Re Hester & Co., Ltd., 44 L. J. Rep. N. S. Pt. 1 Eq. 757, or in Bank of China v. Morse, 168 N. Y. 459, 61 N. E. 774, 56 L. R. A. 139, 85 Am. St. Rep. 676, the call had been not for the purpose of paying the debts of the selling company nor for the benefit of its shareholders, but for the benefit of the purchasing company, or if the securities of the purchasing company were subject to call when the securities of the selling company were not, as in Bisgood v. Henderson's Transvaal Estates, Ltd., 1 Ch. Div. (1908) 743, the defendant would be under no obligation to pay.

Other defenses are but faintly pressed, and we think them without merit. Judgment reversed.

TITLE GUARANTEE & TRUST CO. et al. v. WARD, Collector.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 107.

1. INTERNAL REVENUE (§ 8*)—LEGACY TAXES—CONSTRUCTION OF REPEALING ACT—"IMPOSED."

Within the meaning of Act April 12, 1902, c. 500, § 8, 32 Stat. 97 (U. S. Comp. St. Supp. 1909, p. 876), repealing War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307), which provided for legacy taxes "to become due and payable in one year after the death of the testator," but excepting from its operation all taxes "imposed" by said section 29 prior to the taking effect of the repealing act, on July 1, 1902, a tax was "imposed" one year after the death of a testator and where such year expired prior to July 1, 1898, the tax was collectible although not assessed until after such date.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 8.*

For other definitions, see Words and Phrases, vol. 4, p. 3440.]

2. INTERNAL REVENUE (§ 8*)—LEGACY TAXES—VESTED LEGACY.

Where a testator who died March 31, 1901, devised and bequeathed his residuary estate to trustees, with directions to set aside sufficient property to produce a certain income to be paid to his widow during her life, and to pay over one-fourth of the remaining income, after reserving a part to pay certain incumbrances, to each of his four children, or in the event of the death of either to his or her heirs or devisees, the corpus of the estate after the death of the widow, and the termination of the trust to be divided between such children or their heirs or devisees, each child took a vested estate at once in possession or enjoyment in one-fourth part of the residuary estate except the portion to be set apart for the benefit of the widow, and in such portion on her death, and where that event occurred prior to July 1, 1902, their entire interests were subject to the legacy taxes imposed by War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307).

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

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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 Northern District of New York.

Action by the Title Guarantee & Trust Company and others, as executors of the will of James J. McComb, deceased, against John G. Ward, Collector of Internal Revenue. Judgment for defendant (164 Fed. 459), and plaintiffs bring error. Affirmed.

This cause comes here to review a judgment in favor of defendant in error who was defendant below. The action was brought by the Trust Company and others as executors of the will of James J. McComb to recover the sum of $68.572.90 which had been paid to John G. Ward, Collector of Internal Revenue, as a tax upon legacies bequeathed to certain legatees by said will, under sections 29, 30, War Revenue Act June 13, 1908, c. 448, 30 Stat. 464, 465 (U. S. Comp. St. 1901, pp. 2307, 2308), and $4,800.10 interest thereon. Plaintiff recovered judgment for $12,199.85. The defendant does not question the amount of this recovery, but plaintiffs, contending that the recovery should be larger, have brought the decision here for review. The facts and figures will be found quite fully stated in the Circuit Court opinion. 164 Fed. 459. The relevant provisions of the will are as follows:

"Fifteenth.—All the rest, residue and remainder of my estate of what kind soever, whether real or personal, and wheresoever situated, I give, devise and bequeath to my executors and trustees and to their successors, in trust to hold, invest, maintain and manage during the lives of those two of my children who, surviving me, shall be the youngest of my children at the time of my death, and for such time thereafter, if any, as may be permissible by and under the laws of the State of New York upon the trusts and the purpose stated below, to wit:

"1st. To raise and set aside such sums as may be required and may not otherwise have been provided to secure and meet the payments directed in the preceding clauses of this my will, and to make such payments in accordance with the terms of said will.

"2nd. To set aside and separately invest sums sufficient to insure an annual income of twelve thousand dollars and to pay such income in monthly, semi-monthly or quarterly instalments as she may request to my wife, Mary Esther McComb, during her life, and upon her death to dispose of said sum as is hereinafter directed in respect to the principal of my residuary estate.

"3rd. From the income of said residuary estate not otherwise disposed of, to pay the sum of six thousand dollars per annum, in semi-annual or quarterly instalments, to each one of my four children, to wit: Mary Alice, Fanny Rayne, Lillie and Jennings Scott, to apply the remainder of said income during the continuance of this trust to the payment and satisfaction of all liens or mortgages upon the aforesaid Central Park Apartment Buildings until all said liens and mortgages shall have been paid off and satisfied, and then to divide the said remaining income equally among and pay the same in equal parts to my four children above mentioned, paying to the issue or devisee of any child dying before the termination of said trust, the parent's share and distributing equally among the surviving children the share of any who may have died without issue and intestate.

"4th. Upon the termination of said trust, to pay and satisfy any liens or mortgages upon said Central Park Apartment Buildings then remaining unpaid, and thereupon to pay, transfer and convey said residuary estate in equal parts, share and share alike, to my said children above named, or to their respective heirs, legatees, devisees, next of kin, executors, administrators or assigns.

"It is my desire that the Central Park Apartment Buildings shall continue to be held as one property and in the name of my family so long as practicable and I therefore request my children to agree among themselves to such distribution of my residuary estate as will leave my son, Jennings Scott, should he survive said trusts, in possession of said buildings as owner thereof, but I do not make this request a peremptory direction, nor do I intend hereby to disturb the equality of division among my children.

"Should the trusts of this article of my will terminate while any one of my children is less than forty years of age, I direct my executors and trustees, if the laws of the State of New York permit them to do so, to defer the payment of one-half the principal share of any of my children under such age in such way that a final payment of one-half said share will be made when the beneficiary attains the age of forty years.

"It is my will and I direct that interest on all the legacies and bequests made by this my will, shall commence at and be reckoned from the time of my death."

The widow survived the testator only a few months, and the clauses referring to the Central Park Apartment Buildings were held void by the state courts. The clauses concerned with the four children are, therefore, the only ones left for consideration.

George A. Strong, for plaintiffs in error.

George B. Curtiss, U. S. Atty., for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The testator died March 31, 1901, the repealing act of 1902 (Act April 12, 1902, c. 500, § 8, 32 Stat. 97 [U. S. Comp. St. Supp. 1909, p. 876]), was passed April 12th, and by its terms took effect July 1st of that year. The tax was assessed September 1, 1902. The act of 1902 saved "all taxes or duties imposed by section 29 of the act of June 13, 1898, and amendments thereof, prior to the taking effect of this act." Plaintiffs contend that this tax was not "imposed" within the meaning of the act of 1902 until it was levied and assessed on September 1, 1902, and that therefore the tax is not within the saving clause of the repealing act. This contention has been disposed of adversely by this court in Eidman v. Tilghman, 136 Fed. 141, 69 C. C. A. 139, and by the Supreme Court in Hertz v. Woodman (opinion filed July 1, 1910) 218 U. S. 205, 30 Sup. Ct. 621, 54 L. Ed. 1001. This point is here referred to because it is not specifically disposed of in the exhaustive opinion of Judge Ray.

With the views expressed in that opinion we fully concur. The present case is readily differentiated from those relied upon by plaintiffs in the circumstance that the children of this testator are given their respective shares absolutely. They and they only have power to dispose, each of her share, having that power over the corpus, and in the meantime the enjoyment of the income. They may fairly be held to have each a vested estate of which she has the enjoyment. We are not persuaded by the argument that the statute requires both possession *and* enjoyment as essential to liability for this tax.

The judgment is affirmed.

HIGH v. OPALITE TILE CO.

(Circuit Court of Appeals, Third Circuit. February 7, 1911.)

No. 1,402 (57).

CORPORATIONS (§ 428*)—VOIDABLE PREFERENCE—KNOWLEDGE AND INTENT—KNOWLEDGE OF OFFICER OF CORPORATION.

Where the president and manager of a bankrupt corporation, who owned practically all of its stock, and who was also vice president and general manager of defendant company, without authority and fraudulently transferred money of defendant company to the account of the bankrupt, and before the bankruptcy restored a part of it, the other officers and directors of defendant having no knowledge of the transactions his knowledge of the intended preference was not imputable to defendant, so as to render the preference recoverable by the bankrupt's trustee, under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445).

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748–1761; Dec. Dig. § 428.*]

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

Action at law by John L. High, trustee in bankruptcy of the Frank B. Mirick Company, against the Opalite Tile Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Trimble & Chalfant, for plaintiff in error.

E. W. Smith, W. K. Shiras, and C. C. Dickey, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

LANNING, Circuit Judge. This is an action by the trustee of the bankrupt estate of the Frank B. Mirick Company against the Opalite Tile Company to recover an alleged unlawful preference of $3,647.52. The jury rendered a verdict in favor of the plaintiff. The District Court entered judgment for the defendant non obstante veredicto, upon the motion of the defendant, under the practice authorized by the Pennsylvania statute of April 22, 1905. P. L. 286. The writ of error brings up that judgment.

Section 60b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]) provides that:

"If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

The single question presented by the record is: Was there any evidence produced on the trial from which the jury could legally infer that the defendant, the Opalite Company, had reasonable cause to believe that the bankrupt, by the payment of the moneys sued for, intended to give a preference? The learned judge of the District Court, after a careful review of the facts, concluded that there was

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

no such evidence. Accordingly he gave judgment for the defendant non obstante veredicto.

We think he was right. W. T. Carter, who owned all the capital stock of the bankrupt company excepting two or three shares, and who was its president and manager, was also vice president and general manager of the defendant company. Through his management the bankrupt company became indebted to the defendant company for tile sold by the latter company and also for cash transferred from the account of the latter company. There is no evidence whatever that the board of directors of the defendant company, or any of its officers, ever authorized Carter to loan money to the bankrupt company, or that they knew of any loans. The advances which Carter made to the bankrupt company out of the funds of the defendant company were clearly unauthorized and fraudulent. As he owned practically all the capital stock of the bankrupt company, the advances were in his own interest, and opposed to the interest of the defendant company. The repayments to defendant company by Carter out of the assets of the bankrupt company of the moneys now sued for amounted, as the proofs conclusively show, to less than the advances. No officer or agent of the defendant company, except Carter, had any actual knowledge of these cash transactions. In his opinion the learned District Judge said:

"Carter was therefore in the position of having taken the money of the defendant company, of which he was an officer, and of having appropriated it to the Mirick Company, of which he was president. He was therefore standing in an antagonistic relation to his principal, the defendant company, and his conduct raises the clear presumption that he would not communicate the fact of his misappropriation of his principal's money to it, but when he found his company insolvent he would attempt to restore the defendant's money to it; the motive being to escape the criminal consequences of his embezzlement of the funds of the defendant company. Therefore in making the payment Carter was clearly acting for himself, and not for the defendant company, and his knowledge of the insolvency would not be the knowledge of the defendant company, and his intention to prefer the defendant company cannot be attributable to that company."

This statement is in accord with Lilly v. Hamilton Bank, 178 Fed. 53, 102 C. C. A. 1, and many other cases that might be cited. The knowledge of Carter was not imputable to the defendant company.

The judgment of the District Court is affirmed, with costs.

THE TRANSFER NO. 10.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 133.

COLLISION (§ 39*)—STEAM VESSELS CROSSING—FAULT.

A collision at night in New York Bay between a ferryboat and tug on crossing courses *held* on the evidence to have been due to the fault of the ferryboat in changing her course.

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

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

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

Suit in admiralty by Charles W. Davis, as owner of the ferryboat Irene Elaine Davis, against the steam tug Transfer No. 10; the New York, New Haven & Hartford Railroad Company, claimant. Decree for claimant, and libelant appeals. Affirmed.

Carpenter & Park (Samuel Park, of counsel), for appellant.

James T. Kilbreth, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. November 28, 1908, at about 5 p. m., the ferryboat Davis, bound from Governor's Island to the government landing at the Battery, came into collision with Transfer No. 10, bound from Greenville, N. J., to pier 5, East River, when about halfway between the island and the Battery. The Transfer struck the Davis a right-angled blow about amidships on the port side. The collision was clearly due to the gross negligence of one of the vessels. Those on the Transfer say that the Davis, while on a course showing her green light, suddenly ported right across their bows. Those on the Davis say that she, being on a course about north, exchanged a signal of one whistle with the Transfer, which was on an easterly course, and that the Transfer came ahead with unabated speed and without any change in her course, and struck the Davis on her port side head on.

The maneuver attributed by the Transfer to the Davis is so unlikely that, in view of the fact that it was not mentioned by the master of the Transfer in his report to the steamboat inspectors, made the day after the collision, we should reject it, but for the considerations now to be mentioned. The libel of the Davis alleges that, just before the collision, "there was a tug with two floats, one on each side of the tug, passing from the North River into the East River upon the starboard bow of the Davis, two or three lengths away." Both sides agree that the Davis maintained her speed and passed after the collision close under the stern of this tow. This affords a reason why she might have starboarded, viz., to go under the stern of the tow. That she did starboard, so as to shut out her green light from the tug Interstate, which was coming down the East River with the Davis a little on her port bow, is testified to by two disinterested witnesses—the master and the deckhand of that tug.

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

HORAN v. BOSTON & M. R. R.

(Circuit Court of Appeals, First Circuit. January 19, 1911.)

No. 902.

RAILROADS (§ 320*)—INJURY TO PERSON AT CROSSING—NEGLIGENCE IN OPERATION OF TRAIN.

As a general proposition, a locomotive engineer is not chargeable with negligence for not stopping his train because he sees a foot traveler approaching the track at a crossing in the daytime, as, in the absence of exceptional situations, the justifiable assumption would be that the foot traveler would see the train and that he would not walk in front of an approaching engine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1015; Dec. Dig. § 320.*]

On petition for rehearing. Denied.

For former opinion, see 183 Fed. 559.

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

ALDRICH, District Judge. The petition for a rehearing is denied. It is true that the second ground stated in the petition for a rehearing was not expressly discussed in the opinion, and it was because it was not considered that the record reasonably raised any question in respect to the defendant's want of care after discovering the plaintiff's proximity to the railroad track. As a general proposition, it is palpable that there is no warrant for saying that a locomotive engineer should stop his train because he sees a foot traveler approaching the track at a crossing. In the absence of exceptional situations, the justifiable assumption would be that a foot traveler in daylight would see the train and that he would not walk in front of an approaching engine.

The other point taken in the petition, that the opinion states "that then the plaintiff walked diagonally across part of the street toward the track, and then, still without looking, diagonally across the track," when in fact he had not reached the track, is grounded upon verbal error. The statement, in the opinion, is in substance accurate, and would have been strictly accurate if it had concluded, "and then still without looking started diagonally across the track," or "diagonally toward the track." Either would have been an accurate description of what occurred, and the statement in the opinion is in substance sufficiently accurate because the point against the plaintiff is based, not necessarily upon the idea that he was on the track, but upon the idea that, without looking for an approaching train, he walked diagonally toward the track, and to a point at or near the track where he was struck by the engine. As it appears that he was walking with his back partly to the approaching train, and that he walked, without looking, to the point where he was struck by the engine, it matters

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

little whether his diagonal course had taken him onto the track, or only to a point so near the track that the engine struck him.

It appearing that no one of the judges who concurred in the judgment desires a rehearing, the petition for rehearing is denied, and mandate may issue forthwith.

In re BROWN et al.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 125.

BANKRUPTCY (§ 140*)—BROKERS—OWNERSHIP OF STOCKS.

Where a bankrupt firm of brokers converted stock purchased for a customer, other stock of the same kind, found in their possession after their bankruptcy, into which the proceeds of that converted are not traced, cannot be claimed by such customer, to the exclusion of general creditors, but is a part of the general assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 225; Dec. Dig. § 140.*]

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

In the matter of A. O. Brown and others, bankrupts. From an order of the District Court, James E. Gorman appeals. Affirmed.

This is an appeal from an order setting aside the report of the referee and special master, and dismissing petitioner's application to have 250 shares of Greene Cananea Copper Company stock delivered to him. The bankrupt bought 250 shares of such stock for him, on April 14, 1908, in odd lots from various sellers and received certificates therefor. Gorman paid for the stock, but allowed the certificates to remain with bankrupts without being transferred to his name. Without his knowledge bankrupts by May 14, 1908, had taken all this stock and delivered it out in execution of contracts of their own with other parties. From that time down to their failure (August 24th) it does not appear what transactions they had in Greene Cananea stock. Upon their bankruptcy there was found in their safe 350 shares of the stock of that company, made up of different certificates. Petitioner claims that he is entitled to 250 shares thereof.

Robert Dunlap, James L. Coleman, and Thorndike Saunders, for appellant.

Ralph Wolf, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The precise point raised here was before us in Re McIntyre, Petitions of Grace, Talbot, and Others (opinion filed August 11, 1910) 181 Fed. 960. The special master's report on the Talbot claim will be found in 24 Am. Bankr. Rep. 20. Upon the appeal before us, attention was called to the circumstance that there was a division of opinion in the District Court; Judge Hand having decided one way in Re A. O. Brown & Co., 171 Fed. 254, and Judge Hough the other way in the case then before us. Counsel for

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

Talbot presented an exhaustive brief of 34 pages, citing substantially all the authorities to which we are now referred, and supporting his appeal by the same line of reasoning. We sustained Judge Hough, and see no reason for reopening the question settled by that decision.

The order is affirmed, with costs.

BYERLEY v. SUN CO.

(Circuit Court of Appeals, Third Circuit. January 19, 1911.)

No. 35.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ASPHALTIC PETROLEUM PRODUCTS AND PROCESS OF MAKING SAME.

The Byerley patent, No. 524,130, for a process of making artificial asphalt by the further distillation of the residuum from the ordinary distillation of petroleum, and for the product itself, was not anticipated and discloses invention; also *held* infringed as to both process and product claims.

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

Suit in equity by Francis X. Byerley against the Sun Company. Decree for complainant (181 Fed. 138), and defendant appeals. Affirmed.

Augustus B. Stoughton and J. Parker Kirlin, for appellant.

W. K. Richardson and Harrison F. Lyman, for appellee.

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

BUFFINGTON, Circuit Judge. In the court below Francis X. Byerley brought suit against the Sun Company, charging infringement of patent No. 524,130, issued to him August 7, 1894, for "manufacture of asphalt, etc., from petroleum." On final hearing a decree was entered adjudging the patent valid, and product claim 2, and process claims 1, 3, 6, 7, 8, 9, and 10 infringed. From such decree the Sun Company appealed to this court.

After a thorough argument by counsel and a patient examination of the record and briefs, we are satisfied the decree below must be affirmed. In the exhaustive opinion of the judge below, which is reported at 181 Fed. 138, the case is gone into so fully that an additional one by this court could but be a mere repetition. We therefore limit ourselves to briefly recording the conclusion to which a study of the case has impelled us.

The art, as Byerley found it, is fairly stated in his specification in these words:

"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 the petroleum residuum or tar has heretofore been com-

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

monly 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 cooling, in the formation of a coke or a coke-containing pitch."

Byerley's invention consisted of a process which in the further distillation of the tar residuum avoided the formation of a coke, or coke-containing, pitch and produced an artificial asphalt. From the proofs we are clear that this transformation from tar to asphalt is a chemical action or process, and that such chemical action is wrought by agitated air raised to a high temperature; water being formed from the air and oil in the still. This chemical action affords a basis for a process claim.

We have also reached the conclusion that no anticipation of Byerley's process is shown. It would seem the nearest alleged approach was a patent of Jenney; but this patent started with sludge oil and its product was resin. "My invention," says Jenney, "consists of a new process of treating this sludge oil to manufacture a resinous substance." Without entering into the details of Jenney's process, it suffices to say that in the purification of hydrocarbon oils produced by the distillation of crude petroleum Jenney agitated with concentrated sulphuric acid in order to remove certain oils contained in the distillate. The sulphuric acid combined with these oils and the tarry substances and formed a dark red, heavy liquid. This settled and formed sludge oil, a product which was thrown away. Jenney's process and Byerley's were addressed to different problems. Byerley's product was asphalt; Jenney's, resin. Byerley's was black, while Jenney's was light, shading from yellow to a dark garnet red, and the chemical constitution of the products obtained by blowing Jenney's purified sludge oil is different from that of the product obtained from blowing Byerley's tar residuum. So much for the product, which is the subject of the second claim.

The other claims are addressed to the process, which in substance consists in making asphalt by the prolonged exposure of petroleum tar in a still to so high a temperature as to be pitch-forming, but still non-coking, with the introduction of air into the residuum, or, as stated by respondent's own expert:

"The Byerley process consists in the treatment of petroleum tar in such a manner which will, when agitated by air, result in the production of asphaltic products. During the agitation with air, a pitch-forming, non-coking temperature is maintained."

As to this product and process we agree with the conclusion of plaintiff's expert, who says:

"I find nothing in the patents which have been cited by the defendant to indicate that any one ever made the Byerley product by his process from any material until Byerley made his invention."

Indeed, the prior art had no teaching on the subject, and Byerley discovered it, not by any process of reasoning or building upon former methods, but accidentally and without design. Byerley on one occasion and from mere curiosity carried the distilling process beyond the usual point, and to his surprise found it resulted in an unlooked-for and unknown chemical action and product, namely, the artificial

asphalt of his second claim. We think, also, the court below rightly held, for the reasons by it stated, the respondent infringed.

As to the further contention, now made in this court, that respondent avoids infringement by using Texas oil, which it is alleged is asphaltic oil to begin with, we are of opinion that, assuming this to be the case, the respondent by the use of Byerley's process still obtains Byerley's asphaltic product; and while it may not in distilling Texas oil use the Byerley process to the limit required when Lima oil is used, it nevertheless makes use of the Byerley process, in that it agitates by air, and uses a pitch-forming, non-coking temperature, and obtains a product of artificial asphalt.

The decree of the court below is therefore affirmed.

CENTRAL OIL & GAS STOVE CO. v. SILVER & CO. et al.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 7.

PATENTS (§ 328*)—INFRINGEMENT—OIL BURNERS.

The Wilder patents, No. 653,893 and reissue No. 11,905 (original No. 595,231), both for improvements in oil burners of the wickless type, *held* not infringed.

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

Suit in equity by the Central Oil & Gas Stove Company against Silver & Co. and John H. Ernst. Decree for defendants (168 Fed. 712), and complainant appeals. Affirmed.

Frederic G. Bodell, Frank L. Middleton, W. F. Hall, and Arthur E. Parsons, for appellant.

Stephen J. Cox, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Judge Chatfield's opinion sets forth very clearly and completely the devices of the two patents, their mode of operation, and that of defendants' device. It also presents the prior art with sufficient fullness. He reached the conclusion that, although both patents showed improvements in the art and appeared to be valid, the claims in issue cannot be given a construction broad enough to bring defendants' stove within their dominion. In this conclusion and in the reasoning by which it was reached we fully concur. It will be necessary merely to dispose of some specific criticisms which are here presented.

Appellant asserts that "the first serious error is the evident impression of the trial judge that the reissue patent relates to the flooding of the burner or oil bowl," and that "the method for effecting this action is not claimed in the reissue patent, but in patent 653,893 only." This "flooding" action *is* specifically claimed only in the first patent, but means for accomplishing such action exist in the reissue patent;

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

and if, as seems probable, the supply of an extra quantity of oil to the burner at the moment of ignition is necessary for practical commercial success, the mechanism for securing it is found in the device of the reissue.

The next alleged error is "the statement that an interference proceeding with one Blackford resulted in substantial changes being made in the applications or claims." Appellant insists that there is nothing in the record to show that the claims of the patent in suit were in any way modified by reason of this interference, nor to show how the interference terminated. The interference apparently had to do with an oil burner, but it is not important to know how it terminated. The patent shows an oil burner, which it is contended is an improvement over those of the prior art, but the specification contains the following statement:

"While I have shown and described an oil holder having a lower contracted part and an upper part enlarged or flaring, with an igniting medium seated in the contracted portion and extending between the walls of the enlarged part, I do not claim this combination of the holder and the igniting medium in this application; this being made the subject of a divisional application, serial No. 701,160. The present case is directed to a holder capable of being drained or emptied or to maintain a column of oil as a base of vaporization; said holder being used with a combustion chamber, or with means for controlling the supply of liquid to the holder."

It is not material whether or not the particular form of burner disclaimed was ever in interference.

It is further alleged that the judge erred in assuming that in defendants' stove, although the burners could be lighted with safety while the oil holder is filled, the resultant smoke and smell would greatly interfere with the success of the stove. But, if this be an error, we do not see that it at all interferes with the argument that defendant is using an old and common device—a valve—to regulate the flow of oil to the burner.

Finally, it is asserted that there is error in the statement that complainant "is making claims which are broader than the use of any particular device, when he attempts to patent as a combination the use of the wickless burner and any increased supply of oil, whether supplied by old device or not." The authority referred to, Expanded Metal Company v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034, involved a process patent. The patents here in controversy are for a combination constituting a device. The trial judge correctly characterized the claims.

The decree is affirmed, with costs of this appeal.

ELY et al. v. VAN KANNEL REVOLVING DOOR CO.

(Circuit Court, E. D. New York. February 9, 1911.)

1. RECEIVERS (§ 154*)—ALLOWANCE TO ATTORNEY.

Where the attorney for complainant creditors in receivership proceedings was awarded an allowance of $2,000 for services to the temporary receivers to October, 1909, and thereafter devoted nearly an equal amount of time to matters connected with the work of the permanent receivers, he was entitled to a further allowance of $2,000, and the firm to which he belonged was entitled to a further allowance of $1,200 for instituting the action and conducting the proceedings generally for the benefit of all the creditors, in addition to taxable costs and disbursements in the action.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 282; Dec. Dig. § 154.*]

2. RECEIVERS (§ 189*)—CREDITORS—ALLOWANCE TO CREDITORS' ATTORNEYS.

Where creditors presented claims to receivers of the debtor which were rejected, whereupon the creditors prosecuted their claims to an allowance before a master, the creditors' attorney was entitled to an allowance for taxable disbursements and a docket fee, but not to an attorney's fee.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 379; Dec. Dig. § 189.*]

3. RECEIVERS (§ 207*)—PAYMENT OF DIVIDENDS.

Where dividends payable by a federal court receiver are claimed by a receiver appointed in an action in a state court, it is the duty of the federal court receiver to deposit the dividends in a court having competent jurisdiction, unless a release of all the parties claiming the same can be obtained without such deposit.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 411; Dec. Dig. § 207.*]

4. RECEIVERS (§ 149*)—CLAIMS—CONTRACT OF EMPLOYMENT—BREACH.

When a contract for services not of a personal nature for a definite period is broken by the discharge of the person furnishing the services either just before, or at, or after, insolvency, the servant's claim for damages should be liquidated against the insolvent's estate, if a satisfactory measure of damage can be shown.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 149.*]

5. COURTS (§ 359*)—FEDERAL COURTS—DECISIONS—RULES IN STATE COURTS.

Where an employment contract was made in New York and broken there, if broken at all by the employer's insolvency, a federal court administering the insolvent's estate in New York would follow the New York rule as to what constitutes a breach of such contract.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939–949; Dec. Dig. § 359.*

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

6. RECEIVERS (§ 90*)—BREACH OF CONTRACT—DAMAGES.

Where an insolvent, having a contract for the employment of claimant and for assignment of certain of his patent rights, went into the hands of a receiver, who transferred the property to a purchaser on September 1, 1910, but did not actually deliver the property until September 22, 1910, claimant's contract rights, in theory at least, not being affected under the transfer, he was entitled to recover against the receivers for the 22 days in September during which they had possession of the property, and neglected or refused to employ him, or deprived him of his rights

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

under the contract, and also for any damage he can show he suffered by the action of the receivers in transferring the property to the purchaser, as well as for past-due payments under his contract.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 164–166; Dec. Dig. § 90.*]

In Equity. Suit by Walter S. Ely and Benjamin G. Hitchings, incorporated, against the Van Kannel Revolving Door Company. Proceedings to settle the account of receivers for the benefit of creditors.

Hitchings & Palliser, for complainants.

Melvin G. Palliser, for receivers.

Charles A. Webber, for J. B. F. Maher.

Edward Jacobs, for Architectural Record Co.

Charles H. Ayres and Lawrason Riggs, Jr., for Walter W. Ife and others.

CHATFIELD, District Judge. One of the attorneys for the complainant creditors has asked for an allowance for his services in this case rendered to the receivers. These attorneys have also asked for a counsel fee for instituting the action and conducting the proceedings generally for the benefit of all creditors, as well as for the particular creditor who acted as complainant.

It appears from the records of the court that this attorney received an allowance of $2,000 for services to the temporary receivers up to October, 1909, and that since that time he has devoted to this work, as attorney for the permanent receivers, nearly an equal amount of time. It would seem that he should receive for these services a similar amount, and that his firm should also now be paid for general services in instituting, planning, and conducting the action. He may be paid, therefore, at the present time a further sum of $2,000, and his firm may be paid an allowance of $1,200, a total of $3,200, for all services to date, in addition to taxable costs and disbursements in the action itself to the complainants.

The attorney for J. B. F. Maher, a creditor of the defendant, asks for an allowance for his services in presenting a claim of $2,486, which was rejected by the receivers but allowed by the master in full. This attorney is entitled to charge his client for the successful litigation of his claim, and he, with respect to this, is in the same position as the attorney for the Architectural Record Company, who likewise filed a claim with the receivers for $809.67, and also in behalf of the record & Guide Company, for $16. These claims were disallowed by the receivers, but on hearing before the master were allowed.

The statements presented by these attorneys are for services entirely alike in character, and, if any allowance can be granted, they should be paid on the same basis, although the attorney for the creditor Maher has presented a much more voluminous explanation of his services.

It would appear from the cases of Harrison v. Perea, 168 U. S. 311, 18 Sup. Ct. 129, 42 L. Ed. 478, and Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157, that a court of equity has jurisdiction over

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

the allowance of costs and proper expenses, by the party creating or saving the fund in question, if his acts resulted in benefit to all. Such expenses include a counsel fee for bringing and conducting the litigation, over and beyond taxable costs. The presentation of a claim to the receivers and its rejection would not justify an allowance of fees or costs; but the appearance before the master and substantiation of these claims would seem to justify the allowance of any taxable disbursements and of a docket fee, and that allowance will be made to each of these attorneys.

This conclusion necessarily determines the principle of a special allowance to the attorneys for the complainant creditors, except in so far as they have created the fund, which in this instance was made possible by bringing the action, and thus saving to the creditors a greater portion of the estate than would have been realized if no such action had been taken. And, because of this, the allowance to them as attorneys for the complainant creditors of $1,200 over and above their services to the receivers has been included.

Other items allowed by the special master (viz., claim allowed amounting to $170.83, due one Ife or his successors, for salary due to September 1, 1910, for $1,500, payments upon contract up to the same time, and for $208 on royalties under certain assignments of patent rights) are not now disputed, and as to those items the report was correct. In so far as the dividends upon these allowances are claimed by a receiver appointed in an action in the state court, it will be necessary for the receivers, upon payment of the final dividends, to deposit these dividends in a court having competent jurisdiction, unless a release of all the parties claiming thereto can be obtained without such deposit.

The special master has disallowed a claim of $4,160, made by Mr. Ife, or his successors or assigns, for payments to become due from September 1, 1910, on throughout the stipulated period for which the contract above referred to was to run. This contract was not for the entire lifetime of the patents in question, but was based upon an absolute assignment of the patents, with payment to be made only through a period specified, upon certain good will or readiness on the part of Ife to give advice and moral support to the Van Kannel Company. The payments were to be made at regular intervals, and from time to time, in consideration of the agreements by Mr. Ife and his successors in title.

He has claimed before the special master that the action of the receivers in disposing of the property of the company, and in terminating his so-called employment, thereby ending further payments by the Van Kannel Company under its contract, is a breach of contract, and that he is entitled to prove as damages for the breach the total amount of the payments up to the end of the period for which the contract was made.

He cites in support of this the case of Spader v. Mural Decoration Mfg. Co., 47 N. J. Eq. 18, 20 Atl. 378. But that case and the case of Rosenbaum v. Credit System Co., 61 N. J. Law, 543, 40 Atl. 591, do not sustain his present contention. Those cases hold, and the principle

seems plain, that when a contract for services, not of a personal nature for a definite period, was broken by the discharge of the person furnishing the services, whether that discharge be just before or at or after insolvency, a claim for damages for the breach of the contract was legal and should be referred to the proper court, in order that, if a satisfactory measure of damage could be shown, the amount of such damage could be proven.

It was remarked by the New Jersey court in the Rosenbaum Case that an insolvent estate might continue to employ a person for a time, and then break the contract, and that, if any damages could be proven, an opportunity should be given to do so. But the court did not hold, in either of these cases, that upon such a breach, and upon a mere showing of readiness to perform, the claimant could recover for the contract compensation up to the end of the contract period, whether or not the services were or could be rendered.

In the present case the receivers have sold the property and all their rights under the contract with Mr. Ife, and have ceased to employ him or to take advantage of his services in the future. His services were not of such a nature that they were to be rendered to any individual, or such that they could not be transferred with the business. If the contract has any validity because of the assumption of its privileges, the responsibility for its obligations must follow the contract, and they are not provable against the estate which has ceased, under judicial proceedings in this court, to make use of the services, or to receive benefit from the other rights under the contract.

On the other hand, if the contract calls for purely personal services and could be terminated upon a legal termination of the company's activities, then Ife suffered no damage after September 22, 1910.

In New York a contract brought under the insurance law of the state was held terminated by the action of the state in stopping the further transaction of business by the company. People v. Globe Mut. Life Ins. Co., 91 N. Y. 174, and this has been upheld in some other cases, such as Lenoir v. Linville Improvement Co., 126 N. C. 922, 36 S. E. 185, 51 L. R. A. 146, in which the contract had been forfeited and the employment terminated under a state law of which the persons contracting must be held to have had knowledge.

The New York rule would seem to be that any legal termination of business (especially under court order) which could have been reasonably in the minds of the contracting parties as a possible intervention of some vis major could not be relied upon as a breach of contract in case it did occur.

In the present instance the court would follow the New York rule as to what constitutes a breach of contract, inasmuch as this contract was made in New York and broken there, if a breach has occurred.

But the principles applicable to the allowance of claims in the federal courts will follow also the general rules of equity as applied in those courts (many such questions arising under the bankruptcy statute requiring frequent construction of such equity rules). It would seem, also, that even the rule in the New Jersey cases, holding that the claimant was entitled to damages for a breach of his contract, to

the extent that he can prove such damage, is not in conflict with the decision of the master upon this claim.

The receivers did not deliver possession until the 22d of September, while the purchaser took possession as of the 1st of September. Nevertheless, any employment or refusal to employ, or deprivation of rights of the claimant Ife, during those 22 days, was by reason of the receivers' action, and for that period his claim should be allowed against the estate. The termination of the contract, as to the receivers' responsibility, did not occur until September 22d. From that date the property rights conveyed by this contract were not being used by the receivers, but everything had been legally transferred to another party, and Mr. Ife and his successors could have no claim against the receivers, or the estate of the Van Kannel Company, unless they could be shown to have suffered damage by the action of the receivers in transferring the property of the company to a purchaser. No evidence of any damage of this sort was offered, and in theory Ife's contract rights (if he could elect to continue to offer his services) are protected under the transfer, and the claim was properly disallowed.

The situation, while analogous to bankruptcy, is hardly the same as where a termination of such contracts may be effected by a statutory proceeding, for, again, in bankruptcy a contract must be held to have been made in contemplation of what might be the law with relation to such a contract. But in a proceeding in equity it would be the duty of the court to respect all contract rights, from which benefits would be derived to the estate, and also to protect all contract obligations against the estate at the time of liquidation. In the present case it would seem that this could be done by holding, as in the New Jersey cases, that Mr. Ife and his successors would be entitled to a general claim for any damage that they can prove against the estate, but that upon the record here no damages have been shown, and apparently no damage can be shown on the transfer of a contract of this nature.

The allowance to Mr. Ife should be made to cover the extra 22 days, and, as so modified, will be confirmed.

WILLIAM F. JOBBINS, Inc., v. KENDALL MFG. CO.

(Circuit Court, D. Rhode Island. January 18, 1911.)

No. 2,923.

PATENTS (§ 211*)—LICENSES—CONSTRUCTION OF CONTRACT.

Plaintiff and defendant entered into a contract, reciting that plaintiff was the owner of patents for a process and machinery for producing commercially refined (nitro) glycerine from waste soap lyes and that defendant was a producer of such waste soap lyes. The contract granted to defendant the right to use such machinery and process during the life of the patents, on payment of royalties, and further provided that if defendant should, before the expiration of the patents, "discontinue the use of the said first party's within-named process for any other," it should pay to plaintiff a stipulated sum in lieu of future royalties. De-

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

fendant discontinued the use of plaintiff's process, and adopted a new process for extracting the glycerine from the original fats before saponification, and in consequence did not produce any waste soap lyes. *Held*, that the subject-matter of the contract was the treatment of waste soap lyes, and that, as it contained no provision requiring defendant to continue the production of such lyes, it did not by the substitution of the process, which did away with such production, discontinue the use of plaintiff's process for treatment of such lyes for any other, within the meaning of the contract, and was not liable under such provision.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 304–311; Dec. Dig. § 211.*]

At Law. Action by William F. Jobbins, Incorporated, against the Kendall Manufacturing Company. Trial to court. Judgment for defendant.

Henry W. Hayes, for complainant.

Gardner, Pirce & Thornley, for defendant.

BROWN, District Judge. This is an action of covenant, in which jury trial was waived. The written instrument under seal, bearing date April 19, 1892, contains an agreement between Jobbins and Van Ruymbeke, manufacturing chemists, of Aurora, Kane county, Ill., and the Kendall Manufacturing Company, a Rhode Island corporation doing business at Providence, R. I. It recites in substance that:

Jobbins and Van Ruymbeke are inventors of a new chemical and distilling process, and of machinery adapted thereto, for producing commercially refined (nitro) glycerine from waste soap lyes, and have United States letters patent issued them therefor, to wit, Nos. 458,647 and 458,648, both dated September 1, 1891; that the defendant is a producer of waste soap lyes, and desires such machinery as will have capacity to operate the waste soap lyes resulting from the daily use of 17,000 pounds of tallow or other oleaginous material, producing therefrom the glycerine and salt contained; also to acquire the right to use such patented machinery and process as aforesaid for the utilization of such waste soap lyes as may be produced by them.

The contract contains somewhat elaborate provisions concerning the erection of machinery and terms of payment, with the detail of which we need not concern ourselves. It provides, also, that all of the waste soap lyes produced at defendant's works shall be treated by this said process by the defendant during the life of the patents and of all patented improvements or modifications thereof. The owners of the patents agree during the continuance of the license to protect the defendant against actions for infringement.

The contract contains no agreement, however, binding the defendant to continue the production of waste soap lyes. It was doubtless contemplated by both parties that the defendant, in the usual course of its manufacture of soap, would produce waste soap lyes, which it would be advantageous for it to treat by this process for obtaining the glycerine, etc., therefrom. The important provision is as follows:

"But if they, the said second party [the Kendall Manufacturing Company], should at any time prior to the 1st of September, 1908, A. D., discontinue the use of the said first party's within-named process for any other, that then they, the said second party, shall to the said first party pay such sum as, together with the royalty heretofore paid, will equal the gross sum and inter-

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

est they would have paid in the net value of the glycerine and salt produced from the lyes resulting from the use of 5,000,000 pounds of tallow or other oleaginous materials in lieu of which said royalty was accepted, as per clause 5 thereof."

The declaration alleges that the defendant did, prior to the 1st of September, 1908, discontinue the use of said process for another, and avers that by reason of said discontinuance of said process it became liable to the plaintiffs for the gross sum and interest set forth.

Upon the trial it was proved that the defendant, prior to September 1, 1908, did discontinue the use of the plaintiff's process and adopted a new process, known as the "Twitchell Process," which is a process of extracting glycerine from the original fats before they have been submitted to the process of saponification, and is not a process of extracting glycerine from waste soap lyes. As the entire agreement relates to a process and machinery for the treatment of waste soap lyes, and as the defendant discontinued the production of waste soap lyes, the situation is exactly the same as if the defendant had entirely gone out of business, as it had the right to do. While both parties contracted in the expectation of the probable continuance of the defendant's business, and of the use of soap-making processes which would involve the production of waste soap lyes, yet I am unable to find anything in the agreement which bound the defendant either to continue in the business of soap-making or to conduct its business of soap-making in such way as to produce as a by-product waste soap lyes. There is nothing in the business situation which makes it necessary for the defendant, in order that the patentees may receive royalties, to continue the use of the process or machinery, if, in the course of the development of the soap-making art, a new process should be adopted which did not involve the production of the particular by-product which the plaintiff's process was designed to treat. In the expression "discontinue the use of the said first party's within-named process for any other," the words "for any other" must be given their due effect.

The subject-matter concerning which the parties are contracting is a process for producing glycerine from a particular material—i. e., waste soap lyes—and the words "for any other" must be held to mean for any other process for producing glycerine from waste soap lyes. The contract clearly does not mean that merely upon the discontinuance of the process a gross sum should be payable, for if it did the words "for any other" would be superfluous; and it cannot be interpreted to mean for any process of extracting glycerine from tallow and other oleaginous materials without unduly extending the terms of the contract. The patentees have made provision for the payment of a gross sum upon the discontinuance of their process and the adoption of another process for treating waste soap lyes; but they have entirely failed to provide for the contingency that the defendant corporation might so change its mode of conducting business as to dispense with the production of waste soap lyes, and consequently with the use of any process for their treatment.

I am, therefore, of the opinion that, though the plaintiff has proved a discontinuance of the use of the patented process, it has failed to show that this was discontinued with the intent to adopt any other process for treating waste soap lyes, or that any other process for this purpose has been used by the defendant corporation.

Both plaintiff and defendant have preferred formal requests for findings of law and fact. I find as follows:

Findings of Fact.

1. I find the due execution of the said instrument in writing declared upon, and that the plaintiff has succeeded to the rights of Jobbins and Van Ruymbeke thereunder.

2. The defendant did not at any time prior to September 1, 1908, discontinue the use of the plaintiff's process of extracting commercially refined glycerine from waste soap lyes for any other as in the plaintiff's declaration alleged, but did at some time prior to September 1, 1908, discontinue the use of the plaintiff's said process and adopt for the production of glycerine the Twitchell process, so called, which Twitchell process is a process of extracting glycerine from the original fats before they have been submitted to the process of saponification, and is not a process of extracting glycerine from waste soap lyes.

3. The defendant did not become liable to pay the plaintiff any sum by reason of its discontinuance of the plaintiff's said process for another, as in the plaintiff's declaration alleged.

Findings of Law.

1. The agreement between the parties, which is the subject of this action, is a covenant and specialty, and therefore the plaintiff has properly sued in an action of covenant.

2. The words in the contract between the parties declared upon, "if they, the said second party, should at any time prior to the 1st of September, 1908, A. D., discontinue the use of the said first party's within-named process for any other," taken in connection with the other language of the contract, mean and refer to a discontinuance of the plaintiff's said process for another process of extracting commercially refined glycerine from waste soap lyes, and do not mean or refer to a discontinuance of the plaintiff's said process for a process of extracting glycerine from the original fats before they have been submitted to the process of saponification.

The plaintiff's second request for finding of law is denied. The plaintiff's first and second requests for findings of fact are denied.

Judgment will be entered for the defendant.

BAGNELL et al. v. IVES.

(Circuit Court, M. D. Pennsylvania. January 9, 1911.)

No. 96, May Term, 1907.

1. CORPORATIONS (§ 265*)—JOINDER OF PLAINTIFFS—ACTION TO ENFORCE LIABILITY OF STOCKHOLDER.

Owners of separate judgments against an insolvent Missouri corporation, each entitled under the statutes of that state to maintain an action against any stockholder of such corporation whose stock is not fully paid for to recover the amount due thereon to the extent of his judgment, cannot join in such an action against a stockholder; their causes of action being personal and several.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 265.*]

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

2. TRUSTS (§ 160*)—JURISDICTION TO APPOINT TESTAMENTARY TRUSTEES—PENNSYLVANIA STATUTE.
Under the statutes of Pennsylvania (Act June 14, 1836 [P. L. 632] § 15, and Act April 22, 1846 [P. L. 483] § 1), a register of wills had no authority to appoint testamentary trustees for the estate of minors, and trustees so appointed had no power to bind the estate by any contract.
[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 160.*]

3. TRUSTS (§ 239*)—JOINT TRUSTEES—CONTRACTS—NECESSITY OF JOINT ACTION.
Where two joint trustees were appointed for the estate of minors, one acting alone had no authority to purchase stock in a corporation so as to bind the estate as a stockholder.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 346; Dec. Dig. § 239.*]

4. TRUSTS (§ 217*)—INVESTMENT OF TRUST FUNDS—ILLEGAL PURCHASE OF CORPORATE STOCK.
Under Const. Pa. art. 3, § 22, which prohibits any law authorizing trustees to invest the trust funds in the stocks of any private corporation, the act of a trustee for the estate of minors in purchasing stock of such a corporation of another state for the estate, or accepting it in payment of a debt, was illegal and did not bind the estate as a stockholder.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 301-309; Dec. Dig. § 217.*]

5. CORPORATIONS (§ 243*)—STOCKHOLDERS—LIABILITY FOR UNPAID SUBSCRIPTION—ILLEGAL PURCHASE BY TRUSTEE.
The fact that a trustee who was prohibited by law from investing the trust funds in the stock of a corporation took such stock in payment of a debt did not vest the estate with such ownership as makes it liable for what may be due thereon for the benefit of the corporation's creditors; it subsequently appearing that the stock was not paid for.
[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 243.*]

At Law. Action by William Bagnell and O. P. Laxton against Albert G. Ives, trustee. On trial by the court without a jury. Judgment for defendant.

W. J. Torrey and B. F. Babbitt, for plaintiffs.
C. B. Little, for defendant.

ARCHBALD, District Judge. This is an action at law by judgment creditors of the Logan Live Stock Company, an insolvent Missouri corporation, to enforce against the estate of Marjorie S. and Kenneth G. Collins, minor grandchildren of Mrs. Jane K. Collins, late of Cambridgeport, Mass., deceased, in the hands of the defendant, as their trustee, an alleged liability of $2,400 due and unpaid on the common stock of the said company. The case by agreement was tried to the court without a jury, and the following are found to be the facts, in the nature of a special verdict:

By her will duly probated November 23, 1897, at Cambridgeport, Mass., the place of her residence, Mrs. Jane K. Collins bequeathed the residue of her estate, after certain specific legacies, one-half to her only surviving son, Frederick K. Collins, who was appointed her executor, and one-half in trust for her two grandchildren, Marjorie S. and Kenneth G. Collins, children of a deceased son, the present minors, subject to the payment of $2,000 to their mother, Florence

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

G. Collins, and the like further sum to her, later, appointing as trustee her son, Frederick K. Collins, or, in case of his inability to act, certain others in succession, in the event of either of them not accepting or qualifying. The trust for the children was an active one, and the testatrix left separate specific instructions with regard to its management. This appears by the recitals in the will; but the instructions are not embodied in it, and there is no other proof of them. It is, however, provided in the will that the trustee shall be excused from filing an account of the administration of the trust, in the place where the testatrix's will was probated; it being stated that the trustee, in this regard, would be subject to the orphans' court of the place where the cestuis que trustent resided. Each of the persons named in the will as trustee declined to act, and a petition was thereupon presented, on February 28, 1898, with a proof of the will, to the register of wills of Lackawanna county, Pa., at Scranton, where the children were residing, upon which the register appointed as joint trustees, Mrs.. Florence G. Collins, their mother, and Col. Herman Osthaus, a member of the bar of that county, both of whom accepted the trust, and were both acting as trustees when the present action was instituted.

This action was brought April 13, 1907, against Col. Osthaus as trustee as the sole defendant; no notice being taken of the other trustee, Mrs. Florence G. Collins. A year later, on April 18, 1908, Col. Osthaus died, and on due petition to the orphans' court of Lackawanna county, Pa., Wallace Ruth was appointed in his place, and duly substituted as defendant of record, and, later on, Mr. Ruth having resigned, Albert G. Ives, the present defendant, was appointed trustee by the same authority, and duly substituted.

The right to recover in this case is predicated upon certain things which occurred with regard to the estate in the lifetime of Col. Osthaus. There was owing to Mrs. Jane K. Collins, at the time of her death, from one Alexander Dow, some $5,600, exclusive of interest, which the executor had endeavored to collect, without success, and regarded as desperate. Mr. Dow's total indebtedness to all his creditors was about $30,000, which he was owing to a number of people, and had no immediate means of satisfying. He was interested, however, in the Logan Live Stock Company, of Piedmont, Mo., which was incorporated under the laws of that state, with a capital of $20,000, for the purpose of buying, selling, and dealing in cattle and live stock; his wife owning one half of the capital stock of the company, and, with the exception of two shares, Mr. Dow owning the other half. After being in business for a year, under the management of Mr. Dow, the company had not proved a success. But Mr. Dow was hopeful of its prospects, and in October, 1901, made a proposition to his creditors, including Mrs. Collins' executor, by which he offered to pay what he owed in stock of the company at par, provided they would subscribe and pay for one quarter as much more, which would give that amount of new capital to go into the business. His idea was to increase the capital of the company from $20,000 to $60,000, of which $10,000 was to be preferred stock, to be paid for in

cash, and $30,000 common, to be turned over in payment of his indebtedness. Following this out, after some considerable delay, in May, 1902, the increase of capital was made; the certificate of increase, which was filed with the Secretary of the State, as required by law, reciting that one-half had been paid in money, which was in the hands of the directors, although the fact is that nothing had been paid upon it.

The proposition of Mr. Dow was submitted to Col. Osthaus, as trustee, by Mr. Collins, the executor, and after extended correspondence back and forth, between them and Mr. Dow, and numerous inquiries with regard to the prospects of the company, it was deemed advisable, both by Mr. Collins and Col. Osthaus to accept the offer to the extent of $4,800; this being their only hope of realizing any part of the debt, which was recognized by both of them as otherwise uncollectible. Col. Osthaus thereupon took and paid as trustee for $600 of preferred stock, and got $2,400 of common—240 shares at $10, a share—which was accepted in payment of that much of his part of the Dow indebtedness. And Mr. Collins, as executor and legatee of the other half, did likewise. But, except one F. E. Smith, they were the only creditors who did so, although they did not know this. A certificate for the 240 shares, under the seal of the company, was duly issued to Col. Osthaus; but by mistake he was designated as executor, and not as trustee therein, and on August 29, 1902, he receipted as trustee for it. He also participated, by proxy, in the annual meeting held in January following.

The certificate for the common stock, which was issued to Col. Osthaus, recited that it was fully paid up and nonassessable; but the fact is that no part of it had been paid to the company. There was credited to Mr. Dow, on the books of the company, for lands and implements turned over to it by him, sufficient in value to cover this stock; but there is no evidence that any such application was ever made of it. Mr. Dow had paid-up stock in the company, and it was his intention to have this issued to Col. Osthaus and Mr. Collins; but the stock which was issued to them was a part of the increase stock, which, except as to the preferred, was never paid for. The transaction by which the stock was transferred to and acquired by Col. Osthaus, as trustee, and Mr. Collins, as executor, took place wholly between them and Mr. Dow, and in no respect with the company, save only as they subscribed and paid the company for the preferred stock, and got certificates from the company for it, and for the common. It was also assumed by them, in taking the common stock, that it was the stock of Mr. Dow, and not that of the company, and it was receipted for by Col. Osthaus as coming from him.

Mrs. Florence G. Collins, co-trustee with Col. Osthaus, was not named in the certificate for either the preferred or the common stock, and there is no evidence that she knew of or participated in their acquisition.

The attempted financial reorganization of the Logan Live Stock Company was a failure. The new capital put into it was not sufficient

to effect anything. The company did business for a while, but became hopelessly insolvent before many months, and in the spring of 1903 all its assets were seized and disposed of by creditors, on mortgages and attachments. Following this, suit was brought against the company by O. P. Laxton, one of the present plaintiffs, a former employé, in the circuit court of Reynolds county, Mo., and on May 28, 1903, a judgment was recovered therein for $557.67, on which execution was issued and $9.80 realized and applied, leaving $547.87 due and unsatisfied, and this was subsequently assigned for collection, before the present suit was brought, to the other plaintiff, William Bagnell. Mr. Bagnell himself also brought suit against the company in the circuit court of Wayne county, Mo., and on February 10, 1904, recovered judgment for $5,558.01, with $10.20 costs, on which execution was duly issued and returned nulla bona. On these two judgments $2,700 has been collected by Mr. Bagnell, leaving a balance of $3,413.08, which is still due and owing thereon by the company, which is dissolved and gone out of business.

Accepting these as the facts, it is difficult to see how the plaintiffs are entitled to recover; and that not on one ground, but on several. And not only on the merits, but the mode of procedure. There is no intention of denying that under the Missouri law the holder of stock in an insolvent corporation is liable to creditors to the extent of what is unpaid on it. Van Cleve v. Berkey, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593. And this may be enforced by action at law against a single stockholder without joining the others. Perry v. Turner, 55 Mo. 418. It is also immaterial whether the defendant in fact subscribed for the stock; the acceptance of a certificate being sufficient. Shickle v. Watts, 94 Mo. 410, 7 S. W. 274. And suit may be maintained even though there are other creditors than the one suing. Norris v. Johnson, 34 Md. 485. Conceding all this, there are other considerations that are controlling.

It is to be observed, at the outstart, that, although there are two plaintiffs, there is no joint cause of action, as there must be to enable them to sue jointly. Each, by virtue of the judgment which he obtained against the company, had a right to proceed for satisfaction against holders of unpaid stock; but the right in each was personal, and could not be combined with that of others, simply because the liability to be enforced by each was against the same party. It is not as though suit was brought by Mr. Bagnell alone, as holder of both judgments, in which case it might be said, with some plausibility, that it was based, not on the judgments, but on his right as creditor to have satisfaction of them out of the unpaid subscription, as to which the judgments would be a mere matter of inducement. Nor is the case to be so taken because it is brought to his use, which does not overcome the objection that there are two independent plaintiffs. The action, as it stands, is in the name of Mr. Laxton, as well as Mr. Bagnell, one having one cause and the other another, that of Mr. Laxton, moreover, being less than the jurisdictional amount, and so not able to be tacked on to the other, the assignment to Mr. Bagnell being for collection only. Woodside v. Beckham, 216 U. S. 117,

30 Sup. Ct. 367, 54 L. Ed. 408. Neither is it the same as though this was a bill, prosecuted in the interest of all creditors, which proceeds very differently. This defect, if not remedied, is fatal; but it is no doubt amendable, and may therefore be passed by for others, which are not so easily disposed of. At the same time, as the case stands, it helps to justify the judgment.

But, if there are too many plaintiffs, just the opposite is true, as the action was originally brought, with regard to the number of defendants. The purpose of the action is to charge the trust estate, and, if the appointment of Col. Osthaus was valid, so was that of Mrs. Florence G. Collins, and both therefore should have been made parties. The trust was not committed to the one, but to both, and both conjointly were alone competent to represent it. It is said that Col. Osthaus was the only one who had anything to do with taking the stock. But that only serves to show the infirmity of that transaction. If the estate is to be affected here, it must be through both or none, and neither of the trustees could therefore be omitted. It may be that advantage should have been taken of this by plea in abatement; or, if that is not so, that the defect is curable, and has been overcome by the substitution, after Col. Osthaus' death, of the trustee appointed by the orphans' court, and the substitution subsequently of his successor, the present defendant. If parties competent to represent the estate were not brought in, in the beginning it is difficult to see how this could be remedied, and made to relate back, by the substitution now of others, who, by reason of a different appointment, are in no privity with them. Nor does this give effect to the trusteeship in Mrs. Collins, which is still outstanding. But, as observed above, with regard to the number of the plaintiffs, there are other objections which go deeper. And this feature therefore will also be passed over.

Disregarding mere form then, and disposing of the case squarely on the merits, it is nevertheless clear that the plaintiffs are not entitled to recover. In the first place, the appointment by the register of wills of trustees for these children was a nullity, and conferred no authority whatever upon either of them. Hart's Est., 12 Pa. Dist. R. 47. It seems to have been undertaken on the idea that the will having been proved, and the trustees being testamentary, the register could deal with it. But there is nothing to sustain this. The jurisdiction was in the orphans' court or the common pleas, and this was exclusive. Act June 14, 1836 (P. L. 632) § 15; Act April 22, 1846 (P. L. 483) § 1; Seibert's Appl., 19 Pa. 49. In accordance with this, the present defendant was appointed by the orphans' court, as well as his predecessor. But this was not retroactive. When Col. Osthaus therefore assumed to act for the estate, he was nothing more nor less than an intermeddler. The children, being minors, had nothing to say, and the present defendant is not precluded from raising the question now, as their representative. It is said that, having taken the estate into his actual control, and administered upon it, he was at least a de facto trustee, and that any one was protected in dealing with him; the estate, having got the benefit of what he did, being bound to bear the burden. But this fails to recognize the

fact, if there was nothing more, that the beneficiaries are minors, as to whom everything must be according to strict law, and no implication indulged in. Col. Osthaus, therefore, under the circumstances, had no authority to do anything which is now relied on to bind the estate, and his taking of the stock, which is at the bottom of it all, must be held to be of no validity.

Assuming, however, that this is not so, and that the appointment by the register, having been followed by an actual administration of the estate, is to be respected, there were two trustees appointed, as already pointed out, Mrs. Florence G. Collins, as well as Col. Osthaus, and in any matter of contract both must join to make it effective.

"The general doctrine does not appear to admit of dispute that, where the administration of a trust is vested in several trustees, they all form but one collective trustee, and must exercise the powers of the office in their joint capacity. Their interest and authority being equal and undivided, they cannot act separately, but must all join. Thus one trustee alone has no power to convey, lease, or bind the trust property, or to perform any act resting in the sound discretion of the trustees as a body." 28 Am. & Eng. Encycl. Law (2d Ed.) 586.

That is the exact situation here. And the act of Col. Osthaus by himself, in taking the stock of the Logan Live Stock Company as he did, was not binding. It is not as though there was need for immediate action, to save the estate from loss, which forms a possible exception. It was simply the case of one of two trustees undertaking to make an important contract without any authority from the other, which was beyond his power. Vandever's Est., 8 Watts & S. (Pa.) 405, 42 Am. Dec. 305.

It might possibly be different if Mrs. Collins, although not participating at the time, was subsequently consulted and acquiesced in it. It is stated, in a letter of Mr. Collins, that she did. But that is not evidence. Nor was it necessary to call Mrs. Collins to deny it. It was for the plaintiffs to show, by competent proof, that she ratified what was done by Col. Osthaus, if they intended to rely on it, and it is to be assumed that this was not the fact, so long as they did not.

But, even if this obstacle was overcome, there is still another in the way of a recovery. It has long been the policy of the law, not only in this state, but in many others, not to permit the investment of trust funds in a private corporation. And this, in Pennsylvania, has been embodied in the Constitution, where it is provided:

"No Act of the General Assembly shall authorize the investment of trust funds by executors, administrators, guardians, or other trustees, in bonds or stocks of any private corporation, and such acts now existing are avoided, saving investments heretofore made." Const. Pa. art. 3, § 22.

This is not simply a restraint upon legislation; it is a positive inhibition against any such transaction. With this provision in the fundamental law, the present trustees were prohibited from putting any of the estate in their charge into the stock of an industrial corporation, such as the Logan Live Stock Company, or making any arrangements that would have the effect of doing so. The payment by Col. Osthaus for $600 of preferred stock was thus absolutely unauthor-

ized, and he, and not the estate, is responsible for the consequences. Commonwealth v. McConnell, 226 Pa. 244, 75 Atl. 367. Nor did the acceptance of $2,400 of common stock in that connection impose any liability on the estate, whether it is treated as a payment by Mr. Dow on his individual indebtedness or otherwise. The liability for unpaid stock is admittedly contractual, and grows out of the obligation of each holder to see that what he has is paid for where it is necessary to meet the demands of creditors. And it is manifest that, if a trustee cannot bind the estate by direct subscription, he can do nothing indirectly to make it liable. To hold otherwise would permit of an evasion of the law that cannot be countenanced. And this is emphazised in the present instance by the provision of the Missouri statute that no person holding stock in a corporation as executor, administrator, guardian, or trustee shall be personally liable; the liability being thrown over onto the estate which is so represented. Rev. St. Mo. 1889, § 2776v. Creditors of a corporation, according to this, having a right to rely on the stock being paid for, are entitled to look to those who appear by the books to be stockholders, if it turn out that it is not, and this, in case of a trustee, is the estate, which thus becomes liable. But the effect of this, if enforced, would be to nullify the constitutional provision which has been referred to. And unfortunately for the plaintiffs, in the present instance, it is the Pennsylvania law, under which this estate was being administered, that determines the authority of the trustee, and not the law of Missouri, where the corporation was domiciled, which cannot interfere with this. The implied undertaking, on which the plaintiffs rely, arises out of the prohibited act of an unauthorized trustee, and it is not possible to bridge over the gap and reach the estate, which the trustee, by the law of his appointment, had no power to bind; it being the purpose of the law to protect against such improvidence. The creditors of the corporation have a responsible subscriber in the person of the trustee, if he assumed to act without authority, and do not need to search around for some one to hold, outside of that. The Missouri statute, in relieving the trustee and holding the estate, assumes that he acts with authority, and, where this is not the case, he is liable under the implied warranty that he does so. At all events, the estate of these minors cannot be looked to; the trustee, so far as they were concerned, being incompetent to bind them.

It is said, however, that the stock here was taken in payment of a debt, and not as an investment, and that, the debt being otherwise uncollectible, the estate is at a serious disadvantage unless the trustee had authority to make the arrangement. But, assuming that the trustee had a qualified right to accept the stock for the purpose of preventing a loss, an undertaking to pay what was due on it is not to be implied against the estate in view of the protection extended by the law over it. To involve an estate in loss, to avoid a loss, would be an absurd proposition. In First National Bank v. Converse, 200 U. S. 425, 26 Sup. Ct. 306, 50 L. Ed. 537, a national bank, to protect itself from loss on a pre-existing indebtedness, took stock in a corporation organized for the purpose of engaging in a speculative

business; and it was held that, having no authority to subscribe for such stock, it could set this up in defense of an action against it to enforce a double stock liability. And in Merchants' National Bank v. Wehrmann, 202 U. S. 295, 26 Sup. Ct. 613, 50 L. Ed. 1036, it was similarly held that, while a national bank, as security for a debt, may take property which it is not authorized to invest in, and foreclose on it, it cannot be held liable on such stock as an absolute owner, being prohibited from such ownership by the national bank act. That principle is applicable here. By the policy of the law, as expressed in the constitutional provision referred to, trust estates are prohibited from being put at the risk of commercial ventures, or being drawn by investment into them. And even though, in order to save a debt, stock in a private corporation of this character be taken, the estate does not thereby become vested with such ownership as makes it liable for what may be due thereon; the policy of the law in favor of the estate standing in the way of the implication.

Judgment is therefore directed to be entered in favor of the defendant.

THE STRATHALLAN.

(District Court, E. D. New York. January 21, 1911.)

SHIPPING (§ 84*)—LIABILITY OF VESSEL—INJURY TO STEVEDORE'S EMPLOYÉ—NEGLIGENCE OF WINCHMAN.

Under a time charter which required the vessel to furnish to the charterer the use of her steam winches for loading and discharging and to provide men to work the same, a seaman furnished by the vessel to operate a winch for stevedores employed by the charterer to load the vessel remained a servant of the vessel, which was liable for an act of negligence on his part by which an employé of the stevedores was injured.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349-351; Dec. Dig. § 84;* Master and Servant, Cent. Dig. § 492.]

In Admiralty. Action by Albert J. Aronson against the steamer Strathallan. Decree for libelant.

Stephen M. Hoye and Joseph K. Field, for libelant.

Convers & Kirlin, Charles R. Hickox, and Russell T. Mount, for claimant.

CHATFIELD, District Judge. The libelant was injured by a draft of railroad-iron rails, in the hold of the steamer Strathallan, on the 27th day of July, 1908, when he, with a number of other stevedores, was engaged in releasing the rails from the slings and stowing them in the hold. Two winches were used at the hatch in question, each operated by separate winchmen upon the deck of the steamer, while a gangwayman gave signals directly to the winchmen for the operation of the winches. The steamer had eight of these winches in operation at the time, of which six were run by the crew of the steamer and the others by the stevedore's men. The stevedores had been hired for the specific purpose of loading the vessel, and were

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

performing the loading in the ordinary way. The libelant was an employé of the stevedore.

The negligence which caused the injury was found by this court immediately after the taking of the testimony, in the following opinion:

"The libelant was standing in such a position that as the draft of rods raised he either fell or stepped astride of the draft and was injured, both on the leg and ribs, by coming in contact with the draft. He apparently struck his head as he came in contact with the tunnel, and then the draft was lowered to the floor. The starboard winch, operated by one of the stevedore's men, was used to draw the draft of rods across the deck over the hatch and to lower the draft into the hatch; the port winch having already raised the draft from the lighter to a point above the rail, and the port winch then reversing or letting its fall run out, so that the starboard winch could draw the draft as far as it was operated. The starboard winch also lifted the bridle and fall from the hold; but at the time the port winch would run forward to take up the cable, which it had let out for the accommodation of the starboard winch. The testimony shows that the port winchman, who was a sailor on the vessel, ran his winch to correspond to the movements of, and signal to, the starboard winchman after the draft had been raised to a point over the rail.

"The accident was caused by the starting of the port winch when the starboard winch had not begun to raise the bridle and fall from the hold. The bridle at the end of the draft, where the libelant was attempting to unfasten the chain, was taut, and he had not accomplished the unfastening when the draft was pulled up and to port, as well as forward under the strain from the port winch; the starboard winch not being in operation. The port winchman apparently started his winch under a mistake or careless assumption that the gangwayman (who had to signal from the side of the ship for the raising of the draft from the lighter, and then step to the coaming to signal for the handling of the draft in the hatchway) had turned away from the hatch and given an order to 'heave away.' This gangwayman testifies that he had given no signal, while the port winchman testifies that the gangwayman gave the signal.

"Inasmuch as the port winchman, even if a signal were given, should not hoist the draft without a corresponding motion on the part of the starboard winch, when the draft was in the hold (that is, in the absence of express direction for some handling of the draft), and also because the starboard winchman testifies that he did not start his engine and received no signal, it would seem that the mistake or misinterpretation of the signal must have been made by the port winchman, and that the accident was caused by the operation of the port winch, either under a mistake in interpretation or in the absence of any signal from the gangwayman; and, if the ship was liable for the actions of the port winchman, I think it should be held at fault. I see no contributory negligence on the part of the libelant because, even if his position in the hold were such that he might have been placed in some other danger, it was not negligence with respect to the immediate cause of this accident, which was the raising of the draft."

The court sees no reason to change the conclusion then made.

The claimant has, in spite of this finding, suggested that the gangwayman was at fault rather than the winchman, inasmuch as it tries to show that the witnesses Conners (page 6) and Ward (page 33) testified that, the chains having been too tight to unhook the sling, they called to the winchman for more slack. But this was considered in the previous decision. All of the other witnesses are clear upon the point that the draft started, and that the calling for slack was an attempt to have the draft lowered, to release the libelant after he was caught; and Ward's testimony, above referred to, was also to that effect, rather than as the claimant now contends.

The gangwayman was not in a position to give any signal, the starboard winch did not start and did not receive a signal, and the libelant has satisfactorily shown that the winchman made the mistake by which the libelant was injured.

As to the responsibility for the winchman's negligence, a serious question arises. Under the authority of Standard Oil Co. v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480, affirming the Circuit Court of Appeals, and following the reasoning in the case of The Slingsby, 120 Fed. 748, 57 C. C. A. 52, a winchman would seem to be (so far as the manner in which he runs a winch is concerned) the servant of the owners of the steamer, if the steamer is furnishing him as winchman to do the work. The doctrine upon which the case of The Elton, 142 Fed. 367, 73 C. C. A. 467, was decided seems to be based principally upon a determination that the duty to furnish competent or suitable winchmen does not go far enough to cover a single or specific act of negligence on the part of one of those winchmen, and that the ship cannot be held liable for such a single act of negligence, on the theory of any breach of duty to furnish a suitable man.

The general trend of the cases which in the state of New York has been recently developed, following the case of Higgins v. Western Union Telegraph Co., 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537, in which the responsibility for a workman is made to depend upon whose work he may be doing—that is, whose service is being accomplished at the time—has been distinguished by the Supreme Court in such a way as to make this general proposition inapplicable to the work of the crew of a vessel, when furnished to a charterer or to stevedores under the usual provisions of a charter, such as existed in the present case.

The Strathallan was chartered, upon the 16th day of July, 1908, to Norton & Sons, for a period of one round trip to South America, under the usual form of time charter, so far as the matters with which we have to do in this case are concerned, for a lump sum per month, and contained the following provision:

"17. Steamer to work night and day if required by charterer, and all steam winches to be at charterer's disposal during loading and discharging, and steamer to provide men to work same both day and night as required, charterer agreeing to pay ordinary extra expense, if any incurred by reason of night work. In the event of short steam or a disabled winch or winches, owners to pay for shore engine or engines, in lieu thereof, if required, and to pay any loss of time occasioned thereby. Coals used for cooking, evaporating water, or for grates and stoves to be agreed as to quantity and their value allowed by owners."

At New York, Norton & Sons hired the stevedore for whom the libelant was working to load the vessel.

This is the same form of charter which has been considered by the courts in a number of cases, and the provisions of such charter are apparently the basis of the question with relation to the furnishing of a competent crew and competent men to perform particular service, such as was considered in The Elton, supra.

In the case of Constantine & Pickering S. S. Co. v. Tweedie Trading Co., 159 Fed. 706, 86 C. C. A. 574 (citing Golcar Steamship Co. v. Tweedie Trading Co. [D. C.] 146 Fed. 563; British Maritime Trust, Limited, v. Munson Steamship Line [D. C.] 149 Fed. 533; and The Santona [C. C.] 152 Fed. 516), the Circuit Court of Appeals of this circuit held that the steamer fulfilled her obligation under this clause when she tendered to the charterer men competent to work the winches. But the question there involved, and the question involved in all of the cases stated, was the obligation for the expense of operating winches, and had nothing to do with the question of negligence in the manner in which they were operated.

In the case of The Santona, supra, the court holds that the furnishing of a competent crew is all that is required so far as the furnishing of labor is concerned. But on page 518 of 152 Fed. the court says:

"Under the very ordinary form of time charter involved in this cause, it shocks knowledge common to all men acquainted with maritime business to say that the owner has surrendered the possession or control or command or navigation of his ship. But he has surrendered control of her freight and passenger capacity and handed the same over to the charterers for all lawful purposes."

It can be seen from these citations that if the winchman is to be regarded as the servant of the vessel, and the running of the winches considered as a part of the control and command of the ship, then the winchman is still the servant of the owners, and they are liable for his acts of negligence. In other words, he would not be a fellow servant and employé of the stevedores in this respect.

On the other hand, if the doctrine of The Elton, supra, were to be taken, and the only allegation of negligence to be considered were whether a competent man were supplied, then the responsibility for the winchman's actions would be terminated when he was turned over to the stevedore, if competent to do the work, and he would immediately become a fellow servant of the stevedore's man in the actual process of unloading.

As has been said, the reasoning in the Anderson Case seems to be controlling, and, until that reasoning has been applied by the appellate court to the case of a ship under charter, it would seem that the libelant is entitled to recover.

It is possible to point out a distinction of fact between the cases; but, if the matter is disposed of from the standpoint of principles rather than particular facts, no difference would seem to be interposed by the existence of the charter, and by the fact that a right to call for members of the crew to operate the winches has been transferred under the charter to stevedores hired by the charterer, instead of being given directly by the owners of the ship to stevedores who would be working for the shipowners instead of the charterers.

The man's injuries, fortunately, were not severe. He suffered substantially three months' loss of time, and more or less physical pain, arising from a severe cut upon the thigh, some broken ribs, and

a gash upon the head, which caused pain, but which ultimately disappeared. His three months' loss of time was worth substantially $180, and it would seem that a recovery of $500 would be sufficient.

The libelant may have a decree for that amount, with costs.

HOWE v. CITY OF NEW YORK.

(District Court, S. D. New York. July 20, 1910.)

SALVAGE (§ 38*)—COMPENSATION—RELEASING GROUNDED VESSEL IN NEW YORK BAY.

The ferryboat Bay Ridge went aground in New York Bay in a dense fog, and in response to her signals two tugs owned by libelant went to her assistance. One broke a hawser and suffered some other injuries, but after pulling for about 20 minutes the ferry boat floated. *Held*, that the service was one of salvage, although not of a high order, and that libelant was entitled to an allowance of $300 therefor, one-third to be divided among the officers and crews, and sufficient in addition to repair the injured boat.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 93–102; Dec. Dig. § 38.*

Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

In Admiralty. Suit for salvage by Patrick Howe, master, in behalf of the owners and crews of two tugs, against the City of New York, as owner of the ferryboat Bay Ridge. Decree for libelant.

James J. Macklin, for libelant.

Archibald R. Watson, Corp. Counsel, for respondent.

HAZEL, District Judge. On December 31, 1908, at about 7:20 o'clock in the morning in a dense fog, the steel ferryboat Bay Ridge, on a trip from Brooklyn to Whitehall street, New York, went aground on an even keel on the southeasterly side of Governors Island. Just before grounding she collided with a canal boat lying alongside a dock on the Brooklyn side of the river and sustained damage to her upper works. After the collision she went into Buttermilk channel to get on her proper course, and then went aground on a rocky bottom. She signaled for assistance, and the steam tugs William J. McCaldin and James A. Garfield, hearing the distress signal, navigated from their mooring place near by to the scene of the mishap, going through the fog to reach her. Lines were made fast to the ferryboat, and after some pulling the McCaldin's hawser parted, and it became necessary for the tugs to maneuver in the fog and again make fast the line. In doing so the McCaldin broke her propeller wheel and the collar on the shaft between the ferryboat and the shore. The pulling on the lines by the tugs to release the ferryboat continued for about 20 minutes, when she floated. The exact location of the grounding is in sharp dispute; libelant's witnesses testifying that it occurred between Governors Island and the Black Buoy, where the bottom was

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

rocky, while the respondents claim that the grounding occurred at the southeast of the Black Buoy, where the bottom was soft. The injuries to her bottom and rudder, however, would seem to corroborate the testimony of the libelants on this point. The tide had an hour and 40 minutes to ebb, and her position was not fraught with immediate danger. She was lying easily, and it is not improbable that other passing tugs or water craft would have come to her assistance. Such probabilities are to be considered in awarding compensation for the services rendered. The Joseph Laughlin v. The Rumsey (D. C.) 40 Fed. 909. I am of the opinion that when the tugs came alongside the ferryboat her master understood that a compensation higher than mere towage would be exacted, and therefore I think an award on a basis of a low order of salvage would not be improper. It became necessary to overhaul and repair the McCaldin, and the estimate of the witness Shewan that the reasonable cost of her repairs was about $500 is accepted by me.

In view of the circumstances, the salvage compensation cannot be large; but, to encourage steam tugs to go to the assistance of vessels in distress under similar circumstances, I think a higher amount than for mere towage service should be paid.

As there was no great danger to the tugs if carefully navigated, I think an award to the libelant of $300 for salvage services and $500 costs of making repairs to the tug McCaldin would be a fair remuneration. Two-thirds of the salvage award may be retained by the owners of the tugs, $25 each to the masters of the McCaldin and the Garfield, and the balance to be divided among the members of the crews in proportion to their wages.

A decree may be entered accordingly, with costs.

KARNS v. W. L. IMLAY RAPID CYANIDE PROCESS CO. et al.

(Circuit Court, E. D. Pennsylvania. January 4, 1911.)

No. 477.

EQUITY (§ 430*)—OPENING OF DECREE—NONAPPEARANCE OF COMPLAINANT AT HEARING—DISCRETION OF COURT.

Where the complainant and his counsel failed to appear at the final hearing of an equity cause, from whatever cause, the opening of the decree to permit him to have another hearing is a matter of discretion, and should only be granted upon terms.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1034–1047; Dec. Dig. § 430.*]

In Equity. Suit by B. F. Karns against the W. L. Imlay Rapid Cyanide Process Company and others. On motion to open decree. Motion granted upon terms.

See, also, 181 Fed. 751.

Wm. R. Murphey, for complainant.

W. H. G. Gould, for respondents.

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

J. B. McPHERSON, District Judge. Whether the noncompliance with rules 6 and 9 of this court, and the nonappearance of the plaintiff and his counsel at the final hearing of this cause, were due either to the plaintiff's own negligence, or the misfortune of his sickness, or simply to the negligence or misconduct of his counsel, it is clear that in either event the opening of the decree so as to permit him to have another hearing is a matter of discretion, and should only be granted upon terms. Owing to the somewhat unusual incidents of this controversy, I have not been free from doubt whether the plaintiff was entitled to relief at all; but, as the dispute may involve valuable rights, I have concluded to err (if at all) upon the safe side, so as to avoid a possible injustice.

It is therefore ordered that, if the plaintiff shall pay to the examiner the costs still unpaid for taking the testimony of his witnesses, and shall print so much of his testimony as is still unprinted, depositing five copies thereof with the clerk for the use of the defendant, and shall enter security for the costs of the cause in the sum of $1,000, the clerk is directed to enter an order that the decree made on December 5, 1910, be opened for the purpose of permitting further argument upon the bill, answer, and proofs, but specifying that the lien of the decree is to remain until the further order of the court. These conditions must all be complied with on or before January 19, 1911. If the plaintiff shall fail to comply with any one of them within the period named, the clerk is directed to enter an order that the petition to open the decree is dismissed. If the decree be opened, the court will fix a date for argument upon application of either party.

PRIMEAU v. GRANFIELD.

(Circuit Court, S. D. New York. January 23, 1911.)

1. TRUSTS (§ 219*)—CONSTRUCTIVE TRUST—INTEREST.

   Where defendant to whom complainant gave money to be invested converted the money to his own use, and the circumstances of the conversion indicated wantonness, the fact that defendant got no return from his investment and use of the money did not relieve him from liability for simple interest in an action for an accounting.

   [Ed. Note.—For other cases, see Trusts, Cent. Dig. § 314; Dec. Dig. § 219.*]

2. TRUSTS (§ 350*)—INVESTMENT OF TRUST FUNDS—REMEDIES OF BENEFICIARY—ELECTION.

   When a trustee makes a separate investment of trust funds though wrongfully, the beneficiary may follow the money into the res, or may elect to pursue the money as a lien or charge thereon.

   [Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 515-519; Dec. Dig. § 350.*]

3. TRUSTS (§ 350*) — CONSTRUCTIVE TRUSTS — MIXING FUNDS — ELECTION OF REMEDY.

   Where a trustee wrongfully mixes his own money with that of his cestui que trust and invests the same, the beneficiary does not thereby lose the right to follow his money into the res as property and claim an interest therein, nor is his claim limited to a charge on the property to the

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

extent of his investment, but he is entitled either to enforce his right to a proportionate interest in the property in which the money has been invested, and recover proportionate profits, or to enforce a charge or lien at his election.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 515–519; Dec. Dig. § 350.*]

4. TRUSTS (§ 354*)—TRUST FUNDS—MINGLING—INTEREST OF BENEFICIARY.

Where a trustee wrongfully invested certain of the trust funds in a mining lease, and thereafter sold a one-eighth interest in the lease for $3,000, the beneficiary's interest in that sum was not a sum proportionate to the respective contributions of money by the beneficiary and the trustee up to that time, which had entered into the mine, but was the proportion to which, in equity, the beneficiary was entitled in the whole mine; which was so much as he had contributed to the trustee's total payment, royalty, etc., which made up the consideration for the lease, and this though at the time of the sale, the beneficiary's proportion could not be ascertained, but must remain indefinite until all the expenditures were completed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 527; Dec. Dig. § 354.*]

5. MORTGAGES (§ 199*)—INTEREST OF MORTGAGEE—PROFITS.

A mortgagee has no interest in the property except to have it sold for his debts, and it is of no consequence to him what profits are made from it or in what form they may be so long as the property remains adequate security.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 513; Dec. Dig. § 199.*]

6. TRUSTS (§ 354*)—FOLLOWING FUNDS.

A trustee used certain funds of his cestui que trust to pay a mortgage on the trustee's house, and thereafter put on another mortgage and used the proceeds for the development of a mine. *Held* that, though the beneficiary was subrogated pro tanto as between himself and the trustee to the equity of the first mortgage which his money was used to pay, and was also entitled to a lien on the proceeds derived from the second mortgage, as well as on the trustee's equity in the house, his rights were limited to those of a lienor, and hence he could never become a co-owner with the trustee of any property in which the money derived from the second mortgage had been invested.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 527; Dec. Dig. § 354.*]

7. TRUSTS (§ 354*)—TRUSTEES—WRONGFUL INVESTMENT OF TRUST FUND—RIGHTS OF BENEFICIARY.

A trustee obtained the lease of a mining claim for a term of years with the right to take therefrom all the ore that he chose, agreeing, in return, to work the mine continually with 50 shifts of men per month during the whole term of his possession, and to pay a rent in the form of royalty of 20 per cent. on all of the smelter returns of the ore which he should take out. In developing the mine and performing his agreements under the lease, he wrongfully used certain of his beneficiary's funds. *Held*, that the rent and royalty as used in such lease meant payment for the use of the ground in money, and that the beneficiary in an action against the trustee for an accounting would be entitled to that proportion of the value of the ore as it lay in the ground, as was represented by his contribution to the total expenses of working the mine plus the total rentals or royalties paid to the lessor, together with interest on such sums from the date of their receipt by the trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 527, 528; Dec. Dig. § 354.*]

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

In Equity. Suit by Paul A. Primeau against Horace Granfield. Decree for complainant.

See, also, 180 Fed. 847.

Mark Hyman, for complainant.
Edmund F. Richardson, for respondent.

HAND, District Judge. The defendant does not raise upon his brief the exceptions to the rulings of the learned master upon the falsifications of his five credits, and I shall therefore not consider them. As to interest, I will not allow compound interest, but I see no reason why the defendant should not pay simple interest. The circumstances of his conversion of the money were especially wanton, and the fact that he did not get any return for it does not relieve him from wrongdoing, nor the complainant from the loss arising from being kept out of it for so long. The complainant, whether or not his conduct has been altogether what one could wish, has certainly been much abused in his confidence, and his loss is not made good by the mere return of his principal at the end of 11 years.

The next question, therefore, is as to following the trust funds. The first question is whether from any point of view Primeau can get more than a charge upon the whole Raaler funds to the extent that his money went into it. If not, then it will be unnecessary to go further in the inquiry. No one disputes that when the trustee makes a separate investment of trust funds, though wrongfully, the beneficiary may follow the money into the res, or may elect to pursue the money as a lien or charge upon the res. The claim is that, when the trustee's money is mixed with that of the beneficiary, he loses the right to follow the res as property, and has the right only tc hold it for a charge to the extent of the claim. On principle there can be no excuse for such a rule. There is no reason why, by adding his own funds to the beneficiary's, the trustee should change the beneficiary's rights in the investment, provided there is no doubt what was the proportion of ownership in the funds actually invested. As Lord Brougham says in Docker v. Somes, 2 Myl. & K. 664, that is just the case most likely to arise, when a guilty trustee has used the funds in his own business. Why the estate should suffer all the risk and give the trustee the profit if he wins is beyond comprehension.

Upon authority, also, there is no question that the beneficiary is not limited merely to a charge. Authorities which distinctly proceed upon that theory and cannot proceed on any other are the following: Docker v. Somes, 2 Myl. & K. 664; Wedderburn v. Wedderburn, 4 Myl. & C. 41; Bohle v. Hasselbroch, 64 N. J. Eq. 334, 51 Atl. 508, 61 L. R. A. 323 (Errors & Appeals, 1902); Watson v. Thompson, 12 R. I. 466; Bitzer v. Bobo, 39 Minn. 18, 38 N. W. 609; Bazemore v. Davis, 55 Ga. 504; Greene v. Haskell, 5 R. I. 447; McLeod v. Venable, 163 Mo. 536, 63 S. W. 847; City of Lincoln v. Morrison, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885. I do not find a single case, and I have read a great many, in which the plaintiff's claim for a proportionate profit was disallowed when there were profits to get, and he claimed profits instead of his money with inter-

est. In Atkinson v. Ward, 47 Ark. 533, 2 S. W. 77, a charge only was declared, and the property was sold, although the bill had prayed for a conveyance; but, so far as appears from the report, there were no profits, and the plaintiff was content enough to have the property sold and to get back his money out of it. In any case the point was not raised. The same is true of Land Co. v. Lewis, 101 Me. 78, 63 Atl. 523. There are almost numberless cases in which the words are repeated of Sir George Jessel's judgment in Knatchbull v. Hallett, L. R. 13 Ch. D. 696, 710, that where the trustee's money has been mingled with the beneficiary's the beneficiary is entitled to a charge or lien, but in none of these cases did the plaintiff claim more than to get his money back, and the question of profits was not raised in a single one. The same is true of Knatchbull v. Hallett, supra, itself. Docker v. Somes has never been questioned and was followed by Lord Cottenham in Wedderburn v. Wedderburn, supra.

Another class of cases is that of resulting trusts. I need hardly say that these have nothing whatever to do with the present question because they only decide what is the supposed intention when one person voluntarily pays his own money as part consideration for a conveyance to another. It has long been established law that unless the advance is in some aliquot part of the consideration, it will be assumed to be only a charge. The reason is quite obvious, which is that people do not usually own real property in any but aliquot shares, and that the presumption of intent must follow the usual practice of people.

The case of Litchfield v. Ballou, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132, remains, in which the plaintiff held municipal bonds illegally issued. The bonds having been declared invalid, the plaintiff then sought to have a lien impressed upon the public improvements built with his money. The Supreme Court dismissed the bill for various reasons. The grounds of the decision are not perfectly apparent, except that it is quite clear that the court had no such idea in mind as would help the defendant in this case. A sufficient ground stated was that the bondholders were participes criminis in the violation of the charter, and an equity court would no more raise a trust in their favor than it would raise an implied assumpsit. Another ground seems to have been the difficulty of ascertaining the interests of all persons who would have liens if any such existed. However, whatever the meaning of the language of Mr. Justice Miller, it seems to go to the extent, when so construed, as to forbid any tracing whatever of mixed funds, even for the purpose of establishing a lien, which was certainly not intended to be laid down as the law, for it would have overruled National Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693. It is either good to that extent or it is to be explained as dependent solely upon the facts of that case, which is as Judge Lowell explains it in Re Mulligan (D. C.) 116 Fed. 715, 717. It is only fair to say, however, that in Randolph v. Allen, 73 Fed. 23, 39, 19 C. C. A. 353, the present Chief Justice, sitting in the Circuit Court of Appeals for the Sixth Circuit, cited Litchfield v. Ballou, supra, for the proposition that the beneficiary could not even assert

a lien upon mingled funds. That remark was obiter and I cannot think that the decision in National Bank v. Insurance Company, supra, has been overruled. Unless it has, these obiter remarks do not help the defendant, because they do not support his distinction, and even contradict the law, as he concedes it. They revert to the old rule that mingling of trust moneys with the trustee's stops all further identification. Therefore, I conclude that the beneficiary may follow his mingled funds and become at his election a co-owner with the trustee.

A more difficult question, because it is without authority, arises in ascertaining what part of the withdrawals shall be deemed to have been Primeau's money. I shall consider each bank account as if it were a separate fund, because the parties consent to that disposition. No one disputes that, if the interlocutory decree be right, then some of Primeau's money went into the several bank accounts. Primeau by that mingling got more than a lien, and got the option either to claim a lien or to claim that he was a co-owner in the fund. The language about presumed intent in Knatchbull v. Hallett, supra, which Sir George Jessel laid down with his customary vigor, was merely a way of giving an explanation by a fiction of the right of the beneficiary to elect to regard his right as a lien. That it is a fiction appears clearly enough in this case where Granfield could have had no intention about the investments as he meant to use all the money for himself anyway. To say that in such a case he will be "presumed" to intend to take his own money out first is merely a disingenuous way common enough, to avoid laying down a rule upon the matter. This fiction in Re Oatway (1903) 2 Ch. Div. 356, would have brought the usual injustice which fictions do bring, when pressed logically to their conclusion. Logically, the trustee's widow, in that case, was quite right in claiming the first withdrawal, although the trustee had invested it profitably, and had subsequently wasted all of the fund which had remained in the bank. That was, of course, too much for the sense of justice of the court which awarded to the wronged beneficiary the investment, intimating that the rule in Knatchbull v. Hallett, supra, applied only where the withdrawals were actually spent and disappeared. If to that rule be added the qualification that if the first withdrawals be invested in losing ventures, then the beneficiary is to have a lien, if he likes, till he uses up that whole investment, and then may elect to fall back for the balance upon the original mixed account from which the withdrawal was made, there is no objection, but it is a very clumsy way of saying that he may elect to accept the investment if he likes, or to reject it. The last is the only rule which will preserve to the beneficiary the option which he has when the investment is made wholly with his money. Suppose, as here, that the trustee deposits the money with his own in a bank. That is an investment. We call it a deposit, but we all know that it is only a chose in action. The beneficiary has the right at his election either to become a part owner in this chose in action, or to keep a lien upon it. Suppose he chooses to be a part owner; then, when part of it is released by payment, he is likewise a proportionate co-owner in the money paid. If that money is in turn invested he is a propor-

tionate co-owner in that new investment, and there is no ground why as to that investment likewise he should not have, at his election, the right to become a lienor pro tanto. Sir George Jessel's dictum in his judgment in Knatchbull v. Hallett at page 710 did not deny this, if the words are nicely observed. He says that in the case of a purchase with a mixed fund "the cestui que trust, or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust money purely and simply." No one can dissent from that statement of the law. Then he at once follows it by saying that he does have a charge, which, likewise, no one disputes; but he nowhere says that he has only a charge, and may not have pro tanto an ownership. Two chancellors, Lord Brougham and Lord Cottenham, had previously said that the beneficiary might have such an ownership, and later in Re Oatway it became apparent that, if not, then very great wrong could be done. Sir George Jessel was a very great equity judge, and no one should lightly differ with him, but there is no reason in this case to impute to him anything of the kind here suggested, or to press the fiction of a presumed intent to a conclusion which is out of harmony with the rights of a beneficiary in the analogous case where there has been no mingling of the funds.

The next question is what are the funds to be traced into Granfield's bank accounts. Upon this I must rely upon the oral argument, for the defendant's brief does not discuss the question, and I have no means of knowing how much he disputes. There are three funds claimed to have gone in: The "French Fund," the "Duke Fund," the "Mortgage Fund." There is no dispute that the "French Fund" went into the banks, and I have already decided that they were trust moneys. The "Duke Fund" arose from the sale by Granfield to Mrs. Duke of a one-eighth interest in the lease. He got for this the sum of $3,000, which he deposited in the banks and used. This the master has divided in proportion to the respective contributions of money up to that time entering into the mine. That division I cannot accept. What Granfield sold was an interest in the mine, and Primeau's share of the proceeds of that sale was that proportion to which in equity he was entitled in the whole mine. That proportion, as I shall hereafter show, was so much as he contributed to Granfield's total payments, as royalty and otherwise, all of which together made up the consideration for the lease. It makes not the slightest difference that at the time of the sale to Mrs. Duke Primeau's proportion could not be ascertained, and that it must remain indefinite until all the expenditures were completed. It is often the case that a man may have rights the extent of which cannot at once be ascertained. The easiest way to treat this payment in the account is to disregard it altogether, both in estimating what Primeau put into the mine, and the total payments which formed the whole consideration. This is also the correct way, because by just that proportion in which it would swell the total consideration, by just the same proportion would it swell Primeau's share of the consideration. To illustrate: Suppose that the total consideration, excluding this sum, paid by Granfield was $100,000, and the sums paid by Primeau $2,000, then Primeau had an interest of 2 per cent. in the mine.

That interest he also had in the share sold to Mrs. Duke, and in the $3,000 for which it is sold. The actual total expenses were, however, $103,000, of which therefore Primeau contributed $2,060. As we are concerned only with percentages, the sum of $3,000 may be left out altogether.

The last fund is the "Mortgage Fund." Out of Primeau's funds $4,140 had gone to pay a mortgage on Granfield's house; therefore, in equity Primeau was subrogated, pro tanto as between himself and Granfield, to the equity of that mortgage. When in extremis Granfield put another mortgage of $3,000 on his house and used the money in the mine. Primeau now claims that all of this fund of $3,000 must in equity be regarded as his money because the new mortgage became a first mortgage succeeding his own. That, however, is not in my judgment correct. A lienor has no interest in the property except to have it sold for his debt, and it is of no consequence to him what are the profits made from it or in what form it may be, so long as it remains adequate security. Primeau's rights were wholly as a lienor, in subrogation to the original mortgage, which his money had paid. He never became a part owner in the house, or in the money which came from the house. I agree that he was entitled to a lien upon the $3,000 which Granfield got on the subsequent mortgage as well as on the equity in the house, but his rights were limited to those of a lienor. Whatever Granfield did with that money, Primeau could never become a coowner in it, because his money had never gone into it, but into a mortgage which was an incumbrance upon it. It is, therefore, of no consequence how the lien is marshaled between the fund and the house. Therefore, the only funds which Primeau has traced into the Raaler lease are the "French Funds," but as to those he is entitled to select any investments upon the assumption that he was the owner of that proportion of the money invested which his money bore to the total fund at the time of the withdrawal.

Having now traced a certain portion of Primeau's money into the expenditures made to sink the shaft and open the Raaler lease, the question is whether Granfield's return from the mine was in law the proceeds of that money. That question involves what is meant by "tracing" money into another form. Literally Primeau's money was used in buying machinery and paying the wages of men, to work the mine. The result of that work was to sink a shaft, discover and uncover certain bodies of ore and to bring them to the surface. As to one element—i. e., that of making the ore bodies accessible and bringing them to the surface—that added no more to their value than the actual work done. That is to say, assuming the existence of known ore bodies, their value in the soil is substantially only so much less than when brought out, as the cost of sinking the shaft and opening the drifts. There is no miraculous addition to them by the mere fact of cutting away the superincumbent rock so as to reach them.

As to the second element—i. e., the discovery of the ore—the matter is not so easy. On the one hand it is quite obvious that the ore was not created by its discovery; it was always there. Moreover, its presence was thought not unlikely; or else no one would have spent money looking for it at that place. The money was spent to see whether the

conjecture would be verified. Still it is undoubtedly also true that the verification of this conjecture added value to the lease itself. To give value to such property, not only must it in fact have gold, and be suspected as having it, but it must be known to have it, because value exists in the known uses of a thing, not in the unknown. It cannot therefore be denied that the one cause of the increase in the value of the lease was because Primeau's money went to discover it. However, it is not enough that the expenditure was one cause of the discovery to make the consequent value of the lease the product of that money. There might be a number of such causes running back in time and though the value of the lease was the product of all of them jointly it cannot be said to be the product of any one. How much is to be attributed to the ore itself, for example, and what proportion shall be assigned between the money spent to discover the ore and the ore? Certainly it would be absurd to say that the ore which gave all the value when discovered should not count at all. Therefore, so far as I know the law has never gone into such metaphysics to ascertain how much such expenses contributed to the ore; certainly not, when as here, there is a very much more simple way of ascertaining what the product of the money was. If Granfield had owned the land in fee, and had used the money to explore, these questions might have arisen, but he did not. He had purchased these rights, and they were therefore produced, as rights anyway, by the money which he paid for them under the lease itself. If Primeau's money was part of what he paid, then pro tanto it produced the rights which became so valuable. What then did Granfield have to pay for these rights?

Under the lease Granfield got a term for years in a certain piece of realty with the right to take from it all the ore that he chose. The consideration—i. e., what he gave in exchange for that right—consisted of certain promises upon his part and in the performance of those promises he used some of Primeau's money. The total performance was what he gave in exchange for what he got. Now his performance included working the mine continuously with 50 shifts of men per month during the whole time of his possession, together with the payment of a "rent" in the form of a "royalty" of 20 per cent. upon all the smelter returns of the ore which he should take out. It is quite true that the parties undoubtedly expected that if Granfield struck ore he would in fact pay the rental out of his winnings, and also keep the mine operating by the same means. However, what the parties expected would be the actual course of the business, is quite different from what they stipulated should be their mutual rights and obligations. Whatever Granfield might in fact do, he was not bound to divide the ore with the lessor, and he was bound to pay the rent. Indeed, if he had been the operator of many mines, he would probably have never divided the ore with the lessor in practice. When once the smelter returns had fixed his obligation, the whole ore remained his for better or worse. I do not forget the provision of the lease that the ore shall remain the lessor's, but that can only mean to give him a lien upon it for security of his rent, else otherwise it would defeat the whole purpose of the lease. Nor was this difference in rights fanciful

in result. There have been times when gold was the most speculative of commodities and in 1899 the time was not far past when it had again appeared quite likely to become such. Moreover, it does not appear how the gold was to be sold and in the absence of proof I cannot assume that there were not risks of loss in its transportation and sale as in the case of any other commodity. Whatever the risk of loss or chance of profit upon the whole ore it was Granfield's. Or to take the question of the continued operation of the mine; it was, of course, not dependent upon the mine's continuing to pay after it had once started, but was an absolute covenant during the life of the lease. No doubt, in fact, there was no need of such an obligation, once the mine became paying, but here, as before, the question is not of expectations, but of what the parties meant to be bound by.

If instead of being a gold mine, this had been an iron or a diamond mine, no one would have thought for a moment of regarding it as a co-ownership, instead of what the parties called it, a matter of "rent" and "royalty." Then Granfield would have had to "finance" his rent by arranging to pay money before he sold his product. Gold is, however, so nearly the equivalent of money that one easily confuses the two. Yet they are not identical, and the lessor could under this lease have refused anything in payment but money. Had Granfield, for instance, offered to divide the ore, or the bullion from the ore, the lessor would have had as much right to refuse as if it had been iron, or copper, or coal, or zinc. "Rent" and "royalty" mean the payment of money, and Granfield did not get money out of the mine, but the raw material from which money is made. In my judgment, therefore, the lease was procured by the payments not only to open up the mine originally, but by all the royalties paid and by all the subsequent work of operation. On the other hand, the value of the rights acquired was not Granfield's net winnings, but the total gross value of all the ore, as it lay in the ground and before it was taken out. What Granfield got was the right to take it out, and that is the right into which Primeau has traced his money. Whatever it cost to take it out he must be allowed, for even a defaulting trustee is allowed for beneficial expenditures. Nor does it make any difference that those expenditures were likewise a part of the consideration for the right itself.

This opinion will require a new calculation, but not, I hope, a new reference. Primeau will be entitled to that proportion of the value of the ore in situ, as is represented by his contribution to the total expenses of working, plus the total rentals or royalties paid the lessor. Interest upon these sums from the date of their receipt by Granfield will also be allowed.

Let a final decree pass in accordance with this opinion.

BLACKWELL v. SOUTHERN PAC. CO.

(Circuit Court, N. D. California. December 19, 1910.)

No. 14,820.

1. CARRIERS (§ 149½*)—CARRIAGE OF GOODS—LIMITED LIABILITY CONTRACT—VALIDITY.

Where a shipper was given an option of different rates, one based on full legal liability by the carrier for actual value of goods lost or damaged, and the other a lower rate for which the carrier proposed to carry the goods in case it was released and liability limited to a valuation agreed on between the parties and noted on the bills of lading, and the shipper voluntarily and with full knowledge accepted the lower rate and agreed on a valuation much less than the actual value of the goods, and that the carrier should not be liable except for gross negligence beyond the agreed value, such contract was valid and not contrary to public policy.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 651–662; Dec. Dig. § 149½.*]

2. COURTS (§ 359*)—FEDERAL COURTS—RULES AND DECISIONS.

Where Congress has not seen fit to legislate on a subject involving no federal question, and the case presenting such subject is in the federal court merely by reason of diversity of citizenship of the parties, the court will determine the question in accordance with the declared policy of the state in which it sits, as found either in its statutes or the decisions of its highest tribunal.

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

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

At Law. Action by William Blackwell against the Southern Pacific Company. Judgment for plaintiff.

Thomas, Gerstle, Frick & Beedy, for plaintiff.
C. W. Durbrow, for defendant.

VAN FLEET, District Judge. This is an action at law to recover from the defendant, as a common carrier, damages resulting from the failure of the carrier to deliver in good order and condition certain consignments of spirits and whisky shipped over its lines; the amount claimed being based upon the full or market value of the goods lost.

The consignments all moved under tariff schedules, regularly promulgated and filed by the carrier providing alternative rates, whereby the shipper was given the option of shipping at a certain specified rate of carriage, with full legal liability by the carrier for the actual value of the goods lost or damaged; or of shipping at a specified lower rate, with liability of the carrier released and limited to a valuation agreed upon between the parties and noted on the bills of lading; and during the period covered by the shipments in question there existed between the shipper and carrier special contracts of carriage covering the commodity, whereby, in consideration of the shipper being given the benefit of the lesser rate, the carrier was released from liability other than for gross negligence, beyond the valuation so agreed upon, and which was in each instance stated and indorsed by

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

the shipper on his bill of lading in such appropriate manner as to bring it within the terms of the contract existing at the time of the particular shipment.

No claim of gross negligence is made, the loss arising from leakage or other cause flowing merely from the ordinary accidents of carriage; nor does the case present any question growing out of coercion or overreaching by the carrier, the shipper, so far as appears, being afforded perfect freedom of election between the alternative rates offered and making his choice of the lesser with a full appreciation of its purpose and effect, and the contracts apparently being entered into by both parties freely and voluntarily, for their mutual benefit.

The evidence, however, is such as to indicate, if material, that, in making the contracts, the value of the goods was, with the knowledge of both parties, fixed without reference to their real value, but at a figure much less; and this fact has given rise to the only question in the case, the contention of the plaintiff being that, because with the carrier's knowledge such agreed value failed to equal or approximate the actual value, the case discloses an attempt to unlawfully limit the liability of the carrier, and that the contracts are therefore void as against public policy, and plaintiff entitled to recover his actual loss.

In this attitude plaintiff does not deny the right in the carrier to limit his common-law liability as such by special contract, so long as he does not attempt to exempt himself from responsibility for his own wrong or negligence; nor is it denied that he may lawfully stipulate, in consideration of accepting a lower rate of carriage, for a corresponding limitation of the extent of his liability in the event of loss, the contract being fairly made; but it is claimed that, where it appears that the agreed value is so disproportionate to the actual as to show that the latter was wholly ignored, the contract must as matter of law, and no matter how free in fact from bad faith, be regarded as unfair and wanting in bona fides, and as having only the purpose of avoiding the legal liability of the carrier.

While some such limitation in the right of special carriage contracts has been recognized in certain of the states, the doctrine has never obtained in this state, nor does it accord with the principles announced on the subject by the Supreme Court of the United States. The facts do not make a case distinguishable in principle from that of Hart v. Penna. R. R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, which is conceded to be the leading case upon the subject in this country. If anything, the facts here presented are not as favorable to the claim made as they were in that case. There the plaintiff had shipped over the lines of the carrier a chartered car of five horses under a bill of lading designated, "Limited Liability Live Stock Contract," issued by the defendant company to the plaintiff and signed by him, wherein, in consideration of the rate of carriage therein stated, the liability of the defendant carrier was limited in case of loss to a valuation of $1,200 for the contents of the car, with certain other limitations and conditions not material to notice. It did not appear, as in the case at bar, that the plaintiff was, under the schedule of rates, expressly given a choice of paying a higher rate of carriage with full legal liability by

the company in preference to the contract signed by him; but, so far as the record indicates, the bill of lading tendered was the regular and only form prepared and used by the defendant for the shipment of such property with all of its stipulations printed therein, and was signed by the plaintiff as presented without his being asked to state the real value of the property. Loss having occurred, the plaintiff sued to recover a sum largely in excess of the valuation stipulated in the bill of lading, as damages alleged to have been sustained through the defendant's negligence, and at the trial offered to prove that the horses were valuable race horses; that one of them, killed by the defendant, was actually worth $15,000; and that two others injured so as to be worthless were of a value of $3,000 to $3,500 each. The Circuit Court excluded this evidence and held that plaintiff was limited in his recovery to the agreed valuation of $1,200 stipulated in his bill of lading. The case went to the Supreme Court, where it was claimed, as here, that the contract was void as against public policy in attempting to fix a limit of liability by the carrier less than the actual loss suffered. The judgment was affirmed, the court holding that the contract was valid and obligatory and not opposed to public policy; that:

"Where a contract of carriage, signed by the shipper, is fairly made with a railroad company, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." (Syllabus.)

This statement of the doctrine declared is fully borne out in the text, and is put upon the ground that, the rate of carriage being graduated in accordance with the valuation agreed upon, there is a just and reasonable consideration moving to both shipper and carrier; and that it would be inequitable, in the absence of fraud or imposition by the latter, to permit the former to avoid his contract. In this respect it is said:

"This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he had induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract."

And in answer to the argument that to uphold such a contract is to relieve the carrier from liability, and thus withdraw the incentive to care and diligence on his part, it is further said:

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond

in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

The principles of that case have been fully recognized and followed by the Supreme Court of this state in Donlon Bros. v. Southern Pacific Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. 811, a case presenting facts precisely similar in legal effect to those there considered. In the Donlon Case the bill of lading fixed the value of the animals killed at $20 each, and the plaintiffs sought to recover an alleged value of $1,500 upon substantially the same contention as urged here, and further that the contract was obnoxious to the provisions of section 2175 of the Civil Code of the state, providing that a common carrier cannot exonerate himself from liability for his gross negligence by any agreement made in anticipation thereof. It was held that the contract did not contravene the statute and was not opposed to any principle of public policy, but that, having been fairly made, it concluded and limited the rights of both parties. After a careful review of the authorities on the subject, it is there said:

"In two cases in this court, while the particular section of our Code as to contracts limiting liability for gross negligence was not directly involved, still, discussing the effect of an agreed valuation in a contract between a shipper and carrier, the court expressed itself in approval of the rule laid down in the Hart Case. Said this court: 'There is a wide distinction between a contract for exemption from liability in case of negligence which is usually held in derogation of public policy tending to encourage negligence, and a contract fairly made whereby, in consideration of a lower freightage, the parties agree upon a fixed or determinate value to be placed upon the article to be shipped, in case of its loss.' Pierce v. Southern Pacific Co., 120 Cal. 156, 166, 47 Pac. 874, 52 Pac. 302 [40 L. R. A. 350].

"Also: 'It would be unreasonable for a shipper to expect his packages to be carried for a compensation based upon an agreed valuation much less than the actual value and then, in case of loss, recover the full value. * * * Where * * * the shipper agrees to a certain value, he should not be heard in case of loss to claim a greater value. Such a contract is fair and reasonable and is not contrary to public policy. It is not a contract that relieves the carrier from responsibility for his own misbehavior; he is liable in case of loss for the value of the packages as agreed to by the shipper, and upon which value he pays a reduced compensation for the carriage. Limitation as to value does not excuse negligence.' Michalitschke v. Wells Fargo & Co., 118 Cal. 683, 688, 50 Pac. 847. * * *

"It is true that there are some authorities holding to a contrary doctrine, as there are those which sustain contracts exempting carriers from all liability for negligence; but the weight of American authority is in support of the doctrine announced in the Hart and other cases cited."

And speaking of the specific feature of the contract here relied upon as rendering it void, it is said:

"Nor, in determining whether such a contract is fair or reasonable, can there be taken into consideration the fact whether the agreed value of the property reasonably approximated its real value. That question was pre-

sented in some of the cases cited. In Hill v. Northern Pacific Ry. Co., 33 Wash. 697, 74 Pac. 1054, in reply to a contention of counsel for appellant urging that it should, the court said: 'An examination of the cases cited we do not think sustains this contention, and, even where there has been an attempt to make this distinction, it has been in principle a failure. The contract establishing the released valuation must be construed to embrace the real valuation.' In the Hart Case, 112 U. S. 331, 337, 5 Sup. Ct. 151, 28 L. Ed. 717, which was a suit relative to the value, as here, of race horses, the court dismisses that contention as without merit, saying: 'Although the horses, being race horses, may aside from the bill of lading have been of greater value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed."

The attempt to distinguish those cases from the one at bar is unsuccessful. As we have seen, the rate in this case was made to depend upon the value of the commodity, that value being agreed upon for the purpose of securing the advantage of the lower rate, and in that respect this case is squarely with the doctrine as there stated.

The fact that the goods were in fact of greater value than that agreed upon is immaterial, and was so decided in the Donlon Case; and the fact that both the carrier and shipper knew that the actual value was greater than that stipulated is likewise immaterial, and was so considered in the Hart Case. The evidence here, as in those cases, fails to show that the contracts were not fairly made. While it is true that such a contract will not be enforced if unfair, that only means that the agreement must not have been procured from the shipper by the deceit or coercive action of the carrier; and, as we have seen, there is nothing of that nature appearing in the case.

In support of the distinction contended for, plaintiff places his main reliance upon a report of the Interstate Commerce Commission in 15 I. C. R. 550, under the title, In the Matter of Released Rates. In that opinion the learned commissioner writing the report was expressing the views of the commission as the result of an ex parte hearing, upon the general subject of the validity of released rates, so-called, or contracts for limited liability of the carrier; and particularly as affected by section 20 of the Hepburn act. After discussing the question in various other phases and reaching the conclusion that the right of contract remains substantially unaffected by that section, it is said, in speaking of contracts undertaking, like the present, to limit the liability of the carrier to a stipulated or agreed value:

"(c) If the specified amount does not purport to be an agreed valuation, but represents an attempt on the part of the carrier to limit the amount of recovery to a fixed sum, irrespective of the actual value, the stipulation is void as against loss due to the carrier's negligence or other misconduct.

"Much confusion has arisen from failure to distinguish between this situation and the situation comprehended in Hart v. Pennsylvania Railroad Co., supra. That decision was expressly predicated upon the principle of estoppel; the shipper had misrepresented the value of his property, and had thereby secured the benefit of a lower rate than he was properly entitled to by virtue of the real value. He was estopped by his fraudulent conduct from recovering an amount in excess of the value he had declared. In the case we are now considering, the requisites of estoppel are wanting. An estoppel cannot arise unless the party invoking it has been the victim of misrepresentation and has himself acted in good faith. Can it possibly be argued that when a carrier has arbitrarily placed in its bill of lading a stipulation limiting the amount of its liability, regardless of the actual value of the property,

it may claim the benefit of an estoppel? Obviously not; it has not acted in good faith, neither has it been the victim of misrepresentation."

And again:

"(d) If the specified amount, while purporting to be an agreed valuation, is in fact purely fictitious and represents an attempt to limit the carrier's liability to an arbitrary amount, liability for the full value cannot be escaped in event of loss due to negligence.

"This situation is substantially identical with that just considered—the difference is one in form only. If the shipper and carrier collusively agreed that, for the purpose of the transportation, the property shall be deemed to have a specified value which both knew to be grossly disproportionate to the true value, the agreement cannot be called bona fide. It may be styled an 'agreed valuation,' but it is obviously an attempt to accomplish what the law forbids. This requirement that the carrier shall not limit in any degree its responsibility for negligence is uncompromising, and it will not yield merely because the parties choose to employ the phrase 'agreed valuation.' The law will not countenance so obvious a subterfuge."

It is contended that, within the rule as thus stated, and more especially as stated in the second proposition (d), the contracts involved should be held void as entered into collusively and in bad faith, since both parties knew of the disparity between the actual and the stipulated value of the goods shipped; and it may be conceded that, if the proposition as there put embodies a correct statement of the law, that result should follow. But it is at once apparent that the views there advanced are based upon the authority of certain state decisions where such doctrine prevails and the theory that the decision is the Hart Case is not opposed thereto. In other words, the opinion construes the latter case as having no application to an instance where both parties to such a contract are aware that they are stipulating to a value greatly disproportionate to the actual value of the property. This is plain since it is said in effect that the carrier in that case did not know the value of the property to be other than as stated in the bill of lading; and it is explicitly stated that the decision was "expressly predicated upon the principle of estoppel" because of the fraudulent misrepresentation of the value by the shipper.

A careful reading of the opinion in that case will disclose that this statement involves an obviously erroneous conception of the ground on which the conclusion of the Supreme Court was rested. While the court discusses, with other elements, the effect of misrepresentation or concealment as to value in making such a contract, it does not base its decision upon the existence of any such element in that case. Indeed, upon the facts as stated, no such element was there shown. The court bases its conclusion squarely upon the proposition that the shipper was concluded by his contract; the court saying:

"Although the horses, being race horses, may, aside from the bill of lading, have been of greater value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed."

And again:

"The valuation named was the 'agreed valuation,' the one on which the minds of the parties met, however it came to be fixed."

And the court concludes:

"The distinct ground of our decision in the case at bar is that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. Squire v. New York Central R. R. Co., 98 Mass. 239, 245 [93 Am. Dec. 162], and cases there cited."

From this it is certain that, as stated above, the question of the carrier's knowledge of the real value of the goods, where the contract is otherwise fair, is regarded by the Supreme Court as a wholly immaterial factor. The views of the Interstate Commerce Commission as above expressed are therefore out of harmony with the principles announced by the Supreme Court in that case.

But independently of the decision in that case this court would feel called upon to follow the ruling of the Supreme Court of the state in the Donlon Case. Congress has not seen fit to legislate on the subject of the validity of contracts of the nature involved; and consequently, the matter for decision involving no federal question, the case being here merely by reason of diversity of citizenship, this court will adopt the declared policy of the state in which it sits, as found either in its statutes or the decisions of its highest tribunal. Pennsylvania R. R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268.

It results from these considerations that the contracts in question must be upheld as lawful and binding, and the plaintiff thereby precluded from recovering herein on the basis sought by him. It is conceded, however, that, under the agreed valuation fixed in the contracts, the plaintiff has suffered a loss in the sum of $1,760.70; and, accordingly, a judgment may be entered in his favor in that sum.

MURPHY et al. v. HERRING-HALL-MARVIN SAFE CO.

(Circuit Court, D. Nevada. January 23, 1911.)

No. 1,068.

1. REMOVAL OF CAUSES (§ 112*)—SPECIAL APPEARANCE—OBJECTIONS TO PROCESS—WAIVER.

An appearance in the state court for the sole purpose of exercising a right to remove the case to the federal court should be regarded as a special appearance for such purpose, though containing no express limitation, and will not therefore constitute a waiver of an objection to the jurisdiction on the ground that the summons was not properly served.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 238; Dec. Dig. § 112.*]

2. APPEARANCE (§ 9*)—GENERAL APPEARANCE—MOTION TO EXTEND TIME TO ANSWER.

Where, after service of process, defendants' attorneys applied for and were granted an order extending the time to answer, appear, move, or otherwise plead to the complaint or action in the cause, such order con-

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

stituted a general appearance and waived defendants' objection to the service of process, though defendants for the express purpose of obviating such effect secured the order secretly, ex parte, and out of court, and did not file the same in the state court until it was necessary to do so to have it certified in the record on removal.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42–52; Dec. Dig. § 9.*]

3. MOTIONS (§ 8*)—ACTION OF JUDGE—ACTS DONE OUTSIDE OF COURT.

Anything that a judge may properly do in a cause on the application of a party is an exercise of jurisdiction, whether done in open court or in chambers, and hence an order extending the time to plead, made by the judge as he was leaving the courthouse, was valid under the rule that that which a judge may lawfully do in chambers he may do at any other place in the district.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 5; Dec. Dig. § 8.*]

Action by J. B. Murphy and another, doing business under the name of Murphy-Balliet Company, against the Herring-Hall-Marvin Safe Company. On motion to quash service of summons. Denied.

M. A. Murphy, for plaintiffs.

McIntosh & Cook, for defendant.

VAN FLEET, District Judge. This is a motion to quash the service of summons on the ground that it was not made in a manner to give the court jurisdiction of the defendant. The action is one at law, commenced in the state court by plaintiffs, residents of the state, to recover damages for alleged deceit against the defendant, a corporation organized and existing under the laws of the state of New York. Defendant maintained no office or place of business in the state, nor had any resident agent therein, but had a general agent for the Pacific Coast who was a resident of the state of California with his office located in the city of San Francisco. Service of summons was had personally upon this agent at Tonopah, Nev., while he was temporarily there in necessary attendance as a witness upon the trial of a case then in progress in the state court in which this defendant was plaintiff and the present plaintiffs were defendants; the service being made by the sheriff of the county.

Having, in due time, had the cause removed to this court upon the ground of diversity of citizenship, the defendant has interposed the present motion, based upon the theory that the facts bring the case within the well-established doctrine of the federal courts that, in a personal action like the present, brought against a corporation in the courts of a state of which the defendant is a nonresident and wherein it neither has property nor does business, nor maintains an agent to represent it, a service made, as in this instance, upon an officer of the defendant merely temporarily within the state, is ineffectual and void and confers no jurisdiction over the person of the defendant. Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517, and cases there cited.

Plaintiffs resist the motion upon several grounds. It is contended: First, that the circumstances under which the service was made take

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

the cause out of the rule above referred to; second, that, by reason of a certain order made at defendant's instance in the state court, defendant waived any defect that may have attached to the mode of service; and, third, that, defendant not having limited his appearance in the state court on his application for a removal to a special appearance for that purpose, such application in itself constituted a general appearance in the case which gave the state court jurisdiction of the person of the defendant.

As to the last proposition, it is sufficient to say that, while there are some of the earlier cases which sustain such contention, the latest expressions from the Supreme Court hold the contrary view; and it may now be regarded as settled that an appearance in the state court for the sole purpose of exercising the right of removal, even in the absence of any express limitation thereof in its terms, is to be regarded as a special appearance for such purpose, and as constituting no waiver of an objection to the jurisdiction, such as here made. Wabash Western Railroad v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; National Accident Society v. Spiro, 164 U. S. 281, 17 Sup. Ct. 996, 41 L. Ed. 435.

With reference to the defendant's first contention, above stated, there was evidence adduced at the hearing of the motion tending to show that, while defendant maintained no office or fixed place of business in Nevada, it nevertheless did business therein through the medium of traveling salesmen employed in selling its safes, and further that, while having no resident agent therein, that state was in fact included in the territory represented by the agent upon whom the service was had; and it is contended that these facts make a case which does not fall within the application of the doctrine relied on by defendant. But I do not deem it necessary to pass on this objection, since, in the view I take of the second ground urged against the motion, that question becomes immaterial.

As to the latter objection, it appears that, within the time required under the statute of the state to appear, the attorneys then representing this defendant in the action on trial in the state court and now appearing for it here made application to the judge of that court and obtained an order in the cause of which the following is a copy:

"At the request of Messrs. McIntosh & Cook, the time of answering, appearing, moving, or otherwise pleading to the complaint or action in the above-entitled cause is hereby extended to and including the 12th day of April, 1909. Dated March 24, 1909.

"M. R. Averill, District Judge."

It is contended by plaintiffs, and I think correctly, that in applying for and obtaining this order the defendant must be held to have submitted itself to the jurisdiction of the state court and to have thereby estopped itself from now urging any objection to the regularity of the service of the process. The making of an order in a cause is an exercise of jurisdiction therein, and jurisdiction may be exercised only at the instance of a party; that is, it must appear and ask it. When, therefore, one applies to a court or judge for an order granting him relief of any character, and an order for time in which to

do an act is a grant of relief (Curtis v. McCullough, 3 Nev. 202; Ayres v. Western Railroad, 48 Barb. [N. Y.] 132), he necessarily appears for that purpose.

Such an appearance may be either general, that is, without reserve, or it may be special, for a particular purpose; but if intended as special it must be so stated in some appropriate manner, otherwise it will be deemed a general appearance.

In this instance, as disclosed by the very comprehensive terms of the order, the application was without reserve, the order being sufficiently broad to enable defendant within the time given to plead to the complaint in any form in which under the statute he could be called upon to answer the cause of action set up. Moreover, the application was purely a voluntary one on the part of the defendant and was necessarily based upon the assumption that the court had acquired jurisdiction to grant the relief sought. That such an application constituted an appearance I entertain no doubt. "It was doing an act in the progress of the cause and submitting to the jurisdiction of the state court, and was equivalent to an appearance." Ayres v. Western Railroad, supra. See, also, Curtis v. McCullough, supra; Insurance Company v. Swineford, 28 Wis. 257; Texas & Pacific Ry. Company v. McCarty, 29 Tex. Civ. App. 616, 69 S. W. 229; Murat v. Hutchinson, 16 N. J. Law, 46; Sargent v. Flaid, 90 Ind. 501.

And since it was clearly not an appearance for any special purpose it must be held to be a general appearance for all purposes.

Nor need an appearance to conclude a party for the purpose here involved be made in any specific manner. Any act which in its legal effect submits one to the jurisdiction of the court is sufficient, although the statute may prescribe a particular method for other purposes. See cases above cited.

Defendant very strenuously seeks to evade the effect of its action in obtaining this order by urging upon the attention of the court the manner in which it was applied for and obtained, and by reason of which it is argued that the act did not in this instance constitute a proceeding in court, nor an appearance therein for any purpose; and further that it cannot be held to have been an appearance in the action because never intended as such. The order was applied for without notice and obtained from the judge ex parte, out of court, being signed, in fact, in the corridor of the courthouse as the judge was leaving the building; it was not served upon the attorneys for the opposite side, nor filed with the clerk at the time, but retained in the keeping of the attorney obtaining it; nor does it appear that opposite counsel had any knowledge for some considerable period of time thereafter that any such order had been procured; but subsequently and after the proceedings for removal had been taken the order was filed by the attorney obtaining it in time to be certified here with the record on removal, and now appears as a part of the history of the case.

This course is now frankly admitted by counsel for defendant to have been intentionally pursued by them for the very purpose of

avoiding any chance that their action could be held to be an appearance; and from which they argue that the order thus obtained cannot be properly regarded as a step taken in the action at all, but as one constituting no part of the proceedings in the case and by which the defendant therefor should not be bound.

But obviously there is no principle which would lend to an act accomplished in the surreptitious manner here disclosed any different aspect as to its effect upon the rights of the party pursuing such a course, from that it would have if performed in the open. Such a rule would enable one to reap the advantage of his own wrong; for very certainly the law should and does discountenance any such clandestine method in judicial proceedings. The circumstances might well have availed the opposite party to have the secret order set aside, but certainly they cannot be pleaded by the one obtaining it to his own advantage. Nor is there anything in the fact that the application was made and the order procured out of court which in the slightest detracts from its legal effect as an appearance in the cause. Anything a judge may properly do in a cause on the application of a party is as much the exercise of jurisdiction, whether it be in open court or in chambers; and, as that which a judge may lawfully do in chambers he may do at any other place in his district, an application made to him under the circumstances here disclosed is as potent to invoke the exercise of jurisdiction as if made in court. And, of course, it can make no difference in the effect of the proceeding that it was not intended as an appearance. As suggested by the Supreme Court in Wabash Western Ry. v. Brow, supra:

"An appearance which waives the objection of jurisdiction over the person is a voluntary appearance, and this may be effected in many ways, and sometimes may result from the act of the defendant, even when not in fact intended."

In other words, the effect is not to be deduced from what the party may have intended, but from what he did. It is the act which speaks, and not the secret purpose. A party cannot avail himself of the benefit of such a step and then be heard to say that it shall not be given the usual and ordinary effect of like proceedings because he did not so intend.

The motion will be denied.

UNITED STATES v. CALHOUN.

SAME v. BORNN HAT CO.

(District Court, S. D. New York. January 9, 1911.)

1. CUSTOMS DUTIES (§ 80*)—APPRAISEMENT—REAPPRAISEMENT—STATUTES—CONSTRUCTION.

Aldrich Tariff Act Aug. 5, 1909, c. 6, § 28, subsec. 13, 36 Stat. 99 (U. S. Comp. St. Supp. 1909, p. 819), providing that an appraisal of goods by an appraiser shall be final and conclusive against all parties, and shall not be subject to review in any manner for any cause, in any tribunal or

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

court, does not exclude a reappraisement previously provided for in the same subsection.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 80.*]

2. CUSTOMS DUTIES (§ 80*)—IMPORTATION—APPRAISAL—JURISDICTION OF COLLECTOR.

Tariff Act Aug. 5, 1909, c. 6, § 28, subsec. 13, 36 Stat. 99 (U. S. Comp. St. Supp. 1909, p. 819), provides for the appraisal of imports by an appraiser, and that such appraisal shall be final and conclusive against all parties, and shall not be subject to review in any manner for any cause, in any tribunal or court. Subsection 14 declares that the decision of the collector as to the rate and amount of duty shall be conclusive against all persons interested, and subsection 15 provides for an examination touching any matter which the officer may deem material in respect to any imported merchandise in ascertaining the dutiable value and classification thereof. Act Cong. June 22, 1874, c. 391, § 21, 18 Stat. 190 (U. S. Comp. St. 1901, p. 1986), left unrepealed by the tariff act of 1909, provides that after duties have been liquidated the settlement shall, after the expiration of a year from the time of entry, in the absence of fraud, be final and conclusive on all parties. *Held* that, where imports have been appraised by an appraiser, the collector has no jurisdiction to reappraise the same, and though authorized to institute a proceeding within a year to reliquidate the duties, and to examine the importer as a witness for that purpose, he has no jurisdiction in that proceeding to compel the importer to testify with reference to the value of the goods, and so lay a foundation for reappraisement under the guise of a reliquidation; and this though the original appraisement was induced by fraud.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 80.*]

3. CUSTOMS DUTIES (§ 80*)—APPRAISEMENT OF IMPORTS—REAPPRAISEMENT—AUTHORITY.

Under Tariff Act Aug. 5, 1909, c. 6, § 28, subsec. 13, 36 Stat. 99 (U. S. Comp. St. Supp. 1909, p. 819), authorizing a reappraisement of goods entered and appraised for duty, such reappraisement can be conducted only by the appraising officers and not by the collector.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 80.*]

4. CUSTOMS DUTIES (§ 81*)—PROCEEDINGS—APPEARANCE—DUTY TO APPEAR—SCOPE OF PROCEEDING—JURISDICTION.

Where a defendant corporation was cited to appear before the collector and produce books and papers for examination in a proceeding which the collector had jurisdiction to institute, it was no excuse for the corporation's disobedience of the collector's order to appear and produce books and papers that the collector intended to extend the proceedings to matters over which he had no jurisdiction.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 81.*]

5. CUSTOMS DUTIES (§ 81*)—PROCEEDINGS BY COLLECTOR—EXAMINATION OF IMPORTER—PURPOSE—RELIQUIDATION—"VALUE OR CLASSIFICATION."

Tariff Act Aug. 5, 1909, c. 6, subsec. 13, 36 Stat. 99 (U. S. Comp. St. Supp. 1909, p. 819), provides that an appraiser's appraisal of goods to be imported shall be final and conclusive against all parties, and shall not be subject to review, but authorizes a reappraisement. Subsection 14 declares that the collector's decision as to the rate and the amount of duties shall also be final and conclusive against all persons interested, but Act Cong. June 22, 1874, c. 391, 18 Stat. 190 (U. S. Comp. St. 1901, p. 1986), unrepealed, provides that, after the duties have been liquidated, the settlement shall after the expiration of a year from the time of entry, in the absence of fraud, be final and conclusive. Section 28, subsec. 15, provides that the general appraiser and collectors shall examine the importer under oath in any matter or thing which they may deem material respecting any imported merchandise in ascertaining the dutiable "value or classification" thereof. *Held* that, since the words "value or classifi-

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

cation" include both an appraisal and liquidation, it may also include a reliquidation by the collector by proceedings instituted by him within the year, and hence the collector is entitled within that period to institute reliquidation proceedings, in which the importer may be cited for examination, though there can be no reappraisement by him.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 81.*]

6. CUSTOMS DUTIES (§ 81*)—TARIFF ACT—CONSTRUCTION—RELIQUIDATION—PENALTIES.

The right of a collector to examine an importer in a proceeding for a reliquidation of duties within a year after importation, conferred by Tariff Act Aug. 5, 1909, c. 6, § 28, subsec. 15, 36 Stat. 100 (U. S. Comp. St. Supp. 1909, p. 821), is not limited or affected by the fact that the provision for forfeiture in case of default contained in subsection 16 does not apply to examinations in aid of reliquidation.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 81.*]

7. CUSTOMS DUTIES (§ 81*)—CORPORATION—PRODUCTION OF BOOKS.

Where proceedings were instituted by a collector to reliquidate duties on goods imported by a corporation engaged in business and having books of account, citation was properly issued therein to the corporation directing it to appear in such proceedings and produce its books of account.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 81.*]

Actions by the United States of America against David Calhoun and against the Bornn Hat Company to recover penalties for failure to answer and produce books and papers before a collector of internal revenue. Verdict for plaintiff in the first case, and for the United States in the second.

These are two actions brought under subsection 16 of section 28 of the Aldrich tariff act passed August 5, 1909 (Act Aug. 5, 1909, c. 6, 36 Stat. 100 [U. S. Comp. St. Supp. 1909, p. 821]), providing a penalty of $100 against any person who refuses, when duly cited, to appear and answer and to produce papers before a general appraiser, a board of local appraisers, a local appraiser, or a collector. Subsection 15 of that section provides as follows: "That the general appraisers, or any of them, are hereby authorized to administer oaths, and said general appraisers, the boards of general appraisers, the local appraisers or the collectors, as the case may be, may cite to appear before them, and examine upon oath any owner, importer, agent, consignee, or other person touching any matter or thing which they, or either of them, may deem material respecting any imported merchandise, in ascertaining the dutiable value or classification thereof; and they, or either of them, may require the production of any letters, accounts, or invoices relating to said merchandise, and may require such testimony to be reduced to writing, and when so taken it shall be filed in the office of the collector, and preserved for use or reference until the final decision of the collector or said board of appraisers shall be made respecting the valuation or classification of said merchandise, as the case may be."

Before the issue of this citation, the defendant Calhoun had imported into the United States one shipment of Panama hats. This had been entered in due course, the provisional duties paid, the merchandise surrendered, the appraisement had been made, and the time had passed within which either the collector or the importer could "appeal to reappraisement." No such appeal was taken. Upon the appraisement so made the collector had fixed and liquidated the duties, and those duties had been paid. The same state of facts is true of the defendant Bornn Hat Company, which is a corporation, except that they had previously imported more than one consignment of hats. The Panama hats are being constantly imported into the United States from a number of shippers in South America and the island of Jamaica. This cita-

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

tion was issued by a collector of customs in the port of New York at the instance of one Wheatley, a special agent of the Treasury Department, who at that time was engaged in a general investigation into the price of such hats at the places of exportation of the same. He had received certain letters which led him to suppose that such shipments were being constantly made at fraudulent valuations, and likewise supposed that the importations of the defendants herein were fraudulent in the same way. The purpose of the special agent was to ascertain the market value of the goods at the places of exportation. Except as this may have constituted it, there was no proceeding pending to reopen the liquidation of the duties paid by either of the defendants, nor to secure a reappraisal. The case was tried before a jury of one and reserved for the consideration of the court.

Addison S. Pratt, Isaac H. Levy, and John N. Boyle, for the United States.

John Giblon Duffy, for defendant Calhoun.

Abram I. Elkus and Donald A. Adams, for defendant Bornn Hat Co.

HAND, District Judge (after stating the facts as above). At the outset it must be noticed that this case does not involve the citation of the defendants here as witnesses in a proceeding for appraisal, reappraisal, liquidation, or reliquidation of the goods of another. The citations expressly limit the proposed examinations respectively to importations made by the defendants themselves. Therefore it is as importers, not as witnesses, that they are summoned.

Subsection 15 of section 28 of the tariff act authorizes the examination touching any matter which the officer may deem material respecting any imported merchandise in ascertaining the dutiable value and classification thereof. As at present located, this subsection follows subsections 13 and 14, which set forth the appraisal of the merchandise and the fixing of the duties. Subsection 13 provides that the appraiser shall make an appraisal of the goods which "shall be finally conclusive against all parties and shall not be subject to review in any manner, for any cause, in any tribunal or court." This, of course, does not exclude the reappraisement previously provided for in the same subsection. Subsection 14 provides likewise that the "decision of the collector as to the rate and amount of duties * * * shall be final and conclusive against all persons interested." There remains unrepealed section 21 of the act of June 22, 1874, which provides that, after duties have been liquidated, the "settlement of duties shall, after the expiration of one year from the time of entry in the absence of fraud, * * * be final and conclusive upon all parties." Act June 22, 1874, c. 391, 18 Stat. 190 (U. S. Comp. St. 1901, p. 1986). Since subsection 14 of section 28, which has been in substantially the same form since before 1874, provides that the liquidation of the collector shall only be final and conclusive upon all parties interested in the goods, the result was that prior to 1874 there had been an unlimited right on the part of the collector to reliquidate at any time he saw fit, but that the importers had no such right. The act of 1874 imposed such a limitation upon the collector, but gave him no new powers. U. S. v. Phelps, 17 Blatchf. 312, Fed. Cas. No. 16,039; U. S. v. Comarota (D. C.) 2 Fed. 145; Neresheimer v. U. S. (C. C.) 131 Fed. 977. The same law seems to be recognized in Gandolfi v.

U. S., 74 Fed. 549, 20 C. C. A. 652; Abner Doble Co. v. U. S., 119 Fed. 152, 56 C. C. A. 40.

It was the collector who issued these citations, and the time had not expired within which his inquiry for reliquidation could have been made. The defendant Calhoun appeared in response to the citation and testified in regard to the classification, thus recognizing the rights of the collector to inquire into a reclassification, but he refused to testify in regard to the value of the goods, asserting that his powers did not include any reappraisal. He therefore raised distinctly the question of whether a citation could issue to review an appraisal, and he might further have raised an issue as to whether the collector from any point of view could take such testimony; he not being the appraising officer under these circumstances.

The position of Calhoun was correct, I think, and the time had passed in which any reappraisal of the goods could take place. The statute is as peremptory as can be, and makes the appraisal conclusive upon all parties, including the collector, and not subject to review in any manner, for any cause, or by any tribunal. No words could be stronger. The right of the collector to liquidate is not affirmatively given anywhere, but is recognized by implication in subsection 14 of section 28 of the present act, in that he is not concluded by his own liquidation and in section 21 of the act of June 22, 1874, in that the right is limited to one year. If the right be supposed to extend to a reappraisal, it is met by three difficulties, each insuperable: First, the collector is not concluded by the appraisement of subsection 13 in the very teeth of the statute; second, the two statutes themselves conflict, since under subsection 13 the conclusiveness is immediate, while under section 21 of the act of 1874 it is such at the end of one year; third, the collector is made an appraising officer, which, when there are appraisers, he is never intended to be, but is indeed intended to be a party before the appraiser. If the construction of the government be sound, a collector need never abide by any appraisal, though he does not appeal, for under the guise of reliquidation he may at once appraise it for himself. Another consequence is that, under such a reliquidation, appeal would lie to the Court of Customs Appeals upon a question of appraisal.

Therefore, from every point of view, even from the very scheme and structure of the whole system, it is apparent that the reliquidation of the collector cannot include a reappraisal, but must proceed upon the basis of the old appraisal. Such authority as there is accords with this view. U. S. v. Morewood (C. C.) 94 Fed. 639. In this case Judge Townsend refused to admit the validity of a change in appraisal made even to correct a clerical error, and the same position was conceded by the government in U. S. v. Thomas Leeming & Co. (C. C.) 153 Fed. 489. General Appraiser Somerville so decided in a lucid opinion in U. S. v. Western Union Telegraph Co., Treasury Decisions, vol. 5, Index No. T. D. 23,601 (G. A. 5,100).

The government insists that a different rule applies in cases in which the appraisal has been procured by fraud. I do not think so.

In case there has been a fraudulent appraisal, the government has the right in subsection 9 of section 28 of the tariff act to sue for the full value of the goods, and it then has all the right to procure evidence which any plaintiff has in a court of law. Moreover, the offense is criminal, and the United States is therefore protected in that way as well. As I have shown, the reason for the collector's right to reliquidate at all is because subsection 14 does not conclude him. U. S. v. Phelps, supra. Section 21 of the act of June 22, 1874, was merely a statute of limitation, and but for the exception as to fraud would have concluded the collector from reliquidating at the end of the year. His right to reappraise did not need any limitation because he never had any such, either to reappraise, or to appraise in the first place, when there were appraisers. The fact of fraud might have reopened the appraisal to the appraising officers; but it did not, for Congress apparently relied upon the other sanctions of the act. It is not as if the United States had no protection. Therefore, even assuming that the collector could issue this citation upon a reliquidation, the scope of his inquiry did not include a reappraisal. If it was not material, Calhoun need not have answered it. U. S. v. Doherty (D. C.) 27 Fed. 730. In Calhoun's case I direct a verdict for the defendant.

The case of the Bornn Hat Company is different, because, though served with the citation, it defaulted altogether. Several questions arise: Was there any power in the collector to hold such an examination at all? Had the time passed for it? Was the fact that the purpose of the collector was to examine as to values a good defense? Was a corporation amenable? Could production of its books and papers be ordered without proof of their materiality? Was there a proceeding pending, and did the defendant have adequate notice of it?

The first question is whether the collector could hold such an examination at all, which question in turn depends upon whether subsection 15 applies to other hearings than appraisals and original liquidations. That question Calhoun avoided; but it is necessary to decide it here, because, if the collector had the power to hold an examination at the time for any purpose, it is clear that the defendant was not excused from attendance, because in fact the collector had in mind a new appraisal. The defendant would have been bound to appear and conform to all lawful directions of the collector. It could only refuse to submit the books at all in case the collector had no right to hold any examination of its books whatever at that time and upon those shipments for any purpose. The undisclosed illegal purpose of a public officer is no answer to a disobedience of his order, if that order be within the scope of his powers at the time. Of course, had he in fact gone into irrelevant matters, then the defendant might have protected itself. U. S. v. Doherty, supra.

The defendant takes the broad position that the collector may not use subsection 15 even upon a reliquidation which does not involve any reappraisal, but that it is clear that that subsection contemplates only appraisal and liquidation, together with the proceedings on appeal in each.

Originally both in section 17 of Act Aug. 30, 1842, c. 270, 5 Stat. 564, and in section 2922 of the Revised Statutes, the examination was expressly limited to "ascertaining the true market value or wholesale price" of the merchandise. Obviously no such examination could be authorized by a collector seeking either to liquidate or reliquidate, if the decision is right in respect to Calhoun. In 1890, under sections 16 and 17 of Act June 10, 1890, c. 407, 26 Stat. 138, 139 (U. S. Comp. St. 1901, p. 1935), the words were changed to the words "value or classification," which include not only an appraisal but a liquidation. Do they include only the original liquidation, or also the reliquidation allowed by implication from the fact that the collector is not under subsection 14 concluded by his own finding, at least for a year? Normally, the examination would be held to be in aid not only of the first liquidation provided under subsection 13, but of any subsequent liquidation, since such a subsequent one must arise from the general power conferred by the words "ascertain, fix and liquidate the rate and amount of the duties to be paid." The defendant raises several objections from the phraseology of subsections 15 and 16: First, they say that since the appraisal must be while the goods remain in custody, and since the subsection clearly contemplates that the examination be in aid of an appraisal, therefore the examination may not be had after the goods are in the commerce of the country. The argument goes too far. It does not follow that, because the examination may be in aid of appraisal or reappraisal, it may not also be in aid of a reliquidation. The appraisal would have to be while the goods were in custody; not so the reliquidation. The classification of the goods, "thereof," may be ascertained in the absence of the goods, though it so happens that the original classification could not be.

Nor is the objection better that the testimony shall be filed until the final decision. There is no indication in the act that that final decision must be before the goods get out of the collector's custody. There is a final decision and an appeal as much in case of a reliquidation as in case of a liquidation. Nothing therefore in that provision contradicts the application of the subsection to a reliquidation.

In subsection 16 it is provided that the appraisement shall be final if the person cited shall fail to appear. There is no provision that the liquidation shall be final. It is an instance of carelessness in drafting the statute in 1890 when the scope of it was changed to an examination in aid of both appraisal and classification from one applicable only to appraisal. However, the argument proves too much, because legitimately carried out it would eliminate the added word "classification," which it cannot do. Whatever may be said of "reliquidation," no one can doubt that the examination may be in aid of the original "liquidation." If so, the penalty of finality is not in any case coextensive with all the examinations possible under the act. But, if there be possible examinations in aid of "liquidation," why not in aid of "reliquidation"? That particular penalty would apply to neither, and, if the argument fails as to one, then it cannot cut out the application of the act to the other.

Finally, subsection 16 concludes with a provision for forfeiture. It is true that this may apply to a default as to examinations in aid of both appraisals and liquidations, but that it cannot apply to examinations in aid of reliquidations. However, it does not follow that the scope of the act must be limited because some of the penalties will not extend to all the cases covered by it. We have just seen that the penalty of finality does not extend to liquidation in any case, and yet that liquidation must be comprehended within subsection 15. This forfeiture provision, like the finality penalty, was coextensive with the whole act till 1890, but the change of that year necessarily enlarged the scope to the general liquidating duties of the collector, and in fact included, as I believe, the second liquidation after the goods were out of custody. The old provisions remained applicable in some parts only to appraisal and in others to appraisals and original liquidations, though to the latter merely by chance up to that time. I believe that the truer interpretation of the intent of Congress is to suppose that the old penalties were left to apply so far as they would go, and that they were not intended to limit the scope of the examination. As I have pointed out, that cannot have been the case as to the penalty of finality. If so, why should the penalty of forfeiture have a different effect?

Therefore I think that the collector had the power to order an examination in aid of a possible reliquidation. The defendant could not safely disregard his citation. As to the corporate entity of the defendant, the point is not good. It could not be sworn, but it alone could produce its books. It was an importer, and a person, and it had books. Those books were open to any legal inspection. The question of whether they would in fact contain anything material or not the defendant had no right to determine for itself. If it had appeared and made evidence of the contents of the books, submitting to be cross-examined as to whether the books were material in fact, perhaps its officers' oaths would be conclusive in analogy with the old rule of inspection in equity. It is not necessary to decide that, but only to decide that a mere assertion now that the collector has not shown that the books were material is not enough to excuse a disregard of the citation altogether.

I direct a verdict for the United States in the case against the Bornn Hat Company.

In re BORNN HAT CO.

(Circuit Court, S. D. New York. January 12, 1911.)

1. GRAND JURY (§ 36*)—SUBPŒNA DUCES TECUM—CORPORATIONS.
A subpœna duces tecum may issue against a corporation requiring it to appear before a grand jury and produce books and papers for examination.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 36.*]

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

2. WITNESSES (§ 293*)—PRIVILEGE—CORPORATION—"PERSON."
A corporation is not a "person" within the fifth amendment of the federal Constitution, providing that no person shall be compelled in any criminal case to be a witness against himself.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1012; Dec. Dig. § 293.*

For other definitions, see Words and Phrases, vol. 6, pp. 5322–5335; vol. 8, p. 7752.]

3. GRAND JURY (§ 25*)—POWERS—INQUISITION.
A federal grand jury has inquisitorial powers.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 62; Dec. Dig. § 25.*]

In the matter of the presentment against the Bornn Hat Company. Application for subpœna duces tecum to compel the corporation to bring its books and papers before a grand jury. Granted.

The grand jury is engaged in an inquiry into certain alleged violations of the customs laws of the United States by the Bornn Hat Company. The Bornn Hat Company is a New York corporation. A subpœna duces tecum has been duly issued, out of this court, addressed to the Bornn Hat Company, and has been duly served upon the corporation. This subpœna is as follows:

"The President of the United States of America to Bornn Hat Company, 22 West 4th Street, New York City—Greeting:

"We command you, that all business and excuses being laid aside, you appear and attend before the grand inquest of the body of the people of the United States of America for the Southern District of New York at a Circuit Court to be held at the United States Court House and Post Office Building, Room 119, fourth floor, in the borough of Manhattan, city of New York, in and for the said Southern District of New York, on the 5th day of January, 1911, at 11 o'clock in the forenoon of that day in a certain inquiry pending before the said grand inquest into alleged violations of the act of Congress of the United States approved August 5, 1909, entitled 'An act to provide revenue,' etc., by the Bornn Hat Company, and that you produce at the time and place aforesaid: The books of account, records and writings of every kind whatsoever, containing entries of all transactions had between Bornn Hat Company and F. E. Helguero, and all letters, invoices, bills, accounts and writings of every kind whatsoever relating to transactions had between Bornn Hat Company and F. E. Helguero and between Bornn Hat Company and Frederick Probst & Company now in your custody, and for a failure to obey you will be deemed guilty of a contempt of court and also liable to pay all loss and damages sustained thereby to the party aggrieved.

"Witness the Hon. Edward D. White, Chief Justice of the United States at the Borough of Manhattan in the City of New York, in the Southern District of New York, on the 3d day of January, 1911.

"[Signed] John A. Shields, Clerk.

"[Signed] Henry A. Wise, United States Attorney."

Upon the return day of this subpœna—which contains no ad testificandum—the corporation, in response to the call of the subpœna by the marshal in attendance upon the grand jury, appeared by its president, who presented himself before the grand jury and stated that he had with him the books and papers called for by the subpœna. He personally demanded to be sworn, and thereupon was informed that no subpœna commanding his appearance had been issued, and that his evidence was not wanted, and his demand to be sworn was not complied with. Thereupon he filed with the grand jury a written statement addressed to the grand jury and signed "Bornn Hat Company." This statement raises the following points: (1) That no validly instituted proceeding was pending. (2) That to compel the Bornn Hat Company to produce writings in a criminal proceeding against itself was in violation of the fourth and fifth amendments to the Constitution of the United

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

States, in that the proceeding amounted to an unreasonable search and seizure and compelled the corporation to bear witness against itself. (3) That there is no authority for directing a subpœna to a corporation. At the same time the president of the corporation filed with the grand jury a further paper on his own behalf, in which he refused to permit the books and papers called for "to be used in evidence or to be inspected," stating as his reasons for such refusal "that the introduction of the said books in evidence before the grand jury might tend to incriminate me, and that it would violate my rights under the fourth and fifth amendment to the Constitution of the United States. * * *" Thereupon the grand jury came into court and presented the Bornn Hat Company, as for contempt of court in failing to deliver up the books and papers called for by the subpœna. The presentment was traversed by the Bornn Hat Company.

Mr. Levy, for the United States.
Abram I. Elkus and Joseph M. Proskauer, for defendant.

HAND, District Judge (after stating the facts as above). The only precedent for the subpœna is In re American Sugar Refining Company (C. C.) 178 Fed. 109, and Wigmore, vol. 5, p. 219, § 2200. It is quite true that Wigmore's method is somewhat different, but it is a stronger exercise of power than the present subpœna and less in accordance with past analogies. The question of what sanction the court can apply is not up at present. No good reason exists why subpœna duces tecum should not lie against a fictitious being which is subject to sub pœna ad respondendum, and to a writ of sequestration. Some archaic procedure may perhaps have to be revived; but the law has an adequate arsenal, if the corporate entity be contumacious, even though no individual aid the contempt affirmatively.

The more substantial question is of the right against self-incrimination. Whatever be the necessity to the decision of that part of the opinion of Mr. Justice Brown in Hale v. Henkel, 201 U. S. 43, contained on pages 74 and 75, 26 Sup. Ct. 370, 50 L. Ed. 652, I do not feel at liberty to disregard the language there used. The opinion was of a majority of the court, and the two concurring opinions did not question that corporations were not within the fifth amendment. Moreover, the dissenting opinion concerned itself expressly and solely with that point. It is quite plain that whether or not a Circuit Court has ever the right to disregard expressions found in the prevailing opinions of the Supreme Court, because they are not necessary to the decision, this is not such a case. The expression in question was certainly deliberate, and as such no lower court should disregard it even if unnecessary. The respondent insists that by a long series of precedents corporations are persons within the bill of rights, and that, at least if a part of the "people" to be protected by the fourth amendment, they are "persons" within the fifth. Those are considerations solely for the Supreme Court; they do not concern a judge of first instance.

No question is made of the sufficiency of the subpœna, i. e., of its too great generality. The defendant Bornn had no right to be sworn; any one could produce the books, and it need not be he; his privilege is not the corporation's, and may be disregarded when the question is merely of the production of the books.

The result is, of course, to give the grand jury inquisitorial powers. Its temporary constitution and its popular character must be the guaranty against their abuse. Had our law in fact evolved into the form which once seemed likely, the privilege would have existed only against mere executive inquisition, without prior charge or presentment by which the inquiry could be limited and abuse avoided. But it did not so develop. The privilege against "ex officio" oaths merged into the larger privilege in all tribunals which we know to-day. Wigmore, § 2250. It is either absolute or it is nothing, and, as the grand jury is given general powers of inquisition, such powers must have their proper scope wherever the privilege in its extreme form does not exist. If evils arise from this, we have perhaps to thank those tyrants who made detestable even the legitimate powers of the crown to inquire into the commission of crime, and so thwarted a development to which we seemed likely to become entitled.

Therefore I must direct the corporation to produce the books for the inspection of the grand jury within 10 days under a penalty of $500.

DAVIS v. DIXON et al.

(Circuit Court, S. D. West Virginia. July 27, 1910.)

No. 421.

1. COURTS (§ 307*)—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—CHANGE OF DOMICILE.

While a domicile once acquired by intention and acts may be held by intention alone, so far as relates to citizenship necessary to support the jurisdiction of a federal court, to constitute a change of domicile which will confer such jurisdiction, the intention must be supported by such acts as are consistent with the change, and not contradictory of it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 854; Dec. Dig. § 307.*

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.]

2. COURTS (§ 307*)—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—CHANGE OF DOMICILE.

Plaintiff in an action in a federal court in West Virginia, against citizens of that state, had resided continuously on a farm in that state inherited by him from his parents, until a year or so prior to the suit, since which time he had spent a part of each winter in the South with his wife, and in going and coming had each time stayed for some days at a hotel in Richmond, Va. During most of the year he had resided on his farm in West Virginia, where his tangible personal property was situated and all his personalty was taxed. *Held* that, under such facts, his intention to make Richmond his residence, formed prior to the commencement of the action, did not effect a change of domicile such as to give the court jurisdiction on the ground of diversity of citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 854; Dec. Dig. § 307.*]

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

3. COURTS (§ 307*)—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—CHANGE OF DOMICILE.

A change of citizenship, although for the purpose of acquiring a right to sue in a federal court, is not unlawful and does not deprive the court of jurisdiction if there is an actual bona fide change, with the intention of remaining in the new domicile.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 854; Dec. Dig. § 307.*]

In Equity. Suit by George N. Davis against Samuel Dixon, the Stuart Collieries Company, and others. On plea in abatement challenging the jurisdiction of the court. Plea sustained, and suit dismissed.

W. R. Thompson and T. N. Read, for plaintiff.
Dillon & Nuckolls, for defendants.

KELLER, District Judge. This matter is before me upon a plea to the jurisdiction based on the allegation that the plaintiff is not really a citizen and resident of the state of Virginia, but is in fact a citizen of West Virginia, and that the suit should be dismissed by virtue of section 5 of the act of March 3, 1875, c. 137, 18 Stat. 472, as amended by Act Aug. 13, 1888, c. 866, § 6, 25 Stat. 436 (U. S. Comp. St. 1901, p. 511). The burden of proof, as well as of allegation, is upon the defendant to make out this defense to the jurisdiction by a preponderance of the evidence. Street's Fed. Eq. Prac., § 335, and cases there cited. The question was, by agreement of parties, submitted to the court in lieu of a jury upon evidence taken upon the hearing and certain affidavits and documentary evidence then filed.

From all of this evidence it appears that George N. Davis, the plaintiff, was born and raised upon a large farm in Greenbrier county, W. Va., which descended to him from his parents and upon which he has ever since his birth spent a large part of his time; that he has upon this place farm stock and farming implements, a house, and that he apparently spends by far the larger part of his time there. His family consists of himself and his wife, and it appears that in 1906 his wife was ill in a hospital in Richmond, Va., all winter, and when she came out the doctors advised that she be taken South. Since that time it appears that a portion of each winter has been passed in the South, and upon these trips some little time has been passed in Richmond, Va. (which is the gateway to the South), both in going and returning. It appears that in 1908 Mr. Davis purchased property in Richmond, Va., including a dwelling house, but has never occupied said property, and that the dwelling house is now leased to a tenant for three years; it appears, further, that up to the present year, 1910, Mr. Davis was always assessed with a capitation tax in Greenbrier county, W. Va., and that for the year 1910 he declined to be assessed for a capitation tax, but was assessed there with all of his movable personal property such as money, bonds, notes, etc., as well as with the real estate and personal property having its situs in said county; that he has never been assessed with a capitation tax

in Richmond, Va., nor with any of such personal property as follows the citizenship of the owner, such as money, bonds, notes, and the like. Mr. Davis was examined in his own behalf on July 11, 1910, and the following extracts from his testimony are here presented. On examination in chief he was asked:

"Q. State to the court where your residence is? A. Richmond, Virginia. Q. How long since you have claimed Richmond as your residence? A. I went over there in 1908, but did not claim it positively as my residence until, I think, this March. It may have been in February, but I think it was some time about the early part of March—I am not sure of the exact date—1909. Q. Have you claimed your residence to be there ever since that, and do you now claim that as your residence? A. I do, sir. Q. You have this property in Greenbrier? A. Yes, sir. Q. You live there part of the time? A. I do, sir. Q. Have you made application to register in Richmond? A. I have, sir. Q. When did you do that? A. I think it was this month, sir. Q. What part of the time have you resided in Richmond since you have claimed it as your residence? A. I went there during the winter of 1909, and I stayed there for some weeks; and I had to take my wife South—or she had gone ahead of me—and we went down there and stayed until April, if I remember correctly, and came back and stayed until warm weather. That was in 1909. During last winter I spent part of my time there, and part of the time in the South, and we went to Cuba, and came back to Richmond in April, and stayed there for a while, and I did not expect to go back to West Virginia until May, but I had some matters that called me back, and I came back, but have been in Richmond since. Q. You went there in 1909? A. Yes, sir. Q. And, as I understand you, for the purpose of making that your home permanently? A. Yes, sir. Q. And you have continued with that intention ever since? A. Yes, sir."

Cross-examination by Mr. Dillon: "Q. For what purpose did you go there? A. First, I wanted to go, it was my pleasure, and it had been my mother's request; and, in the next place I wanted what land suits I might have to be in the federal courts. Q. Your purpose was to get jurisdiction in the federal courts? A. There were other considerations. Q. That was one of the purposes? A. That is right; yes, sir. Q. That occurred to you in March, 1909? A. In 1906 my wife was in the hospital all winter, and when she came out the doctors made me take her South, and we came back there, and were attached to the place, and went there every winter afterwards, and made up our minds to reside there. Q. It was one of your purposes, you said, and that occurred to you in March, 1909? A. Oh, I could not answer that truthfully, and say it occurred to me just then. It may have occurred to me before that; I would not say that positively. Q. Was that under advice of counsel? A. No, sir. Q. Mr. Davis, how long did you live in Richmond in the winter of 1909? A. If I remember correctly—I want to give you the dates, sir—I went there in March, and I think I stayed there until April, and then went to South Carolina. Q. I said in Richmond. How long did you live in Richmond in the winter of 1909? A. All told, I presume, sir, I was there steadily for—well, I think, I have stated to you—two to three weeks the first time, and then I came back there. Q. You were there from two to three weeks in the month of March? A. I would not state that positively. Q. Where did you stay there, or board? A. At Murphy's Hotel; I would not say, two or three weeks. I was there some few days; and then went South and came back, and stayed there some few days again. Q. Where did you go to from there? A. I went to South Carolina. Q. How long did you stay in South Carolina? A. I really could not tell you—a couple of weeks. I really don't remember, to be honest with you. I stayed there for a little while; some few days. Q. A couple or three weeks, you say? A. I would not say that. I was there some days; I don't remember the dates. Q. Then when did you go back to Richmond? A. If I remember correctly, it was—really I could not state positively; but I think some time in April, but I would not state that positively, to be honest. Q. How long did you stay in Richmond that time? A. Some days. Q. About how many? A. I could not say how many; some few days.

Q. Three or four days? A. I should say along there—a week or ten days; I could not say that. Q. What hotel did you stop at then? A. At Murphy's Hotel. Q. Your wife was being treated there at that time, was she not? A. Not that spring. Q. Not that spring? A. No, sir. Q. Then when was the next time after April, in 1909, that you lived in Richmond? A. After April? Q. Yes. A. Well, I was there once or twice for a day or so during the summer, but went back there the 7th of last January. Q. The 7th of last January, how long were you there? A. I stayed there until, I think, the 27th of January, and came back to West Virginia and shipped my wife to South Carolina, and then I came to West Virginia and stayed until the 9th or 10th of February, and went then back to Richmond, and stayed there a few days and went South. Q. When you went there on the 7th of January, your wife was not with you? A. Yes; she was. Q. I understood you to say that you came back and shipped her to South Carolina. A. I said when I left there to go to West Virginia I shipped my wife South. Q. You, then, went to Richmond in January, and stayed there the month of January, 1910? A. Yes, sir. Q. You and your wife? A. Yes, sir. Q. She was taking treatment? A. Yes, sir. Q. She was there then under treatment, under what physician? A. She had been examined by experts, and the expert had given her medicine, so I would not say she was under treatment then by the physician, though she was taking the medicine. Q. While she was there? A. Yes, sir. Q. Then you went from there to South Carolina? A. That's right. Q. How long did you stay there? A. I think, sir, we got there—I think we were there a week, and left there on the 22d of February, and went from there to Cuba, and around through the South. Q. How long were you away from Richmond, down in South Carolina and Cuba? A. I think I stayed there in South Carolina a week, and on the 22d of February started to Cuba, and landed in South Carolina on the 22d of March, and stayed there a few days, and then came back to Richmond. Q. How long did you stay in Richmond, when you came back to Richmond that time? A. I could not tell you the dates. I suppose, guessing at it—it is guesswork—I think we were there at least a week, maybe ten days; I would say a week. Q. You were then at the Murphy Hotel? A. Yes, sir. Q. And you then came from there back to Ronceverte? A. I did, and saw you there. Q. And saw me there? A. I did, and shook hands with you. Q. You own a farm near Ronceverte, do you not? A. I do, sir. Q. How much? A. 576 acres in one tract, and 250 in another. Q. Where did you get that land? A. I inherited it. Q. From whom? A. One from my father, and one from my mother. Q. How long have they been in the family? A. One tract for a hundred and some years, and the other my father bought soon after the war. Q. Your father was born, and you were born and raised there? A. I was? Q. Yes. A. I was. Q. Have you any interest in the bank at Ronceverte? A. I am a very small stockholder in one bank there. Q. And a director? A. I am; yes. Q. Do you attend the directors' meetings? A. No, sir, have been but to one this year. Q. What time was that? A. I could not tell you that to save my life. I think it was in May. I went there twice, but the second time there was no meeting, and I walked out. Q. Have you any other interests in West Virginia? A. Yes, sir. Q. Where? A. Well, I have some lands in Fayette, some in Raleigh, and some in Nicholas—scattered around. Q. Yes? A. Little pieces; yes, sir. Q. What is the value of your property in West Virginia? A. I could not tell you that, to be honest. (Objected to.) Q. Where is your household and kitchen furniture? A. In Greenbrier county, except some I have in Richmond, a little bit, stored away there, but my principal furniture is in Greenbrier. Q. Did you ever keep house in Richmond? A. No, sir; I never did. Q. Have you a house there? A. I have. Q. When did you buy it? A. On the 19th day or the 29th day of June, 1908. Q. Is that house leased? A. It is rented now; yes, sir. Q. For how long? A. Three years, so my real estate man tells me. I don't know that. Q. You bought a dwelling house in Richmond in 1908? A. Yes, sir. Q. And rented it for three years? A. I didn't rent it; my agent did. Q. You had your agent to rent it out? A. Yes, sir; I did. Q. And you have never kept house in Richmond, Virginia? A. Never. Q. And what time you were there, for a week, ten days or two weeks, you lived in a hotel. A. Yes, sir. Q. And your wife was taking treatment from a physician there. A. Not all

the time. She has taken treatment, but not all the time. Q. You are assessed for the year 1909 with your personal property in Greenbrier county? A. That's right. Q. And for the year 1910 you are assessed with all of your personal property in Greenbrier county, West Virginia? A. That's right. Q. Is the farm in Greenbrier county the home place of your mother and father? A. Is it what? Q. The home place of your mother and father, the farm in Greenbrier county, that you own? A. It is; that's right. Q. It has been in the family and has come down for many long years? A. One of them has. The other has not."

Redirect examination by Mr. Thompson: "Q. Have you been summoned to jury service since you changed your residence? A. I have, sir. Q. Did you serve? A. No, sir. Q. Have you paid any capitation tax since you changed your residence to Richmond, in Greenbrier? A. No, sir. Q. Have you refused to do so? A. Yes, sir."

Recross-examination by Mr. Dillon: "Q. You simply refused to pay the capitation tax for the year 1910? A. That is right. Q. You did not have yourself assessed with capitation or any taxes in the city of Richmond? A. No, sir; I went to the assessor's office, and gave in, I think, one hundred dollars' worth of stuff I had there. I have forgotten just what, but I went to the assessor's office myself, and put it in. Q. Have you seen the certificate— A. (interposing) I heard you read it. Q. (concluded)—of the treasurer of the city of Richmond? A. Yes, sir; I heard you read it, but I went to that office myself and gave it in. Q. One hundred dollars' worth of what? A. He said, on personal property. He said, 'You've moved here, and we can put it in as money, or anything, but you must give in something,' and I said, 'All right; here is a hundred dollars' worth,' and I put it in that way. Q. Didn't you do that for the sole purpose of undertaking to make out a case? A. No, sir; I did not. Q. Didn't you do that for the purpose of undertaking to make out a case of citizenship in Richmond? A. No, sir; I could not state that. Q. He didn't assess it, did he? A. He told me he did. I saw him write it down. Q. Did you have yourself assessed with poll tax there? A. No, sir. Q. Why didn't you? A. Because I could not vote there before two years any way. Q. Why didn't you have your money assessed in Richmond, Virginia, where you were a resident? A. Well, I don't know that I have any special reason for that. The assessor came along and I gave it to him. Q. Were you in Richmond when you had your one hundred dollars assessed? A. Yes: and afterwards. Q. How is that? A. Yes; I was there—some time in February, it was, I think. Q. Why didn't you have your personal property assessed in Richmond then? A. Because it had been assessed here in West Virginia. Q. Isn't it true— Why didn't you refuse to have it assessed in West Virginia when the assessor came around on the 3d of February? A. As a matter of fact I had been told that it was a matter of indifference where I had my personal property assessed. That is the reason—to be honest with you—I was so advised by my attorney. Q. Then it was because you were told that it made no difference where it was assessed, with reference to constituting yourself a citizen? A. Yes, sir. Q. You inquired about that? A. I asked the question, where I had better give my property in, and he said, 'It makes no difference where you give in your property.' Q. Of whom did you ask that question? A. My attorneys. Q. You wanted to undertake to make yourself a citizen by inquiring of your attorneys where you would have your property assessed? A. I inquired of them, because I wanted to comply with the law. Q. Did you ask your attorneys about it before you had it assessed? A. It was after I had given it in. I said, 'I have given in my property. I do not reside in this state. What about it?' and he says, 'I don't know that it makes any difference.' And that was all there was to it. Q. Have you any family, other than your wife? A. Not living; no sir. Q. Where is she now? A. In Greenbrier county, West Virginia. Q. That is, at the old home place? A. Yes, sir. Q. And you are living there now? A. Yes; I am there for the summer."

Upon the whole of this testimony I am forced to the conclusion that the acts of Mr. Davis have not corresponded with his announced

intention of taking up his residence in Richmond and becoming a citizen of Virginia. I have no reason to doubt the truth of his statement that in 1909 he formed the intention of changing his citizenship, and that at least one purpose, if not the only purpose, was to enable him to sue in the federal courts of West Virginia. Such a purpose is not unlawful. As is said in Hughes' Federal Procedure, p. 247:

"It has sometimes happened that a citizen changes his citizenship for the purpose of acquiring a right to sue in the federal courts. If his change is an actual, bona fide change, and he removes and takes up his domicile in a new place, with the intention of remaining there, then the federal court would have jurisdiction, and the single fact that it was his intention to confer jurisdiction would not defeat it."

However, it has also been held by the Supreme Court of the United States in the case of Morris v. Gilmer, 129 U. S. 315, 328, 9 Sup. Ct. 289, 293, 32 L. Ed. 690, that in order to effect such a change of domicile as constitutes a change of citizenship, "there must be * * * an actual residence in this place, with the intention that it is to be a principal and permanent residence"—quoting from Ennis v. Smith, 55 U. S. 400, 423, 14 L. Ed. 472.

While it is difficult to lay down with exactness any rule to determine just what will constitute a change of domicile by choice, it is evident that mere intention without corresponding acts will not suffice. A domicile once acquired by intention and acts may doubtless be held by intention alone so far as would be necessary to support the jurisdiction of a court, but in the event of a change of domicile the intention must be supported by such acts as are consistent with the change and not contradictory of it. Actions are said to sometimes speak louder than words, and when they point to an apparent intention at variance with that announced, they are certainly entitled to great weight in determining the question whether a real change of domicile has been effected.

In the case at bar there has been no family residence in Richmond since the alleged intention of establishing a residence there was formed in 1909. At the most, a very few weeks in the winter, passed as guests at an hotel, is all that can be claimed in that regard; the great bulk of each year being spent at the West Virginia farm which had always been the family home. No poll tax, nor tax upon such intangible personal property as follows the residence of its owner, was paid in Richmond in 1909 or 1910, but on the contrary both were paid in West Virginia for 1909, and intangible personalty to the value of $22,000 was assessed in West Virginia in 1910, which, if in fact Mr. Davis resided in Richmond, should have been there assessed, and the assessment of which in West Virginia was inconsistent with his citizenship elsewhere. I do not think that the evidence in this case shows an "actual residence in the place with the intention that it is to be a principal and permanent residence" as held necessary in Morris v. Gilmer, supra. There is nothing in the evidence to indicate that at any time when Mr. Davis went to Richmond he went there with any present intention to remain there per-

manently or for an indefinite time, but, on the contrary, merely for short definite periods which served as little interludes between journeys to the South during the winters and returns to the ancestral home for the great bulk of the year.

In Butler v. Farnsworth, 4 Wash. C. C. 101, 103, Fed. Cas. No. 2,240, Mr. Justice Washington said:

"If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a bona fide intention of changing his domicile, however frequent and public his declarations to the contrary may have been."

I conclude that the effect of all the evidence is to sustain the plea to the jurisdiction, and a judgment may be entered in accordance with this opinion, dismissing this suit for lack of jurisdiction under the provisions of section 5, Act March 3, 1875, as amended by Act Aug. 13, 1888, and without prejudice to the institution of any other suit in any court of competent jurisdiction for the same cause of action.

HEALEY ICE MACH. CO. v. GREEN et al.

(Circuit Court, E. D. North Carolina. January 3, 1911.)

No. 293.

EQUITY (§ 296*)—PLEADING—SUPPLEMENTAL BILL.

Complainant in a suit in equity in a federal court will not be given leave to file a supplemental bill after final hearing and decision on the original bill and a prior supplemental bill, to set up facts to make a new and different case, all of which, so far as appears, were known to complainant months before the hearing and before the filing of the former supplemental bill, and some of them before the filing of the original bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 584–599; Dec. Dig. § 296.*]

In Equity. Suit by the Healey Ice Machine Company against Robert Green, Louisa A. Green, and others. On application by complainant for leave to file supplemental bill. Denied.

A. B. Andrews, Jr., for complainant.

Harry Skinner, T. H. Calvert, and S. Brown Shepherd, for defendants.

CONNOR, District Judge. On the rule day, next following the filing of the decree herein, October 3, 1910, complainant presented, and asked leave to file, a supplemental bill. The facts set out in the supplemental bill are the same as those contained in the original and the supplemental bills heretofore filed and recited in the opinion filed herein. 181 Fed. 890. In addition thereto, complainant avers, as new and supplemental matter:

"(1) That R. Green, in the negotiation leading up to the contract (of purchase), requested that time be given him for payment of the balance of the

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

principal sum (of purchase price), and agreed that if such were done he would insure the property for the benefit of your orator, the Healey Ice Machine Company, all of which appears in the letter written by Green to your orator in that regard.

"(2) That on April 7, 1908, being at the same time and as a part of the terms and conditions upon which the sale of the property in controversy was made by Green and wife to Hill and Johnson, an agreement was entered into between the parties to said sale, together with F. J. Forbes, cashier of the National Bank of Greenville, containing, among other provisions, the following: 'And whereas it appearing to all parties concerned that a perfect title cannot, at this time, be made by the said R. Green and wife to the said R. L. Hill and D. B. Johnson, the purchasers of said ice plant property now in litigation involved in suit now pending in the United States District Court which, up to this time, has not been determined; and it further appearing that the National Bank of Greenville is the beneficial owner of a debt of $1,250 and interest, secured by a first mortgage on said premises and, in order to effectuate the intention of the parties to this instrument to convey said property subject to these aforementioned charges against said property, and for the purpose of securing the means of paying said debt due the National Bank of Greenville and of settling and adjusting all claims against said property by reason of the suit now pending, as shall hereafter be declared to be and to secure in the most effectual manner, it has been mutually agreed by and between the parties to this instrument that the deed conveying title to the said R. L. Hill and D. B. Johnson, the mortgage from the same parties to R. Green and wife securing said balance of said purchase price as enumerated in the said notes aggregating the sum of $3,500 shall be placed and deposited with the said B. J. Forbes, cashier of said National Bank of Greenville, who, it has been agreed, shall retain the same, together with all moneys arising from the collection or payments made on said notes until the entire sum of $3,500, with interest, according to the tenor of said notes, has been paid to him, or collected by him free from the control of the remaining parties to this instrument, so far as carrying out the purposes of this trust in each and every particular is concerned. The first charges upon said sum of $4,000 (the purchase price of said property), when collected and paid, being the debt due said National Bank of Greenville, by virtue of its first mortgage on said premises, and whatever sum or sums, if any, the court shall declare and adjudge to be due the Healey Ice Machine Company on account of its suit against said property and R. Green and wife referred to according to their priority. It has been agreed that, after the said two prior claims referred to and all other conditions arising under said contract of escrow shall have been paid, discharged, and performed according to said contract, balance of said moneys so remaining in the hands of said cashier shall be held by said cashier of said bank for the use and benefit of said R. Green and wife, Louisa Green, or for the use and benefit of any person or persons to whom they may have indorsed any of the notes; said indorsement being in subordination to the prior charges mentioned and referred to. * * * It has further been agreed that the said premises shall be insured by the said purchasers, the said R. L. Hill and D. B. Johnson, for the benefit of the National Bank of Greenville first, and the said R. Green and L. A. Green second, and said R. L. Hill and D. B. Johnson third, as their interest may appear.'"

The foregoing contract was executed by all of the persons named therein, and the said L. A. Green, feme covert, was privately examined in respect to her voluntary assent thereto, as provided by the statute for the execution of contracts relating to real estate by married women and recorded in the office of the register of deeds of Pitt county on the 4th day of March, 1909. The original bill herein was filed on the 14th day of December, 1906, against defendant R. Green and wife and John W. Aycock for the purpose of enforcing an alleged

mechanic's and materialman's lien upon said property. The building containing the machinery was burned on the 18th day of September, 1908, and on October 30, 1908, complainant filed its supplemental bill alleging the sale to Hill and Johnson, the issuing of the insurance policies, and the destruction of the property by fire, making said purchasers and the insurance companies parties, praying that the money due thereon be paid into this court, etc. Neither in the original nor supplemental bill was there any averment of the facts set out in the bill, now exhibited, as the basis for relief; nor is there any averment that, at the time of filing either of said bills, the facts now alleged were not known to complainant. In respect to the averment that defendant Green, in a letter to complainant, for the purpose of securing credit on account of the purchase money, promised to insure the property for its benefit, it is manifest that complainant had such knowledge when it filed the supplemental bill subsequent to the time of the destruction of the property. In regard to the agreement between the parties of April 7, 1908, it must be noted that the paper writing was not recorded until March 4, 1909—being subsequent to the date of filing the supplemental bill, October 30, 1908. The original bill was based upon the proposition that the complainant was entitled to a mechanic's and materialman's lien, under the North Carolina statute, upon the ice machine and fixtures, and the land upon which it was located, and that, having effectuated the lien by filing the notice thereof in the office of the clerk of the superior court of Pitt county, it was entitled to go into a court of equity for the purpose of enforcing it. Pending the suit, the property was sold by Green and wife to Hill and Johnson. The title being in Green and wife, under the law of North Carolina, neither could, without the concurrence of the other, incumber the property or subject it to a lien. The policies having been taken out by the mortgagors Hill and Johnson, the court was of opinion that complainants had no equity to have the proceeds applied to its debt. These conclusions resulted in a decree dismissing the bill as to complainant. It appearing to the court that the proceeds of the insurance policies had, by consent, been paid into the registry of the court, and that, as between the several defendants, it was necessary to ascertain the interests of the defendants in the amount in the registry of the court, a reference was ordered for that purpose only. Complainants were not interested in the manner of the distribution of this fund. But for this, the bill would have stood dismissed at the October rule day.

Complainant now seeks to set up, by means of a supplemental bill, an entirely different equity from that relied upon in the original bill. The defendants insist: That, under well-settled rules of equity practice, it is too late for complainant to assert a new and distinct ground for relief, by way of a supplemental bill—that, in so far as the proposed bill sets up an agreement on the part of defendant Green to insure the property for the benefit of complainant, it appears from its allegation that the letter relied upon as the evidence of such promise was in complainant's possession before the institution of the suit and before the first supplemental bill was filed. That no cause is shown,

or suggested, why it was not alleged or referred to in the bill. That, as to the agreement made between the defendants, April 7, 1908, at the date of the sale by Green and wife to Hill and Johnson, it appears from the exhibit filed that said agreement was recorded in the office of the register of deeds of Pitt county on March 9, 1909, more than a year before this cause was argued and submitted to the court. And that there is no averment that complainant was not advised of its existence.

Judge Story says:

"A supplemental bill is, in the first place, proper whenever the imperfection in the original bill arises from the omission of some material fact which existed before the filing of the bill, but the time has passed in which it can be introduced into the bill by amendment. This may arise either from the importance of the fact not being understood in the preceding stages of the cause, and therefore not being put in issue; or from the fact itself not having come to the knowledge of the party until after the bill was filed. In either case, the filing of a supplemental bill is not always a matter of course; but sometimes special leave must be asked of the court, as, for example, when it seeks to change the original structure of the bill and to introduce a new and different case." Story's Eq. Pleadings, § 333.

"The plaintiff must show that he could not have availed himself of the opportunity of introducing the new facts at any antecedent stage of the cause by way of amendment; or that they were of a nature not proper to be introduced by an amendment, as, for example, events which had occurred since the filing of the bill. Therefore, when a supplemental bill was filed after the hearing of the original bill stating additional facts which arose and were known to the plaintiff before he filed his original bill, and praying that other matters might be taken into the account ordered to be taken before the master in the cause, the court held that the bill was demurrable, and that it came in too late a stage of the proceedings. The plaintiff should either have amended his bill on the defendant's answering it, or at least he should have applied to the court for leave to amend, or to file a supplemental bill in an earlier stage of the proceedings." Id., note.

Mr. Street notes the tendency of the court to allow amendments more freely than formerly, both by observance, and liberal interpretation of the statutes (Rev. St. § 954 [U. S. Comp. St. 1901, p. 696]) and rules of court, saying:

"Under the present practice of the federal courts, all proper amendments can be allowed at any juncture prior to the entry of the final decree. A supplemental bill is, therefore, no longer necessary in these courts to enable a party to have the benefit of facts that happen before the suit is brought but are only discovered while the suit is in progress. As to all such facts and matters the plaintiff can now amend; and, having the right to amend, he ought to pursue this course rather than to ask leave to file the supplemental bill. The extension of the right to amend has, to that extent, contracted the right to file the supplemental bill." 2 Street's Fed. Eq. Prac. § 1157.

By equity rule 57 it is provided that:

"Whenever any suit in equity shall become defective from any event happening after the filing of the bill, or for any other reason, a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day upon proper cause shown and due notice to the other party."

The wisdom of the foregoing rule and its applicability is obvious in this case. When the original bill was filed, the property upon which complainant claimed to have a lien was in existence. The sole purpose of the bill was to invoke the aid of the court to enforce the alleged lien. Subsequently, the defendants Green and wife sold to Hill and Johnson, who insured the defendants against loss by fire as, and upon, the terms set out in the supplemental bill. The property was destroyed by fire, and the companies adjusted the loss and were ready to pay the amount. These conditions presented a state of facts clearly within the provisions of the rule. The court permitted complainant to file its supplemental bill, and the proceeds of the insurance policies were paid into the registry of the court. This was September, 1908. The cause pended upon answer to the bill and supplemental bill and the cross-bill and answer until July, 1910, when it was submitted upon the pleadings and decided upon its merits. It thus appears that the cause pended in this court for four years, and two years have elapsed since the supplemental bill was filed and the proceeds of the insurance policies paid into the court. No fact is alleged in the proposed supplemental bill which has occurred since the supplemental bill of October, 1908, was filed; nor is there any allegation that the facts now alleged as the basis for relief were not known to complainant prior to the hearing and making of the decree.

At any time, under the liberal rule of the court for amending pleadings, there can be no doubt that, upon application, the court would have permitted complainant to set these facts up by way of amendment.

"Before leave will be granted to file a supplemental bill attacking a decree on the ground of newly discovered facts, it must appear that those facts could not have been discovered in the exercise of reasonable diligence in time to have been set up in the original bill or an amended bill." 2 Street's Fed. Eq. Prac. 1184.

Complainant has had full opportunity and ample time to bring the matters, now alleged, to the attention of the court. It would seem that, in view of the authorities cited and the rules of the court, it should not, at this late day, after a full hearing upon the merits of the case disclosed upon the original and first supplemental bill, be permitted to continue the litigation by interjecting into the case a new and different ground for relief.

The language of Mr. Justice White in Warner v. Godfrey, 186 U. S. at page 378, 22 Sup. Ct. at page 857 (46 L. Ed. 1203), is appropriate here. After the cause had gone to decree upon the original pleadings, complainant sought, by way of amendment, to interject a new ground for relief. The learned justice says:

"It would be highly inequitable to permit a litigant to press with the greatest pertinacity, for years, unfounded demands for specific and general relief, however much confidence he may have had in such charges, necessitating large expenditures by the defendants to make a proper defense thereto, and then, after the submission of the cause, when the grounds of relief actually asserted were found to be wholly without merit, to allow averments to be made, by way of amendment, constituting a new and substantive ground of relief. This is especially applicable when the facts upon which such amendment rests were known at the incipiency of the litigation, and

the character of the relief was such as called for promptness in asserting a right thereto."

While the language applied to the facts in that case may be stronger than the facts in this case justify, the principle is the same. While the merits of a case must not be sacrificed to forms, or technical objection to pleadings, experience has demonstrated that a reasonable adherence to well-settled rules of pleading and procedure is essential to protect the substantial rights of litigants. In this cause the defendant Green, in his cross-bill, strongly avers, under oath, that complainant breached its contract with him and utterly failed to comply with its guaranty in regard to the machinery, resulting in large damage and serious loss, exceeding the balance of the purchase price. This is denied by complainant. Without regard to the merits of this phase of the controversy, it is referred to as illustrating the probable injustice of opening up the controversy, after decree, by permitting complainant, by way of a supplemental bill, to introduce an entirely new ground for relief. It is by no means clear that the new matter, sought to be introduced, would avail complainant.

In regard to the allegation that defendant Green promised to insure the property for the benefit of complainant, no copy of the letter referred to is filed, or attached, to the bill. Assuming, however, that such a promise was made, it would seem that no very great importance was attached to it. The property was purchased on, or about, the 21st of April, 1906, and very soon thereafter defendant declined to pay the balance due on account of the purchase money, and on December 4, 1906, the notice of lien was filed. Ten days thereafter the original bill was filed. The sale to Hill and Johnson was not made until April 7, 1908, when they, and not the defendant Green, insured the property making the loss payable to Green and his wife. It would be quite difficult to fix upon the funds, accruing from this policy, a trust, in favor of complainant, upon the theory that it was taken out pursuant to, and in execution of, the alleged agreement. In regard to the claim asserted under the agreement of April 7, 1908, there is certainly nothing in the language of the contract indicating a purpose to declare a trust for the benefit of complainant; it purports to be made for the purpose of indemnifying the purchasers against loss or harm, in the event that complainant shall establish a claim against the property, paramount to the right acquired by the purchaser. The case is different from those wherein courts of equity have subrogated the creditor to the rights of a surety or indorser in property conveyed to him for the purpose of indemnity against loss growing out of the contractual liability. Trusts are impressed upon property by courts of equity either to effectuate the intention of the parties to contracts, or to prevent fraud; the latter being called trusts ex maleficio. The underlying principle upon which trusts of the last class are declared is that the property sought to be reached has been obtained by fraud—that is, under a promise to hold it in trust, or by reason of some duty, obligation, or relationship, which the party owes or sustains to the person injured or defrauded by the failure to discharge the duty or obligation assumed—or imposed by the law. A mere breach of con-

tract, as the failure to pay the purchase price, does not entitle the vendor to have the vendee declared a trustee for his benefit. The only averment in the supplemental bill, in this respect, is that:

"The defendant R. Green, owning (an) interest in a lot which he and his wife had purchased for $400 only, induced your complainant to erect, construct, and install one of its valuable ice-making plants upon the said lot, the deed for which, as an estate by entireties, was taken in the name of said R. Green and wife, Louisa A. Green, after your orator had begun the constructing, erecting, and installing of said ice-making plant; he having represented himself to your orator as being a person that could command means or security to carry out any business enterprise in which he was engaged."

Following this language is the averment in regard to an alleged promise to insure the property for the benefit of complainant. It will be noted that there is no suggestion that Green made any false statement, or that he was not able "to command means or security," as represented. This language falls very far short of an allegation of a specific, fraudulent representation sufficient to cause a court of equity to impress a trust upon the property ex maleficio. It is not alleged that Green represented that the ice-making plant was to be erected on land belonging to him, or that he paid the purchase money for the land, or that the deed to his wife and himself was withheld from registration. On the contrary, it appears that it was recorded before complainant completed the erection of the plant. The transaction, in any aspect of the pleadings, appears to have been an outright sale of the property, one-third of the price being paid cash, and credit extended for the balance, upon the personal credit of the purchaser. Eliminating the allegation in regard to the lien, which has been disposed of by the decree of October 3, 1910, it is difficult to perceive any ground for equitable relief or to sustain the jurisdiction of this court. The parties have a controversy based upon mutual allegations of a breach of contract, which should be tried in a court of law before a jury. What the result of such trial will be is, of course, not a matter for the thought of this court. They are not involved, nor is either party estopped to litigate them in a court of law by the decrees rendered herein.

Being of the opinion that complainant is not entitled, under the rules of pleading and practice, in this court, to file the supplemental bill, the application is denied. The cross-bill of defendant Green is dismissed, at his cost. The exceptions to the report of Julius Brown, special master, are overruled, and the report confirmed. Let a decree be drawn accordingly.

In re BEEG.

(District Court, E. D. Pennsylvania. January 31, 1911.)

No. 3,721.

1. FIXTURES (§ 1*)—WHAT CONSTITUTES—DETERMINATION—PHYSICAL ATTACHMENT—INTENTION.

In Pennsylvania the question whether property constitutes a fixture depends, not on physical attachment, but on the nature and character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intention of those concerned in the act.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 1, 6; Dec. Dig. § 1.*]

2. FIXTURES (§§ 14, 21*)—WHAT CONSTITUTES "FIXTURE"—LANDLORD AND TENANT—VENDOR AND VENDEE.

Whether a structure is a fixture as between landlord and tenant depends on the intention to annex to the freehold, but as between vendor and vendee the intention of the owner may be of little weight if the structure is essentially a part of the freehold and so entirely indispensable for the use for which the freehold is intended that the secret purposes of the owner cannot control the rights of others, which depend more on the inference to be drawn from what is external and visible.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 22, 47; Dec. Dig. §§ 14, 21.*

For other definitions, see Words and Phrases, vol. 3, pp. 2831-2846; vol. 8, p. 7664.]

3. FIXTURES (§§ 18, 28*)—WHAT CONSTITUTES "FIXTURE"—MORTGAGE—JUDGMENT CREDITORS.

In Pennsylvania, between vendor and vendee, heir and executor, debtor and execution creditor, mortgagee or judgment creditor and assignee for benefit of creditors, and judgment creditors and general creditors in bankruptcy, machinery in a factory which is a necessary part thereof and without which it could not be a fully equipped establishment is a "fixture" to be regarded a part of the freehold subject to the lien of a real estate mortgage or judgment against the owner.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 32-41, 58, 59; Dec. Dig. §§ 18, 28.*]

4. FIXTURES (§ 28*)—MACHINERY IN FACTORY—EQUIPMENT—PRIOR TRANSFER—"FIXTURE."

Where engines, boilers, machinery, utensils, and fixtures contained in a building and on the premises were owned and conducted by the bankrupt as a sausage factory and were essential to the operation of the premises for such business, they would be regarded as fixtures and subject to the lien of a judgment on the land notwithstanding they had been separately conveyed to the bankrupt, the land by deed and the machinery, etc., by bill of sale.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 58, 59; Dec. Dig. § 28.*]

In the matter of bankruptcy proceedings of Carl F. Beeg. On certificate of referee to review an order directing the delivery of certain of the bankrupt's property sold at a receiver's sale to the purchaser and discharged of the lien of a judgment creditor. Reversed.

Alfred Aarons, for trustee.

J. Rech Guckes, for claimant.

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

HOLLAND, District Judge. On April 20, 1910, this court, on approving a receiver's sale of the bankrupt's property, entered an order directing delivery to the purchaser "free and clear of all claims of Adam Schlorer, judgment creditor"; and further ordering that the question arising out of the claim of the said Adam Schlorer shall be referred to a referee "for his finding and decision, and that if the said referee shall find that the said articles, or certain of them, are part of the real estate, the prices bid therefor shall be taken by the referee as the values of said articles and awarded according to law."

After hearing testimony and argument by counsel, the referee found "that the property in question is not subject to the lien of the judgment of the said Adam Schlorer, and that as between the said Adam Schlorer and the trustee in bankruptcy the title to the said property is in the latter," and thereafter, on November 1, 1910, entered a formal order dismissing the proceedings of Schlorer. Thereupon a petition for a review was filed and accordingly certified to this court.

The question involved is whether certain chattels, machinery, utensils, etc., used in a sausage factory owned and occupied by the bankrupt are part of the real estate and bound by the lien of judgments held by the claimant.

The referee found that these chattels "were used by the bankrupt in his business as a sausage maker and constituted the necessary apparatus for conducting a sausage factory," etc. He further found that the premises were sold by the sheriff of the county of Philadelphia in 1884 to one Charles F. Schuler at the time they were being used as a sausage factory, and the sheriff, in his deed to Schuler, states that the premises conveyed are "occupied as an engine and boiler house, stable and sausage factory and lot or piece of ground, situate, etc., * * * also the engines, boilers, machinery, utensils and fixtures in said building contained." Following this sheriff's sale there were six conveyances which constitute the chain of title to the bankrupt, in all of which the premises are described as "occupied as an engine and boiler house, stable and sausage factory and lot or piece of ground, situate," etc. During the time from 1884 to the present the premises have been occupied as a sausage factory.

On May 31, 1901, the property passed from one Alber to Juergens, and in this transaction the real estate was valued at $13,000; the good will and fixtures at $7,000. A deed was executed for the real estate, and a bill of sale for the personal property. At about the same time Juergens mortgaged the property, and the habendum clause of the mortgage includes the "buildings, engines and factory and other improvements." This mortgage is still on the premises, prior to the judgments of Schlorer. Subsequently, Juergens conveyed this property to Beeg, the bankrupt, and his partner, Dufalla, for $3,500, subject to the mortgage above mentioned of $10,500, and, in addition to that, he executed to the partners a bill of sale for the "stock, good will, fixtures, machinery, implements, horses, wagons, etc., of the messuage and factory and business" for a consideration of $12,500, and finally, on January 6, 1908, Dufalla conveyed his interest in the entire property to the bankrupt by a deed for his interest in the real estate, and a bill of sale for the personal property.

The referee held that the execution of separate bills of sale for the machinery and chattels in question in the conveyance of this property by the predecessors in title to the bankrupt disclosed an intention to regard the machinery and chattels as personal property, and that the creditors of the bankrupt are entitled to the proceeds of the sale in the hands of the receiver.

"In Pennsylvania the old notion of a physical attachment has long since been exploded. * * * The question of fixture or not depends upon the nature and character of the act by which the structure was put in place, the policy of the law connected with its purpose, and the intention of those concerned in the act." Meig's Appeal, 62 Pa. 28, 1 Am. Rep. 372.

As between landlord and tenant, the intention to annex is the criterion; but, as between vendor and vendee, the intention of the owner may be of little weight, as there are some things which are so essentially a part of the freehold, and so entirely indispensable as a part of the property for the purpose for which it is intended, that the secret purposes of the owner cannot control the rights of others, the latter's rights depending more upon the inference to be drawn from what is external and visible. Association v. Berger, 99 Pa. 320; Bank v. North, 160 Pa. 303, 28 Atl. 694.

In Pennsylvania, between vendor and vendee, heir and executor, debtor and execution creditor, mortgagee or judgment creditor and assignee for benefit of creditors, and, we might add, as between judgment creditors and the general creditors in bankruptcy, machinery of a factory, which is a necessary part of it, and without which it would not be a fully equipped establishment, is a fixture to be regarded a part of the freehold, subject to the lien of a mortgagee or judgment creditor as part of the realty. Voorhis v. Freeman, 2 Watts & S. 116, 37 Am. Dec. 490; Morris' Appeal, 88 Pa. 368; Witmer's Appeal, 45 Pa. 455, 84 Am. Dec. 505; Wilder v. Kent (C. C.) 15 Fed. 217.

The judgments held against the bankrupt estate by Schlorer were entered long prior to the bankruptcy proceedings and are liens upon the real estate. He is entitled, as a security for these judgments, to the value of this property as a sausage factory, and, when he accepted this property as security for his judgments, he valued it as a sausage factory, equipped, as it then appeared, with a boiler house, engines, and other machinery, both fast and loose, necessary to equip an establishment to carry on that business. As to this machinery and its relation to the property at the time he accepted these judgments, he was bound not by the private undisclosed intention of the owner, but by what was external and visible in regard to the property as a whole and as equipped as a sausage factory. The fact that, in the conveyance to the then owner and to the predecessors in title, there had been bills of sale executed for the machinery, could in no wise alter their character as to this judgment creditor. The execution of a bill of sale for the necessary machinery to equip a manufacturing establishment does not change its character and make it personal property as between a judgment creditor and general creditors in bankruptcy any more than it does change the character of such machinery as between a mortgagee or judgment creditor and an assignee for the

benefit of creditors, and we conclude that, as between the judgment creditor Schlorer and the general creditors of the bankrupt estate, the machinery in question is part of the realty and belongs to the claimant Schlorer. The fact that there had been bills of sale executed in some of the conveyances to the bankrupt and prior to his ownership thereof does not alter the character of the property in question. Morris' Appeal, supra. If, as has been found by the referee, the articles, whether fast or loose, are indispensable in carrying on this specific business as a sausage factory, they become part of the realty. Morris' Appeal, supra; Vail v. Weaver, 132 Pa. 363, 19 Atl. 138, 19 Am. St. Rep. 598; Muehling v. Muehling, 181 Pa. 483, 37 Atl. 527, 59 Am. St. Rep. 674; Glasgow v. Hill, 29 Pa. Super. Ct. 222.

The order of the referee dismissing the petition of Schlorer, the judgment creditor, is reversed, and it is ordered that the referee distribute the funds arising from the sale to the parties entitled thereto, in accordance with this opinion.

UNITED STATES v. S. TWITCHELL CO.

(District Court, E. D. Pennsylvania. January 30, 1911.)

No. 7.

1. INTERNAL REVENUE (§ 9*)—DISTILLED SPIRITS—"RECTIFYING, PURIFYING, AND REFINING."

Defendant manufactured a ginger ale paste used for making ginger ale. The paste was manufactured by placing a quantity of ginger in a percolator and adding alcohol. The oleoresin thus obtained from the ginger containing unnecessary alcohol was distilled and the alcohol separated. This alcohol was of a low grade and was charged with ginger essence so as not to be commercially salable and could not be used except in repeating the process of extracting oleoresin from ginger root and in the manufacture of flavors. *Held*, that defendant in so distilling the alcohol was engaged in the business of rectifying, purifying, and refining distilled spirits within Rev. St. § 3244 (U. S. Comp. St. 1901, p. 2096), imposing an internal revenue tax on every person so engaged.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 21; Dec. Dig. § 9.*

For other definitions, see Words and Phrases, vol. 7, p. 6022.]

2. INTERNAL REVENUE (§ 9*)—REFINING AND RECTIFYING SPIRITS—STATUTES—CONSTRUCTION.

Rev. St. § 3244 (U. S. Comp. St. 1901, p. 2096), provides that every person, who rectifies, purifies, and refines distilled spirits by any process other than by original and continuous distillation from mash, wort, or wash, through continuous closed vessels and pipes until the manufacture thereof is complete, shall be regarded as a rectifier and being engaged in the business of rectifying. *Held*, that the phrase "through continuous closed vessels and pipes until the manufacture thereof is complete" refers to the exception, to wit, "other than by original and continuous distillation from mash, wort or wash through continuous vessels and pipes until the manufacture is complete," and not to "every person who rectifies, purifies or refines distilled spirits or wines by any process."

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 21; Dec. Dig. § 9.*]

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

3. STATUTES (§ 219*)—CONSTRUCTION—EXECUTIVE OFFICERS.

A uniform practice by the Internal Revenue Department as the result of a construction put on a doubtful statute will be given great weight with the court in construing it, and, where the practice has been followed for a long time, the court will accept the Department's interpretation as a proper one.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. § 219.*]

4. INTERNAL REVENUE (§ 9*) — DISTILLATION OF SPIRITS — MANUFACTURE OF EXTRACTS—"APOTHECARIES."

A distiller of alcohol from oleoresin, obtained from ginger root in the manufacture of a ginger ale paste, which alcohol so obtained was again used in obtaining ginger extract by percolation, was not engaged in business as an "apothecary" and was not exempt from liability for internal revenue taxation as a rectifier, purifier, or refiner of distilled spirits by Rev. St. § 3246 (U. S. Comp. St. 1901, p. 2103), exempting apothecaries from liability to taxation for the distillation of spirits used exclusively in the preparation of medicines.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 21; Dec. Dig. § 9.*

For other definitions, see Words and Phrases, vol. 1, pp. 438, 439.]

At Law. Action by the United States against the S. Twitchell Company. Verdict for plaintiff, and defendant moves for judgment non obstante veredicto. Denied.

John C. Swartley, Asst. U. S. Dist. Atty.

Francis S. Chapman, for defendant.

HOLLAND, District Judge. This suit was instituted by the government to recover the sum of $174.99, with interest from the 1st day of December, 1908, being a special internal revenue tax and penalty prescribed by section 3244, Rev. St. (U. S. Comp. St. 1901, p. 2096), to be paid by all persons engaged in the business or occupation of "rectifying, purifying and refining" distilled spirits.

The case, with three others, was tried before the same jury, and witnesses called both by the government and the defendants. At the close of the trial, however, the facts were practically agreed upon in all the cases, and, as to the defendant, the facts are as follows:

The S. Twitchell Company is a corporation engaged in the business of manufacturing chemists and manufacturers of bottlers' supplies, and part of its business was the manufacture, in the usual way, and sale (in quantities some times more and some times less than five gallons) of flavoring extracts, commonly called "flavors," which were sold and used to flavor soda water.

The defendant also manufactured a preparation known as "World's Challenge Ginger Ale Paste," used for making a ginger ale suitable for high-class trade, and in its manufacture oleoresin of ginger is used, which is secured in the following way: A quantity of ginger is placed in an apparatus known as a percolator, and there is added thereto a quantity of alcohol. The percolator is then allowed to stand a sufficient time to exhaust or extract the oleoresin of ginger from the root. The oleoresin thus obtained from the ginger root contains unnecessary alcohol, and for the purpose of separating the oleoresin,

which is thereafter to be so used in preparation of paste, from the alcohol, the liquid from the percolator is placed in a still, and the alcohol is separated from the oleoresin by means thereof. The alcohol so distilled and so used in extracting oleoresin from the ginger root is not a necessary part of the finished oleoresin and is not sold therein. After the process of percolation described has been completed and the oleoresin in the ginger root has been exhausted, there still remains in the residuum, which is a fibrous mass capable of being handled with a shovel or other tool, a quantity of alcohol which is recovered from the fibrous mass by means of a still. The alcohol so separated from the oleoresin and from the fibrous mass remaining in the still after the completion of the process of percolation is less in quantity and lower in grade than that placed in the receptacle with the ginger root originally, and is so charged with the ginger essence as to be commercially unsalable and is not sold by defendant, nor used in any manner save and except in the further process of extracting oleoresin from other ginger root in the same manner and in the manufacture of flavors. It is recovered in quantities less than 500 barrels in each year and is not capable of being drunk and is not drunk as a beverage by reason of the fact that it is so charged with said ginger essence. In this process the alcohol is used as a mechanical means to secure the oleoresin and is the means in general use.

The court gave binding instructions in favor of the government, and the jury accordingly rendered a verdict against the defendant. Whereupon, this motion, under the Pennsylvania practice act, for judgment non obstante veredicto, was duly filed, and the question for decision on the above facts is whether the defendant company is a "rectifier" as defined by section 3244 of the Revised Statutes. The first part of this section, which alone is applicable to the case, is as follows:

"Every person who rectifies, purifies or refines distilled spirits or wines by any process other than by original and continuous distillation from mash, wort or wash, through continuous closed vessels and pipes until the manufacture thereof is complete * * * shall be regarded as a rectifier, and as being engaged in the business of rectifying."

Counsel for this defendant holds that the phrase "through continuous closed vessels and pipes until the manufacture thereof is complete" refers to "every person who rectifies, purifies or refines distilled spirits or wines by any process"; whereas, the proper reading of the section applies it to the exception, to wit, "other than by original and continuous distillation from mash, wort or wash through continuous vessels and pipes until the manufacture thereof is complete," which is the process of distillation and for which the distiller's license is paid.

This is the view taken by Dr. Sadler, who testified at the trial of these cases, in answer to the following questions submitted to him:

"Q. I desire to submit this definition of a 'rectifier' as given here by the act of Congress, and ask you to describe it and define it, because, after all, that is the question of law here. It reads as follows: 'Every person who rectifies, purifies or refines distilled spirits or wines by any process other than by original and continuous distillation from mash, wort or wash, through continuous closed vessels and pipes, until the manufacture thereof is complete.' Define the process as it is defined there by the act of Congress.

"A. The first section in this statement here is 'Every person who rectifies, purifies or refines distilled spirits or wines by any process' other than the one mentioned, and the one mentioned is continuous distillation carried on until the proper alcoholic strength is reached. That may be a distilled liquor, and probably is a distilled liquor, sufficiently rectified. That means, therefore, a production in which the original distillation and the rectifying are not separated, but is a continuous process, which probably includes rectifying, as we would understand it; and therefore, in that case, the manufacturer is a rectifier as well as a distiller; but, in other cases, the two parts are separated. One man manufactures and the other man rectifies. That is meant to cover the case of a continuous manufacture."

The defendant by the use of the still reclaims distilled spirits or alcohol from dregs and refuse by a process of purifying or refining, thereby eliminating the impurities. They may not carry the operation to the extent of perfect rectification or purification; but so long as they are engaged in the business of purifying and refining alcohol by use of a still, to some extent, they are not exempt from liability for a tax as rectifiers under this section simply because they fail to carry the operation to perfection so that the alcohol reclaimed would be a merchantable commodity.

The Treasury Department has uniformly construed this section to apply to all persons engaged as the defendant, and to make them liable to pay the special tax as rectifiers. Beginning as early as Treasury Decision No. 95 April 13, 1900, the Secretary has insisted upon taxing all those as rectifiers who were engaged in recovering alcohol used in extracting ginger from the ginger root, and from many so engaged has collected the special tax.

The only exception to this liability is found in section 3246 (page 2103), which refers to druggists who use alcohol exclusively in the preparation or making up of medicine, and who, under this section, are permitted to make use of a still for the recovery of such alcohol where this alcohol is to be again used exclusively by them in the preparation of medicine.

A uniform practice by the Department, as a result of a construction put upon a doubtful statute, has great weight with the court in construing it, and, where the practice has been followed for a long time, the court will accept the Department's interpretation as the proper one. This defendant is not in any sense engaged as an apothecary, and is not exempt from liability.

The motion, therefore, for judgment non obstante veredicto, is refused.

UNITED STATES v. HANCE et al.

(District Court, E. D. Pennsylvania. January 30, 1911.)

No. 8.

1. INTERNAL REVENUE (§ 9*)—TAXATION—RECTIFIERS—"RECTIFYING, PURIFYING, AND REFINING DISTILLED SPIRITS."

Rev. St. § 3244 (U. S. Comp. St. 1901, p. 2096), imposes an internal revenue tax on all persons engaged in the business or occupation of rectifying, purifying, and refining distilled spirits, and section 3232 (page

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

2091) declares that no person shall be engaged in or carry on such trade or business until he has paid a special tax in the manner provided. *Held*, that it was not essential to the imposition of the tax that the person taxed be engaged in rectifying, purifying, or refining distilled spirits as a principal business, but that, where a manufacturer of ginger extract by means of alcohol percolation distilled the dregs of the ginger root to recover so far as possible the alcohol remaining therein and used the same when recovered in the successive percolation of more root, he was a person engaged in the business of "rectifying, purifying, and refining distilled spirits" and was subject to the tax.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 21; Dec. Dig. § 9.*

For other definitions, see Words and Phrases, vol. 7, p. 6022.]

2. INTERNAL REVENUE (§ 9*) — DISTILLATION OF SPIRITS — PREPARATION OF MEDICINE—"APOTHECARIES."

The alcohol so distilled and used in the further preparation of fluid extract of ginger was not used exclusively in the preparation of medicine so as to exempt the distiller from taxation under Rev. St. § 3246 (U. S. Comp. St. 1901, p. 2103), providing that no special tax shall be imposed on apothecaries as to spirituous liquors used exclusively in the preparation of medicines.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 21; Dec. Dig. § 9.*

For other definitions, see Words and Phrases, vol. 1, pp. 438, 439.]

At Law. Action by the United States against Edward H. Hance and another, trading as Hance Bros. & White. Verdict for plaintiff. On motion for judgment non obstante veredicto. Denied.

John C. Swartley, Asst. U. S. Dist. Atty.
Henry N. Paul, for defendant.

HOLLAND, District Judge. This was a suit in assumpsit, brought by the United States against the defendant, to recover $600, special tax and penalty, together with interest thereon from December 1, 1908, under section 3244, Rev. St. (U. S. Comp. St. 1901, p. 2096), requiring a special tax to be paid by all persons engaged in the business or occupation of "rectifying, purifying and refining" distilled spirits.

This case was tried by the same jury, with three other cases, including the Twitchell Case, No. 7, September Sessions, of the same year.† The court, after hearing the testimony offered by the parties, directed a verdict for the plaintiff. Defendant filed a motion for judgment non obstante veredicto under the Pennsylvania practice act, and the question now to be determined is whether or not the defendant is liable for this special tax as rectifiers under section 3244, Rev. St.

The defendant claims to be engaged in the manufacture of medicinal preparations, and, in addition, according to the testimony of one of the witnesses, it manufactures a fluid extract of ginger. This is produced by placing comminuted ginger root in a percolater and allowing pure alcohol of high proof to percolate through the ginger root dissolving out the essence of ginger. The fluid extract of ginger resulting from this percolation is drawn off, and there remains in the percolater the dregs of the ginger root with alcohol; and, in order that this alcohol shall not be wasted, the mixture of ginger root and alcohol is

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

† 184 Fed. 525.

placed in a still, and the alcohol, so far as possible, is recovered by distillation, but the recovery is only partial, and the resulting alcohol is distinctly contaminated and less pure than at the beginning of the process.

Counsel urges that, even if the defendant was solely engaged in the manufacture of this fluid extract, it could not be regarded as engaged in the business of rectifying, purifying, or refining distilled spirits within the meaning of the statute, and it was argued that the statute only applies to those who are distinctly engaged in rectifying, and not to persons who are engaged in other business and only incidentally in the conduct of this other business are required to reclaim distilled spirits to prevent its waste.

We do not think this is a proper construction to place upon section 3244, Rev. St. It is true that section 3232 of the Revised Statutes (U. S. Comp. St. 1901, p. 2091) provides:

"No person shall be engaged in or carry on any trade or business hereinafter mentioned until he has paid a special tax in the manner hereinafter provided."

And it is argued from this that no one is liable for this tax as a rectifier who is not engaged in the business of rectifying, purifying, or refining distilled spirits as a business in the popular acceptation of the term. But this view cannot be accepted, for the reason that section 3244, Rev. St., gives a statutory definition of what shall be regarded as "engaging in the business of rectifying," and we find that it makes no difference whether one is a rectifier in accordance with the popular opinion of that business or not. The section provides that "every person who rectifies, purifies or refines distilled spirits or wines by any process" shall be regarded as a rectifier and as being engaged in the business of rectifying. The reason for which the distilled spirits are recovered or the amount recovered seems to have nothing to do with it, nor does the fact that the person who reclaims or purifies the distilled spirits is engaged in another business and recovers the alcohol as an incident to the conduct of his business make any difference, because the section provides that "every person" who rectifies, etc., shall be regarded as being in that business, and it is easily understood why the provision is made so broad. It is necessary for the government, in the suppression of illegal distillation by use of stills and illegal rectification of distilled spirits, to know and be in touch with all persons who in any degree engage in this business. To guard against the illegal use of stills, section 3258 (page 2112) requires their registration in all cases, even those used by apothecaries who are not required to pay a tax; but the same vigilance as to the extent and use of the still is observed. We take it, therefore, that the defendant is not exempt because of the fact that the recovery of the distilled spirits is only incidental to its other business.

It is further urged, however, that it is not liable, because the courts have held that a person may, as incidental to his regular business, perform and carry on certain employments without bringing himself within the scope of the revenue laws, despite the fact that if such employment constituted the principal trade or occupation of such person he

would be liable to taxation, and cites United States v. Northwestern Ohio Natural Gas Co. (C. C.) 141 Fed. 198; United States v. Consumers' Co., 142 Fed. 134, 73 C. C. A. 352; United States v. Kenton, Fed. Cas. No. 15,526.

In the first two cases, it is held that the provisions of section 27 of War Revenue Act June 13, 1898, c. 448, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2306), imposing on persons, firms, corporations, or companies "owning or controlling any pipe line for transporting oil or other products" a special tax, apply only to receipts from the transportation business, and to persons or companies engaged in such business, and a company in the business of purchasing and buying natural gas, which it conveys by means of pipes to a city, where it distributes and sells the same to consumers, is not engaged in the business of transportation within the meaning of the act, nor subject to the tax.

Our view of the section of the Revised Statutes is not at all in conflict with these decisions, because the special tax authorized under the provisions of section 27 of the war revenue act was levied upon and collected from "persons, firms, corporations and companies carrying on the business of * * * transporting oil or other products," and, of course, only included such companies as were in the business of "transportation" by means of "pipe lines," and the persons, firms, etc., included were restricted in the definition of the section to these alone, and did not include every person or corporation who transported goods or other products by means of pipe lines, in connection with another business; or, in other words, the section simply taxes those persons or corporations who were in the business popularly known as "pipe lines transportation business." But the section with which we have to deal in this case is broader and gives its own definition of who shall be regarded as engaged in the business as a rectifier, and it includes every one who rectifies, purifies, or refines distilled spirits.

The same may be said of the last case, which was an effort to impose a cattle broker's tax upon a farmer who occasionally bought and sold cattle and hogs in the course of his business as a farmer. The provisions of the act were restricted to a collection of a tax from men engaged in the business as cattle brokers, and, of course, a farmer who occasionally sold or bought cattle or hogs could not be regarded as a cattle broker and was not held liable.

But, as we have said, this can have no controlling influence upon the decision of the court in this case, because the suit here includes every one who rectifies. If the provision of the law considered in United States v. Kenton, supra, had included every person who bought or sold cattle or hogs, there might have been a different conclusion.

It has been held by the department that the recovery of alcohol by an apothecary, which has been used in making up medicine to be again used by him for the same purpose, is permissible under the exempting clause of section 3246 (page 2103), for which no tax will be collected. But it does not appear from the evidence that the alcohol used and reclaimed by the defendant was used "exclusively" in the preparation of medicine; but, on the other hand, it does appear that it was used in the

preparation of fluid extract of ginger, and it is clear that this is not a use in the preparation of medicine.

For these reasons and those already stated in the case of United States v. Twitchell Co., 184 Fed. 525, the motion for judgment non obstante veredicto is refused.

UNITED STATES v. SMITH, KLINE & FRENCH CO.

(District Court, E. D. Pennsylvania. January 30, 1911.)

No. 6.

1. INTERNAL REVENUE (§ 9*) — RECTIFIERS OF SPIRITS — MANUFACTURE OF FLAVORING EXTRACTS—"ENGAGED IN RECTIFYING, PURIFYING, AND REFINING DISTILLED SPIRITS."

Defendants manufactured fluid extract of ginger by pouring distilled spirits on ginger root. After drawing off the fluid, the distilled spirits remaining in the dregs was separated therefrom by distillation, and this product, less in quantity and lower in grade than that previously placed in the receptacle with the ginger root, was reused in repeating the process and in the manufacture of medicinal preparations. *Held*, that defendant was a person engaged in the business or occupation of rectifying, purifying, and refining distilled spirits and subject to internal revenue taxation imposed by Rev. St. § 3244 (U. S. Comp. St. 1901, p. 2096), on those so engaged.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 21; Dec. Dig. § 9.*]

2. INTERNAL REVENUE (§ 9*)—DISTILLED SPIRITS—"APOTHECARIES."

Defendant was not exempt from such tax as an apothecary under Rev. St. § 3246 (U. S. Comp. St. 1901, p. 2103), providing that no special tax shall be imposed on apothecaries as to spirituous liquors used exclusively in the preparation of medicines.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 21; Dec. Dig. § 9.*

For other definitions, see Words and Phrases, vol. 1, pp. 438, 439.]

3. INTERNAL REVENUE (§ 45*)—SPECIAL TAXES—PENALTIES—LIMITATIONS.

Under Rev. St. § 1047 (U. S. Comp. St. 1901, p. 727), requiring all suits for penalties to be instituted within five years, the government may not recover unpaid special taxes and penalties against persons engaged in the business of rectifying, purifying, and refining distilled spirits for a longer period than five years from the date of suit brought.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 109–113; Dec. Dig. § 45.*]

Action by the United States against the Smith, Kline & French Company to recover special taxes and penalties imposed on persons engaged in the business of rectifying, purifying, and refining distilled spirits. Verdict for plaintiff. On motion by defendant for judgment non obstante veredicto. Denied.

John C. Swartley, Asst. U. S. Dist. Atty.
James Collins Jones, for defendant.

HOLLAND, District Judge. This is a suit in assumpsit instituted to recover the sum of $1,800, special tax and penalties thereon under

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

section 3244, Rev. St. (U. S. Comp. St. 1901, p. 2096), requiring a special tax to be paid by all persons engaged in the business or occupation of rectifying, purifying, and refining distilled spirits. During the years ending June 30, A. D. 1896 to A. D. 1907, respectively and inclusively, defendant was engaged in business in this city as wholesale druggists and manufacturing chemists. It was also engaged in the manufacture of fluid extract of ginger by pouring distilled spirits upon the ginger root, which had theretofore been placed in a receptacle. All of the distilled spirits, save that which remained in the dregs of the ginger root, was drawn off after it had extracted all the ginger essence of the root, the alcohol carrying off and becoming a part of the finished product, namely, the fluid extract of ginger, five per cent. of which was used for making soluble essence of ginger, which was sold for flavoring purposes in soda water fountains, the remainder being used for the making of preparations sold and used exclusively for medicinal purposes. The distilled spirits remaining in the dregs after the fluid extract of ginger had been extracted was separated from the dregs of the ginger root by means of a still, in quantities of less than 500 barrels for each year. The dregs from which the distilled spirits was thus recovered constituted solid matter, being handled with a shovel or a similar implement, and was less in quantity and lower in grade than that theretofore placed in the receptacle with the ginger root, and the distilled spirits thus recovered by means of the still were reused in the manufacture of and became a part of medicinal preparations. The case was tried before a jury with three other cases, and the court, on the above facts, directed a verdict for the government. Thereupon this motion for judgment non obstante veredicto was filed.

The company defended upon the grounds: (1) That it was not liable as a rectifier under the terms of section 3244; (2) that, assuming the defendant was a rectifier within the meaning of section 3244, it was exempt from the tax under section 3246 (page 2103), which provides that no special tax shall be imposed upon apothecaries as to wines or spirituous liquors which they use exclusively in the preparation or making up of medicines; and (3) section 1047, Rev. St. (U. S. Comp. St. 1901, p. 727), bars a recovery in this case beyond a period of five years from the time suit was instituted.

What was said by the court in the cases of United States v. Twitchell Co. (No. 7, September Sessions, 1908) 184 Fed. 525, and United States v. Hance Bros. & White (No. 8, September Sessions, 1908) 184 Fed. 528, is applicable to the facts of this case as to the question of whether this defendant is to be regarded as a rectifier and not exempt under section 3246. It is contended, however, in this case, that, as the alcohol recovered from the dregs after the manufacture of the extract is used exclusively in the preparation of medicine, this case differs in this particular from the two cases above mentioned and brings it within the exemption of section 3246.

The defendant is engaged in manufacturing extract of ginger, which is used as a flavoring for soda water fountains. This is not a medicinal preparation, and the recovery of alcohol from the dregs by the use of the still is to be regarded as rectifying, and for which a tax must

be paid. The fact that the recovered alcohol is subsequently used in the preparation of medicine by the defendant does not entitle it to exemption under the Secretary's ruling. It was there held that the recovery of alcohol from medicines by apothecaries for use again by them in the preparation of medicines could not be extended beyond the express terms of the exempting section, and that neither druggists, apothecaries, nor manufacturing chemists can, as the law stands, set up stills and use them for the recovery of alcohol from flavoring extracts or toilet articles, or any other preparations that are not medicines, without being required to pay a special tax as rectifiers under the third subdivision of section 3244. In other words, some of the alcohol is recovered by the defendant in a business other than the preparation or making up of medicines, and for the recovery of this alcohol it is to be regarded as a rectifier without regard to the use to which it is put by it after the recovery.

In the suit the government seeks to recover this special tax for the years 1896 to 1907, respectively and inclusively, which we think cannot be done in view of section 1047, which requires all suits for penalties to be instituted within the five years. The government cannot, by reason of the provisions of this section, recover beyond five years from the date of the institution of the suit.

The parties therefore will draw a decree in accordance with this opinion, upon which judgment will be entered, after which the motion for judgment non obstante veredicto will be refused.

In re LATHROP, HASKINS & CO.

(District Court, S. D. New York. August, 1910.)

1. BANKRUPTCY (§ 138*)—ASSETS—INTEREST OF BANKRUPT IN POOL—"PROPERTY."

   The interest of a bankrupt in a stock pool to advance the market in a certain stock and then sell to the public constituted "property," within the meaning of the bankruptcy act.

   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 138.*

   For other definitions, see Words and Phrases, vol. 6, pp. 5693–5728; vol. 8, pp. 7768–7770.]

2. WITNESSES (§ 196*)—QUESTIONS—REFUSAL TO ANSWER.

   The refusal of a witness to answer questions relevant to an inquiry in bankruptcy, because he owed to his customers and firm the duty not to disclose their private affairs, is unjustifiable.

   [Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 196.*]

3. BANKRUPTCY (§ 242*)—REFUSAL TO ANSWER QUESTIONS—RELEVANCY.

   A bankrupt was a member of a pool organized to deal in a certain stock to be managed by K. Prior to bankruptcy K. sold several thousand shares of pooled stock, which he had deposited with the witness' firm, together with large quantities of other securities, to secure advances for the benefit of the pool, under an arrangement that the witness might at any time sell for his own account such of K.'s securities as he wished. The pool stock having advanced to 90, witness testified that he began to be uneasy at K.'s refusal to sell, and thereupon determined to sell some of the stock for his own account, and did so to such an extent as to

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

break the market and depress the price to 20, causing the bankruptcy in question. *Held*, that questions asked of the witness in the bankruptcy proceeding as to the market value of the property held by his firm for K. on the day he concluded to sell the stock, and as to whether he had purchased any similar stock to replace that he had used for delivery under the sales he had made, were calculated to inform the trustee whether any assets existed which should be collected, and hence the witness' refusal to answer the same, when ordered so to do by the referee, was contumacious.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 242.*]

In the matter of bankruptcy proceedings of Lathrop, Haskins & Co. On petition to review a referee's order directing one Popper to answer certain questions propounded to him at a meeting of creditors. Order affirmed, and witness punished for refusing to answer.

Abram I. Elkus and W. S. McGuire, for trustee.
Edward W. Hatch, for Popper; Sternbach & Co.

HOUGH, District Judge. It plainly appears from the evidence that the bankrupts were interested (with others) in what is commonly known as a "pool" in certain stock colloquially described as "Hocking Coal & Iron." The object of these joint adventurers was to control the market and advance the quoted price for said stock until such time as the public should become sufficiently interested therein to bid and pay a price satisfactory to the members of the pool. That the interest of the bankrupt in this business enterprise constituted property is not denied.

Another party interested in this scheme was Mr. Keene, who was the manager of the pool; that is to say, he seems to have directed the transactions, whether of buying or selling, in the pool stock which (in a manner to be stated) was under his control, for the benefit of himself and all others jointly interested. Mr. Keene's control over several thousand shares of this pooled stock in the early part of 1910 was of the following nature: The stock was deposited with Popper, Sternbach & Co., together with very large quantities of other securities, and against the entire mass of securities the firm last named had advanced large sums of money in a manner too familiar to require description in this city. Summarily stated, Popper, Sternbach & Co. were "carrying" the securities referred to for Mr. Keene.

Mr. Popper testifies that at the beginning of 1910 he grew uneasy at the refusal of Mr. Keene to sell any of this Hocking Coal & Iron stock. He was of opinion that, if the facts regarding Mr. Keene's account should "transpire," said account "would be in a very bad shape, and I would be compelled to call on him for a very large sum of money, and I wasn't certain whether I would get the amount of money that was necessary, or such securities as I could use."

Mr. Popper had done business with and for Mr. Keene for a considerable time, and when their business relations began (or at any rate long before the beginning of 1910) it had been agreed between them that Mr. Popper might at any time sell for his own account such of Mr. Keene's securities as he wished. As a method, therefore, of

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

curing the difficulty above referred to, and arising from a difference of opinion between Messrs. Popper and Keene as to the disposition of the latter's securities, Mr. Popper concluded to sell some Hocking Coal & Iron, and he said:

"I thought there was very little risk, as we considered it, * * * in selling the stock at around the prices it was then selling at, which was about 87 or 88, so I commenced to sell some stock."

It is alleged (with what exact truth does not appear to me from the record) that the effect of these sales by Mr. Popper was to break the market, depress the nominal price of Hocking Coal & Iron from nearly 90 to 20, and produce with promptitude the bankruptcy of Lathrop, Haskins & Co. and others. The proceeds of Mr. Popper's sales were not paid to Mr. Keene. When Mr. Keene testified herein, on June 17, 1910, he did not know whether the stock so used by Mr. Popper had been replaced or not, and he states that he first found out that Mr. Popper or his firm had sold Hocking Coal & Iron for their own account about "the 23d of February," and the occasion of his finding it out was that:

"He [Mr. Popper] had to make under some subpœna a detailed account of his stock and what he had done with it."

In this condition of the testimony, and Mr. Popper being on the witness stand, he was asked in substance:

(1) As to the market value of the property held by Popper, Sternbach & Co. for Mr. Keene at the close of business on January 18th; i. e., the time, or approximate time, when Mr. Popper concluded that it was necessary to sell some of the said stock for his firm's account out of Keene's holdings; and

(2) As to whether he had purchased any Hocking Coal & Iron stock to replace that which he had used for delivery under the sales that he had made.

The object of these inquiries seems too plain to require comment. Both of these queries Mr. Popper refused to answer. He gave to the referee as a reason for such declination that he owed it to his "customers to refuse to give evidence in this proceeding concerning their private affairs or the private affairs of [his] firm." So far as this reason for the witness' action is concerned, I have nothing to add to what was held in Re Harriman (C. C.) 157 Fed. 440, and I do not understand that this ground of refusal is now asserted to be good.

It is, however, vigorously declared that no conceivable answers to the questions asked could be relevant to the "acts, conduct, or property" of the bankrupt, and therefore cannot be within the scope of any inquiry authorized by the bankruptcy statute. If it be (as it is) admitted that the bankrupts' interest in the pool property controlled by Mr. Keene and deposited with Mr. Popper was itself property, then every question tending to show why that property was lost, in what manner it was lost, who lost it, and who is responsible for such loss, is pertinent, relevant, and material. In this instance it is asserted that the bankrupts' property right was lost by Mr. Popper's

action, that such action was due to the exercise of his legal right as against Keene, that the reason for the exercise of that legal right was a distrust, not communicated to Mr. Keene, of the latter's willingness or ability to respond with money if the market went against him, and that the result of such exercise by Mr. Popper of his legal right was to lower the market, so that he could have replaced the stock he had himself sold at prices which would have shown a large profit to somebody. Query, whether to Mr. Popper or to Mr. Keene.

The transaction was most extraordinary, and, in my judgment, although it is true that these bankruptcy inquisitions are to be conducted only to enable creditors to discover whether the bankrupt is entitled to a discharge, and inform the trustee whether any assets exist which should be collected (In re Horgan & Slattery [2d Circuit] 3 Am. Bankr. Rep. 253, 98 Fed. 414, 39 C. C. A. 118), this is eminently an instance where "large latitude of inquiry should be allowed in the examination of persons closely connected with the bankrupt in business dealings." In re Foerst (D. C.) 1 Am. Bankr. Rep. 259, 93 Fed. 190.

I agree with the referee that the first inquiry is calculated to ascertain the accuracy of the statement by Mr. Popper in respect of the reasons moving him to make sales so disastrous in their results, and the second question is calculated to show whether anybody, and, if so, who, profited by the opportunities for gain presented by the transaction above outlined from the evidence.

It is admitted that in this matter there is no willful contempt. The ruling of the referee is therefore affirmed, and a nominal fine of $10 imposed upon Mr. Popper, for the use of the United States, and he is directed to answer the questions certified.

THE QUEEN.

(District Court, N. D. California. January 10, 1910.)

No. 13,478.

PILOTS (§ 3*)—STATE PILOTAGE LAWS—EXEMPTION BY FEDERAL STATUTE—"COASTWISE STEAM VESSEL."

A duly registered American steamer engaged in making voyages between United States ports on Puget Sound and San Francisco, although in making such voyages she touched at the foreign way port of Victoria, taking on freight and passengers for San Francisco, was a "coastwise steam vessel," within the meaning of Rev. St. § 4444 (U. S. Comp. St. 1901, p. 3037), which exempts such vessels from the operation of state pilotage laws, and a state pilot whose services were refused on her entry into the port of San Francisco, her master and mate being licensed pilots under the laws of the United States, cannot subject her to pilotage fees under Pol. Code Cal. §§ 2466, 2468.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. § 2; Dec. Dig. § 3.* For other definitions, see Words and Phrases, vol. 2, p. 1239.]

In Admiralty. Suit by M. Anderson against the steamship Queen. Decree for respondent.

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

G. R. Lukens, for libelant.
Geo. W. Towle, for respondent.

DE HAVEN, District Judge. This is an action, in rem, to recover the sum of $108.60, alleged to be due the libelant as a pilotage charge, under the laws of the state of California. The action was submitted to the court upon an agreed statement of facts, from which it appears that the libelant was, at all the times referred to in the libel, a duly licensed pilot of the port of San Francisco, holding a license to so act, issued to him by the United States local inspectors of steamships, and also a license as such pilot issued to him by the state board of pilot commissioners for the port of San Francisco; that libelant tendered to the master of the steamer Queen, as she was entering the port of San Francisco, on August 14, 1905, his services as a pilot, and the same were refused; that the steamer Queen was a duly registered American vessel at the time; that she was then completing a voyage from an American port on Puget Sound to the port of San Francisco, via Victoria, B. C., and for some time prior thereto had been engaged in making voyages between the port of San Francisco and American ports on Puget Sound; and that "on each and every such voyage the port of Victoria, B. C., was a regular port of call, being the first port of call or stop on each voyage outward from San Francisco, Cal., and the last port of call or stop on each voyage towards San Francisco, Cal."

It further appears that the stop at Victoria was only for a short period, and the earnings of the vessel for passengers, mail, and freight, carried to and from that port, were small as compared with the earnings of the steamer in its purely domestic, coastwise trade; that the master and the first officer of said steamer were duly licensed under the laws of the United States to act as and serve as master and as pilot of any American steam vessel, when entering or departing from the port of San Francisco.

There are other facts set out in the agreed statement; but, in the view I take of the case, they need not be referred to at this time.

The particular statute under which libelant claims his right to maintain this action is found in sections 2466 and 2468 of the Political Code of the State of California. The first of these sections provides the rates of pilotage for vessel spoken when bound into or departing from the harbor of San Francisco, and section 2468 is as follows:

"All vessels sailing under an enrollment, and licensed and engaged in the coasting trade between the port of San Francisco and any other port of the United States shall be exempt from all pilotage unless a pilot be actually employed. All foreign vessels and all vessels from a foreign port or bound thereto, and all vessels sailing under a register between the port of San Francisco, and any other port of the United States shall be liable for pilotage as provided in section twenty-four hundred and sixty-six of this Code."

That the state has authority to regulate pilot charges at ports within its territorial limits in so far as such regulations do not conflict with the legislation of Congress relating to the same subject is author-

itatively settled. Cooley v. Board of Wardens, etc., 12 How. 299, 13 L. Ed. 996.

The right of the pilot to the compensation provided for in the sections of the statute above referred to does not depend upon the acceptance of his services by the vessel when such services are tendered. This being so, it follows from the facts agreed upon that the libelant is entitled to recover, unless the statute, under which he claims, is inconsistent with some act of Congress.

Now section 4444 of the Revised Statutes (U. S. Comp. St. 1901, p. 3037) provides:

"No state or municipal government shall impose upon pilots of steam vessels any obligation to procure a state or other license in addition to that issued by the United States, or any other regulation which will impede such pilots in the performance of the duties required by this title; nor shall any pilot charges be levied by any such authority upon any steamer piloted as provided by this title. * * * Nothing in this title shall be construed to annul or affect any regulation established by the laws of any state, requiring vessels entering or leaving a port in any such state, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such state, or of a state situate upon the waters of such state."

The effect of this section is to exempt coastwise steam vessels from the operation of state pilotage laws. Olsen v. Smith, 195 U. S. 332, 25 Sup. Ct. 52, 49 L. Ed. 224; Sprague v. Thompson, 118 U. S. 95, 6 Sup. Ct. 988, 30 L. Ed. 115; The Carrie L. Tyler, 106 Fed. 422, 45 C. C. A. 374, 54 L. R. A. 236.

If then the Queen was a coastwise steamer, within the meaning of section 4444 of the Revised Statutes, she is exempt from the payment of the pilotage charges, provided for in the statute of the state of California, and sued for in this action; and I am of the opinion that under the agreed statement of facts she is to be so regarded. She was engaged in making a coastwise voyage, between ports of the United States, when libelant tendered to her his services as a state pilot, and the fact that in making such voyage she touched at the foreign way port of Victoria, and took thereon freight and passengers for San Francisco, did not deprive her of her character as a coastwise steamer and subject her to pilotage charges under the law of the state of California. The libel is dismissed.

On appeal to the Circuit Court of Appeals; certain questions certified to the Supreme Court.

In re FRANKEL.

(District Court, S. D. New York. January 4, 1911.)

BANKRUPTCY (§ 136*)—PROCEEDINGS AGAINST BANKRUPT FOR CONTEMPT—ESTOPPEL BY ORDER OF REFEREE.

In a proceeding for contempt in a District Court against a bankrupt for failure to comply with an order of the referee to turn over money or property to the trustee, such order, not appealed from, is conclusive of the fact that at the date of its entry the bankrupt had the money or property in his possession or under his control.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 235; Dec. Dig. § 136.*]

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

In the matter of Justus Frankel, bankrupt. On motion to punish bankrupt for contempt. Motion granted.

This cause comes up on the return of an order to show cause to punish the bankrupt for a contempt of an order of the referee directing him to pay over $16,215 to his trustee. The order was made after full hearing and testimony, and it adjudged that the bankrupt was then concealing that sum of money from the trustee, and refused to pay it over. The time expired within which a petition to review the order could be filed without the bankrupt's filing such a petition. Thereupon the trustee applied to the referee for a certificate that the bankrupt was in contempt, and upon that obtained the order to show cause. Upon the return day the bankrupt filed an affidavit saying that he had retained or concealed no money whatever, and could not comply with the order of the referee, but had no alternative, if held in contempt, but to stay in jail till released. He also submitted an account made by his own accountants to show the error of the conclusion of the referee.

Upon the first hearing the court considered the merits of the original proceeding, upon the theory that it was not conclusive in this, and also considered the account submitted. He concluded that the case was not made out against the bankrupt with enough certainty to justify a commitment, and directed that the motion be denied, unless the trustee cared to go to a special master on the facts. The case now comes up on the reargument, based upon the theory that the order of the referee was an adjudication constituting an estoppel as of the time that it was entered, and as the bankrupt does not suggest that he has disposed of any property since the order, but contents himself with contradicting the finding of the referee and swearing that he cannot comply with its terms.

Robert P. Levis, for trustee.
Irving L. Ernst, for bankrupt.

HAND, District Judge (after stating the facts as above). I have already expressed myself as dissatisfied with the finding of the referee, not so much from what he had before him, as because, with what the bankrupt produced at this hearing, I was not as clear as I think I ought to be that at that time he had property concealed. Upon this motion the issues are merely this: Was the order made? Has the bankrupt disobeyed it? Has he the ability now to comply with it? As to the first two they are conceded; the question is of the third. If the order directing him to pay over the money is an estoppel, then that controversy is concluded by the order, and the only question is simply whether the bankrupt since the time of that order has in fact parted with any of the property which was then in his possession. Moreover, though it would be most unwillingly, still if that be law, it would be my duty to commit the bankrupt, even though I felt as much doubt as I do of his possession of the funds.

The question is therefore of the effect of the referee's order directing him to pay the money. I think it was essential in law, before making a summary order, for the referee to find that the bankrupt had at the time actual possession or control of the property which he was directed to turn over. The only proper purpose of such an order is to bring into the trustee's possession property belonging to the estate. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. If the bankrupt has seized and disposed of property belonging to the trustee, that may well be a civil tort, for which the trustee

might sue him in conversion and get a judgment; but he could not do so in the bankruptcy court. It is true that the Circuit Court of Appeals for the First Circuit (Re Cole, 163 Fed. 180, 188, 90 C. C. A. 50, 23 L. R. A. [N. S.] 255) speaks of such an order as though it might have merely established a debt against the respondent; but they do not indicate whether in their judgment it would be proper to enter such a summary order as a judgment upon a debt. Our own Circuit Court of Appeals, in Re Banzai Manufacturing Company, Ex parte Bergstrom, 183 Fed. 298, called attention likewise to the fact that so much of a similar order as adjudicated liability for money which the respondent had paid out could not be enforced for contempt; but it expressed no opinion that such an order was pro tanto proper, and did not have that question before it. Of course, this is a material inquiry here, because, if the determination was not necessary to the order of the referee, which might equally well have passed without it, then, although an express finding of fact, it has not the force of an adjudication and concludes nothing. House v. Lockwood, 137 N. Y. 259, 33 N. E. 595.

Still the question may be whether, though necessary to the order, the finding is conclusive in a separate proceeding like this, in which the court is asked itself to move, as though it were the complaining party. Judge Brown, in Rhode Island, has held that it is not conclusive in Re Davison (D. C.) 143 Fed. 673, deciding that upon the contempt proceedings the court must de novo always be satisfied that the bankrupt can comply with the order. However, the precise point was not mentioned by him whether in reaching that conclusion he was bound to accept as an estoppel that on the date of the summary order the bankrupt had the money, and the general proposition is undoubtedly correct that the issue must be found against the respondent of his ability to comply. On the other hand, our own Circuit Court of Appeals, in Re Stavrahn, 174 Fed. 330, 98 C. C. A. 202, proceeded upon the theory that the bankrupt upon such a proceeding must show that since the date of the order he had lost ability to comply with it, and that if he did not show that an order of committal was proper. Although it is not expressly so stated, the reasoning appears to be based upon the understanding that the order concluded the controversy up to the date of its entry. The words used are that the order makes a prima facie case; but, of course, no judgment inter alios makes any case whatever and is immaterial. The reason why they did not say that it made a conclusive case was, I think, because the bankrupt might show that since the order he had parted with the funds. In addition, it is of much authoritative weight that it has undoubtedly been the practice in this district to treat such orders as conclusive estoppels upon the date of their entry, and to leave open to the respondent only the issue of showing what he has done with the money since that time.

In Re Marks (D. C.) 176 Fed. 1018, Judge McPherson concluded that at the end of two years from the summary order he would not commit the bankrupt because he thought him then unable to comply. He says that he was under a "presumption" of ability arising from

the order. This must mean, I think, what was meant in Re Stavrahn, supra; i. e., that having been shown absolutely to be in such possession at a given date he is presumed to remain able to comply till he shows the contrary. In Boyd v. Glucklich, 116 Fed. 131, 53 C. C. A. 451, though the court went far in its requirements, even to the extent of the old rule that a denial by the respondent was enough, still the summary order was itself under review. In Re Switzer (D. C.) 140 Fed. 976, the same situation existed. In Samel v. Dodd, 142 Fed. 68, 73 C. C. A. 254, the case was quite different. No authority seems to exist to the contrary, but In re Davison, supra.

If anything be left open on authority, however, upon principle the same conclusion follows. It is quite true that contempt proceedings in the federal courts have often been called criminal. New Orleans v. New York Mail S. S. Co., 20 Wall. 387, 22 L. Ed. 354; Boyd v. Glucklich, 116 Fed. 131, 53 C. C. A. 451; Kirk v. Milwaukee Dust Collector Mfg. Co. (C. C.) 26 Fed. 501. This means that the court is, as I have suggested, in some sense the moving party, and perhaps formally the proceeding is not between the same parties. That is not enough for the defendant's purposes, however. The proceeding presupposes that the order disobeyed was regularly and formally promulgated, and no review of it is open. People v. Spalding, 2 Paige (N. Y.) 326. Therefore, in so far as the order directs any one to do anything, he may not in the contempt proceeding question the propriety of the direction; and in so far as the order determines an existing fact, which is necessary in law to the validity of the direction, he may not question its truth. To question such a fact is to question the validity of the direction which depends upon it, and is only an indirect way of reviewing the order. Therefore now to deny the fact that the bankrupt had the money in his possession is in this case to assert that the order directing him to pay it over was erroneous. On this account, therefore, that fact is concluded, once it be granted that it was necessary to the validity of the order, which I have shown.

Quite reluctantly, therefore, I can only conclude that I was wrong originally to inquire into the merits, and that a committal must issue. However, the authorities are involved in considerable confusion, and, if the respondent wishes, he may forthwith appeal to the Circuit Court of Appeals, and I will stay the warrant meanwhile. In that case I shall permit the account from the books, with a proper affidavit attached, to be considered as a part of the answering papers.

UNITED STATES v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. December 17, 1910.)

Nos. 25 and 26.

1. CARRIERS (§ 38*)—INTERSTATE COMMERCE ACT—PROSECUTION FOR GIVING CONCESSIONS—QUESTIONS FOR JURY.

On the trial of indictments against a railroad company for granting concessions to a shipper in respect to interstate shipments in violation of the Elkins Act of Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1909, p. 1138), and for failing to observe its published tariff rates with regard to demurrage charges, the questions whether defendant had made a settlement with the shipper as to such demurrage, and whether, if so, the cancellation of the charges was a valid settlement of a disputed claim or for the purpose of making a concession in violation of the law were questions of fact for the jury.

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

What constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations, see note to Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co., 94 C. C. A. 230.]

2. CARRIERS (§ 38*)—PROSECUTION FOR GIVING CONCESSIONS IN VIOLATION OF INTERSTATE COMMERCE ACT—VARIANCE.

An indictment against a railroad company containing a number of counts, each charging the granting of a concession by defendant to a shipper in violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1909, p. 1138), by failing to collect a demurrage charge fixed by its published schedule of rates on a single carload shipment, is supported as to any one count by proof that at a single settlement between defendant and the shipper after all the shipments charged had been made defendant made a concession equal to the demurrage charges on all of the cars.

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

Criminal prosecution against the Philadelphia & Reading Railway Company. On motion and reasons for new trial. Overruled.

J. Whitaker Thompson, for the United States.

John G. Lamb and Charles Heebner, for defendant.

HOLLAND, District Judge. The defendant is indicted upon the charge of granting and giving a concession in respect to the transportation of property in interstate commerce in violation of the provisions of Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1909, p. 1138), and also for failing to strictly observe the published tariff rates until changed according to law.

At the trial, upon a plea of not guilty, the defendant was convicted, with a recommendation to the mercy of the court. A motion and 26 reasons for a new trial were duly filed. All the reasons assigned will not be considered, as many of them are based upon questions of law which were fully considered in the charge of the court. Three propositions, however, were discussed by counsel at the argument on the motion for a new trial, to which reference will be made. They are:

First. That there was no settlement for demurrage charges on cars against the Bethlehem Steel Company for the period from April 1 to

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

October 1, 1907, and therefore no concession made by the defendant, as charged in the indictment. The defendant is charged in one indictment (No. 25) with failing to strictly observe its tariffs with regard to demurrage charges on its cars used in the transportation of interstate freight to the Bethlehem Steel Company during the period from April to October, and in indictment No. 26 with having granted a concession in the cancellation of demurrage charges on cars of the defendant used in the transportation of interstate commerce to the Bethlehem Steel Company during the same period. While the weight of the evidence may be to the effect that no settlement was had with regard to the demurrage charges made by the defendant against the Bethlehem Steel Company during this period, yet there was some evidence to show that the comptroller of the company regarded the settlement as covering this period. The voucher in settlement so stated, and there is now no charge against the Bethlehem Steel Company in the accounts of defendant for demurrage on cars for this period. This was a question of fact, and properly submitted to the jury.

Second. That the alleged concession was simply the settlement of a disputed claim for demurrage on cars of the defendant used in transporting interstate freight to the Bethlehem Steel Company, and that the Bethlehem Steel Company had established a legal defense to this claim, which was acknowledged by the defendant, and the cancellation of the charges made. This was also a question of fact which was properly submitted to the jury, and the verdict establishes the contention of the government that it was not a valid settlement of a disputed claim but was the cancellation of a demurrage charge by the defendant for the purpose of making a concession to the Bethlehem Steel Company in the matter of charges, in violation of the interstate commerce act.

Third. That the giving or receipt of a concession being the gist of the offense, the court should have instructed the jury that inasmuch as the defendant in one settlement on December 29, 1908, canceled the demurrage charges against the Bethlehem Steel Company, which cancellation constituted the granting but one concession by the defendant to the Bethlehem Steel Company, the jury could not return a verdict of guilty upon each count of the indictment for each car, though subject to a demurrage which was included in the whole settlement. In other words, as indictment No. 25 contained 63 counts, and indictment No. 26, 24 counts, each based upon a concession granted by the defendant to the Bethlehem Steel Company on demurrage charges on separate car loads, there could be no conviction. There was only the one settlement which took place on the date mentioned when the whole alleged concession was consummated. It is true that the defendant is charged in indictment No. 25 in 63 counts with failing to strictly observe its tariffs during the period mentioned, and in indictment No. 26 the defendant is charged on the 24 separate counts, in similar manner, with granting a concession in demurrage charges on separate car loads. Upon the indictment charging a failure to strictly observe the tariff sheets, the government offered evidence to show that on each of these separate car loads the defendant failed to collect the demur-

rage charges, in accordance with the tariff sheets, and the jury found the defendant guilty in manner and form as indicated, to wit, on the 63 counts. Similar evidence was offered as to the indictment charging the concession with regard to each separate car load, and the verdict establishes that the defendant made a concession on the demurrage charges for each car load shipped, and the evidence also tended to establish, and the jury so found, that the amount of the concession made at the single settlement on December 29, 1908, was in excess of the amount of each car load, and, in fact, sufficient to cover the amount of the alleged concession on the total number of cars, so that the evidence offered was the same, and sufficient to establish a concession made on the car mentioned in any one of the counts. In fact, as a matter of pleading, the government could not more specifically set forth the items of charge of which the concession consisted, and the fact that the total of the settlement exceeded the concession upon one car load is not ground for urging a failure to prove the alleged concession charged in the count. It is established, from the verdict of the jury, that the government proved the concession on the demurrage as to each car load mentioned in the different counts, so that it can be said that the charge as to any count has been fully established.

The charges for demurrage, as set forth in the published tariffs of the defendant, were upon car loads, and it was incumbent upon the government in charging the offense to specifically set forth the nature, and, if possible, the amount of the concession, and to point out what particular tariff charges the defendant violated and failed to observe in making the concession; and, as was said by the court, in the case of United States v. New York Central Railway Company (C. C.) 157 Fed. 293, "if the indictment declared upon one carriage and one payment, and it appeared that there were many carriages for one payment, there would be danger of a variance, and so also it might be impossible to prove all the carriages and all the rebates aggregating the payment made." It is a well-recognized principle of criminal law that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad. Claasen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; Locke v. United States, 11 U. S. 339, 3 L. Ed. 364; Clifton v. United States, 45 U. S. 242, 11 L. Ed. 957; Evans v. United States, 153 U. S. 595, 14 Sup. Ct. 934, 38 L. Ed. 830; Goode v. United States, 159 U. S. 669, 16 Sup. Ct. 136, 40 L. Ed. 297; Greene v. United States, 154 Fed. 401, 85 C. C. A. 251. In the case at bar, the most that can be urged is that the same offense in each indictment is charged in more than one count. Each count, however, is properly drawn, and the crime charged established to the satisfaction of the jury by competent evidence, and it cannot be denied but that the evidence in support of the single concession was competent proof to establish the allegations set forth in each count in the indictment. The defendant is not in any wise prejudiced by the general verdict of guilty on each indictment if the penalty for only one offense be imposed. The decision of the Circuit Court of Appeals in the case of Standard Oil Company v. United States, 164 Fed. 376, 90 C. C. A. 364, is not in conflict with

this view, as it was there held, in effect, that a settlement could only be considered as one concession without regard to the number of "train loads, car loads, or pounds." There is no intimation that the manner of pleading adopted by the government in the case at bar is improper.

The view of the court upon other questions of law which are now urged as reasons for a new trial is fully set forth in the charge, and entirely unnecessary to repeat.

The motion is therefore overruled.

UNITED STATES v. BETHLEHEM STEEL CO.

(District Court, E. D. Pennsylvania. December 17, 1910.)

Nos. 33 and 34.

Criminal prosecution against the Bethlehem Steel Company. On motion and reasons for new trial. Overruled.

J. Whitaker Thompson, for the United States.
John G. Johnson, for defendant.

HOLLAND, District Judge. This case was tried before the same jury that tried the indictments against the Lehigh Valley Railway Company (Nos. 23 and 24 of March Sessions, 1910) infra, and those against the Philadelphia & Reading Railway Company (Nos. 25 and 26 of March Sessions, 1910) 184 Fed. 543. The defendant in indictment No. 33 is charged, in 63 counts, with soliciting and accepting from the Philadelphia & Reading Railway Company a concession in relation to transportation of property in interstate commerce, and is the same transaction for which this company was indicted for granting a concession. And in indictment No. 34 the defendant is charged with a similar offense, in 97 counts, with soliciting and accepting from the Lehigh Valley Railway Company a concession in relation to the transportation of property. In other words, the defendant is charged in both indictments with having solicited and accepted a concession on demurrage charges from each of the above-mentioned railways, and upon both of these indictments the jury found a general verdict of guilty.

Motion and a number of reasons for a new trial were filed, involving the same questions already considered in the case of the United States against the Reading Railway Company, supra, and for the reasons there stated the motion is overruled.

UNITED STATES v. LEHIGH VALLEY R. CO.

(District Court, E. D. Pennsylvania. December 17, 1910.)

Nos. 23 and 24.

Criminal prosecution against the Lehigh Valley Railroad Company. On motion and reasons for new trial. Overruled.

J. Whitaker Thompson, for the United States.
J. F. Schaperkotter, for defendant.

HOLLAND, District Judge. This case was tried at the same time before the same jury that tried the indictments against the Philadelphia & Reading Railway Company (Nos. 25 and 26 of March Sessions, 1910) 184 Fed.

543. A motion and a number of reasons for a new trial were filed. There is no reason set forth in this case that has not already been considered in the case against the Philadelphia & Reading Railway Company, and, for the reasons stated in that case, the motion is overruled.

PATTERSON v. PATTERSON.

(Circuit Court, S. D. New York. December 19, 1910.)

RECEIVERS (§ 58*)—PARTNERSHIP—GROUNDS FOR VACATION OF RECEIVERSHIP.

Where receivers have been appointed in a suit between partners, to wind up a partnership formed to carry out a contract for the construction of a public work, on a bill alleging insolvency and that the completion of the contract by receivers will be for the benefit of creditors, to which the majority of the creditors have given their assent, an affidavit of the attorney for a single judgment creditor, stating his belief merely that the firm is solvent, and that the receivership was obtained for the purpose of hindering and delaying the creditors, and for the benefit of the partners, is insufficient to justify the vacation of the receivership, or the granting of leave to such creditor to issue an execution and levy the same on property in the hands of the receivers.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 97–102; Dec. Dig. § 58.*]

In Equity. Suit by James W. Patterson, Jr., against John W. Patterson. On motion by the Coralline Drug & Chemical Company to vacate receivership. Motion denied.

See, also, 182 Fed. 952.

Wm. H. Stayton, for complainant.

Arthur B. La Far, for defendant.

Carlton B. Pierce, for Coralline Drug & Chemical Co.

WARD, Circuit Judge. This is an order obtained by the Coralline Drug & Chemical Company upon the receivers of Patterson & Co. to show cause why, first, their appointment should not be vacated; second, the Coralline Company should not be allowed to issue execution upon a judgment obtained by it against Patterson & Co. and levy the same on the firm's property in the hands of the receivers; third, why the receivers' work on the contract should not be discontinued and the contract sold.

March 24, 1909, James W. Patterson, Jr., and John W. Patterson, as partners, entered into a contract with the city of New York for the construction of the Bull Hill tunnel of the Croton Aqueduct in Putnam county, known as "Contract No. 22," and the partnership appears to be confined to this one adventure. September 20, 1910, James W. Patterson, Jr., filed a bill against John W. Patterson, alleging that the partners differed as to the method of performing the contract, that the firm was unable to pay its wages or debts in due course, that if threatened suits and attachments were begun and levied its property would be sacrificed and dissipated, and that only by completing contract No. 22 could its creditors be paid in full. The relief

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

prayed for was that receivers be appointed to complete the contract, and the firm be wound up and its assets distributed among its creditors. The dissolution of the firm is necessarily involved, though the fact is not expressly stated in the bill.

On the same day the defendant answered, admitting the allegations of the bill, and joining in the prayer thereof. An affidavit of the complainant, verified the same day, shows that the appraised value of the firm's plant, together with the moneys earned, but not paid, on the contract, amounted to $126,142, of which the sum of $20,000 was not payable until the tunnel should be cleaned out, and the sum of $32,000, percentage retained by the city, was not payable until the completion of the contract. The indebtedness was $107,649.59. Thus insolvency was established, both in the ordinary mercantile sense of inability to meet debts in due course and also in the sense that the assets are not equal to indebtedness.

On the same day the court made an order reciting that it appeared to be to the interest of the creditors to wind up the business of the firm, appointed receivers with authority to continue the contract until further order of the court, with the usual order restraining creditors and all other persons from interfering with the firm's property in the hands of the receivers, and directing that all creditors and other persons interested show cause on October 6th why the receivership should not be made permanent, a copy of the order to be mailed to all creditors on or before September 26th and to be published for two successive weeks in the New York Times and in a newspaper of general circulation in Putnam county.

September 29th the temporary receivers reported to the court that, after an examination of the whole situation, they believed contract No. 22 could be completed at a profit and to the best interest of the creditors of the firm. October 6th, upon the return of the order to show cause, of which the attorney for the Coralline Company had notice, creditors appeared, of whom creditors representing over 50 per cent. of the firm's indebtedness requested in writing that the receivership be made permanent, and none objected. October 13th the receivership was made permanent.

September 26, 1910, the Coralline Company began suit against Patterson & Co. in the state court by an attachment of their funds in the hands of the comptroller. The firm appeared, but November 9th allowed judgment to go by default for $324.88. November 10th the receivers obtained an order releasing the attachment under section 21 of the lien law upon the comptroller's setting aside $500 as security for the lien, which order the Coralline Company has subsequently moved to vacate.

The only affidavit in support of this very comprehensive motion is that of Carlton B. Pierce, one of the attorneys of the Coralline Company, who says he believes that Patterson & Co. are solvent, and were solvent when receivers were appointed, and have more assets than those mentioned in the affidavit of James W. Patterson, Jr.; that the work on contract No. 22 is only half done, and will not be completed for at least 18 months; that other contractors will be

glad to take the contract; and that the receivership was intended to hinder and delay creditors for the benefit of the firm.

Under the circumstances it seems to me that the completion of contract No. 22 by the receivers is the best course to pursue for the benefit of the creditors. Heatherton v. Hastings, 5 Hun (N. Y.) 459. Any disposition of the contract that can be made at a profit will receive the most serious consideration. If I were satisfied that the receivership was applied for to hinder or delay creditors, or that Patterson & Co. were or are solvent and their assets sufficient to pay their creditors in full, I should vacate the receivership, or order a sale of the firm's property at once. But I do not credit these allegations. At all events there is no proof of them. The affidavit of the belief of these allegations by an attorney for a creditor is wholly insufficient to justify the relief asked for. The beginning of the suit by attachment September 26th was a contempt, though apparently unintentional, of this court's order of September 20th.

The motion is denied.

R. GUASTAVINO CO. v. COMERMA et al.

(Circuit Court, S. D. New York. January 4, 1911.)

TRADE-MARKS AND TRADE-NAMES (§ 97*)—INFRINGEMENT—INJUNCTION.

Where it was shown that the names "Spanish tile arch" and "cohesive tile arch" by long use have come to indicate the work of complainant, without the use of his name in connection therewith, because until the recent entry of defendant into the field no one else had built similar arches in this country, an injunction to adequately protect complainant in the exclusive use of such names as a trade-mark should prohibit their use by defendant, even with his own name prefixed or added, except in connection with other words clearly indicating that he is not the original maker of such arches.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. § 97.*]

In Equity. Suit by the R. Guastavino Company against John Comerma and another. On settlement of order for preliminary injunction.

See, also, 180 Fed. 920.

Elbridge L. Adams, for complainant.

H. B. Davis, for defendants.

HAND, District Judge. This case now comes up in settlement of the order; the complainant insisting that no suffix or prefix will serve, but that the writ must forbid the use of the phrases themselves. Now it is quite true that there is no difficulty in law involved in an absolute writ against the phrases "Spanish tile" or "cohesive tile," though they are respectively truly geographical and descriptive Thompson v. Montgomery (1891) App. Cas. 217, Shaver v. Heller & Merz Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878. In this

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

case the defendant may use these words in any other combination, to describe his tiles as copied from Spanish tiles or as cohering together; but if it is essential, to protect the complainant's trade, that he should give up those particular combinations, the authorities permit it. Is it necessary? As I said in the former opinion, the phrases have hitherto designated without differentiation both structure and workmanship. An architect, learning that the structures were called "Spanish tiles" or "cohesive tiles," might be attracted by Guastavino's workmanship, as well as by the kind of arch indicated. In the designation of that workmanship Guastavino is entitled to be protected. Suppose this supposed architect contracts with Comerma for "Comerma's Spanish tile arch." Is there anything in that to indicate that Comerma may not have been the original maker whose work he wishes to get? It is not necessary that the name, Guastavino, should be associated with the phrase, so that the name of the workman be known, but only that the excellence of his work be so identified. If the phrase means his work, it should be protected, though he were unknown by name.

There is evidence here that "Spanish tile" and "cohesive tile" do indicate work of Guastavino, whether known by his name or not. I do not think that it is enough merely to call Comerma's arches by Comerma's name, because that does not contradict their being made by the same person who made "Spanish tile," or "cohesive tile," arches hitherto. That might be so, if Guastavino's work were inevitably known by his name; but, when much of it was known by the phrases, it does not protect him to add "Comerma." Indeed, it may further injure him by lending color to the supposition that the former unknown maker was Comerma. If the name of a kind of architecture has been associated with only one unknown maker, a succeeding maker who imitates it must go so far as to show that he is not the same man as the originator. The only adequate paraphrase would be "Spanish tile arch, not made by the original maker of such arches." That is the effect of the "Stone Ale" case. Of course, it would be simpler to forbid the phrase altogether than to attempt so clumsy a circumlocution as that, leaving the imitator to adopt such a phrase as would otherwise convey the same descriptive idea. For example, he might say "tile arches of Spanish design," "arches of cohesive tiles." The whole language is open to him, except the particular phrase which custom has now associated with the complainant. If it be answered that this cuts off some use of the common language to him, the reply is that it does, indeed, but that it cuts off only a particular combination of words, and that to compel a suffix or a prefix is equally to forbid a particular combination, because such a combination consists as much of what it omits as of what it contains.

I will therefore give the defendant the alternative of adding as a suffix substantially the following: "Not made by Guastavino, the original maker of such arches"—or of abandoning the phrases altogether. Judge Lacombe has already pointed out how in these cases the calm of a temporary stay stimulates the inventive faculties, which congenital imitativeness seems so often to palsy. The defendant may

from the resources of the language find an adequate description, without using the precise phrases which have been associated with Guastavino.

Let the order pass in accordance with the above.

In re LIPPMAN.

(District Court, E. D. New York. November 29, 1910.)

BANKRUPTCY (§ 136*)—WITHHELD ASSETS—EVIDENCE.

Evidence *held* to require a finding that a bankrupt had withheld from his trustee assets of the value of $6,028.05 in money and property, for which he was bound to account to his trustee or show cause why he should not be punished for contempt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

In the matter of the bankruptcy proceedings of Morris A. Lippman. Proceedings to compel bankrupt to turn over assets alleged to have been withheld to his trustee. Application granted.

Hastings & Gleason, for trustee.

Otto A. Glasberg, for bankrupt.

CHATFIELD, District Judge. An extended discussion of the facts upon which the present application depends is unnecessary. The bankrupt was found by a special commissioner, when considering the question of insolvency, to have concealed assets to the amount of $3,474. Later the referee, upon substantially the same testimony, when considering the question of compelling the bankrupt to turn over the concealed property, drew the conclusion that $6,539 had not been accounted for. This court, upon the 12th of March, 1909, in confirming the referee's report, and considering whether the bankrupt should be ordered to turn over the amount reported, found several differences in both of the preceding reports, which affected the amounts stated. Upon the court's figures, some $2,908.05 was not accounted for. The expenses of the bankrupt were included by the court at the greatest amount claimed. The bankrupt was, for the purposes of argument, given credit for $1,620 cash supposed to have been lost, $800 diamonds supposed to have been lost, $1,500 for land purchased, and the full amount of difference between the inventories at various times, considered as depreciation in value. In spite of this, as has been said, a shortage of nearly $3,000 existed.

The bankrupt was given an opportunity, before another special commissioner, who had had nothing to do with the case, to explain these discrepancies, and to prove the credits allowed to him for the purpose of argument, but as to which his previous testimony had been held not persuasive. He has utterly failed to furnish any satisfactory proof of the alleged loss of $800 worth of diamonds and $1,620 cash. The testimony as to this loss and these amounts is exceedingly contradictory. He offers a deed of certain lots of land, but does not show the payment of $1,500 therefor. The circumstances connected with his

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

producing the deed are such as to indicate that the property has been acquired subsequently, and at most his testimony shows not more than $800 paid for whatever he bought. He intimates that certain diamonds were left in the hands of one Breslavsky, amounting to $315; but this is categorically denied by Breslavsky, and the evidence in corroboration of Breslavsky is stronger than that for the bankrupt. He explains a stock on hand of $1,200 by saying now that his own and his wife's diamonds were included in this stock. But, if so, his creditors would seem to be entitled to the diamonds, if they were used as a part of the goods upon which credit was secured; and, assuming that his explanation satisfactorily states how they were disposed of, nevertheless the value which he gives for the pieces of jewelry so used (viz., $1,100 to $1,200) is altogether too near the exact amount of his stock in trade to make it credible. A person could not start in business with nine pieces of jewelry, and no other stock, in a store having fixtures worth $1,000, and with over $3,000 in cash in the bank. He also now suggests that $1,500 of money which he had belonged to his wife, as the result of certain earnings on her part in a jewelry installment business which she conducted. Not only is the testimony unpersuasive, but, if any such payment had been made, the time to claim it was when an explanation was demanded as to what became of the money in the bank. The presentation of testimony regarding such a loan, after a contempt proceeding has been started, when at the most the payment would have been preferential if actually made as stated, indicates that the story is an afterthought, and that the property, if ever turned over, was concealed in contemplation of bankruptcy.

The result of the entire matter is that the bankrupt has failed in his attempt to discredit the report of the referee, in its general conclusions, or to free himself from the decision that he has been shown, with reasonable certainty, to have failed to account for, and as well prove, that he has not or did not have in his possession funds and property belonging to the estate, which he should have turned over to the trustee.

The creditors may have an order directing Lippman, within five days, to turn over to the trustee the sum of $6,028.05, or show cause on the first motion day thereafter why he should not be punished for contempt.

$2,908 05,	shortage previously found.
1,620 00,	money claimed to have been lost.
800 00,	diamonds " " " " "
700 00,	money claimed to have been paid for land.
$6,028 05	

In re CHAMELIN.

(District Court, M. D. Pennsylvania. January 30, 1911.)

No. 1,346, in Bankruptcy.

BANKRUPTCY (§ 136*)—WITHHELD ASSETS—EVIDENCE.

Evidence *held* insufficient to falsify a bankrupt's claim of a loss of certain of his property by theft, so as to authorize an order requiring him to turn over additional assets to the trustee as improperly withheld.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

In the matter of Julius Chamelin, bankrupt. On rule to compel the bankrupt to turn over certain property to his trustee. Referee's order denying the motion certified. Affirmed.

M. J. Martin and Morgan S. Kaufman, for trustee.
M. A. McGinley, for bankrupt.

ARCHBALD, District Judge. The stock of jewelry, which the bankrupt had on hand, when he began to make purchases in October, 1908, added to the amount of those purchases, make up the aggregate of what he was called upon to account for when he went into bankruptcy. On this is to be credited the stock, if any, that he turned over to the trustee, as well as anything that he had paid out to creditors, or on his personal account, less what he had realized meantime from sales made or bills collected. The value of his stock in October, 1908, according to his own estimate, was $1,500, and the goods that he bought after that amounted to $3,098. He paid $1,260.55 to creditors, and was at an expense on personal account of $730. And he collected $627 from December to March, in addition to having $103 on hand at the beginning of that period. There were also some sales of goods on credit. These figures may not be exact, but they will serve the purpose.

The following account may therefore be stated against him:

Goods on hand in October, 1908 (estimated)...	$1,500.00		
Goods purchased after that.....	3,098.00		$4,598.00
Paid to creditors.....	$1,260.55		
Household and personal expenses..	730.00		
		$1,990.55	
Less cash on hand.....	$ 103.00		
Bills collected.....	627.00		
		730.00	1,260.55
Balance to be accounted for.....			$3,337.45

The bankrupt had practically nothing to represent this when he was put into bankruptcy, and he is called on, in consequence, to overcome the discrepancy. His explanation is that on the night of December 15, when he and his wife were at a ball, his rooms were broken into and his goods were stolen. This is an easy story to set up, and a difficult one to refute, and the burden is on him to substantiate it. And

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

yet, considering the nature of the goods and the opportunity afforded, it cannot be said to be inherently improbable. It is also sustained by considerable testimony, some of which, at least, is apparently disinterested. It is said to be discredited by the inconsistencies to be found in it, which have been discussed in argument. I agree, however, with the referee, that they are not enough to do more than arouse a suspicion. It is of no great significance, for instance, that, while the jewelry cases disappeared, the watches of customers were left undisturbed on the workbench. There was some scattering of things around the room, according to the evidence, as though parties had rummaged about in it. But, even if no custom work was taken, the explanation would not be difficult. The watches and jewelry belonging to different individuals would be easy to trace, and no experienced thief would be likely to burden himself with any such means of detection. And whatever may be otherwise said of the story, it has stood this important test: That there is nothing in the circumstances of the bankrupt or his family or friends, following the robbery, to suggest that any of them have profited by it. It is true that $541 turned up, not long afterwards, in his wife's bank account. But $541 falls far short of $3,300. And it is further explained that she borrowed this to meet the possible prosecution of her husband, which was threatened. Besides this, three full years have now elapsed, and abundant opportunity has been given to observe the consequences, which in no wise call in question the bankrupt's conduct. To all appearances he is in the same impecunious condition that he was immediately after the alleged robbery; and the case is thus devoid of those signs of prosperity which some times follow a fraudulent failure.

There was no error, therefore, in the refusal of the referee to make the order asked for, and his action is affirmed.

THOMPSON v. WABASH R. CO.

(Circuit Court, E. D. Missouri, N. D. February 3, 1911.)

No. 510.

1. DEATH (§ 31*)—RIGHT TO SUE—EMPLOYER'S LIABILITY ACT.

Under employer's liability act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), providing that, in case of the death of an employé of a carrier engaged in interstate commerce, an action may be maintained by the decedent's personal representatives for the benefit of the surviving widow or husband and children of the employé, and if none, then of such employé's parents, and if none, then of his next of kin dependent on him, etc., the action must be brought by the decedent's executors or administrators, and cannot be maintained by the surviving widow or beneficiary.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35–46; Dec. Dig. § 31.*]

2. DEATH (§ 31*)—WRONGFUL DEATH—EMPLOYÉ OF CARRIER—FEDERAL STATUTE—EFFECT.

Federal employer's liability act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), authorizing recovery

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

against an interstate carrier for the wrongful death of a servant, in a suit by his personal representative, did not supersede the Missouri law authorizing a wife to maintain an action for the wrongful death of her husband, provided it was brought within 6 months, and if not, then authorizing its maintenance by the children of the deceased, if any, etc.

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

What law governs master's liability for injuries to servant, see note to Mexican Cent. Ry. Co. v. Jones, 48 C. C. A. 232.]

3. REMOVAL OF CAUSES (§ 19*)—GROUNDS—CONSTRUCTION OF FEDERAL STATUTE.

Plaintiff brought suit against defendant, an interstate carrier, for death of her husband, a locomotive fireman, while engaged in interstate commerce, alleging that his death resulted from a collision due to the negligence of the engineer and conductor of the train on which he was employed. *Held*, that such action was not brought under or in pursuance of the federal employer's liability act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), but under the Missouri state law, and hence the cause was not removable on the ground that it involved a construction of a law of the United States.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 37–48, 52, 53; Dec. Dig. § 19.*]

Action by Ethel Thompson against the Wabash Railroad Company. On motion to remand the case to the state court. Motion granted.

M. J. Lilly, for plaintiff.

Robertson & Robertson and J. L. Minnis, for defendant.

DYER, District Judge. The plaintiff in this case, Ethel Thompson, is a citizen of Missouri, residing at Moberly, in the county of Randolph. The defendant is a railroad corporation organized under the laws of the state of Missouri, and therefore a citizen of the state of Missouri, having offices at Moberly, in said state. Plaintiff in her petition filed on the 7th day of January, 1910, in the circuit court of Randolph county, Mo., alleges that prior to the 28th day of August, 1909, she was the wife of one R. W. Thompson, and that since that day she had been his widow. She further alleges in her petition that the defendant company operated a line of railway between Moulton, in the state of Iowa, and Moberly, in the state of Missouri, with the line extending eastwardly from Moulton, in the state of Iowa, into, through, and across the counties of Schuyler, Adair, Macon, and Randolph counties, in the state of Missouri. She further alleges in her petition that her said husband was on the 28th day of August, 1909, in the employ of the defendant corporation, as a fireman on a freight engine, running between Moulton, Iowa, and Moberly, Mo.; that, at a point in Missouri, the engine upon which her said husband was fireman came into collision with another train through negligence and carelessness of the engineer and conductor of the train upon which her said husband was at work as such fireman, and that in consequence of such negligence and of said collision her husband lost his life. The plaintiff asks judgment against the defendant for a sum in excess of $2,000. At a term of the circuit court of Randolph County, Mo., to which the defendant was required to appear, the defendant did appear and presented a petition

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

to the said circuit court of Randolph county for the removal of the case to the United States Circuit Court for the Northern Division of the Eastern Judicial District of Missouri. The application of the defendant for the removal is as follows:

"In the Circuit Court of Randolph County, Missouri. February Term, A. D. 1910.

"State of Missouri, County of Randolph—ss.:

"Ethel Thompson, Plaintiff, v. Wabash Railroad Company, Defendant.

"Your petitioner, the Wabash Railroad Company, respectfully shows to this honorable court:

"(1) That it is the defendant in the above-entitled cause; that the said suit is of a civil nature; that the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of $2,000.00, and that plaintiff and defendant in said suit are actually interested therein.

"(2) That said suit arises under the law of the United States, to wit, an act of Congress, approved April 22nd, 1908, entitled 'An act relating to the liability of common carriers by railroad to their employés in certain cases.'

"(3) That plaintiff in said suit avers in her petition that on the 28th day of August, 1909, the defendant was a railroad corporation, engaged in operating a steam railroad from the city of Moulton, in the state of Iowa, to the city of Moberly, in the state of Missouri, as a common carrier; that R. W. Thompson, her husband, was killed on the 28th day of August, 1909; that said R. W. Thompson was at the time of his death an employé of defendant, performing his duty as a locomotive fireman on one of defendant's trains then being run and operated from the city of Moulton, in the state of Iowa, to the city of Moberly in the state of Missouri; that the death of the said R. W. Thompson resulted from the negligence of the agents and employés of defendant, and that plaintiff by reason of the death of her husband, R. W. Thompson, has been damaged in the sum of $10,000.00, for which said sum she prays judgment against defendant.

"(4) Your petitioner says that it denies that it is liable under the said act of Congress to the plaintiff, or any other person, for said sum of $10,000.00 damages, or any other sum, on account of the death of the said R. W. Thompson, and that the question in said suit is whether plaintiff is entitled to recover from the defendant under the said act of Congress the said sum of $10,000.00 or any other sum, as damages on account of the death of her said husband.

"(5) Your petitioner further states that the decision of said question and said suit will necessarily embrace a construction of said act of Congress, because your petitioner says the question of defendant's liability in said suit involves a controversy between the plaintiff and defendant with respect to the true meaning and intent of said act of Congress and the operation and effect thereof upon the alleged facts stated in the petition.

"Your petitioner herewith presents a good and sufficient bond, as provided by the statutes in such cases, that it will on or before the first day of the ensuing session of the United States Circuit Court for the Northern Division of the Eastern District of Missouri, file herein a transcript of the record in this action, and for the payment of all costs which may be awarded by the said court, if the said Circuit Court shall hold that this suit was wrongfully removed thereto.

"Your petitioner therefore prays that this court proceed no further herein, except to make the order of removal as required by law, and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said court, as provided by law, and as in duty bound, your petitioner will ever pray."

The court before whom the case was pending in Randolph county denied the petition for removal filed by the defendant. Thereupon the defendant caused to be made out a full and perfect transcript of the case and filed it in the United States Circuit Court for the Northern Division of the Eastern Judicial District of Missouri, at

Hannibal. Thereafter, the plaintiff, through her attorney, filed a motion to remand this cause to the Circuit Court of Randolph county, on the ground that the federal court had no jurisdiction of the case. It is this motion to remand that is now before this court.

Under the statutes of Missouri the plaintiff has a cause of action against the defendant to recover damages for the death of her husband. The law of Missouri gives this right to the wife, and in the event that she does not exercise it within six months, then the right of action is in the children, if any, of the deceased. This suit was instituted within six months after the death of the husband, and under and in pursuance of the laws of the state of Missouri, where the plaintiff resided, and where defendant resides, and where the husband was killed. The statutes of Missouri also provide that if the husband loses his life through the negligence of a fellow servant the plaintiff may recover. Congress by an act entitled "An act relating to the liability of common carriers by railroad to their employés in certain cases," approved April 22, 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), provides:

"That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia and any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and if none, then of such employé's parents; and if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Under this act it is perfectly apparent that the plaintiff, the widow of the deceased, cannot maintain the action. It must be done, if at all, by the personal representatives of the deceased; that is to say, his executors or administrators. The question here is as to whether this act of Congress does away with the state statute authorizing the widow to sue for and recover damages against the railroad company, through the negligence of whose officers or agents her husband lost his life, or is it an act giving employés an additional forum in which under certain circumstances they may go for the redress of wrongs? If the court refuses to remand this case, what then? This plaintiff has no right of action under the federal statute and the case must necessarily be dismissed.

My opinion is that the circuit court of Randolph county has complete jurisdiction to try and determine the case. The laws of the state give the right to the wife to recover for the death of her husband, and this right is in no wise interfered with by the act of Congress to which reference is made. In this I may be wrong, but if I am some court of higher authority will correct it.

The motion to remand will be sustained.

POLONSKY v. PENNSYLVANIA R. CO. et al.

(Circuit Court, S. D. New York. December 10, 1909.)

1. FALSE IMPRISONMENT (§ 2*)—ACTS CONSTITUTING.
The gist of an action for false imprisonment is a trespass committed either personally or by procurement upon the body of the plaintiff, and it is essential to the successful maintenance of the action that the act alleged to constitute the trespass be unlawful.
[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 1; Dec. Dig. § 2.*
For other definitions, see Words and Phrases, vol. 3, pp. 2657–2661; vol. 8, p. 7660.]

2. FALSE IMPRISONMENT (§ 7*)—RIGHT OF ACTION—ILLEGALITY OF ARREST.
An arrest is not necessarily unlawful so as to afford ground for an action for false imprisonment because the plaintiff was innocent of the offense for which the arrest was made, if the forms of law were observed.
[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 5; Dec. Dig. § 7.*]

3. FALSE IMPRISONMENT (§ 7*)—LIABILITY—PERSONS PROCURING ARREST.
One who physically makes an unlawful arrest is a tort-feasor, and one who counsels or procures such arrest is a joint tort-feasor, and both are liable in an action for false imprisonment; but if the officer is protected, as where he acted under a warrant valid in form, issued by a competent authority upon sufficient complaint, or where the arrest without process was authorized by statute, the person procuring the arrest is also protected from an action for false imprisonment, whatever may be his liability in an action for malicious prosecution.
[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 45–61; Dec. Dig. § 7.*]

4. FALSE IMPRISONMENT (§ 2*)—ELEMENTS OF CIVIL LIABILITY—MALICE AND PROBABLE CAUSE.
The substance of false arrest or imprisonment is trespass vi et armis, and neither malice nor probable cause can constitute elements in the case except in aggravation or mitigation of damages.
[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 1; Dec. Dig. § 2.*]

At Law. Action by Jacob Polonsky against the Pennsylvania Railroad Company and the Pullman Company. On motion by plaintiff for new trial. Motion denied.

Order reversed, 184 Fed. 561.

Mr. Ernst, for plaintiff.

Mr. Feary, for defendant Pennsylvania Co.

Mr. McCulloh, for defendant Pullman Co.

HOUGH, District Judge. The gist of an action for false imprisonment is a trespass committed either personally or by procurement upon the body of the plaintiff. It is essential to the successful maintenance of the action that the act alleged to constitute the trespass is unlawful. That the trespass aforesaid consists in the arrest, incarceration, or detention of an innocent man is not of itself material. That the arrest of one who is innocent must be unlawful is naturally an attractive statement; but, if the forms of law be observed,

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

such statement is not necessarily true. An arrest and consequent imprisonment may be unjust and mistaken, but, if it be lawful (i. e., in compliance with the technical requirements of statute or common law as the case may be), then no trespass was committed, and resort must be had to an action of trespass on the case (i. e., for false imprisonment). One who unlawfully performs the physical seizure constituting arrest is a trespasser, and therefore a tort-feasor; and one who counsels, procures, aids, or abets such tort-feasor is himself a joint tort-feasor.

It is inherent in the nature of a joint tort that those jointly liable (in order so to be liable) must all in contemplation of law have been guilty of the same tort, and be liable to the same prosecution or suit. There cannot therefore be one proceeding in false imprisonment against the officer or other person who makes the arrest, and another proceeding called by the same name—i. e., false imprisonment—against him who procured the officer's action. The substance of false arrest or imprisonment is trespass vi et armis, and therefore neither malice nor probable cause can constitute elements in the case except in aggravation or mitigation of damages.

Malicious prosecution does not necessarily presuppose an assault of any kind. It essentially consists in maliciously setting the law in motion, and for obvious reasons, therefore, both malice and probable cause are not only proper, but necessary, ingredients in the case.

I am compelled to believe that the foregoing distinctions between the two kinds of action are still upheld by the great weight of authority. The cases have been collected and commented on by Judge Jaggard of the Supreme Court of Minnesota in the articles "False Arrest" and "Malicious Prosecution" in the Cyclopædia of Law and Procedure. It is, I think, undeniable that the distinction between the two causes of action has often been overlooked and language used in decisions of authority tending to produce great confusion of thought. It seems to me this case is an illustration of the injury done to parties litigant by the survival of common-law rules regarding actions different in substance in a day when even the memory of common-law pleading seems to be fast passing away. If this plaintiff had been compelled to declare in trespass for an assault vi et armis, he would have been brought face to face with the proposition that whatever assault was committed was done by an officer in strict conformity with the statute, and that, therefore, the imposition of hands was lawful. He would therefore have been compelled to consider whether he could not frame his action on the case as for an unlawful use of lawful process or its equivalent.

As the matter stands now, plaintiff says in substance that, if he cannot sue in false arrest, he cannot sue at all, because, although there was an arrest, there never was any prosecution, inasmuch as prosecution involves something more than the mere seizure for a short time of plaintiff's body, and for this doctrine there is some authority. 26 Cyc. p. 10. But the courts of this circuit have hitherto maintained the ancient distinction between false arrest and malicious prosecution with the greatest rigidity. Arrest under a warrant valid in form is-

sued by a competent authority upon sufficient complaint is not false imprisonment. It cannot be attacked collaterally, and is a perfect shield in such an action to the officer and the party who has procured its issuance. Whitten v. Bennett, 86 Fed. 406, 30 C. C. A. 140. But it is said here there was no complaint, and there was no warrant. This, however, is immaterial, for, if an "act of Congress authorizes an arrest without process, the officer who makes it is as fully protected as he would be if he made the arrest under valid process." Reisterer v. Lee Sun, 94 Fed. 345, 36 C. C. A. 285. But plaintiff again urges that even if this be so, and the officer in this case was legally justified in making the arrest, nevertheless the person procuring him to do it is not protected because (apparently) there was no written complaint. But, if the officer "who makes an arrest under valid process is also the complainant or the person who originates the proceeding, he does so at the risk of an action for damages if he acts maliciously and without probable cause." Reisterer v. Lee Sun, supra. It can therefore make no difference at all whether the person arresting is himself the complainant or whether another be the complainant, and this must follow from the nature of joint liability in trespass. In the same form of action and by reason of the same cause of action one man cannot be shielded by valid process and another be liable as if that process were unlawful. Therefore in the case just cited the court continued: "The real inquiry consequently is whether the facts proved justified a recovery for malicious prosecution." The same rigid doctrine has been fully expounded by Hanford, J., in Van v. Pacific Coast Co. (C. C.) 120 Fed. 699.

The motion for a new trial is denied and judgment may be entered.

POLONSKY v. PENNSYLVANIA R. CO. et al.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 97.

FALSE IMPRISONMENT (§ 7*)—RIGHT OF ACTION—PERSONS LIABLE.

Plaintiff, a New York business man, took a train at Pittsburg for New York in the evening, buying a ticket and a berth in the Pullman car. He afterward showed his railroad ticket to the conductor, and gave it to the Pullman conductor. About midnight he was awakened by the Pullman conductor, who demanded his railroad ticket, charged him with being a thief, and ordered him to get up and dress, which he did. On arrival at Altoona, such conductor took him to a waiting policeman, and said, "This is the man I want you to lock up," whereupon the policeman took him to the jail, where he was locked in a cell until 11:30 the next forenoon, when he was liberated without being taken before a magistrate or any charge having been made against him. A statute of Pennsylvania (Pepper & Lewis' Dig. p. 3950, par. 120) makes it an offense for any person to ride on a railroad without paying his fare, and provides that "any constable or police officer having knowledge or being notified of any violation of this act shall forthwith arrest such offender and take him before any magistrate," and authorizes the magistrate to issue a warrant on information duly made on oath, to try the accused, and, if convicted, to fine and imprison him. *Held*, that such statute conferred no authority on the policeman to arrest plaintiff upon the mere direction of the Pullman conductor, to lock him up, nor to confine him in jail without the warrant of a magistrate, and that plaintiff had a right of action for false imprisonment against the company or companies whose servant such conductor was.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5-61; Dec. Dig. § 7.*]

Lacombe, Circuit Judge, dissenting.

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

Action at law by Jacob Polonsky against the Pennsylvania Railroad Company and the Pullman Company. Judgment for defendants, and plaintiff brings error. Reversed.

For opinion below on motion for new trial, see 184 Fed. 558.

Olcott, Gruber, Bonynge & McManus (Irving L. Ernst and Monroe M. Schwarzschild, of counsel), for plaintiff in error.

Alexander & Green (Allan McCulloh and Clifton P. Williamson, of counsel), for defendant in error the Pullman Company.

Burlingham, Montgomery & Beecher (Morton L. Fearey, of counsel), for defendant in error Pennsylvania Railroad Co.

Before LACOMBE, COXE and NOYES, Circuit Judges.

COXE, Circuit Judge. The facts as they appear from the testimony offered by the plaintiff are in brief as follows:

The plaintiff has resided in the city of New York for 19 years and is engaged in the wholesale manufacture of cloaks and suits. On the night of the 14th day of July, 1906, he left Pittsburg at about 10 o'clock, destined for New York, on a train of the Pennsylvania Railroad Company. Before starting he had purchased a ticket for his

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

transportation and also for a berth, lower No. 8, in one of the Pullman cars. Previous to taking the train he exhibited his passage ticket to the baggage master and, after paying an excess in weight of $1.40, received a check for his trunk. Again, when passing through the gate he presented his ticket to the man in charge there, who examined and returned it, permitting the plaintiff to pass through. On reaching the train the Pullman conductor was standing in front of the car in which the plaintiff's berth was located. He handed the ticket for his berth to this official, who examined it and handed it back to the plaintiff. The Pullman porter took his bag and the plaintiff went into the car. A short time afterwards the plaintiff went to the smoking compartment and remained there in company with friends until some time after the train started. About half past 10 the Pullman conductor and the railroad conductor entered the smoking compartment and asked for the tickets of the passengers there assembled. The plaintiff gave both his transportation ticket and his voucher for the sleeping car berth to the Pullman conductor. Thereafter the plaintiff retired to his berth in lower 8 and fell asleep. At about half past 12 he was awakened by the Pullman conductor, who asked for his transportation ticket. While the plaintiff was looking for the ticket the conductor said, "You don't belong here." Being asked what he meant by such a statement, the conductor replied, "You are a thief and belong in jail." The conductor said further, "You get dressed; we will soon get to Altoona." The plaintiff said, "What are you going to do?" The conductor replied, "I will show you what I am going to do." The plaintiff said, "All right, I will get dressed." When the train arrived at Altoona, the conductor took the plaintiff to the front of the car, a policeman was waiting there and the conductor said to him, "This is the man I want you to lock up."

It was then about half past 12 at night. The plaintiff was taken to an office at the station where he remained about five minutes. He was then taken to the jail in Altoona, walking with the officer through the public streets. Arriving at the jail he was placed in a cell where other prisoners were also confined. He remained there about 10 minutes and was afterwards removed to another cell, which he occupied alone. He was kept in the latter cell until about half past 11 o'clock in the morning. The cell was without accommodations and he was given nothing to eat. On the way to the station house he asked to be permitted to telegraph to his home and also to visit a friend in one of the hotels which he passed on the way. Both of these requests were refused. At half past 11 o'clock he was liberated from the jail and later in the afternoon took a train for New York, which he reached on Monday morning. He was in Altoona in all about 11 hours.

This, in brief, is the statement of the plaintiff, corroborated in its essential particulars by three disinterested witnesses. Upon the evidence as thus presented it appears that the plaintiff was the subject of a wanton outrage without palliation or excuse. A respectable business man, having paid for his transportation and a berth, was rudely awakened from his sleep at midnight, told he was a thief who

belonged in jail and was handed over to a police officer at Altoona by an agent of the Pullman Company with instructions to lock him up. Obeying these instructions the officer took him to the common jail where he was locked in a cell without food or accommodations and detained until half-past 11 the next morning, when he was released without apology or explanation. During all this time there was not even the semblance of legal proceedings; no complaint was lodged against the plaintiff, no hearing was had before a magistrate, no judgment was rendered, no discharge was granted. To assert that no redress is possible for so wanton a trespass upon the rights of a citizen is to impeach the jurisprudence of our country. It is argued that the proper remedy is an action for malicious prosecution. We think no such action will lie. The indispensable elements of such an action are, first, a prosecution; second, malice; and, third, a termination of the prosecution favorable to the plaintiff. The difficulty here is that there was no prosecution of any kind, no process, no complaint, no trial, no judgment, no dismissal, and of course, no termination favorable to the plaintiff. There was, in fact, nothing to terminate. An action for malicious prosecution, in such circumstances, would never survive a demurrer. If the action for false imprisonment is not well brought, the plaintiff is remediless.

It is argued by the counsel for the defendant, the Pullman Company, that the arrest was justified by the statute of Pennsylvania which provides that it shall be an offense for any person to travel upon a railroad within the commonwealth without paying his fare. Section 120 is as follows:

"Sec. 120. Proceedings on Arrest. Any constable or police officer, having knowledge or being notified of any violation of this act, shall forthwith arrest such offender and take him before any magistrate, alderman or justice of the peace, or any such magistrate, alderman or justice of the peace shall issue a warrant or capias for the arrest of any such offender, upon information duly made on oath or affirmation; and said magistrate, alderman or justice, upon the person charged being produced before him, shall forthwith proceed to hear and determine the matter in issue, and if he shall convict the person so charged with the violation of the provisions of this act, he shall proceed to pronounce the forfeiture of the penalty which he shall adjudge against the person so convicted, and shall commit the person so convicted to the county jail of the proper county for the period aforesaid; and if the person so convicted refuse or neglect to pay such penalty and costs immediately, then the said magistrate, alderman or justice shall commit the person so convicted to the jail of the county wherein the offence was committed, for a further period not exceeding ten days." Pepper & Lewis' Dig. p. 3950.

This statute permits an arrest without process only when the arrest is followed forthwith by a hearing before the magistrate. In other words, it gives the accused person a right to be heard before he is convicted and sentenced. Assuming that the testimony sufficiently shows that the Altoona policeman was notified that the plaintiff was traveling without paying his fare, the policeman was justified in taking him before a magistrate, who alone was authorized, after hearing what he had to say in his defense, to pronounce judgment of imprisonment. The policeman, obeying the conductor's direction, arbitrarily usurped the powers of the magistrate and imprisoned the plaintiff without the pretense of a hearing. In order to justify their ac-

tion under the Pennsylvania law, the defendants must show that the policeman acted under its provisions. This has not been done; on the contrary, it appears that he acted outside of and in opposition to its explicit directions. He cannot claim the protection of a law which he has violated. The defendants, through their duly authorized agents, set the machinery in motion, which resulted in the unlawful imprisonment of the plaintiff, and, in the absence of any explanation on their part, they must be held responsible therefor. They pointed out the plaintiff, directed the officer to "lock him up" and the officer obeyed.

We have been cited to numerous authorities which hold that imprisonment by virtue of a legal writ issued in due form by a court of competent jurisdiction and served in a legal manner cannot be the basis of an action for false imprisonment. Carman v. Emerson, 71 Fed. 264, 18 C. C. A. 38; Whitten v. Bennett, 86 Fed. 405, 30 C. C. A. 140; Reisterer v. Lee Sum, 94 Fed. 343, 36 C. C. A. 285; Van v. Pacific Coast Co. (C. C.) 120 Fed. 699.

In the case of Whitten v. Bennett, supra, which was relied on by the judge of the Circuit Court as authority for dismissing the complaint, the court says:

"Arrest under a warrant, valid in form, issued by a competent authority upon sufficient complaint, is not false imprisonment. It cannot be attacked collaterally, and is a perfect shield, in such an action, to the officer and the party who has procured its issuance."

We understand this to be the law, but the facts do not bring the case at bar within its provisions. As before pointed out, there was in the present case nothing valid from the insufficient complaint to the unlawful imprisonment.

In Knickerbocker Steamboat Co. v. Cusack (1904) 172 Fed. 358, 97 C. C. A. 56, the mate of the General Slocum, a steamer belonging to the defendant, pointed out the plaintiff to a police officer, saying "Catch that fellow, take him." The mate subsequently made a complaint, not justified by the facts, before a magistrate, charging the plaintiff with disorderly conduct with intent to provoke a breach of the peace. The court said:

"In these circumstances we think the conduct of the mate after the arrest may be justly regarded as a continuation of the original wrong for which defendant was liable, and that the subsequent proceedings were the direct result of the unjustified and pernicious activity and urgency of the mate, and only indirectly and remotely attributable to the action of the committing magistrate."

The facts differ from those in the case at bar in that the New York Code permits an arrest without process for a misdemeanor only when committed in the presence of an officer making the arrest. As the offense was not so committed the original arrest was illegal. But so was the arrest in the case at bar unless facts were presented to the officer sufficient to justify him in believing that an offense had been committed. It can hardly be contended that an officer is warranted in arresting a citizen simply because he is told to lock him up.

There is no pretense that the officer had knowledge of the alleged offense and there is nothing to show that he was notified of any facts constituting an offense. The Pullman Company expressly alleges that the arrest was made "without any act, request or participation upon the part of this defendant, its agents, servants or employés or any or either of them." If this be true the officer, upon the testimony, must have acted without proof.

The case of Grinnell v. Weston, 95 App. Div. 454, 88 N. Y. Supp. 781, is very similar upon the facts to the case in hand. The defendant, Weston, mistook the plaintiff, Grinnell, for a man who had swindled him, pointed Grinnell out to an officer and said, "Officer this is the man who swindled me. Take charge of him." Judge Ingraham, who delivered the opinion of the court, refers to the case of Thompson v. Fisk, 50 App. Div. 71, 63 N. Y. Supp. 352, and says:

"If that case determined that where an individual requires a police officer to arrest an innocent person and the police officer, acting upon the statement made, makes the arrest; that the person instigating the arrest is not liable, if the police officer believed him. I think it is contrary to all the decisions and the settled law of this state. A peace officer has authority to make an arrest without a warrant where a felony has been committed and when he has reasonable cause to suspect the person arrested of having committed it, and if the officer acted in good faith and was justified in making the arrest, he is protected; but the fact that the police officer is justified does not absolve the individual at whose request the arrest has been made from liability if in fact no felony had been committed, or the person arrested was not connected with the commission of a felony, and this distinction arises from the difference in the power of a police officer and a private individual to make an arrest. If a private individual identifies a person as one who has been guilty of a crime and requires a police officer to arrest him without warrant, the arrest is the joint act of the private individual and the peace officer, and if the arrest is unwarranted and illegal both the police officer and the private individual are joint tort feasors and both are liable for the wrong. The fact that the officer acting under the information given to him by the individual is the one that takes the physical possession of the person arrested does not relieve the private individual from responsibility. Both the individual and the officer united in the act and are both responsible for the arrest if unlawful. While the officer may prove a justification by showing that a felony had been committed, and that he acted upon the statement made to him by the instigator and had reasonable cause to believe that the person arrested was guilty of the felony, the person instigating the arrest and who was jointly responsible with the police officer for it, to justify himself must show that a felony had been committed, and that the person arrested was connected with it, or at least that he acted upon grounds which would justify a prudent person in believing that the person arrested was guilty.

"It would certainly be a strange result if a person at whose instigation another was arrested could escape responsibility for a false arrest and detention by showing that he had induced a police officer to believe a false statement of another's connection with a crime, so that the police officer would be justified in believing such false statement in making the arrest. That the police officer was justified does not justify the individual who induced the officer to make the arrest."

We are fully in accord with this reasoning.

Of course the evidence offered by the defendants may place an entirely different complexion upon the transaction, but this is conjecture merely. No testimony directly implicating the conductor of the Pennsylvania Railroad appears in the record, but there was some conflict as to which defendant the different officials owed allegiance and, as

the proof may be changed upon a new trial, we deem it more prudent to leave the question of the liability of the Pennsylvania Railroad to be determined by the trial court.

The judgment is reversed.

LACOMBE, Circuit Judge. I am unable to concur for these reasons:

1. Although the state courts hold that the action of false arrest will lie against the person who induces the officer to make the arrest, although it be made under such circumstances that the officer is not responsible, I understand the federal decisions to be the other way. Reisterer v. Lee Sum, 94 Fed. 343, 36 C. C. A. 285; Van v. Pacific Coast Co. (C. C.) 120 Fed. 699. These cases hold that, if arrest without process be lawful, the person procuring such arrest to be made is not liable in an action for false imprisonment.

2. As I read the Pennsylvania statute, it was not necessary for the officer to have any personal knowledge of the alleged offense; notification that an offense had been committed was sufficient.

3. The circumstance that having made the arrest, the officer subsequently failed in his duty by neglecting to take the prisoner at once to a magistrate, should not operate to the prejudice of the person who made the complaint, and who, presumably supposed the policeman would do his duty.

4. In case where arrest can be made only on written warrant issued by a magistrate the person on whose complaint the warrant is issued may, if the facts justify such an action be sued for malicious prosecution. I am at a loss to see why, when the statutes of a state authorize arrest without warrant upon the oral information or complaint of some one, the person who by his complaint brings about the lawful arrest is not as much "prosecuting" the prisoner as he would be if he procured the issue of a written warrant. Manifestly, the proceedings following upon the complaint made by the Pullman conductor have terminated, and, since they did not terminate adversely to the person arrested, they would seem to have terminated favorably.

I think defendant Pullman Company upon the facts shown here would be liable in an action for malicious prosecution, but cannot be held liable in an action for false imprisonment.

DE BRULER, Commissioner of Immigration, v. GALLO.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,860.

1. HABEAS CORPUS (§ 92*)—HEARING—SCOPE.

After an order of deportation has been entered in deportation proceedings against an alleged undesirable alien, the only issue reviewable on a writ of habeas corpus is whether the alien had been given a fair hearing by executive officers on an order to show cause why she should not be deported, and it was therefore error to refer the proceeding to a com-

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

missioner to take testimony on a new issue as to the alien's alleged marriage and whether her alleged husband was a citizen.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 92.*]

2. ALIENS (§ 54*)—DEPORTATION PROCEEDINGS—FAIR TRIAL.

An alien was arrested September 19. 1909, and accorded a hearing before the immigration officers on the next day, at which she was informed of her right to be represented by counsel; but, waiving such right, she was sworn and examined at length. She was again examined by the officers a few days later, when she was represented by counsel, who also examined three other witnesses before the officers, and she was again examined before one of the immigration inspectors on November 23, 1909. *Held*, that she was accorded a fair trial before the department, which precluded a review of their conclusions of fact, reached on conflicting evidence, by the courts.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

3. ALIENS (§ 54*)—DEPORTATION PROCEEDINGS—EXECUTIVE OFFICERS—MISTAKES OF LAW.

Mistakes of law committed by executive officers are subject to re-examination by the courts.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

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

Petition for writ of habeas corpus by Marie Gallo against Ellis De Bruler, Commissioner of Immigration at Seattle. From an order granting a writ and discharging petitioner, the Commissioner appeals. Reversed, with directions to dismiss the proceedings.

Elmer E. Todd, U. S. Atty., and Charles T. Hutson, Asst. U. S. Atty., for appellant

James F. O'Brien, C. P. Burkey, and J. E. Burkey, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. On the 18th day of December, 1909, the Acting Secretary of Commerce and Labor addressed to the Commissioner of Immigration at Ellis Island, New York Harbor, this warrant for the transportation of the petitioner to Italy:

"To William Williams, Commissioner of Immigration, Ellis Island, N. Y. H.

"Whereas, from proofs submitted to me, after due hearing before Immigrant Inspector Thomas M. Fisher, Jr., held at Seattle, Washington, I have become satisfied that Marie Galli (Giovanni), alien, who landed at a port unknown within a period of three years, is in this country in violation of the act of Congress approved March 3, 1903, and February 20, 1907, to wit, That the said alien is a prostitute, and was such at the time of her entry into the United States; that she entered the United States for the purpose of prostitution; that she has been found an inmate of a house of prostitution, and practicing prostitution, subsequent to her entry; and whereas, the period of three years after landing has not elapsed: I, Benj. S. Cable, Acting Secretary of Commerce and Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to the country whence she came at the expense of the appropriation, 'Expenses of Regulating Immigration.' Delivery of this alien at your port will be made by an officer detailed from the Seattle office, to which place sailing advices of the line by which deportation is to be made should be for-

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

warded. You are authorized to purchase transportation for the alien to Naples, Italy, at the lowest scheduled steerage rate; the expenses involved being payable from the above-named appropriation. For so doing, this shall be your sufficient warrant.

"Witness my hand and seal this 18th day of December, 1909.

"Benj. S. Cable, Acting Secretary of Commerce and Labor."

Shortly thereafter a petition for a writ of habeas corpus was presented on behalf of the petitioner to the court below at Seattle, Wash., where the petitioner then was, setting forth:

"II. That on or about the ——— day of August, of 1902, in the city of New York, N. Y., she was lawfully united in marriage with Antone Gallo, her present husband, who is and at all times hereinafter mentioned was a naturalized citizen of the United States, and that she is now and at all times hereinafter mentioned has been his lawful wife, and residing with him in the United States.

"III. That on or about September 19, 1909, petitioner was unlawfully arrested and taken into custody by the immigration officers engaged in the Immigration Service in the United States and in the state of Washington, on the ground that she was a prostitute and immoral person and had not been within the United States for a period of three years, and that she has ever since been illegally deprived of her liberty by Ellis De Bruler, the Commissioner of Immigration, having charge of the United States Detention Station at Seattle, Washington. Your petitioner further shows that after her said arrest a hearing was given her before the said Commissioner. The sole question that was investigated or upon which evidence was taken was whether or not petitioner was a prostitute or immoral person within the United States, and resided in the United States for a period of less than three years, and that at no time was the question of the citizenship of your petitioner raised before said Commissioner, nor the immigration officers, nor was any evidence taken thereon. That said evidence was transmitted to the Department of Commerce and Labor at Washington, D. C. The Secretary of Commerce and Labor ordered that the petitioner be deported from the United States to the kingdom of Italy as an immoral person illegally within the United States. That said Secretary of Commerce and Labor did not have before him any evidence touching the question of petitioner's citizenship, nor did he pass upon the question, nor consider the same, in the consideration of the evidence before him. Your petitioner further states that she has been informed by the officers engaged in the Immigration Service of the United States, and believes the same to be true, and so alleges the same, that the Department of Commerce and Labor at Washington, D. C., and the Secretary thereof, made and conducted an independent investigation as to the character of petitioner, and as to whether or not she had been within the United States for a period of three years; that said investigation was made without any notice or knowledge on the part of petitioner, and without any opportunity to be present in person or by counsel, or to take part in any manner in said investigation; that said investigation, if made, and petitioner so alleges it to have been made, was illegal, and illegally deprived petitioner of her constitutional right to be heard in her own defense.

"IV. That as a citizen of the United States petitioner is not subject to deportation; that she is not held charged with any crime against the United States, or any of the states thereof, but is being held solely by the said Ellis De Bruler, Commissioner of Immigration as aforesaid, for the purpose of being deported from the United States; that unless the said Ellis De Bruler is compelled by this honorable court to release petitioner she will continue to be illegally deprived of her liberty until deported from the United States."

The writ prayed for was granted, answer and return to which was made by the immigration officer, and upon reference to a commissioner "for the taking of testimony therein as to the alleged citizenship of one Antonio Gallo, and the alleged marriage of Marie Gallo to said

Antonio Gallo," testimony was given and other evidence taken, which subsequently came on for consideration by the judge of the court below, who filed this decision:

"The evidence, oral and documentary, proves that the petitioner has lived continuously in the United States previous to her arrest at least seven years, and that she is lawfully married to a naturalized citizen of the United States. There are discrepancies in the evidence, and the petitioner and her husband have a good many variations to their names, and the petitioner prevaricated when examined by the immigration officers. These discrepancies, variations, and prevarications have not been overlooked. Nevertheless I cannot find substantial ground for disbelieving the positive testimony establishing the petitioner's legal right to live in this country. Therefore an order will be entered discharging her from arrest. C. H. Hanford, Judge."

An order of discharge was thereupon signed and filed, from which order the present appeal was taken.

To the order of reference for the purpose stated the government objected, on the ground that it was beyond the power of the court to make; the contention being that the only question then properly before the court was whether or not the appellee had been given a fair hearing by the officers of the Department of Commerce and Labor upon the order to show cause why she should not be deported to the country from which she came. The position of the government in this respect must be sustained, on the principle controlling the disposition of the cases of Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, Looe Shee v. North, 170 Fed. 566, 95 C. C. A. 646, In re Tang Tun, 168 Fed. 488, 93 C. C. A. 644, In re Can Pon, 168 Fed. 479, 93 C. C. A. 635, and Edsell, Chinese Inspector, v. D. Charlie Mark (C. C. A.) 179 Fed. 292.

The record shows that the appellee was arrested at Tacoma, Wash., September 19, 1909, and was given a hearing by the immigration officers the next day, at which time she was informed of her right to be represented by counsel. Replying that she did not desire counsel, she was sworn and examined at length. She was further examined at length by the officers a few days later, at which time she was represented by counsel, who also introduced and examined at length before the officers three other witnesses, named, respectively, Nicola Alfredo Carino, Salvatore Savoye, and Tony Galli. The appellee was again examined before one of the immigration officers—Inspector Fisher—on the 23d of November of the same year. In the course of her various examinations the appellee made numerous substantially conflicting statements, not only in respect to her name, but at one time testifying that she was married to one Tony Galli, and at another time testifying that she was never married to any one; at one time admitting that she was a prostitute, and at another time denying it. Furthermore, the record shows that she, as well as the witnesses examined on her behalf, made statements in respect to her claimed residence in New York City, which officers of the department charged with the execution of the immigation laws found untrue, and there was the direct testimony of a witness introduced by the government—a detective named Miller—that she was an inmate of a house of prostitution in Tacoma in September, 1909. . . . . .

The record contains a review by Inspector Fisher, in his report made to the Department of Commerce and Labor, of the evidence given in the cause, and his findings of fact made therefrom, and the ultimate decision of the department first herein set out. Under such circumstances we do not see how it can be properly held that the appellee was not given a fair hearing by the officers of that department. Mistakes of law by executive officers are, of course, re-examinable by the courts. Such were the cases of Botis v. Davies (D. C.) 173 Fed. 996, and Ex parte Koerner (C. C.) 176 Fed. 478. But mere questions of fact, such as the case before us, where they have been fairly examined by the executive officers designated by Congress for that purpose, and their conclusions of fact reached upon conflicting evidence, will not be judicially reviewed. Authorities supra.

The judgment appealed from is reversed, and the cause remanded to the court below, with directions to dismiss the proceedings.

CALIFORNIA FRUIT CANNERS' ASS'N v. LILLY.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,863.

1. WITNESSES (§ 275*)—CROSS-EXAMINATION—SCOPE—EXTENSION—DISCRETION.
The trial court in the exercise of discretion may relax the rule that a witness may not be cross-examined except with reference to the matters elicited on his direct examination in the case of the cross-examination of a party to the action.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 926, 967-975; Dec. Dig. § 275.*]

2. WITNESSES (§ 275*)—CROSS-EXAMINATION—PARTIES.
Plaintiff sued on an account stated for canned goods alleged to have been sold to defendant, and offered its vice president and treasurer as a witness. He testified that he sent a statement offered to prove the account stated to defendant, and received from defendant a letter claimed to amount to an acceptance of the account. *Held*, that such witness being the active agent of the plaintiff in the transactions with defendant was to all intents and purposes the plaintiff in the case, and that the court in the exercise of discretion, therefore properly permitted defendant on the witness' cross-examination to show that in fact a part of the goods for which charges were made in the account stated had never been delivered nor so segregated as to pass title to defendant.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 275.*]

3. APPEAL AND ERROR (§ 1048*)—REVIEW—PREJUDICE.
Plaintiff was not prejudiced by the court's permitting defendant to prove on the cross-examination of plaintiff's vice president certain facts prejudicial to plaintiff's case not within the scope of the witness' direct examination, where defendant might have called the witness in his own behalf and elicited the same testimony in his defense.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4145; Dec. Dig. § 1048.*]

4. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR—JOINDER OF ACTIONS—REVIEW.
Plaintiff was not prejudiced by an order requiring it to elect whether it would proceed on a cause of action alleged on an account stated or on

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

a count for an unpaid balance for goods sold and delivered, where the evidence introduced was fatal to a recovery on both counts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4084; Dec. Dig. § 1039.*]

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

Action by the California Fruit Canners' Association against C. H. Lilly, doing business as C. H. Lilly & Co. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff in error brought an action against the defendant in error upon a stated account, and in its original complaint alleged in addition to that cause of action a count for an unpaid balance for goods, wares, and merchandise sold and delivered under contracts upon which a balance was alleged to be due in the same amount as stated in the first count. On motion of the defendant the court required the plaintiff to elect upon which cause of action it would stand, whereupon it filed an amended complaint alleging an account stated. The defendant answered, denying the account stated, and denying an indebtedness or a promise to pay, and set up as an affirmative defense that he had been induced by the fraud of the plaintiff to agree to pay for certain goods which the plaintiff represented it had stored in warehouse subject to defendant's order, and the further defense that the defendant had been induced by the fraud of the plaintiff to agree to pay for certain goods which the latter had represented he had stored in warehouse subject to defendant's order; that the plaintiff had confessed that the goods were not of the grade or quality represented to the defendant, and had agreed to remedy the defect, and reimburse the defendant for damages thereby caused, and that defendant, before discovery that the goods were not of the quality represented, had received and paid for a large quantity thereof, and had sold and distributed the same to his customers, representing them to be of the grade and quality as represented by the plaintiff, which goods had been repudiated by the defendant's customers and in many instances returned to him. And the defendant alleged that he had been damaged and demanded judgment against the plaintiff. The plaintiff's reply put in issue the affirmative matter of the answer. After issue was joined, and before the trial, the deposition of S. L. Goldstein was taken in support of the allegations of the amended complaint. He produced a copy of the account which he testified was sent by the plaintiff to the defendant on April 29, 1908. The paper was labeled "statement," and it contained charges for merchandise, storage, and interest running from November 1, 1907, to April 29, 1908, and aggregating $19.185.87. The witness produced and gave in evidence the letter of the defendant of date May 7, 1908, stating: "We have your favor of April 29, and in reply beg to say we will endeavor to send you a substantial remittance on this account during the ensuing month. We are badly overloaded on canned goods, as you doubtless know, and have been endeavoring to make some terms on the goods which you are holding in the warehouse for us, but without success to date." On cross-examination, the witness was asked to explain the item of the account, "Mdse W. H. ac.," and he answered that it was "warehouse account." Thereupon, over the objection of the plaintiff that the testimony was not proper cross-examination, the defendant was permitted to show by the witness that the goods mentioned in the statement of account belonged to the plaintiff, "and are stored in the warehouse until payments are made by Lilly & Co."; that the goods were charged to Lilly & Co., and were not their property until they were paid for; that they were stored in one or more of the plaintiff's 13 warehouses in California; that he did not know in which particular warehouse they were stored; that when goods are billed to a customer they are reserved and stored at one or more of the plaintiff's warehouses; that the plaintiff's goods are stacked in large stacks in the warehouses, a good many thousand cans, and as orders come in for shipment they are labeled, cased,

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

and shipped, and in the meantime they are in stacks; that the goods referred to in the statement were never segregated or stored separately and distinctly from other goods, were the property of the plaintiff, and were stored in stacks with other goods. At the trial the depositions and the exhibits were offered in evidence, and the cross-examination of Goldstein was received in evidence over the objection of the plaintiff. The plaintiff rested. Thereupon the defendant moved for a nonsuit, which was granted, and a judgment was entered dismissing the action.

Thomas, Gerstle, Frick & Beedy and William H. Gorham, for plaintiff in error.

John H. Allen, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). It is contended that the admission of the evidence given on the cross-examination of S. L. Goldstein was error for which the judgment should be reversed. The plaintiff had sued upon a stated account, and had alleged that the defendant was indebted to it in the sum of $19,185.87. The defendant, in addition to other defenses, denied the indebtedness, and denied that an account had been stated. Goldstein was called to testify for the plaintiff. He testified that he had sent the statement of the account to the defendant, and that he had received the defendant's letter in response, and both the statement and the letter were offered in evidence. On the cross-examination he testified that the goods which are mentioned in the statement had never in fact been sold to the defendant, that they had never been segregated from the mass of other similar goods owned by the plaintiff, and that they remained the plaintiff's property. The letter which the defendant had sent on receipt of the statement and which is claimed to have constituted an assent thereto, referred to the goods "which you are holding in the warehouse for us." In an instrument which was made an exhibit to the complaint, it would appear that the dealings between the parties were had upon an understanding that the plaintiff was to hold as bailee for hire, and to insure at defendant's expense all goods ordered by the defendant. The letter of the defendant shows that the defendant so understood the transactions between the parties, and the items of warehouse charges contained in the statement conduced to that understanding. Now, the cross-examination of Goldstein shows that such was not the fact, that it was not true that the plaintiff was a bailee, that there was no actual or constructive delivery of the goods, and that there could be no legitimate warehouse or insurance charges against the defendant, nor charges for goods sold and delivered. It is true that in the courts of the United States the party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination. Various reasons have been assigned for the rule. One is that the party by whom the witness is called stands sponsor for the truth of the testimony which he elicits on the direct examination, and that the adverse party has no right to bind him by testimony brought out on cross-examination as to other matters. Another is that the rule conserves the purpose and end of cross-examination. Another is that otherwise the

party calling the witness would lose the benefit of cross-examination on the evidence adduced to support his opponent's case. Another is that the cross-examiner ought not to be allowed to employ leading questions as to matters brought out in support of his own cause. Another is that the rule tends to promote the orderly and methodical trial of a cause. It may be doubted whether there is any substantial merit in any of these reasons unless it be in the last, and as that reason relates only to form and method, it would seem that a rule based thereon ought to yield to the sound discretion of the trial court. But whatever may be said of the reasons on which the rule is ordinarily upheld, there is no substantial reason why, in the exercise of sound discretion, the court may not relax the rule in the case of the cross-examination of a party to the action. Here was a witness who was the vice president and treasurer of the plaintiff, and its active agent in its transactions with the defendant. To all intents and purposes he was the plaintiff. He was introduced as a witness to testify as to his own acts. He was sworn to testify to the whole truth. He produced in evidence the statement of account which he had sent to the defendant, together with the answer of the defendant thereto, which, on its face, was an assent to the statement and an acknowledgment of the debt. He testified that no payment had been made on the account or on the items of storage therein specified. In presenting those papers he vouched for their truth, and he thereby asserted that the goods had been sold and delivered as represented in the statement. He was examined in such a way as to have him avoid testifying to the important facts which went to the merit of the controversy, facts which were peculiarly within his own knowledge. In such a case, why should the defendant be required to make the plaintiff a witness for the defense, and be compelled to give credit to the plaintiff's testimony as to the very existence of his own cause of action? Callison v. Smith, 20 Kan. 37; Norris v. Cargill, 57 Wis. 251, 15 N. W. 148; Rea v. Missouri, 17 Wall. 532, 542, 21 L. Ed. 707. Said Mr. Justice Bradley in the case last cited: "But a greater latitude is undoubtedly allowable in the cross-examination of a party who places himself on the stand than in that of other witnesses. Still, where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent is very largely subject to the control of the court in the exercise of a sound discretion, and the exercise of that discretion is not reviewable on a writ of error."

But even if the witness Goldstein is not to be deemed, technically speaking, the actual plaintiff in the action, it is clear that the admission of his testimony on the cross-examination was not error for which the judgment should be reversed, for the plaintiff was not injured thereby. The defendant could have called the witness in his own behalf and could have elicited the same testimony in his defense. Lukens v. Hazlett, 37 Minn. 441, 35 N. W. 265. In Wills v. Russell, 100 U. S. 621, 25 L. Ed. 607, it was held that where it appears that no injury has resulted to the plaintiff in error, a judgment will not be reversed merely because the court at the trial permitted a witness on

his cross-examination to be interrogated as to matters pertinent to the issue, but about which he had not testified in chief.

We need not enter into the discussion of the question whether the court erred in requiring the plaintiff to elect between his two causes of actions. The joinder of such counts has been permitted in New York. Johnson v. Tyng, 1 App. Div. 610, 37 N. Y. Supp. 516. But there was no reversible error in the ruling of the court in the present case, for the evidence which was adduced on the cross-examination of the plaintiff's witness would have been fatal to recovery upon either of the counts pleaded in the original complaint.

The judgment is affirmed.

FIRST NAT. BANK OF CENTRAL CITY v. CITY OF PORT TOWNSEND, WASH.†

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,882.

1. COURTS (§ 374*)—FEDERAL COURTS—STATE RULE OF PRACTICE.

The Washington rule, that in case of refusal of the treasurer of a municipal corporation to pay a municipal warrant the holder may not maintain an action to recover a judgment on the warrant, but is limited to mandamus to compel the levy of a tax sufficient to pay his claim, is not binding on the federal courts sitting in that state, in which the holder, if entitled to sue therein, may recover a judgment at law as preliminary to the enforcement of its warrants by mandamus.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 981, 982; Dec. Dig. § 374.*

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

2. MUNICIPAL CORPORATIONS (§ 905*)—FISCAL MANAGEMENT—WARRANTS—ACTION—PLEADING.

A complaint on certain municipal warrants alleged their issuance and the city's refusal to pay the same for lack of funds, and averred that the city had neglected to levy in any year since the warrants were issued more than a small fraction of the tax which it was authorized to levy to supply the indebtedness fund with money to pay the warrants, and had neglected to levy any tax whatever for that fund in 1909. It did not allege, however, what amount of tax had been collected, nor the amount remaining uncollected. *Held*, that since, under Code, § 1796, all moneys collected on and after February 1, 1908, for taxes for 1896 and prior years, together with the penalty and interest thereon, were required to be paid into the indebtedness fund, the complaint did not show that the city had broken its contract, or that plaintiff was entitled to mandamus to compel a higher levy to pay the warrants.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1891–1893; Dec. Dig. § 905.*]

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

Action by the First National Bank of Central City against the City of Port Townsend, Wash. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

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

†Rehearing denied March 10, 1911.

The plaintiff in error brought an action in the court below to recover judgment against the defendant in error for the aggregate amount of 30 warrants issued by the latter, of date February 18, 1898, together with interest thereon at 6 per cent. per annum from February 19, 1898. The complaint alleges that all the warrants were made payable out of the indebtedness fund of the city, that 16 of them were issued to the Bank of British Columbia in part satisfaction of a judgment of that bank against the city, that 14 were issued to the Manchester Savings Bank in part satisfaction of a judgment of that bank against the city, and each of the 30 warrants is made the subject of a separate cause of action. The form of the warrants is as follows:

"Port Townsend, Wash., Feb. 18, 1898.

"By order of city council, Feb. 17, A. D. 1898, of the city of Port Townsend, Wash., the treasurer of said city will pay Bank of British Columbia or order $500.00 for part satisfaction of judgment of Bank of British Columbia v. City, with int. at 6% per a. Indebtedness Fund.

"[Seal.] August Dudenhausen, City Clerk.

"D. H. Hill, Mayor of the City of Port Townsend."

The complaint alleged that on February 19, 1898, the warrants were duly presented to the treasurer of said city of Port Townsend, and payment demanded, and that payment was refused for the want of funds, and the warrants were so indorsed. The complaint further alleges the assignment of said warrants to the plaintiff in error, and that on May 11, 1910, the warrants were presented to the treasurer of the city at his office, and payment was demanded and refused. The complaint further alleged that other warrants of the same date, numbered consecutively from No. 2 to 159, inclusive, of the face value of $65,983.47, were issued; that at the time when they were issued the city was authorized to levy and collect an annual tax, within the maximum of six mills on the dollar upon the taxable property of the city, for the payment of the same; that the city has failed and neglected to levy in any year since the plaintiff's warrant was issued more than a small fraction of the tax which it was authorized to levy and collect to supply the indebtedness fund of said city with money for the payment of the warrants which were payable out of such fund, and failed and neglected to levy any tax whatever for said fund in the year 1909, and has failed and neglected to pay any of the said warrants.

To the complaint the defendant in error demurred on two grounds: First, for failure to state facts sufficient to constitute a cause of action; and, second, for failure to commence the action within the time required by law. The demurrer was sustained on the ground that the warrants were issued to satisfy judgments against the defendant in error. Thereupon a judgment was entered dismissing the action.

J. A. Bentley, for plaintiff in error.

U. D. Gnagey, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The Supreme Court of Washington has held that an action may not be maintained to recover judgment upon a warrant issued by a municipal corporation of that state evidencing its indebtedness to the holder, and that the remedy of the holder in case of the refusal of the treasurer of the corporation to pay the warrant in its order is to proceed against that officer by mandamus, since all that he could obtain upon a judgment in his favor would be a warrant issued by the town authorities for the payment of his claim, and no execution would lie against the municipal corporation. Cloud v. Town of Sumas, 9 Wash. 399, 37 Pac. 305. Said the court:

"If this action can be maintained upon the warrants which have been issued, then a like suit might be maintained upon the warrants issued in satisfaction of this judgment, and so on without limit."

It may be conceded that the decision of a state court construing its own statutes cannot have the force to restrict the powers which are given the federal courts under the Constitution and laws of the United States, and that, whenever citizens of a state may try their controversies by original suits in the courts thereof, they who have the right of recourse to the federal courts may have their controversies adjudicated in such courts, and that no state, by prescribing exclusive methods or remedies, may take away that right or cripple the power of the United States courts to deal with such controversies or to enforce their adjudications. Davis v. Gray, 16 Wall. 203, 21 L. Ed. 447; Ex parte McNiel, 13 Wall. 236, 20 L. Ed. 624; Cowley v. Railroad Co., 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263.

In County of Greene v. Daniel, 102 U. S. 187, 195, 26 L. Ed. 99, the court said:

"A suit, therefore, to get judgment on the bonds or coupons, is part of the necessary machinery which the courts of the United States must use in enforcing the claim, and the jurisdiction of those courts is not to be ousted simply because in the courts of the state a remedy may be afforded in another way."

Conceding, also, that if the plaintiff in error here has the right to proceed by mandamus in a court of the state of Washington to compel the levy of a tax to meet the payment of warrants which it holds, it would, upon the facts which entitle it to that relief, have the right to obtain a judgment at law in the court below as preliminary to the enforcement of the payment of its warrants by mandamus, the question arises whether, upon the facts set forth in the complaint herein, a case is shown for such relief. The averments of the complaint are that the defendant in error has failed and neglected to levy in any year since the warrants issued more than a small fraction of the tax which it was authorized by law to levy and collect for the purpose of supplying the indebtedness fund with money for the payment of the warrants, and has failed and neglected to levy any tax whatever for said fund in the year 1909, and has failed and neglected to pay the warrants.

In State ex rel. American, etc., Co. v. Mutty, 39 Wash. 624, 82 Pac. 118, the court had under consideration a mandamus proceeding at the instance of a warrant holder, to compel the levy of an additional tax in favor of the indebtedness fund of the city of Port Townsend. The relator alleged that it was the duty of the mayor and council to assess and levy a tax of six mills for said fund for the year 1904, that the relator had made due demand for such levy, that a levy of one mill was made, that for several years prior to 1904 the mayor and councilmen had not levied a tax to the full amount allowed by law, and that for the year 1903 the levy was 1.55 mills. The court held that no case was made for a mandamus, for the reason that it was neither shown what amount of tax had been collected, nor what amount remained uncollected, and alluded to the fact, which it said was of common knowledge, that all the taxes upon the assessment roll are never collected until years after the assessment, and to the further fact that section

1796 of the Code requires that all moneys collected on and after February 1, 1898, from taxes for the year 1896 and previous years, together with penalty and interest thereon, shall be paid into the indebtedness fund. The court said that it must be presumed, without a showing to the contrary, that the officers had discharged their duty, and had made levies from year to year as the indebtedness fund required; and the court denied that it was the duty of the municipality to continue to levy each year to the full limit allowed by law until the necessary cash to pay the warrants had been realized. Said the court:

"Such a course might lead to unnecessary taxation, and might become particularly burdensome to those property holders who promptly pay their taxes. If the funds sought to be raised by previous levies are sufficient in amount, it cannot be presumed that those levies will be fruitless of the necessary results, until it appears that the collecting department has exhausted its powers and duties in the premises, and has been unable thereby to secure the required amount of revenue"—citing Duperier v. Police Jury, 31 La. Ann. 709, and Huey v. Police Jury, 33 La. Ann. 1091.

Since the facts alleged in the complaint herein are insufficient to show that the plaintiff in error would have a right to the writ of mandamus in a court of the state, they are insufficient to show that the defendant is entitled to a judgment at law in this action. The warrants are due at no particular date. No action could arise upon them until a breach of the contract by the city. Before the plaintiff in error can prevail in such an action, he must set forth facts sufficient to show such breach, and that he is entitled to a remedy under the laws of the state as fixed by the statutes and construed by its courts. In brief, he must set forth facts which show a dereliction of duty on the part of the officers of the municipality to take the necessary steps to provide the fund out of which the warrants are payable. This, as that duty is defined by the highest court of the state of Washington, is not shown by the averments of the complaint in the present case.

The judgment is affirmed.

FELLMAN v. ROYAL INS. CO.

(Circuit Court of Appeals, Fifth Circuit. January 24, 1911.)

No. 2,003.

1. INSURANCE (§ 623*)—POLICY LIMITATIONS—WAIVER.

A policy provision imposing a short limitation on the right to sue thereon is intended for the benefit of the insurers, and, being a harsh condition in derogation of limitations fixed by law, will be regarded as waived, if there is any reasonably sufficient evidence on which to base such finding.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1551; Dec. Dig. § 623.*]

2. INSURANCE (§ 623*)—ACTION ON AWARD—LIMITATIONS—"ACTION ON POLICY."

Where a fire insurance policy provided a short limitation within which an action on the policy might be brought, and the insurer, having admitted liability on an award after loss, tendered the amount fixed by the

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

award which was not accepted, such contract limitation did not apply to or affect a subsequent action by insured on the award.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1551; Dec. Dig. § 623.*

Conditions in policy as to time for bringing suit, see notes to Steel v. Phœnix Ins. Co., 2 C. C. A. 473; Rogers v. Home Ins. Co., 35 C. C. A. 404.]

3. APPEAL AND ERROR (§ 1175*)—REVERSAL—DISPOSITION OF CAUSE—JUDGMENT ABSOLUTE.

Where, in an action on an award pursuant to a fire policy, a reversal was required because of an error of the trial court in disposing of a question of law and there was no disputed question of fact in the case, the Court of Appeals would render final judgment, instead of remanding the cause for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

Shelby, Circuit Judge, dissenting.

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

Action by Mrs. Anna Fellman against the Royal Insurance Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Edgar H. Farrar, Abraham Goldberg, J. Blanc Monroe, and Harry H. Hall, for plaintiff in error.

Donelson Caffery, Lamar C. Quintero, and Philip S. Gidiere, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. In the year 1900 the plaintiff in error was the owner of a building in New Orleans of the rental value of $700 a month. On the 13th day of July, 1900, the Lancashire Insurance Company issued to her a policy of insurance for the sum of $8,400, 12 months rent, to protect her from loss of rent in the event that the building should be rendered untenantable by fire so as to cause an actual loss of rent. On the 21st of August of that year the Royal Insurance Company issued its policy to insure her for the term of one year from the 22d of August, 1900, against all direct loss or damage by fire to an amount not exceeding $15,000 on the same building, and on the 27th of September, 1900, the London & Lancashire Fire Insurance Company issued its policy to insure her for the term of one year from the 30th of September against loss or damage by fire on this building to an amount not exceeding $5,000. On March 25, 1901, the building was destroyed almost totally by fire. Due notice was given by the insured and proof of loss delivered to the companies, and the only question touching their liability for the same related to the amount of the loss occasioned by the fire. As to this, the insured and the representatives of the insurance companies could not agree, and in accordance with the terms of each policy appraisers and an umpire were appointed, who made their award August 1, 1901. This award was not satisfactory to the assured, especially in

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

reference to the loss on the building. It was satisfactory to the insurers, who, through their duly authorized representatives, admitted their liability for the amounts awarded, and on August 14, 1901, duly tendered the amount to the counsel for the insured. The tender was not accepted, and on January 16, 1902, the plaintiff in error filed her bills in the Circuit Court for the Eastern District of Louisiana against the Royal Insurance Company and the London & Lancashire Insurance Company to correct the award of the appraisers as to the amount of their liability. The subject-matter of these suits being identical and the parties substantially so, the suits were, for the purposes of the hearing, treated as one. The same special master was appointed to act in each, and the cases were fully heard by him. On March 21, 1906, he made an exhaustive report announcing his conclusions of law and fact, accompanied by a full statement of the evidence. His report and the exceptions thereto came on to be heard before the judge resulting in a decree, passed December 15, 1906, enlarging the amount of the award as to the damage on the building. From this decree the insurers appealed to this court. The decree was affirmed.

The plaintiff in error having brought this suit, her pleading in this case avers substantially: That she had a policy in the Lancashire Company for $8,400, covering rents on property described; that the property was rented for $700 per month, and was destroyed by fire on the 25th of March, 1901, while the policy was in force; that the defendant company called for appraisement under the terms of the policy, and accordingly an appraisement and award was duly had and made; that this appraisement and award covered not only the loss on the policy sued on in respect to the rents, but also the amount due for loss on the building accruing under other policies in other companies; that the award of the arbitrators and umpire fixed the rent loss at 100 days; that plaintiff filed a bill in equity in this court against each of the other companies, parties to the award, to set aside the same in so far as it affects and fixes the amount on the building; that the Lancashire Company was not a party to those suits, and that the plaintiff is willing to accept the award on the rents; that since the loss of her building by fire, as herein described, and the award by the appraisers, the Lancashire Insurance Company has been bought out and succeeded by the Royal Insurance Company and the Royal Insurance Company has become liable for this award; that she had made due demand upon the insurance companies to pay the amount of rent awarded by the appraisers, but without avail. She made a part of her petition as exhibits the policy, the agreement to submit to award, and the award.

The pleading of the defendant in error (defendant below) we give in full:

"And now into court comes the defendant company by and through its undersigned counsel, and before answering to the merits of this cause, and specially reserving its rights so to do, does now except to the petition of plaintiff, for that, by the terms of the policy described in plaintiff's petition, the plaintiff stipulated and agreed and bound herself that: 'No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements, nor unless commenced within twelve months next after

the fire.' And the plaintiff's petition shows that the property claimed to be insured and injured by the fire or the casualty, which was insured against, happened on the 25th of March, 1901, and plaintiff's petition in this suit was filed in this court on the 18th day of June, 1906, more than three years after the plaintiff's right of action by her contract was lost or had ceased to exist.

"Further excepting, the defendant shows that, if the plaintiff claimed by virtue of an award made by appraisers, the plaintiff is estopped from making or setting up any such claim, because she has repudiated this award before this court, and has refused to stand thereon and does not abide by the same.

"Wherefore, respondent prays that this exception be maintained, and that plaintiff's suit be dismissed at her cost."

There was no substantial dispute about the actual facts involved in the dealing of the parties as set out in the plaintiff's petition. The appraisement and award were duly had and made as alleged, and on the 14th day of August, 1901, the proper representatives of the several insurance companies made to the counsel of the plaintiff a tender of what they claimed as due under the policies held by the plaintiff in all three of the companies covering the loss of the building and the loss of the rents. The amount of the tender for the rent being the sum of $2,311.12, such companies claiming that the amount tendered was the amount due as per the report of the appraisers and umpire. The counsel for plaintiff declined to receive the amount tendered, but agreed with the parties making the tender, although made by draft, that it should be considered as if made in lawful money of the United States with all due form of law.

The cause came on for hearing before the judge May 31, 1907, and was argued by counsel for the respective parties and submitted, and the court took time to consider, and, after due consideration on January 3, 1908, the court ordered, adjudged, and decreed that the plea of defendant the Royal Insurance Company, of Liverpool, England, filed herein be sustained, and that the demand of the plaintiff, Mrs. Anna Dreyfous, widow of the late Bernard Fellman, be rejected and her suit be dismissed, with costs. The plaintiff in error (plaintiff below) made her motion for a new trial, which was overruled, whereupon she sued out a writ of error, and duly assigned:

"That the court erred as a matter of law on the face of the record in sustaining defendant's plea that the suit was barred by that clause in the policy requiring the assured to bring an action on the policy within twelve months next after the fire, because the following facts were agreed to by the parties:

"(a) That it was agreed by the parties that while Exhibit C, known as 'agreement for submission to appraisement and award,' does not by its terms include the policy herein sued on, yet it was verbally agreed between the parties to this case that the appraisers and the umpire should consider and pass on the time necessary to rebuild, and that their finding should fix the number of days necessary to rebuild the buildings, to be used in fixing the amount of loss under the policy sued on in this case, and the award shows that such a finding was made.

"(b) That on the 14th day of August, 1901, after the said award was made, the defendant company made to the counsel of the plaintiff a tender of the sum of $2,311.12, the amount claimed by it to be due by the defendant under the award aforesaid as loss under the policy sued on in this case for insurance on the rents of the property, which tender the said counsel refused. There is no proof or suggestion that this tender was ever withdrawn.

"The court erred as a matter of law on the face of the record in sustaining the defendant's plea of estoppel from claiming under the award of the ap-

praisers on the ground that she had repudiated said award by filing a bill in this court to set the same aside, when it appears by the records of the suits aforesaid, Nos. 12,990 and 12,991 of the docket of the court, styled Mrs. Anna Fellman v. Royal Ins. Co., and Same v. London & Lancashire Ins. Co., and by virtue of the agreement aforesaid as to effect of said award in determining the amount due on the policy sued on in this case, that the said suits did not in any respect attack the said award in regard to the findings thereof, which fix the amount due under the policy sued on in this case, but that the said suits attacked the said award for errors committed therein against plaintiff in matters touching her rights under other policies not in any respect in issue in this case."

We think both these assignments well taken. The averments of the petition and of the plea show that the plaintiff's action is not an action on the policy within the true meaning of the provision pleaded by the defendant, but an action on the award made under the policy. The defendant having admitted liability on the award, and made a tender to plaintiff of the amount due as fixed by the award, there is no room for the application of the limitation pleaded. So far as the claim for insurance is disputed, and may be a subject of litigation between the parties, the insurers may well provide in their contracts that the action shall be speedily brought so that the extent of their liability may be settled while the facts are recent and the witnesses by whom they are to be proved are readily accessible, but there is no such reason for the limitation of the time within which a suit shall be brought when it is sought to recover only the amount under the policy which has been ascertained and admitted to be justly due by the insurers. Such conditions in the policy, like all others intended for the benefit of the insurers, may be waived by them, and as the condition is a harsh one, and in derogation of the limitation of actions fixed by law, in its bearing on the insured, and works a forfeiture when upheld, the courts will not require very stringent evidence in order to defeat its application. 2 May on Insurance (4th Ed.) §§ 488, 491, pp. 1154, 1160; Thompson v. Phenix Insurance Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408; Godchaux v. Merchants' Mutual Insurance Co., 34 La. Ann. 235; Hanover Fire Insurance Co. v. Hatton (Ky.) 55 S. W. 681.

As there is no disputed question of fact in this case and the issue between the parties is purely a question of law, as our statement of the case has attempted to show, while the case must be reversed on account of the error of the trial court in disposing of that question of law, there appears no reason why we should not here render the judgment which the Circuit Court should have rendered. Therefore, the judgment of the Circuit Court is reversed, and this court now renders its judgment that the plaintiff in error recover of the defendant in error the sum of $2,311.12, with legal interest from the 14th day of August, 1901, and costs incurred in this court and in the Circuit Court.

It is ordered that the cause be remanded to the Circuit Court, with direction to it to have entered there the judgment we have entered here, and to enforce the same by proper process.

SHELBY, Circuit Judge (dissenting). I am constrained to dissent from the judgment of the court in this case.

1. Trial by jury was waived by stipulation in writing signed by the attorneys for the parties under Rev. St. § 649 (U. S. Comp. St. 1901, p. 525), and the Circuit Court was requested to find the facts specially. No finding of facts, either general or special, appears in the record. In this respect the case is exactly like Lloyd v. McWilliams, 137 U. S. 576, 11 Sup. Ct. 173, 34 L. Ed. 788, which was disposed of by unanimous decision in ten lines, as follows:

"In this cause trial by jury was waived by agreement of the parties in writing, duly filed, and the case was tried by the court. But the record discloses no finding upon the facts, either general or special, in accordance with the statute (Rev. St. §§ 649, 700), and no questions are therefore open to our revision as an appellate tribunal.

"As the Circuit Court had jurisdiction of the subject-matter and the parties, its judgment must be presumed to be right, and on that ground affirmed."

There is no agreement in the record to take the place of a finding of facts by the judge. There is printed in the record "an additional statement of fact," which possibly was placed before the judge in connection with the other evidence, though the record does not show that it was. This statement is entirely insufficient to take the place of a finding of facts by the Circuit Court. Raimond v. Terrebonne Parish, 132 U. S. 192, 194, 10 Sup. Ct. 57, 33 L. Ed. 309; Glenn v. Fant, 134 U. S. 398, 10 Sup. Ct. 583, 33 L. Ed. 969.

2. "After hearing evidence" the case was held under advisement, and later the court entered the following judgment, which we are asked to reverse:

"This cause came on at a former day to be heard upon the plea of prescription herein filed by the defendant, the Royal Insurance Company, on November 27, 1906, and a written stipulation having been filed waiving trial by jury, and counsel for the respective parties having offered evidence as per note of evidence on file, the cause was thereupon argued and submitted. Whereupon, after due consideration thereof, it is now ordered, adjudged, and decreed that the plea of the defendant the Royal Insurance Company of Liverpool, England, filed herein be sustained, and that the demand of the plaintiff, Mrs. Anna Dreyfous, widow of the late Bernard Fellman, be rejected, and that this suit be dismissed, with costs."

There is no bill of exceptions in the record, and its absence raises a question of federal appellate procedure, and not one of Louisiana practice. 1 Ency. U. S. S. C. Reports, p. 394. There is nothing whatever, except a motion for a new trial and an assignment of errors, to show that either one of the parties ever objected to the judgment or excepted to any ruling of the judge. This is a writ of error from a judgment at law rendered on an issue of fact. There is a presumption in favor of the correctness of the decision below, and that the evidence sustained the judgment. Without a bill of exceptions the correctness of the judge's decision cannot be reviewed. Rev. St. § 700 (U. S. Comp. St. 1901, p. 570); Preston v. Prather, 137 U. S. 604, 11 Sup. Ct. 162, 34 L. Ed. 788.

In Moller v. United States, 57 Fed. 490, 495, 6 C. C. A. 459, 464, this court, held by Pardee and McCormick, Circuit Judges, and Locke,

District Judge, cited many of the decisions of the Supreme Court on this subject, and said:

"We suggest to the members of the bar in this circuit that an examination of these last-cited cases will be advantageous, if, hereafter, in common-law cases, they shall desire to bring facts to this court for review."

It is difficult to understand why this court should depart from these rules, unless it is because the learned attorneys for the defendant in error argue the case only on the merits. But the absence of a bill of exceptions cannot be waived.

Malony v. Adsit, 175 U. S. 281, 286, 20 Sup. Ct. 115, 117, 44 L. Ed. 163, contains a careful review of a great many cases that show the absolute necessity for a bill of exceptions to review the decision of the lower court on writ of error when the decision relates to a matter upon which evidence was received, and that the omission to take a proper bill of exceptions cannot be waived by parties or counsel. The court said:

"The rationale of these cases evidently was that the Court of Errors could not consider a bill of exceptions that had not been signed by the judge who tried the case, and that such failure or omission could not be supplied by agreement of the parties, but that the only remedy was to be found in a motion for a new trial."

And later, in the same case, this view is emphasized:

"We are referred to no decision of this court on the precise question whether counsel can stipulate the correctness of a bill of exceptions not signed by the trial judge. But we think that on principle this cannot be done, and we regard the cases just cited as sound statements of the law." Page 288 of 175 U. S., page 118 of 20 Sup. Ct. (44 L. Ed. 163).

In Mussina v. Cavazos, 6 Wall. 355, 363, 18 L. Ed. 810, there is a very interesting note which shows that the case was "elaborately" argued on its merits, and that afterwards, "it being discovered by the court that the bill of exceptions had not been either signed or sealed by the judge below," the court said:

"Whatever might be our opinion of the exceptions which appear in the record, if they were presented in such a way that we could consider them, we find them beyond our reach. The bill of exceptions, or what purports to be a bill of exceptions, covering more than 350 pages of the printed record, is neither signed nor sealed by the judge who tried the case; and there is nothing which shows that it was submitted to him or in any way received his sanction. We are therefore constrained to affirm the judgment, and it is affirmed accordingly."

In my opinion the record shows clearly that the Circuit Court has decided a question of fact on the written waiver of jury trial, and for the reasons that there is no finding of facts by the Circuit Court and no bill of exceptions this court is without jurisdiction to reverse the judgment. 2 Foster's Fed. Prac. (3d Ed.) § 374, p. 873, and cases there cited.

The judgment of the Circuit Court in my opinion should be affirmed.

BLUEFIELDS S. S. CO., Limited, v. STEELE.

(Circuit Court of Appeals, Third Circuit. February 7, 1911.)

No. 1,410 (34).

1. COURTS (§ 276*)—JURISDICTION OF FEDERAL COURTS—DISTRICT OF SUIT—WAIVER OF OBJECTION.

The objection to the jurisdiction of a particular federal Circuit Court of a suit between citizens of different states because neither of the parties is a resident of the district is waived by the defendant by appearing and filing a motion to vacate an order on grounds going to the merits of the bill as well as for want of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*

Waiver of right as to district in which suit may be brought, see notes to Memphis Sav. Bank v. Houchens, 52 C. C. A. 192; McPhee & McGinnity Co. v. Union Pac. R. Co., 87 C. C. A. 634.]

2. COURTS (§ 300*)—JURISDICTION OF FEDERAL COURTS—SUIT FOR APPOINTMENT OF ANCILLARY RECEIVER.

Where a receiver, appointed by a federal court, by reason of the character of his appointment, or because of local policy or the rights of local creditors, is not permitted to sue in a jurisdiction other than the one in which he was appointed, a bill may be filed in another federal court for the appointment of an ancillary receiver, and, the ultimate object of such proceeding being to aid the purpose of the original suit, it is in that sense ancillary, and jurisdiction thereof does not depend on diversity of citizenship of the parties.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 300.*

Suits by and against receivers of federal courts, see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 49.]

3. RECEIVERS (§ 206*)—BILL FOR APPOINTMENT OF ANCILLARY RECEIVER—REQUISITES.

A court whose aid is invoked by the appointment of an ancillary receiver must alone determine whether the case is a proper one for the granting of such relief under the rule of comity, which is not a rule of law, but one of practice, convenience, and expediency, and to that end the bill should fully disclose the nature of the suit in which the receiver was appointed by the court of primary jurisdiction and the ground and purpose of such appointment.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 410; Dec. Dig. § 206.*]

4. RECEIVERS (§ 206*)—BILL FOR APPOINTMENT OF ANCILLARY RECEIVER—SUFFICIENCY.

A bill filed by a stockholder in the federal court for the Eastern district of Pennsylvania asked the appointment of an ancillary receiver for a corporation for the sole purpose of bringing an action for treble damages under the federal anti-trust law against a party not a citizen nor resident of Pennsylvania, there being no allegation that there was any tangible property of the corporation within the district. The bill alleged the appointment of a general receiver by a federal court in Louisiana which was the domicile of defendant, but did not disclose the nature of the suit nor set out a copy of the original bill or order of appointment, nor did it show that the action which it was sought to have brought by the ancillary receiver could not be brought in Louisiana. It alleged facts tending to show that the corporation had a right of action for such damages, and that the directors had refused to bring the action, but not that

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

the Louisiana receiver was appointed on such ground or for such purpose. *Held*, that it was insufficient to justify the appointment prayed for.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 410; Dec. Dig. § 206.*]

Buffington, Circuit Judge, dissenting.

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

Suit in equity by Frederick M. Steele against the Bluefields Steamship Company, Limited. From an order appointing an ancillary receiver, defendant appeals. Reversed.

Francis Rawle, for appellant.

Alexander Simpson, Jr., Ernest Dale Owen, and John G. Johnson, for appellee.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

LANNING, Circuit Judge. This is an appeal from an interlocutory order of the Circuit Court of the Eastern District of Pennsylvania appointing an ancillary receiver for the Bluefields Steamship Company, Limited. The complainant, Frederick M. Steele, is a citizen of the state of Illinois, and the defendant, the Bluefields Steamship Company, Limited, hereafter called the "Bluefields Company," is a corporate citizen of the state of Louisiana. The bill contains allegations of fact tending to show that the Bluefields Company has a right of action for threefold damages under the seventh section of the anti-trust act of July 2, 1890, against the United Fruit Company, hereafter called the "United Company," which is a corporate citizen of the state of New Jersey, and that the Bluefields Company refuses to prosecute any action for the recovery of such damages. But the only reference in the bill of complaint to any primary receivership is in its tenth and eleventh paragraphs, which are as follows:

"Tenth. Your orator further says that heretofore, to wit, on the 3d day of December, 1909, a bill in chancery was duly filed by your orator in the United States Circuit Court for the Eastern District of Louisiana, complaining of the said Bluefields Company and others on account of the various matters and things set up in said bill, to which said bill the United Fruit Company was made a party defendant, was duly served with process, and appeared by counsel. That among other things in said bill there was a prayer for the appointment of a receiver to take over the property and conduct the business of the said Bluefields Company. That said bill was so proceeded upon that said Circuit Court appointed one Elmer E. Wood as receiver on the 3d day of December aforesaid. Afterwards a motion was filed by the defendant in said cause to procure the discharge of such receiver, which motion was overruled by the court, whereupon an appeal was taken from the order of the court appointing such receiver and the order overruling the motion to discharge the same, which appeal is still pending and undetermined.

"Eleventh. As a part of the order overruling the motion to discharge said receiver, it was ordered by said court that the receiver should take over the property of said company and actively operate the same, and upon the allowance of said appeal the said court entered as a part of said order a supersedeas to that part of the decree; but the appointment of the receiver has not been suspended by the supersedeas aforesaid and is still in full force and effect."

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

The prayer of the bill is:

"That your honorable court will forthwith appoint a receiver ancillary to said receivership in Louisiana for the purpose of bringing and conducting the litigation necessary to recover such sum as may be due from the said United Fruit Company to and in behalf of said Bluefields Company, and also for an order, when such receiver shall have been appointed, that he proceed to employ counsel and to bring and conduct such action as may be necessary in that behalf."

Upon the filing of the bill, the Circuit Court ordered:

"That Elmer E. Wood be and he hereby is appointed ancillary receiver of the Bluefields Steamship Company, Limited, the defendant in the above case; no money or other property to be paid to or received by said ancillary receiver until he shall make report to this court and shall have entered such security as the court may require. And it is further ordered that said ancillary receiver forthwith employ counsel and proceed within the jurisdiction of this court to recover from the United Fruit Company upon the cause of action set forth in the bill filed in this cause."

It is objected by the appellant that, as this suit was not brought "in the district of the residence of either the plaintiff or the defendant" (Judiciary Act March 3, 1875, c. 137, § 1, 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]), the Circuit Court was without jurisdiction to appoint the ancillary receiver. The appellee contends, however, that the appellant waived the objection referred to by appearing in the Circuit Court and prosecuting there a motion to vacate the order on grounds relating to the merits of the bill as well as on the ground that neither the complainant nor the defendant is a citizen of Pennsylvania. One of the five objections embodied in the written motion to vacate is that the suit was brought in the wrong district, but the other objections go to the substance and merits of the bill. Having invoked the judgment of the court on the merits of the case, the appellant cannot now properly object that the court had no jurisdiction of its person. In accordance with the decision in Western Loan Co. v. Butte & Boston Min. Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101, this objection for the appellant must be overruled.

Nor do we yield assent to the appellant's argument that the power of a Circuit Court of the United States to appoint a receiver ancillary to a receivership in another jurisdiction is in any wise dependent upon diversity of citizenship of the parties in the ancillary suit. Where a court, having jurisdiction of the person of a defendant corporation, has determined by its decree to take possession of that corporation's property for the purpose of winding up its affairs, and has appointed a receiver to act as its officer in that behalf, such receiver has often been permitted, in cases not conflicting with local policy or the rights of local creditors, to prosecute suits in other jurisdictions for the recovery of debts or assets. Kirtley v. Holmes, 107 Fed. 1, 46 C. C. A. 102, 52 L. R. A. 738; Hurd v. Elizabeth, 41 N. J. Law, 1; Mabon v. Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805; Lewis v. Clark, 129 Fed. 570, 64 C. C. A. 138; Converse v. Mears (C. C.) 162 Fed. 767. It is true that in Great Western Mining Co. v. Harris, 198 U.

S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163, it was held that an ordinary chancery receiver is a mere custodian for the court and has no estate in the property, and that comity does not authorize such a receiver to sue in a foreign jurisdiction. But where a receiver is, by the law under which he is appointed, a quasi assignee and representative of the creditors of a corporation, he may sue in a foreign jurisdiction. Bernheimer v. Converse, 206 U. S. 516, 534, 27 Sup. Ct. 755, 51 L. Ed. 1163.

Where the receiver has no such character, or where because of local policy or the rights of local creditors the rule permitting a receiver to sue in a jurisdiction other than the one in which he was appointed is not deemed applicable, a bill may be filed for the appointment of an ancillary receiver, and, on a proper showing, such a receiver will be appointed. In any such case the jurisdiction is analogous to that of a court to appoint a receiver on a proper bill in a suit ancillary to another suit or action pending in the same court. In a suit strictly ancillary to another suit pending in the same court, no subpœna ad respondendum is necessary. The parties are already in court. The service of a rule or of notice is all that is required to enable the court to proceed with the ancillary suit. So, where a defendant has been regularly brought into court in an original suit, and a receiver of his property has been appointed in that suit, another court, whose jurisdiction is invoked in aid of the original receivership, may proceed on the service of a rule or notice merely. Such service may be made on the defendant wherever he is found, or it may be published, as is the practice in the United States Circuit Court for the District of Maine. See preliminary statement in Conklin v. U. S. Shipbuilding Co. (C. C.) 123 Fed. 913, and Haydock v. Fisheries Co. (C. C.) 156 Fed. 988. Having been once brought into a court which has regularly acquired jurisdiction of his person in an original suit, and having there had a decree entered against him appointing a receiver to take possession of all his property wherever situate, the court in which the appointment of an ancillary receiver is sought will take jurisdiction of his person, upon the service of a rule or notice, precisely as if the original suit were pending in that court. Otherwise, the prevailing practice in the federal courts of appointing ancillary receivers in railroad and other cases of insolvent corporations whose property extends through or exists in different judicial districts and states is wrong. While an ancillary proceeding of the kind here considered will be controlled by the court before which it is prosecuted, and in that sense is an independent proceeding, its ultimate object is to aid the purpose of the original suit, and in that sense it is ancillary. Jurisdiction in such an ancillary suit therefore no more depends on diversity of citizenship than it does in a suit ancillary to an original suit pending in the same court. It depends alone on the existence of an original suit in one court which may properly be aided by proceedings in another court. It is unnecessary to refer to cases in which the federal courts have appointed receivers ancillary to receiverships in other jurisdictions without regard to the citizenship of the parties. There are many of them. One is Southern Railway v. Carnegie Steel Co., 176 U. S.

257, 20 Sup. Ct. 347, 44 L. Ed. 458, where ancillary receivers were appointed in ancillary suits for the Richmond & Danville Railroad Company in North Carolina, South Carolina, Georgia, Alabama, and Mississippi; the original suit having been brought in Virginia.

But the court whose aid is invoked must alone determine whether the case is a proper one for the appointment of an ancillary receiver. It cannot act intelligently, and therefore cannot tell what, in comity, it ought to do unless reasonable information has been communicated to it concerning the object which it is requested to aid. It follows that a bill seeking the appointment of an ancillary receiver should disclose the nature of the proceeding in which the receiver was appointed in the court of primary jurisdiction. In the proceeding now before us no affidavits accompanied the bill of complaint except the affidavit of the complainant himself to the effect that he had read the bill, that its contents were true save as to the matters stated on information and belief, and that, as to those matters, he believed them to be true. No copy of the bill of complaint filed in the court of Louisiana, or of the order of that court appointing a receiver there, accompanied the bill filed here. When the Circuit Court here appointed the ancillary receiver, the only information it had concerning the nature of the proceedings in Louisiana, or the ground on which the receiver was appointed there, was the allegation in the tenth paragraph of the bill filed here that on December 3, 1909, the complainant here filed a bill there "complaining of the Bluefields Company and others on account of the various matters and things set up in said bill, to which said bill the United Fruit Company was made a party defendant." Whether the receiver in Louisiana was appointed because of the insolvency of the Bluefields Company, or for some other reason, we are left to conjecture. When to these facts is added the other fact that the ancillary receiver was not appointed to take possession of any tangible assets of the Bluefields Company within the Eastern district of Pennsylvania nor to collect any debt due to the Bluefields Company from any citizen of that district, but that he was appointed for the sole purpose of prosecuting an action at law against a party not a citizen of or resident within that district, we think it becomes apparent that the order appealed from cannot be supported by any rule of comity or practice observed by our courts, federal or state. Comity is not a rule of law but one of practice, convenience, and expediency. It persuades, but it does not command. Mast, Foos & Co. v. Stover Manufacturing Co., 177 U. S. 488, 20 Sup. Ct. 708, 44 L. Ed. 856.

The rule cannot be properly invoked where the essential jurisdictional averments are absent. In the bill before us there are no such averments as would justify the appointment of an ancillary receiver for the limited purpose mentioned in the order, or for any other purpose. While the judgments and decrees of other courts are entitled to full faith and credit, in this case the Circuit Court had before it no judgment or decree of the Louisiana court. It was given no information whatever as to the nature of the proceeding on which the primary receiver was appointed. The bill of complaint does not ask for the appointment of an original receiver. The prayer is expressly limited

to the appointment of an ancillary receiver for a very limited purpose. It is useless, therefore, to consider whether the averments of the bill, outside of the tenth and eleventh paragraphs, would support the appointment of an original receiver, since no such receiver was appointed or prayed for. As we have seen, the single ground on which the receiver was sought was that he might institute a suit for and on behalf of the Bluefields Company against the United Company to recover damages for the injury done to the business of the Bluefields Company. The United Company, it appears, is doing business in Louisiana. It does not appear that it cannot be sued there. Indeed, on the argument before us the only reason given by the complainant's counsel for not suing the United Company in Louisiana is the one that in that state the statute of limitations bars a claim like that which the complainant insists the Bluefields Company has against the United Company after one year, while in Pennsylvania the period of limitation is six years. Instead of suing in Louisiana under the anti-trust act for treble damages for one year, the purpose is to sue in Pennsylvania under that act for treble damages for six years. Assuming that a court may take the property of a corporation from its possession and put it into the possession of a receiver merely because the board of directors of the corporation fraudulently refuse at the request of a stockholder to sue another party for damages and to the end that such receiver may sue for such damages—a question which we need not now consider—it does not appear that the Louisiana receiver was appointed on any such ground or for any such purpose.

But it is said that the order of the Louisiana court appointing a receiver on December 3, 1909, is before us. That is true. It was brought into the record by the defendant on its motion to vacate the order appointing the ancillary receiver. It declares that:

"Elmer E. Wood be and he is hereby appointed receiver of the defendant, the Bluefields Steamship Company, and directed to take possession of all its property and administer the same and its business and affairs under the direction of the court."

On January 18, 1910, the Louisiana court denied the motion of the Bluefields Company to vacate the order of December 3, 1909, and ordered:

"That the appointment of Elmer E. Wood, receiver, heretofore made, be in all things now confirmed, and pending the final hearing of this cause and until further order of this court the said receiver is directed to take charge and possession of the property, assets, and business of the said Bluefields Steamship Company, wherever situated, and that he be authorized and directed to manage, operate, conduct, and carry on the same, and to collect all money due to the said corporation."

These orders, however, cannot cure the infirmity of the bill of complaint. Besides, they fail to furnish any more information than does the bill as to the nature of the original suit, or the ground upon which the receiver was appointed in that suit. The bill is fatally defective in not setting forth facts sufficient to justify the appointment of an ancillary receiver. We leave untouched the question whether the law authorizes the appointment of a receiver for the mere purpose of su-

ing for treble damages under the anti-trust act, or whether, if so, an ancillary receiver may be appointed for the mere purpose of suing under that act in a jurisdiction where the statute of limitations is less liberal toward a wrongdoer than it is in the court of primary jurisdiction, or whether an ancillary receiver will be appointed for the mere purpose of suing a party who is a citizen and resident of another state. It is sufficient, for present purposes, to say that the bill of complaint does not support the order appealed from.

It is therefore reversed, with costs.

BUFFINGTON, Circuit Judge, dissents.

PARISH et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 3, 1911.)

No. 2,095.

PUBLIC LANDS (§ 8*)—TRESPASS—EXTRACTING TURPENTINE FROM TREES ON UNPERFECTED HOMESTEAD—DAMAGES RECOVERABLE.

The boxing of trees by a settler on public land covered by an unperfected homestead entry and the extracting of crude turpentine therefrom constitutes in law a willful trespass, although the settler may have acted in good faith and without knowledge of the illegality of the act; and on relinquishment of his entry the United States is entitled to recover the value of the products manufactured from such crude material from any person into whose possession the same may have passed.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 8; Dec. Dig. § 8.*]

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

Action at law by the United States against W. L. Parish and the Consolidated Naval Stores Company. Judgment for plaintiff, and defendants bring error. Affirmed.

Francis B. Carter (W. A. Blount and A. C. Blount, Jr., of counsel), for plaintiffs in error.

F. C. Cubberly, U. S. Atty., and Emmett Wilson, Asst. U. S. Atty.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. This was an action by the United States, plaintiff, against W. L. Parish and the Consolidated Naval Stores Company, a corporation, defendants. The declaration charged, in the first count, that the defendants had converted to their own use and deprived plaintiff of the use, possession, and value of plaintiff's goods and chattels—that is to say, turpentine and rosin—to the value of $455. The second count is to the same effect, except it describes the goods as crude gum, the product of pine trees, of the value, etc.; and the third count charges that the defendants had entered the plaintiff's close, describing it, and cut, chipped, chopped, and scraped, and caused to be cut, chipped, chopped, and scraped,

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

3,332 pine trees growing on plaintiff's land, and greatly damaged the trees, in the sum of $166.60. The defendants pleaded "not guilty."

The plaintiff proved that the 160 acres described in the declaration was entered as a homestead by Wyatt S. Parish on September 16, 1902; that the entry remained in good standing until January 10, 1908, when it was voluntarily relinquished.

Wyatt S. Parish testified that he entered the homestead in good faith September 16, 1902, and immediately began building and clearing, and completed his home thereon in the early part of 1903, when he moved in and cultivated successively each year, beginning in 1903, until he relinquished his entry, about 5 acres of the land, raising ordinary agricultural products thereon; that he intended in good faith to perfect the same, and to that end made the property his actual home; that in the fall of 1903–04 he boxed the pine timber upon the land, in good faith believing that he had the right to do so and that it was not contrary to law, and extracted crude gum, which he sold to the defendant W. L. Parish at his still near by at $5 per barrel during 1904; that in the spring of 1905 Mr. A. Paul, a government agent, was in the neighborhood, and told him that it was unlawful to extract gum from the trees, whereupon he immediately ceased working the boxes, and never thereafter chipped the trees, or cut boxes, or extracted gum from the trees on his homestead; that the market value of the gum sold to W. L. Parish was $5 per barrel; that he extracted the gum and sold it in good faith, believing that he had a right to do so, and that it was not against the law, and that at the time of cutting the boxes, extracting the gum, and selling it he was in good faith residing in the house erected by him upon the land, cultivating the part which he had cleared and inclosed, making the land his actual home, and having no intention to defraud the government or violate the law, but intending in good faith to comply with the law, to prove up, and obtain a patent at the expiration of the time required.

A. Paul, a witness, corroborated the statement of Wyatt S. Parish that, after he notified him in 1905 that it was not lawful to extract gum from the trees on his homestead, he immediately ceased doing so, and none had been since extracted.

The defendant W. L. Parish testified that he purchased at the market price, $5 per barrel, in 1904, from Wyatt S. Parish, crude gum, which he manufactured into spirits of turpentine and rosin; that when he purchased it he knew it came from trees on land entered by Wyatt S. Parish as a homestead, and which the latter had improved, was living upon, and cultivating; that he in good faith believed that Wyatt S. Parish had the right to extract the gum and sell it, and in good faith believed that Wyatt S. Parish was complying with the homestead laws by living upon, improving, and cultivating the land; that he had no intention of defrauding the government in purchasing the gum, and did not know it was contrary to law for him to do so; that he shipped the spirits and rosin to the Consolidated Naval Stores Company, his factors, at Pensacola, Fla., who sold it for his account and accounted to him for the proceeds before this suit was brought.

J. K. Rozier, an officer of the defendant the Consolidated Naval Stores Company, testified that the company received spirits of turpentine and rosin from W. L. Parish in 1904, and as factor or commission merchant sold it to other persons and accounted to said Parish for the proceeds before this suit was brought; that the company had no knowledge or intimation that any of the spirits or rosin had been manufactured from gum obtained from lands of the plaintiff, or that had been entered as a homestead under the acts of Congress; that the company supposed the property was really the property of W. L. Parish, and in good faith and without notice of wrong on the part of either W. L. or Wyatt S. Parish sold the manufactured product and accounted to W. L. Parish for the proceeds, having no knowledge or reason to suppose any of it came from the land that had been entered as a homestead.

There was no evidence tending to contradict the testimony of any of the witnesses as given above. The evidence proved without dispute that crude turpentine was worth on the market much less than the manufactured product, and that a barrel of crude gum, worth $5 when manufactured into rosin and spirits of turpentine, was worth more than $7.50 in the year 1904.

After all the evidence was introduced and the arguments had, the court instructed the jury as follows:

"That Wyatt S. Parish was in law a willful trespasser in extracting gum from the trees on his homestead, and for that reason the defendants are liable for the value of the spirits of turpentine and rosin manufactured from the gum, and not merely for the value of the crude gum; that they (the jury) should find for the plaintiff the value of the spirits of turpentine and rosin manufactured by defendant W. L. Parish from the gum purchased by him from Wyatt S. Parish, who extracted it from trees upon his homestead."

The defendants excepted to these charges, and requested the court to instruct the jury:

"If you find from the evidence that the homesteader, Wyatt S. Parish, in boxing trees and extracting the gum from his homestead, honestly and really believed that he had the right to do so, and that he had no intention of defrauding the government by so doing, or of taking property not his own, then you should find as damages the value of the crude gum, and not the value of the manufactured product."

And again:

"Even though, under the law, Wyatt S. Parish had no right to extract gum from the trees on his homestead, still, if he honestly believed that he had the right, and did not intend to defraud the government of property which he knew belonged to it, and he extracted and sold the gum under the bona fide belief that he had the right to do so, and he was at the time in good faith complying with the law requiring residence and cultivation and the like to enable him to perfect his homestead entry and really intended to so perfect it, then he was not a willful trespasser, and the damages should be estimated at the value of the crude gum, and not the value of the manufactured product."

These requests the court refused, and the defendants excepted. There was a verdict and judgment for the plaintiff, and the defendants sued out error, and under suitable assignments submit that the

trial court erred in the charges given and in refusing the requested charges.

In our opinion neither of these assignments of error is well taken. The charges given by the court correctly stated the law, and the requested charges were rightly refused. We cannot follow the counsel for the plaintiffs in error through an examination of all the cases which his commendable research has enabled him to place upon the brief. Besides the well-recognized principles of justice and the practice in equity, which courts of law now generally adopt, a few comparatively recent and pertinent cases amply support the view of the law taken by the trial judge. We content ourselves with referring to these cases: Woodenware Company v. United States, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; United States v. Taylor (C. C.) 35 Fed. 484; Shiver v. United States, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231, and the sections of the Revised Statutes cited in the opinion of the court in the Shiver Case.

This view as to what the law was at the time the trespass in this case was committed has, in our judgment, been approved by Congress by the act of June 4, 1906, making such trespasses a misdemeanor. Act June 4, 1906, c. 2571, 34 Stat. 208.

The judgment of the Circuit Court is affirmed.

UNITED STATES v. GROSJEAN et al.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,787.

UNITED STATES (§ 75*)—CONTRACTS—ACTION FOR BREACH—DEFENSES.

One of the defendants contracted with the United States to build two bridges; the other defendants becoming sureties on his bond for performance of the contract. Afterwards he absolutely refused to perform the contract, whereupon the Secretary of the Interior declared it annulled, and readvertised and let the contract to the lowest bidder at a higher price. It was shown that the two contracts covered precisely the same work and that the price paid was reasonable. *Held* that, the contract having been broken by defendant, the fact that the Secretary declared it "annulled" was immaterial, and did not deprive the government of the right to recover damages for its breach, equal to the additional sum it was compelled to pay.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 75.*]

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

Action at law by the United States against Frank Grosjean, J. D. Westfall, and J. C. Grosjean. Judgment for defendants, and plaintiff brings error. Reversed.

A. I. McCormick, U. S. Atty.

John A. Wall, for defendants in error.

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

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

ROSS, Circuit Judge. This was an action by the government upon a bond given to secure the performance of a certain contract entered into by the defendant in error, Frank Grosjean, as contractor for the building of two certain bridges, hereinafter referred to. The amended complaint, upon which the action was tried, alleged, among other things, the advertisement for bids for the building of the bridges, the making and delivery of a bid in writing by Frank Grosjean, the acceptance of his bid by the government, the due and legal execution of a contract for the building of the bridges, the execution of the bond given by the contractor to secure its proper performance, and the approval thereof by the Secretary of the Interior, all of which alleged facts the answer of the defendants admitted. The contract was made and entered into June 16, 1906, by and between the United States, represented in that behalf by H. C. Benson, who was at the time Major of the Fourteenth Cavalry and acting superintendent of Yosemite National Park, as party of the first part, and the defendant in error, Frank Grosjean, as party of the second part. Article 1 of the contract is as follows:

"Article 1. That the said Frank Grosjean, party of the second part, furnishing tools and labor, shall: (1) Construct a bridge over Fall river, in Hetch-Hetchy Valley. (2) Construct a bridge over Fall river just below Lake Vernon, it being required that the approaches thereto connect with the trails running from Till-Till Valley to Lake Eleanor, passing by Lake Vernon; that is, if the bridge is built not where the present trail crosses, the contract will include the constructing of regulation trails from the bridge to the above-mentioned trail."

The contract set forth specifically the description of the bridges to be built, and the quality, quantity, and dimensions of the material to be used therein, and the manner of their construction, and further provided that the officer in charge of the Park "shall be the interpreter" of the true intent and meaning of the contract, and that his "decisions in all cases shall be final"; that the work contracted for should be commenced immediately upon the execution of the contract, and be completed not later than September 15, 1906; and that upon full and complete performance thereof by the contractor and the presentation of proper vouchers the contractor should be paid by the United States the sum of $585. The bond sued on was given by the defendant in error, Frank Grosjean, as principal, and his codefendants in error, J. D. Westfall and J. C. Grosjean, as sureties, to secure the performance by the contractor of his agreements set forth in the contract.

The amended complaint alleges that the contractor failed and refused to construct either of the bridges called for by the contract, and that on July 16, 1906, before anything had been done by him toward the construction of either of the said bridges, he abandoned the contract and refused to perform it; that subsequently other bids were advertised for by the United States, in response to which one Carter proposed to build the two bridges mentioned for the sum of $900, which bid was the lowest one received by the government, and was a reasonable price for the construction of the said bridges; and that thereafter a contract in writing in all respects similar to that

theretofore made by the government with the defendant in error, Frank Grosjean, was made with the said Carter, who duly performed it, for which he was paid by the government the contract price of $900. The damages alleged in the amended complaint to have been sustained by the government were $315, the difference in price between the two contracts, damages for the expenses incurred by the government in reletting the contract, and damages for delay. The last two alleged items of damage were waived by the government on the trial, and judgment was asked for only the difference between the amounts of the two contracts.

The proof, as well as the contracts, show that, in so far as the question here involved is concerned, the bridges called for by the two contracts were precisely the same. The trial resulted in a judgment against the government, upon motion made by the defendants to the action upon the conclusion of the government's case; the court basing its ruling upon the statement that it did so "solely upon the ground that the contract, having been annulled by the government, could not now be affirmed by the government so as to form a basis for the recovery of damages as prayed for in the amended complaint."

The evidence shows without conflict that the contractor, Grosjean, absolutely refused to complete either of the two bridges he contracted to build; saying to Maj. Benson, the officer in charge of the Park, that he would lose money by doing so, and that he could better take the chances of a lawsuit. It was after such refusal on the part of the contractor that the Secretary of the Interior, upon receiving Maj. Benson's report of that fact, declared the contract "annulled" and directed a readvertisement for bids, under which the subsequent proceedings were had.

The case in truth is the simple one of a breach of contract by the contractor, by his absolute refusal to do what he had bound himself to do, and the recognition of the fact of such breach by the Secretary of the Interior, and his direction for advertisement for other bids to do the required work. The fact that the Secretary called his action "annulling" the contract is of no consequence. The contract was already broken by the contractor, of which fact the Secretary was duly advised, and of which he was compelled to take notice, and for which breach the government is clearly entitled to damages. And as the proof showed that the two contracts were, in respect to the point involved, precisely similar, and that the second contract was for a reasonable amount, and that the material furnished and work performed under the second contract was precisely similar to that required by the first, and that the government was compelled to pay and did pay to the second contractor $900, it is plain, upon its showing, that the government was entitled to judgment for the sum demanded by it, with costs.

The judgment is reversed, and the cause remanded.

MARITIME INV. CO. v. HANOS.†

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,894.

1. SEAMEN (§ 29*)—PERSONAL INJURIES—DEFECTIVE MACHINERY.
The findings of an admiralty court that the explosion of a boiler tube on respondent's steam schooner, by which libelant was injured, was caused by overheating, due to the accumulation of scale or other substance therein which obstructed the flow of water, and that the officers of the vessel were negligent in failing to inspect or repair the tube, affirmed.

[Ed. Note.—For other cases, see Seamen, Dec. Dig. § 29.*]

2. SEAMEN (§ 29*)—PERSONAL INJURIES—PLEADING—SUFFICIENCY OF LIBEL.
A libel in a suit to recover damages for an injury to libelant, caused by the bursting of a boiler tube in respondent's vessel, which alleges that the boiler was in "an unsafe, dangerous, and defective condition," is sufficiently specific.

[Ed. Note.—For other cases, see Seamen, Dec. Dig. § 29.*]

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

Suit in admiralty by Basilios Hanos against the Maritime Investment Company, as owner of the steam schooner F. A. Kilburn. Decree for libelant, and respondent appeals. Affirmed.

Samuel Rosenheim, H. W. Hutton, and Bernard Silverstein, for appellant.

Henry B. Lister and Franklin P. Bull, for appellee.

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

ROSS, Circuit Judge. The appellee was libelant in the court below, where he brought the libel against the Maritime Investment Company, claimant of the steam schooner F. A. Kilburn (appellant here), to recover damages for personal injuries sustained by him by the bursting of a water tube in one of the boilers of the schooner, and the consequent escape of steam, resulting in the almost total destruction of the use of his hands. The libelant was at the time employed as one of the firemen of the schooner. The tube that burst was in the after-boiler, and the ground for recovery of damages was the alleged neglect of the owner and officers of the boat to keep its water tubes in proper condition.

That the tube that burst and caused the libelant's injury was overheated clearly appears from the evidence, one of the claimant's own witnesses stating that the tube itself showed that it was overheated; and it was so found in effect by the trial court, which further found that the overheating was caused by the accumulation of scale or some similar substance in the pipe, whereby the circulation of the water therein was impeded, resulting in the reducing of its thickness by burning to the bursting point, and that the officers in

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

† Rehearing denied March 10, 1911.

charge of the schooner were negligent, either in failing to make such inspection as would disclose the existence of the deposit, or to take proper steps to remove it if discovered.

It is urged on behalf of the appellant that the findings of the court were not justified by the evidence, but that, on the contrary, the proof is uncontradicted to the effect that the libelant's injuries were caused by a latent defect in the pipe.

We do not so read the record. It is true that the witness Bulger, who was a government boiler inspector, said that in his opinion the bursting of the tube was caused by a latent defect; but a careful examination of the evidence satisfies us that the trial judge was right in his conclusion that Bulger's opinion was not well-founded, even if read only in connection with the balance of his own testimony. The case shows that there were two boilers in the schooner, each of which contained 16 4-inch and more than 300 2-inch tubes. There was evidence other than Bulger's given on the part of the appellant tending, to a greater or less degree, to sustain the claim of the appellant that the bursting of the tube was caused by a latent defect in the iron. For example, the witness Grundell, who was a marine engineer in the employ of the makers of the boiler in question, and whose business it was to install and repair such boilers, was questioned and answered as follows:

"Q. Mr. Grundell, you have examined these tubes, have you not? A. I have seen that tube when it was taken out, when it arrived in port on that trip. Q. After the accident? A. Yes, sir. Q. At the office of the inspector? A. No, sir; aboard the ship. Q. Did you form an opinion as to whether it was caused by a patent or latent defect? A. I should say latent. Q. And what do you mean by latent defect? A. That the iron in manufacturing some way became defective. Q. That happens at times in these constructions? A. That is the first to (in) my experience that anything happened like that."

This witness also testified that he considered that about once a month was often enough to inspect the tubes, and this the witness gave as the proper method to examine the tubes of such boilers:

"Take a plate off either end. You can hold a candle and look right through them. In straight tubes you can look right through them. They are all straight tubes, only nine feet long, and you can readily see any obstruction in them. There are plates on both ends. When a tube is defective, that is, where I have to take a tube out, or examine the boiler for defects, I usually find them on the ends where they have been rotted, or, if there is any pitting, I find that with a scraper; it is readily detected. You can see through all of the tubes by taking the plate off opposite either end. They are in clusters of four. You can see through four by holding the candle on the opposite side."

On behalf of the libelant, the exploded tube was put in evidence as an exhibit, which showed that it had been overheated and burned from some cause, and there was testimony tending to show that the cause was neglect on the part of those in charge of the schooner to keep the tubes properly cleaned out. For example, the witness Malakis, who was one of the firemen on board the schooner, testified, among other things, that he was on deck at the time of the explosion in question, and examined the boiler as soon as the steam permitted

him to go near it, and found that the tube that had burst was one of the 2-inch tubes near the bottom. He also testified that they tried to clean that tube about four days before the explosion, at the dry-dock of Boole & Sons' shipyard in Oakland, Cal., and gave testimony tending to show that the tube was blocked with rust or dirt and was not then in a safe condition.

Under the well-established rule prevailing here, it is apparent that upon such evidence as is presented by the record we would not be justified in interfering with the conclusion reached by the trial court.

The cases of The Oscoda (D. C.) 66 Fed. 347, and The Albion (D. C.) 123 Fed. 189, do not at all support the contention of the appellant that the libel was insufficient in failing to specify the particulars in which the boilers were alleged to be in "an unsafe, dangerous, and defective condition." The allegation in that behalf was sufficient. Admiralty courts do not encourage either technicality or prolixity in pleading.

The record contains no evidence to support the plea of laches set up in the answer, and in the opinion of the trial court it is stated that that defense was not referred to by the claimant's counsel in argument.

The judgment is affirmed.

IDAHO & W. N. R. R. v. NAGLE et ux.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,842.

1. EMINENT DOMAIN (§ 106*)—TAKING PROPERTY FOR PUBLIC USE—"DAMAGE."
A railroad's interference with a property owner's right to ingress and egress by means of a street on which his property abuts is "damage" within Const. Wash. art. 1, § 16, providing that no private property shall be taken or damaged for public or private use without just compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 282–289; Dec. Dig. § 106.*

For other definitions, see Words and Phrases, vol. 2, pp. 1812–1820; vol. 8, pp. 7625, 7626.]

2. EMINENT DOMAIN (§ 104*)—TAKING PROPERTY FOR PUBLIC USE—"DAMAGE."
Where the line of a commercial railroad is constructed along a street near plaintiff's residence block in a city, the jarring of the earth of respondent's lots, the casting of soot and cinders thereon, the emission of smoke physically injuring property, constitute "damage" within Const. Wash. art. 1, § 16, providing that property shall not be taken or damaged for public use without just compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 278–281; Dec. Dig. § 104.*

Consequential and indirect damages, see note to High Bridge Lumber Co. v. United States, 16 C. C. A. 468.]

3. EMINENT DOMAIN (§ 91*)—OPERATION OF RAILROAD TRAIN—GENERAL AND SPECIAL INJURY.
An adjoining property owner cannot recover damages to his property caused by the operation of a railroad train on an adjoining right of way

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

without proof of special injury substantially different in kind from that suffered by the public at large.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 234, 235; Dec. Dig. § 91.*]

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

Action by Philip Nagle and wife against the Idaho & Washington Northern Railroad. Judgment for plaintiffs, and defendant brings error. Affirmed.

Albert Allen, Charles L. Heitman, and W. G. Graves, for plaintiff in error.

W. H. Plummer and Fred Miller, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The plaintiffs in the court below, who are defendants in error here, were at the times in question the owners of a parcel of land at the corner of State avenue and Second street in the city of Newport, state of Washington, a municipal corporation of that state, which parcel of land was known as lots 1, 4, 5, 8, 9, 12, and 13 of block 10 of Talmadge's addition to the city, and on which they had a two-story residence. Their premises fronted on State avenue, the eastern line of which constituted the boundary line at that point between the states of Washington and Idaho, and were also bounded on the northerly side by Second street. The defendant railroad company, which is the plaintiff in error, was granted by the city authorities a certain right of way through the city for the construction of a railroad, under which grant the company, without condemning or otherwise acquiring any right from the plaintiffs, constructed a road along such right of way, and proceeded to operate it. In their complaint the plaintiffs alleged, among other things:

"That said railroad in its construction and operation passes through the northwest corner of block 10, and passes within 25 feet of the northwest corner of lot 1 in said block, which is owned by these plaintiffs; that is to say, the center line of said tracks of said defendant railway is within 25 feet of the northwest corner of said lot, and that said railroad in its construction, operation, and maintenance cuts diagonally across Second street and State avenue, occupying and using both of said streets just immediately northeast of plaintiffs' said premises, and in the construction of its said railroad and in making the road thereof the defendant has dug and made a deep ditch or excavation for its said road in the earth, which is about 10 feet deep at State avenue, and averaging from 1 to 10 feet deep on Second street just northeast of plaintiffs' said premises.

"That the said defendant by the building and construction of said railroad and in the making of the said excavation as aforesaid has cut off and closed immediately eastward and on the front of plaintiffs' said premises all use and easement in said State avenue, and thereby cut off the use and easement of said Second street, which said use and easement from the north and east has been destroyed, and the access to plaintiffs' said premises to and from all that portion of the said city lying north and easterly therefrom has been cut off and destroyed, and the easement in and the use of sidewalks on State avenue and Second street adjoining plaintiffs' property on the north and east, and the access and travel by team to and from plaintiffs' said premises along the said streets has been interfered with, impaired, and rendered dangerous.

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

"That over and upon said line of railroad as above described the defendant is conducting, and will continue to conduct, a general traffic railway business, and using and operating thereon heavy passenger and freight cars and locomotives propelled by steam power, and, by reason of the fact that said premises are located near the terminus of said railroad, trains of cars and engines are permitted to stand upon the track just north of plaintiffs' said premises and easterly thereof, cutting off the view, obstructing travel, ingress and egress to and from plaintiffs' property, and rendering it dangerous to plaintiffs and their family to cross defendant's tracks at any time during the day or nighttime; that said trains and locomotives passing at all times both in the day and nighttime cause in front of plaintiffs' premises great noise and confusion, to wit, ringing of bells, escape of steam, smoke, and cinders, blowing of whistles, the rattle of cars, and a rumble and vibration that severely jars said premises, and while so passing cast and blow off large quantities of smoke, cinders, soot, sparks, noxious odors, and gases, all of which are forthwith blown or cast upon plaintiffs' said premises, thereby polluting and rendering the air unwholesome and disagreeable, exposing many buildings placed upon said premises to danger of destruction by fire, and, together with the noise aforesaid, subjecting plaintiffs or the occupants of said premises or buildings placed thereon, and which are now erected thereon, and all who may or shall occupy said premises, and who do now occupy said premises, to great discomfort, annoyance, and disturbance.

"That prior to the construction and operation of said railway, the said State avenue and Second street and Newport avenue, and all the streets in the vicinity of plaintiffs' said property, were desirable residence streets, and plaintiffs' premises were especially desirable for residence purposes, and of a reasonable market value of $3,000, exclusive of the buildings placed thereon, together with all improvements, amounting in all to the reasonable value of $6,500, and were of little value for other purposes except residence purposes.

"That by reason of the construction and maintenance of said railroad and excavation, and the cutting off of plaintiffs' ingress and egress thereto, and depriving them of the use of the streets and alleys and walks, and the operation of said railway and the acts, matters, and things done in connection therewith, by the defendant as hereinbefore more specifically set forth, the plaintiffs' said premises have become undesirable for residence purposes, and have diminished in usable and market value, and have been damaged in the sum of $3,000, all of which damage and diminution in value, as well as the acts, matters, and things alleged as causing the same, were of and are peculiar to the plaintiffs' premises, and exclusive of that and those suffered by the plaintiffs and community in general."

These allegations the defendant company put in issue, the trial of which issues resulted in a verdict in the plaintiffs' favor for $1,500, for which sum, with costs, judgment was entered against the company.

The Constitution of the state of Washington provides, in section 16 of article 1 thereof, that:

"No private property shall be taken or damaged for public or private use, without just compensation having first been made or paid into court for the owner."

It is the settled holding of the Supreme Court of the state of Washington that interference with the right of the owner of property abutting on a street to ingress and egress is "damage" within the meaning of that constitutional provision. Lund v. Idaho & Washington N. R. R., 50 Wash. 574, 576, 97 Pac. 665, 666, 126 Am. St. Rep. 916, and authorities there cited. The same court in the preceding case of Smith v. St. Paul, Minn. & M. R. Co., 39 Wash. 355, 81 Pac. 840, 70 L. R. A. 1018, 109 Am. St. Rep. 889, held, among other things, that:

"The jarring of the earth of respondent's lots, and the casting of soot and cinders thereupon, and the emission of smoke physically injuring property, are injurious physical effects to the corpus of respondent's property, which, we think, come within the scope of the term 'damaged,' as used in the constitutional provision. If a railroad company cannot carry on its business upon its own property without necessarily disturbing the physical conditions of other property, it is evident that such company has not acquired sufficient property for the conduct of its business, and it should be required to pay such damages as the actual physical disturbance of the neighboring property entails thereupon."

These rulings of the Supreme Court of Washington with respect to real property rights within that state must be applied by us in the present case.

The evidence was somewhat conflicting as to the exact location of the defendant's road on Second street; but there was evidence tending to show that both on Second street and on State avenue its location was so near the plaintiffs' property and of such a character as to inconvenience and injure the plaintiffs in an essentially different manner from the public at large. The trial court instructed the jury in plain terms that, to entitle the plaintiffs to a recovery at all, it was incumbent on them to show such special damages, and that, unless they had done so to the satisfaction of the jury, a verdict should be returned for the defendant. The court also instructed the jury, in accordance with the rules established by the Supreme Court of the state, in respect to the damage alleged to have been sustained by the plaintiffs by reason of the smoke, soot, cinders, ashes, and noise caused by the defendant's trains. Upon each of the points in the case the charge was full, fair, and clear, and a careful examination of the record fails to disclose any error in the admission of evidence for which a reversal would be justified.

The judgment is affirmed.

NIELSEN v. NORTHERN PAC. R. CO.

NIELSEN et ux. v. SAME.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

Nos. 1,891, 1,892.

1. PUBLIC LANDS (§ 92*)—GRANT OF RIGHT OF WAY TO RAILROAD—SUBSEQUENT ACQUISITION BY SETTLER.

A settler, acquiring public land between the time of the passage of an act of Congress granting right of way over the public lands for a proposed railroad and the date of definite location of such road, takes the same subject to the prior right of the railroad company to such right of way.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 281; Dec. Dig. § 92.*]

2. LIMITATION OF ACTIONS (§ 19*)—ACTION TO RECOVER LAND.

An action brought in the state of Washington to recover land which had been occupied and used by a railroad company as right of way for 18 years *held* barred by limitation.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 19.*]

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

In Error to the Circuit Court of the United States for the Southern Division of the Eastern District of Washington.

Actions at law by Hans Nielsen against the Northern Pacific Railroad Company, and by Peter Nielsen and Sophia Nielsen, his wife, against the same. Judgments for defendant, and plaintiffs bring error. Affirmed.

Stallcup & Keyes and Ray & Dennis, for plaintiffs in error.

Geo. T. Reid, J. W. Quick, and L. B. Da Ponte, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. Two cases involving the same questions are submitted upon the briefs in one.

Error is assigned to the ruling of the court below in each case in sustaining a demurrer to a complaint which alleged, in substance, that on May 25, 1881, the land described in the complaint being unsurveyed, public, unoccupied land of the United States, the plaintiff, being duly qualified to acquire a homestead under the homestead laws of the United States, settled on said land for the purpose of acquiring a homestead, and continued in possession thereof until 1893, when the land was surveyed by the government; that subsequently, upon the proofs required by law, he received a patent on March 15, 1894; that the Northern Pacific Railroad Company filed its map of general route through the Cowlitz Pass in 1873, but subsequently, in 1884, abandoned the line, and filed a map of general and definite location, running elsewhere and through the plaintiff's premises, and thereafter built its road thereon. It was for the recovery of the possession of the strip of land used by the defendant as its right of way that the action was brought.

The plaintiff's contention is that the railroad company, having filed its maps of general route in 1873, could not change the route upon the final and definite location thereof to the detriment of the plaintiff, who, in the meantime, had settled upon the land under the homestead laws, and that neither as to the land grant, nor as to the right of way, did the railroad company, prior to the definite location of its line, acquire any right to any definite lands, which, between the date of the grant and such definite location, had been lawfully entered by a settler. But a clearly marked distinction is recognized in the decisions of the Supreme Court between the grant of land to aid in the construction of the road, and the grant of the right of way, and it is held that, while both are grants in presenti, the grant of the right of way is not subject to the conditions attached to the land grant that the lands be free from homestead or other claims at the date of definite location. This was first held in Railroad Co. v. Baldwin, 103 U. S. 426, 26 L. Ed. 578, where the court expressed the opinion that:

"All persons acquiring any portion of the public lands after the passage of the act in question took the same subject to the right of way conferred by it for the proposed road."

This was said in reference to a grant of lands and a right of way in which the conditions of the grants were substantially the same as

those found in the grant to the Northern Pacific Railroad Company. The doctrine of that case was reaffirmed in Bybee v. Oregon & California Railroad Co., 139 U. S. 663, 679, 11 Sup. Ct. 641, 644 (35 L. Ed. 305), in which the court said:

"The distinction between a right of way over the public lands and lands granted in aid of the construction of the road is important in this connection. As to the latter, the rights of settlers or others who acquire the lands by purchase or occupation between the passage of the act and the actual location and identification of the lands are preserved unimpaired, while the grant of the right of way is subject to no such condition; and in the construction given by this court to a similar grant in Railroad Co. v. Baldwin, 103 U. S. 426 [26 L. Ed. 578], a person subsequently acquiring any part of such right of way takes it subject to the prior right of the railroad company."

The plaintiff in error cites Missouri, Kansas & Texas Railway Co. v. Cook, 163 U. S. 491, 16 Sup. Ct. 1093, 41 L. Ed. 239. But that case, so far from sustaining his contention, is authority to the contrary. It is true that the court held in that case, as did this court in Northern Pacific R. Co. v. Murray, 87 Fed. 648, 31 C. C. A. 183, that the rights of a settler, acquired after the line had once been definitely located, were not affected by the subsequent act of the company in changing its location. But the court also again affirmed the doctrine that, before the definite location, all persons acquiring any portion of the public lands after the passage of the granting act took the same subject to the right of way for the proposed road.

The demurrer to the complaint was clearly sustainable on the grounds just considered. It was also sustainable on the ground that the action was barred by the statute of limitations; the railroad company having been in possession of the right of way for 18 years prior to the commencement of the action.

The judgments are affirmed.

NORTHERN PAC. TERMINAL CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,841.

CARRIERS (§ 38*)—CARRIERS OF LIVE STOCK—VIOLATION OF TWENTY-EIGHT HOUR LAW.

Defendant, a terminal railroad company, received a car load of horses from a connecting railroad company, which had transported them in interstate commerce. Such carrier had kept them confined in the car for more than 28 hours without unloading for rest, water, and feeding, in violation of the 28-hour law (Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]), and was indicted and fined therefor. Defendant received them for transportation over its line for some 1,300 feet to stockyards, and moved them to such yards with all speed possible, and there unloaded them for rest, water, and feed. *Held*, that defendant was not chargeable with violation of the statute, but that, on the contrary, its action aided in giving effect to its object and purpose.

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

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

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

Prosecution against the Northern Pacific Terminal Company. From a judgment of conviction, defendant brings error. Reversed.

See, also, 181 Fed. 879.

Dolph, Mallory, Simon & Gearin, for plaintiff in error.

John McCourt, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. In this case it appears that a car load of horses were brought from Plymouth, in the state of Washington, to Portland, Or., by the Spokane, Portland & Seattle Railway Company. The destination of the horses was the yards of the Union Stockyards Company in Portland, which are distant about 1,300 feet from the tracks of the railway company mentioned. That company, in transporting the horses from Plymouth to Portland, kept them confined, without feed, water, or rest, for more than 28 hours, in violation of the act of Congress of June 29, 1906, known as the "Twenty-Eight Hour Law" (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]), having received the horses on board its car at Plymouth at 6 p. m. of May 12, 1909, and not having arrived with them at Portland until 7 a. m. of May 14th. For that offense the Spokane, Portland & Seattle Company was duly indicted, and duly convicted and punished. The government then procured a similar indictment against the present plaintiff in error, and it, too, was convicted, and, judgment following against it, the case is here for consideration.

The record shows that the only thing the plaintiff in error did in connection with the horses was to take them from the Spokane, Portland & Seattle Railway Company, at its request, at the terminus of its tracks in Portland, with all speed possible, and hurry them for 1,300 feet over its terminal track into the yard of the Union Stockyards Company, and there turn them loose to water, feed, and rest. This action of the plaintiff in error, so far from being in contravention of the provisions of the act of Congress in question, was, in our opinion, but aiding in giving effect to its object and purpose. We do not, of course, hold or intend to intimate that terminal companies may not under some, and perhaps in many, circumstances be equally guilty with the main transportation companies of a violation of this act of Congress; but we have no hesitation in holding that this is not one of those cases. No law should be so construed as to do violence to its clear meaning and intent, and bring about unjust or absurd results.

The judgment is reversed.

CENTER v. CADY.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,844.

1. QUIETING TITLE (§ 39*)—CROSS-BILL—SUFFICIENCY.

Complainant in a suit to quiet title alleged the recovery of judgment in ejectment against defendant, and that plaintiff had been put in possession by the marshal on execution of a writ of possession. Defendant answered, denying that the marshal had executed the writ, and filed a cross-bill alleging possession since 1899, as also of a 20-acre tract south and adjoining the land in controversy; that the marshal, in executing the writ of possession, removed defendant from such south 20-acre tract, and placed plaintiff's agent in possession thereof, afterwards filing a return that he had executed the writ by placing plaintiff's agent in possession of the land in controversy. The cross-bill did not allege that the marshal did not in fact place plaintiff in possession of the land in controversy, nor was there any averment that defendant had paid taxes on such land. *Held*, that the cross-bill was demurrable for failure to show that the writ of possession was not executed according to its return.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 80; Dec. Dig. § 39.*]

2. ADVERSE POSSESSION (§ 84*)—COLOR OF TITLE—GOOD FAITH—POSSESSION AFTER ADVERSE JUDGMENT IN EJECTMENT.

Where judgment had been rendered against defendant in ejectment by plaintiff to recover the land in controversy, and a writ of possession had been issued, and an attempt at least made to execute it, defendant's continued possession of the land, in the absence of an acquired title in some manner other than by merely obtaining possession of the premises, was not in good faith, under Ballinger's Ann. Codes & St. Wash. § 5503 (Pierce's Code, § 1160), providing that every person in actual, open, and notorious possession of land under claim and color of title made in good faith, who shall continue in possession for seven years and pay taxes, shall be adjudged to be the lawful owner to the extent and according to the purport of his or her paper title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 488–500; Dec. Dig. § 84.*]

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

Bill by Cholett Cady against Lewis W. Center. Complainant having dismissed his bill without prejudice, and a demurrer having been sustained to defendant's cross-bill for want of equity, and the bill dismissed, defendant appeals. Affirmed.

In December, 1909, the appellee filed his bill to quiet title to a 23-acre tract of land, alleging that he owned the land and had paid taxes thereon for the last seven years; that in 1901 he had brought an action of ejectment against the appellant to recover the property, and upon the issues framed he was adjudged to be the owner of the property and entitled to the possession; that a writ of possession was issued and delivered to the marshal, who executed the same by putting the appellee into possession; that the appellant, notwithstanding such judgment and execution, has maintained possession, asserted ownership, and has converted wood cut upon the premises. The appellee prayed for an injunction and that his title be quieted. The appellant answered the bill, denied that the marshal had ex-

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

ecuted the writ of possession, denied the title of the appellee, and asserted title in himself. With his answer the appellant filed a cross-bill, in which he alleged possession since 1899 of the land in controversy and also of a 20-acre tract lying south thereof and adjoining the same. He alleged that the marshal, in executing the writ of possession, being unacquainted with the boundaries of the land described therein, removed the appellant from said south 20 acres, took from his tenant the keys of the buildings standing thereon, and placed the appellee's agent in possession of said 20-acre tract and the buildings; that the marshal thereupon made and filed his return of the service of the writ, and stated therein that he had executed the same by placing the appellee's agent in possession of the north 23-acre tract. The appellant alleged ownership by reason of uninterrupted possession for 10 years, and prayed that the return of the marshal be adjudged a cloud upon his title, and that it be removed. The appellee demurred to the answer. The demurrer was overruled; the court ruling that issues were framed which should be tried by a jury. Thereupon the suit of the appellee was dismissed without prejudice. A demurrer was interposed to the cross-bill for want of equity, and was sustained, and the cross-bill was dismissed. From that order the appeal is taken.

A. H. Garretson and Jesse Thomas, for appellant.
Frank D. Nash, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The facts as disclosed in the cross-bill are that for more than 10 years before the commencement of the suit the appellant had been in possession of about 40 acres of land contained in a single inclosure; that he owned the south 20 acres thereof, and thereon had constructed his buildings and improvements; that in 1901 the appellee brought ejectment to recover the north 23 acres, and in 1903 obtained a judgment for the possession thereof; that in the following year a writ of possession was issued and executed, by the return of which, upon its face, the appellee was placed in possession of said north 23 acres, but that the marshal by a mistake executed the writ by placing the appellee in possession of the south half of the tract, and that neither the judgment nor the writ operated to disturb the possession of the appellant in the land which is in controversy. The cross-bill makes no allegation that the marshal did not in fact place the appellee in the possession of the land in controversy, and from the facts as they are alleged it would appear that the marshal may have executed the writ by placing the appellee in the possession of the whole tract. There is no averment that the appellant has paid taxes on the land in controversy, and, conceding that the judgment in ejectment did not operate to disturb the possession unless executed by a writ of possession, the facts stated in the cross-bill fall short of showing that the writ was not in fact executed as it appears on its face to have been executed. Upon that ground alone the relief sued for was properly denied.

But there is other ground on which the decree may be sustained. The statute of Washington (Ballinger's Ann. Codes & St. § 5503 [Pierce's Code, § 1160]) provides:

"Every person in actual, open, and notorious possession of lands or tenements under claim and color of title, made in good faith, who shall, for seven successive years continue in possession, and shall also during said time

pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the lawful owner of such lands or tenements to the extent and according to the purport of his or her paper title."

One of the essential requisites to the relief which the appellant seeks by his cross-bill is that his claim of title shall be made in good faith. There can be no good faith in such a claim, in the face of the decision of a court of competent jurisdiction adjudging that the claimant has no title or right of possession. In May, 1903, the court, from which the present appeal is taken, rendered a judgment in ejectment adjudging the title to the premises here in controversy to be in the appellee. From that time on the appellant could not claim in good faith, unless he acquired a claim of title in some way other than by merely retaining possession of the premises. May v. Sutherlin, 41 Wash. 609, 84 Pac. 585; Ramsey v. Wilson, 52 Wash. 111, 100 Pac. 177. In May v. Sutherlin it was said:

"But it should require no argument to show that a party who holds property contrary to and in defiance of the judgment of a court of competent jurisdiction is without color or claim of title, and that good faith is entirely wanting."

The decree is affirmed.

DOME CITY BANK v. BARNETT.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,856.

1. TRIAL (§ 253*)—INSTRUCTIONS—PRETERMITTING ISSUES.

On June 12, 1907, T. deposited a gold nugget with defendant bank for safe-keeping, and in October following pledged the nugget to the bank for an advancement of its full value. On July 22, 1908, he sold the nugget to plaintiff, who demanded the same, and on defendant's refusal to deliver it, claiming that T. had sold and assigned the nugget to the cashier for full value in July, 1908, plaintiff sued to recover possession. The court charged that there were two issues in the case: First, who was the owner of the nugget at the time the bank claimed to have purchased it from T.? and, second, if at the date when the nugget was sold to plaintiff T. was the owner thereof, the jury should find for plaintiff, but if they did not so find, but found that the cashier had purchased the nugget prior to the sale to plaintiff, the verdict must be for defendant. *Held*, that such instruction was erroneous, as pretermitting the issue whether the nugget was pledged to the bank in September, 1907.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec. Dig. § 253.*]

2. PLEDGES (§ 43*)—POSSESSION—PLEDGEE'S RIGHT TO RETAIN.

Where a gold nugget was pledged to a bank for a loan, the bank was entitled to possession, with the right to enforce its lien, notwithstanding a subsequent sale of the nugget by the pledgor to another.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 102; Dec. Dig. § 43.*]

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

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

Action by Mrs. C. Barnett against the Dome City Bank. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Wickersham, Heilig & Roden and F. J. Kierce, for plaintiff in error.

Cecil H. Clegg and Metson, Drew & Mackenzie, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error brought an action against the plaintiff in error, a banking corporation, to recover the possession of a gold nugget, alleged to be of the value of $1,400, which had been deposited with the bank as bailee by J. L. Tobin, and on July 22d, for a valuable consideration, alleged to have been sold and assigned to the defendant in error. The plaintiff in error answered, alleging that on June 12, 1907, J. L. Tobin deposited the gold nugget with the bank for safe-keeping, and that thereafter, in October, 1907, he pledged the nugget to the bank under an agreement that he might draw money against the same to the amount of its full value, and that long prior to the date of the sale to the defendant in error said Tobin drew against the value of the said nugget the full value thereof, which the plaintiff in error paid him; that thereafter, in July, 1908, said Tobin sold and assigned the nugget to the cashier of the bank, whereupon the plaintiff in error gave him credit on the debt which he then owed to the bank in the full sum of the value of the nugget. The evidence was that in June, 1907, Tobin deposited the nugget with the bank for safe-keeping, and thereafter withdrew it, and in September returned it to the bank, and there was the testimony of the cashier and the manager of the bank that in September, 1907, he pledged the nugget to the bank as security for money to be drawn by him, and that thereafter he drew upon such security to the full amount of the value thereof, and that the money had not been repaid. The jury returned a verdict for the defendant in error.

Error is assigned to the instruction of the court to the jury, which was in substance that the issues were: First, who was the owner of the nugget at the time when the bank claimed to have purchased it from Tobin? and, second, that if, at the date when the nugget was sold to the defendant in error, Tobin was the owner thereof, they should find for the defendant in error, but if they did not so find, but, on the contrary, found that the cashier had purchased the nugget prior to the sale to the defendant in error, their verdict must be for the plaintiff in error. This instruction was error, for the reason that it took from the consideration of the jury one of the issues of the case, the issue whether or not the nugget was pledged to the bank in September, 1907. If it was so pledged to the bank, and the bank, on the strength of the security thereof, advanced money thereon, which was not repaid, it had a lien upon the nugget, and the right to enforce the same, and it was entitled to the possession thereof, notwithstanding the sale to the defendant in error, which was subsequently made, and notwithstanding that the jury may have found that there was no actual sale of the

nugget to the cashier of the bank. The validity of such a pledge is universally recognized by the courts, and there is no requirement in the statutes of Alaska that such a transaction be evidenced by writing.

For the error in the instruction, the judgment must be reversed, and the cause remanded for a new trial.

THE COLORADO.

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

ADMIRALTY (§ 118*)—CROSS-SUITS TRIED TOGETHER—APPEAL.

Where the issues presented by a libel and cross-libel and the answers thereto in an admiralty cause are tried as a single controversy in the District Court, the effect is the same as if the two suits had been formally consolidated, and an appeal from the final decree brings up all questions.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 759; Dec. Dig. § 118.*]

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

Suit in admiralty by the New York Central & Hudson River Railroad Company against the steamship Colorado, and cross-suit by the Mallory Steamship Company against the New York Central Steam Lighter No. 24. Libel against the Colorado dismissed, and decree against the lighter (173 Fed. 649), and libelant appeals. On motion to dismiss appeal. Motion denied.

Charles Haight, for the motion.

F. M. Brown, opposed.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. In the absence of any controlling authority to the contrary, we are satisfied that, where the issues presented by libel and cross-libel and answers thereto in an admiralty cause are tried as a single controversy in the District Court, the effect is the same as if the two suits had been formally consolidated, and that appeal from final decree brings up all questions.

Motion to dismiss appeal is denied.

H. MUELLER MFG. CO. v. GLAUBER.

(Circuit Court of Appeals, Seventh Circuit. February 2, 1910. Petition for Rehearing Withdrawn December 27, 1910.)

No. 1,622.

1. PATENTS (§ 167*)—CONSTRUCTION—LIMITATION OF CLAIMS.

A patentee cannot read the specification into a claim for the purpose of changing it, or to escape anticipation or establish infringement, and much less can be read into it a feature not shown in either the specification or drawings.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

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

2. PATENTS (§ 62*)—ANTICIPATION BY PRIOR USE—BURDEN AND DEGREE OF PROOF.

Prior use, in order to show anticipation of a patent, must be proved beyond a reasonable doubt, and it cannot be said to have been proved with such degree of certainty by oral testimony, where it may be reasonably deduced from all the record that other and conclusive evidence might have been obtained, and no effort was made to produce it nor to excuse the omission.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 78; Dec. Dig. § 62.*]

3. PATENTS (§ 328*)—VALIDITY AND INVENTION—COUPLING-JOINT FOR PIPES.

The Glauber patent, No. 782,552, for a unitary elbow-shaped coupling-joint for pipes in combination with coupling connections for both ends thereof, was not anticipated, and, in view of the presumption arising from the grant and the utility of the device, must be held to disclose patentable novelty, although of a low order of invention. Also, *held* infringed.

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

Suit in equity by Joseph A. Glauber against the H. Mueller Manufacturing Company. Decree for complainant, and defendant appeals. Affirmed.

See, also, 181 Fed. 1022.

Appellee instituted this suit to restrain infringement of the four claims of patent No. 782,552, granted to him on February 14, 1905, upon application filed May 21, 1904, for improvements in coupling-pipes. Claim 1 calls for a coupling-joint per se, as a new article of manufacture. The other claims in varying language call for a coupling-joint in combination with coupling connections, such as a faucet-spud and a service-pipe. They read as follows, viz.:

"1. As a new article of manufacture, an elbow-shaped coupling-joint of the same cross-section from end to end and having one arm longer than the other and a fixed collar about its shorter arm and a smooth surface on the end of the longer arm, whereby a slip-joint may be made with said longer arm of greater or less penetration while the shorter arm is fixed in its connections by said collar.

"2. A coupling-joint of the same cross-section from end to end and provided with a fixed collar about one end thereof, the external surface of said joint being smooth at both ends, in combination with coupling connections having externally-threaded members at each end into which the ends of said joint extend and coupling-nuts over said members, one of said nuts engaged over said collar and definitely locking the joint and the other nut out of engagement with said joint, whereby said joint is left free at its longer end to make slip connections of varying lengths, substantially as described.

"3. In couplings for water-pipes and the like, a coupling-joint of elbow pattern of the same cross-section at both ends and having one arm longer than the other, and the shorter arm having a fixed collar about the same, the external surface of the joint being smooth at both ends, in combination with a pair of connections into which said arms project and the longer of said arms is free to slide to greater or less depth, substantially as described.

"4. In couplings for water and other pipes, a coupling-joint of elbow shape and of the same cross-section at both ends, one arm of the joint being longer than the other and the shorter arm having a fixed collar, in combination with coupling connections for both ends of said joint, one of said connections having a fixed internally-tapered seat and the other a square seat, and the said joint interchangeable end for end in said connections, whereby connections of varying lengths at either end of the coupling can be made, substantially as described."

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

Drawings of Patent in Suit.

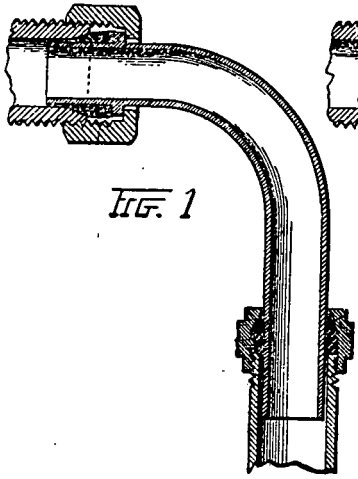


FIG. 1

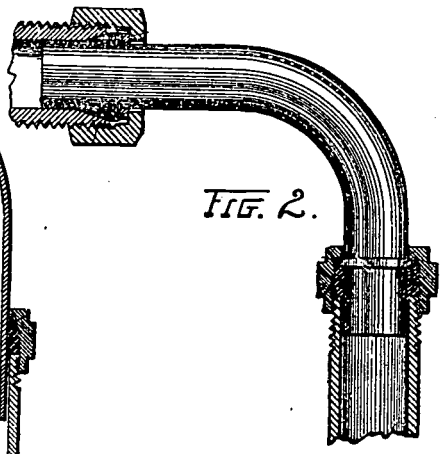


FIG. 2.

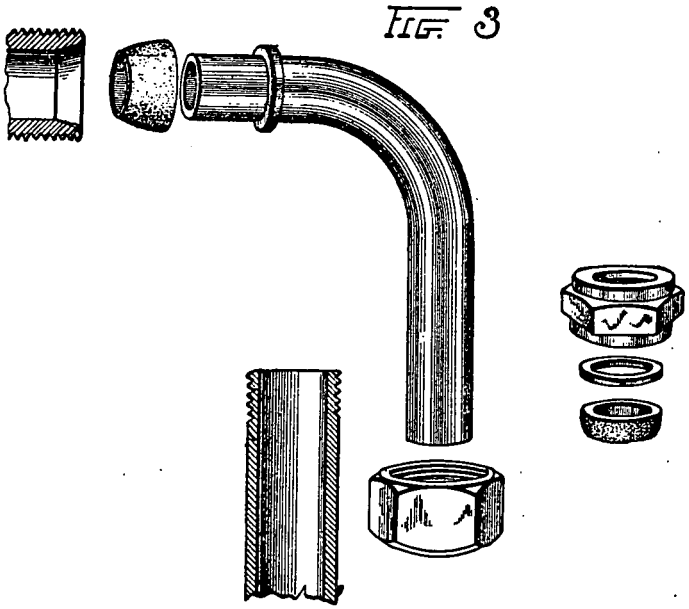


FIG. 3

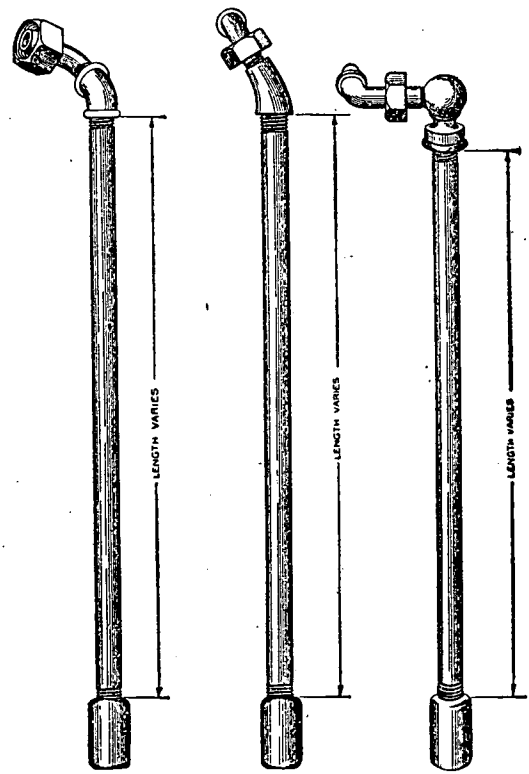
The main idea and the alleged invention of the patent is to provide, as the patentee claims in his evidence, a coupling-pipe which is jointless, universal, and reversible, which does away with the necessity of a preliminary survey in connecting service-pipes with water-bowls, and bathtubs—one which can be connected with any ordinary sized faucet or bathtub pipe at one end, while the other end telescopes into the service-pipe, and is held and made

water tight with the aid of coupling-nuts and gaskets; and one which can be installed without considerable expense, and with little effort.

The device of the patent is a one-pieced, or unitary, connection-pipe between the faucet-spud and service-pipe, in contrast with what is termed a built-up connection between the two. The built-up coupling-pipes between the faucet-spud and service-pipe, were constructed of a tail-piece at the upper or faucet end, carrying a metallic conical shoulder adapted to co-operate with the conical seat in the faucet-spud; a body, or stem, consisting of a straight piece of tubing threaded at its opposite ends, and connected at its upper end with the tail-piece by means of an elbow coupling, and at its lower end to the service-pipe by means of a straight away coupling. Thus, as it is claimed, requiring five joints in place of two, as in the device of the patent in suit.

Glauber Drawing No. 8.

"Built-Up" Bath Supplies of Prior Commercial Art.



It is conceded that every element of the device of the patent in suit is old, but appellee insists the combination produces a new result amounting to invention. The Circuit Court sustained the patent and granted the relief prayed. The cause is before this court on appeal. The nine errors assigned are, in substance, that the court erred in sustaining the patent in suit and holding that appellant infringed. The further facts are stated in the opinion.

Albert H. Adams, C. E. Pickard and J. L. Jackson, for appellant.
W. Clyde Jones, Keene H. Addington, Robert Lewis Ames, and Arthur B. Seibold (C. C. Linthicum, of counsel), for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). Preliminarily to a consideration of the patent as set out in the claims, specification, and drawings thereof, it may be well to look into a certain assumption of the patentee, the experts, and counsel, wherein it is sought to read into the patent features which are neither claimed nor suggested therein. Of these, the most prominently asserted are those which claim for the patent the invention or first use of what is variously termed an annealed mongrel-sized pipe, or pipe of a new, or characteristic, or off-size in dealing with the element of telescoping one pipe within another. The merits of such a pipe are effusively reiterated in the brief of appellee, wherein it is asserted that not only is telescoping thus made easy, but that the pipe, being thin and annealed, can be readily bent to meet situations requiring adjustment. It also appears that, as a matter of fact, appellee uses this so-called annealed, off-size pipe in manufacturing his device. A reference to the claims, specification, drawings, and the proceedings in the Patent Office wherein the claims were several times rejected and as often amended, however, fails to discover even a suggestion of these ideas. Even when rejected on references which involved the standard pipe, no distinction on account of size and annealing was raised. On the contrary, it is stated, commencing at line 33 of page 2 of the specification, that:

"From the foregoing description, as well as from the drawings, it will be seen that the coupling-pipe is essentially a pipe or section of a pipe, being of the same cross-section at both ends and throughout its length, and distinguished from an ordinary piece of pipe by having a fixed collar at or near one end. This is the feature which makes it practical for coupling purposes as herein described, and its belongings are the two gaskets, c and d, and washer, c', when used."

Appellee himself testifies that his invention is not limited to any particular size of pipe. The expert McElroy testifies (Ans. to cross-question 10, page 210 of record) that the thinness of the pipe is a vital feature. At page 191 of the record, the same witness, speaking of appellee's purpose in constructing the device of the patent, says:

"With this object in view, the first and most vital step was to employ a radically different coupling-pipe from those of the prior art, as just discussed. It was a thin annealed pipe, of a characteristic diameter, and small enough so that it could telescope into the smallest size service-pipe that might be employed. As he dispensed with all threaded joint connections on the pipe, he was able to make the pipe of thin material, and as the pipe was also of small diameter and annealed it could be readily bent at any point to as much of an angle as might be necessary to accommodate the pipe to the relative locations of the shanks of the bath-cocks and the ends of the service-pipes to be connected."

It nowhere appears in the record that any one skilled in the art would know from the patent that the using of an annealed off-size pipe or tube is an essential element of the invention; nor is the court

able to make such a deduction. The specification itself (lines 38 and 39, p. 2) says the coupling-pipe of the patent differs "from an ordinary piece of pipe by having a fixed collar at or near one end." Appellee's experts and counsel insist that such a construction as they place upon the patent is vital. In so contending appellee's brief is amplified to an extent not justified by the real issue. Yet little attempt is made to disclose the reasoning by which they reach their conclusions. It certainly is a far cry from the language of the patent to that of the experts. It appears in the record that ordinary pipe may vary so in size as to permit of slip-joints. While the pipes must be of different sizes in order to telescope, yet that does not at all suggest that the pipe walls shall be thin and annealed—that is, tempered and toughened—so thin as to be readily adjustable by bending, etc. The record contains several patents, as, for instance, the Smith patent, the Totham patent, the Moore patent, which involve the slip-joint, or the telescoping of one pipe into the other, yet there is no claim made that the question of off-size, or mongrel, or annealed pipe is contemplated. Nor was it. The situation before us here is in no wise different.

That the specification may not be read into a claim for the purpose of changing it, or to escape anticipation, or establish infringement, is settled beyond question by the authorities. Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136; Gen. Sub-Construction Co. v. Netcher et al. (C. C.) 167 Fed. 549 (affirmed at the October session of this court). Much less will one be permitted to read into his claims a feature not shown in either the specification or drawings, and therefore the attempt so to do is without merit in the present controversy, and may not be considered in determining the question of validity and infringement herein. Dealing with the patent as granted, it is apparent that the unitary device alone and in combination presents an article of manufacture and merchandise which has very considerable merit. Whether, in view of the prior use and art set up, there is disclosed a true combination or only an aggregation, involves an investigation of the history of pipe coupling. It will be observed that claims 1 and 2 make no mention of the kind of pipes to be coupled, while claims 3 and 4, respectively, speak in terms of "water-pipes and the like" and "water and other pipes." Appellee (Q. 13, p. 22, of the record) says his devices "are generally used for a connection to couple the service-pipe to a faucet. They may be used for connecting other members that may require connection." The specification (line 49, p. 2) says:

"* * * And as these pipes are used for open plumbing, they are nickel-plated and finished alike from end to end."

The expert McElroy (Record, p. 209) says:

"I do not know of any other use in open plumbing to which these coupling-joints could be put except for connecting bathtubs and wash basins with service-pipes, and I accordingly understand that that was what they are designed for."

And again on the same page:

"As a mechanical expert, however, I should say that the invention is designed solely for use in connection with water systems where there is a high pressure to be taken care of, as the specification of the patent emphasizes the fact that there is no possibility of the coupling being blown out, and this, of course, is a trouble which can only be apprehended in connection with water under high pressure."

Later on he testifies that it might be applied to a gas machine.

The pertinency of all this is found in the attempt to narrow the field of the prior art to devices for use in connection with faucet-spuds and service-pipes. Five patents were cited in the Patent Office against the Glauber patent in suit, i. e., Bower patent, No. 337,126, granted March 2, 1886, "for pipe-connections designed more especially for wash basins, bathtubs, traps, etc."; Schamp patent, No. 685,694, granted October 29, 1901, for a "simple coupling for connecting various kinds of pipes for the conveyance of water, steam, or other fluids"; Thomas patent, No. 657,712, granted September 11, 1900, for a combined union and elbow for coupling steam or water pipes; Sexton patent, No. 546,906, granted September 24, 1895, for a pipe-joint "for uniting pipes without threads cut on the ends thereof, and without solder, calking, or flanges"; and the Goodale patent, No. 130,216, granted August 6, 1872, for a joint or coupling for connecting steam or air-conveying pipes beneath cars, etc. On these references, the examiner rejected the application of Glauber three times. Claim 2 was rejected because the examiner was of the opinion that it would not require invention to apply to the elbow of the Bower patent the pipe-end of the Schamp pipe-coupling.

The Bower patent is for a waste-pipe which may well be deemed within the term "open or exposed plumbing." It shows slip-joints at each end of the elbow-shaped coupling-pipe and the same cross-section from end to end. No collar is provided. It is stated that:

"The pipe F is arranged to extend more or less into the respective sockets, as may be required, according to the relative positions of the trap and basin or bathtub."

Coupling-nuts are used as well as rubber gaskets, differing somewhat from Glauber's, as the situation required. The Schamp patent covers a straight coupling-pipe, having a fixed collar near one end against which a coupling-nut contacts, the end of the coupling-pipe beyond the collar projecting into another pipe member, which end is drawn by the coupling-nut and washer into water-tight relation with the other pipe-end as required. The end is thus telescoped into the neighboring pipe. The Thomas patent merely shows that slip-joints were old. The Sexton and Goodale patents show slip-joints and gaskets suited to the coupling provided for therein. Of the patents relied on by defendant, it will be necessary to consider only the following, viz.: Tyden patent, No. 696,383, granted March 25, 1902, which is primarily for a device to prevent stealing of gas, water, etc., but showing a one-piece coupling-joint of elbow shape of the same cross-section from end to end, and provided with a collar near one end. This end is plainly to be telescoped into its neighbor-

ing pipe or meter connection, and fastened with a coupling-nut. It is provided with a gasket which makes a water-tight joint.

The connection with the pipe corresponding to the water service-pipe of the patent in suit is made by a solder-joint, just as Glauber says his connection may be made, although the Tyden joint is effected without telescoping the coupling into the service-pipe.

Cornelius patent, No. 776,298, granted November 29, 1904 (after the filing of Glauber's application, but prior to the last rejection and amendment thereof), is for a one-piece faucet-coupling "having a proper degree of adjustability, and, furthermore, to provide such a coupling having a proper degree of flexibility." The faucet end of the coupling-pipe is provided with a collar, a tapered gasket to correspond with the internally tapered seat of the faucet-spud and a water-tight connection effected by a coupling-nut substantially as in the Glauber device. The collar is adjustable, being screwed into the screw-threaded end of the coupling-pipe which extends beyond it to receive the gasket and fit into the tapered seat of the faucet-spud. This collar would seem to be to all intents the equivalent of a fixed collar. Appellee contends that the two last-named patents show only what he terms "tail-pieces," and do not describe his commercial article.

Smith patent, No. 425,553, granted April 15, 1890, is for a unitary waste-pipe connection between washtubs and soil-pipes. It shows an elbow-shaped coupling-pipe having one arm longer than the other. It is of the same cross-section from end to end. Its long arm telescopes into another pipe to any desired distance, and is held by the usual coupling-nut and washer. It has a fixed collar, which also is held in end to end engagement with another pipe by means of a flat washer and a coupling-nut. The patentee says his object was to provide a series of expansible and contractable pipes and connections for washtubs, whereby washtubs of varying dimensions may be readily connected to the soil-pipes. His specification closes with the following statement, viz.:

"With the above construction the plugs, a, may be of varying distances apart and be readily connected by the pipes, D D, and couplings, B, by passing the unflanged end of a pipe farther in or out of a coupling until the required position is found. The parts are then suitably fastened. With this arrangement a system of piping for washtubs may be sold that will fit any tub, and an ordinary workman can readily set up the piping. This is a great saving on the practice heretofore employed of measuring and cutting each pipe and then soldering the pipes together. This system also overcomes the danger of becoming loosened and water escaping."

The Murdock patent, No. 192,654, granted July 3, 1877, calls for a combined cock and coupling intended to do away with the existing complicated and expensive system of attaching pipes and faucets to hot-water boilers. It shows a comparatively short and straight piece of pipe, having a fixed collar near one end, which end is telescoped into another pipe, and the two drawn together by a coupling-nut. The other end is smooth and capable of making a slip-joint, but not so used.

Downing patent, No. 167,850, granted September 21, 1875, shows double coupling-pipes, each composed of one piece, and a collar near their ends, which are drawn and held in connection with other pieces of pipe by means of washers and a coupling-nut. It also discloses the smooth ends which telescope into service-pipes.

Shields patent, No. 433,750 for a pipe-joint, shows a short coupling-pipe having a fixed collar at its end with a tapering gasket fitting into a tapering seat in its adjoining pipe, a coupling-nut engaging the collar, and a smooth surface.

Dockery patent, No. 582,137, granted May 4, 1897, and several other patents introduced in evidence, furnish cumulative evidence of the fact that every element of the patent in suit, separately, or in various combinations, approximately that of the present device, were old and in common use.

In the field of prior use defendant cites the so-called Nelson pipe, claimed to have been manufactured by the N. O. Nelson Manufacturing Company of Edwardsville, Ill., from the year 1899 or 1900 to the present time. The exhibit is not one of the pipes put upon the market by the manufacturer, but is introduced as a fac simile thereof. The witnesses are one C. H. Harkins, formerly in the employ of the Nelson Company, L. D. Lawnin, secretary and manager of the Nelson Company and connected with the company for 23 years, John F. Staab, who had been with the Nelson Company since 1902, and Thomas R. Walton, who had been with the Nelson Company for about 15 years.

It will be remembered that Glauber filed his application May 21, 1904. These four witnesses are relied upon by appellant to establish the fact that the Nelson coupling-pipe antedated the patent in suit. The witness Harkins says he invented the Nelson pipe and recognizes it as easily as he would his own children. His evidence as to the identity is unequivocal. Two or three hundred pair were made at a time prior to the year 1902, when he left the employ of the Nelson Manufacturing Company. The witness does not tell to whom, if any one, the pipes were sold; nor does he swear that they were ever used in the trade. The witness Lawnin positively identifies the coupling as like one made by Nelson Company more than eight years prior to date of deposition, i. e., January, 1908. They were made up in lots of 300 or 400 pairs, both smooth and threaded at the end. He confirms Harkins' statement that he (Harkins) invented the pipe. To the best of his recollection, Harkins left in May, 1902. He further testifies that pipe was made and sold by Nelson Company for several years before Harkins left; that Nelson Manufacturing Company have made 500 pairs or more of these coupling-pipes per year for the last 8 years; that about 100 pairs were sold to appellant during the last 3 years. Staab entered the employ of the Nelson Company in September, 1902. He saw pipes like the exhibit at the Nelson Company's place in about a month or six weeks after he began work there. He says he had one order for 100 or 200 pairs, and that the company has been making them right along; that they were made with or without threaded ends as desired; that he began to

make them without threads in about 1904 or 1905; that those sold were ordered through the St. Louis store. Walton identifies the exhibit as a coupling-pipe which the Nelson Manufacturing Company had been making for seven years prior to January, 1908. He claims to have manufactured the first one made, under the witness Harkins' direction; that they have been made up by the Nelson Company continuously since 1900 or before, generally in sets of about 100. He also is unable to give names of purchasers, as the orders came through the St. Louis house; and that the Nelson Company first began to manufacture the device of the exhibit with a second coupling-nut for use on the longer arm somewhere about 1903 or 1904.

There is no question but that these four witnesses identify the exhibit as one made by the Nelson Company, though two of them, at least, are somewhat mixed as to time. Their testimony so far as it goes is emphatic. But it suggests a lack of endeavor to procure the best evidence. It is a well-established rule of law that prior use, in order to show anticipation of a patent, must be "proven by evidence so cogent as to leave no reasonable doubt in the mind of the court that the transaction occurred substantially as stated." Deering v. Winona, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153.

In Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154, the court, speaking of oral testimony with reference to anticipations, says:

"In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses. * * * courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory, and beyond a reasonable doubt."

Authorities to the same effect might be multiplied indefinitely. A reading of the testimony of these witnesses raises the inquiry: What has become of the great number of these pipes which they say were manufactured? Were they used at all, and, if so, where? It is not at all probable in the ordinary course of things that they have all disappeared. No attempt is made on the part of appellant to show that they were in actual use, or had been placed in the hands of the public. No original coupling-pipe made by the Nelson Manufacturing Company at the time of the alleged prior use is produced. The witnesses are shown an alleged duplicate of the original pipe and depose from memory alone that it is the same device. However clearly and emphatically the testimony of such witnesses may be given, yet if it may reasonably be deduced from all the record that other and conclusive evidence might have been obtained, the existence of which is not negatived, nor its absence accounted for, the court is forced to the conclusion that it is purposely withheld. There is no excuse for the failure to follow up the coupling-pipes alleged to have been made by the Nelson Manufacturing Company.

It is conceded that prior use must be established beyond a reasonable doubt. There must always be doubt in the mind of the court, when no effort is made to produce in evidence facts, the existence of which may reasonably be inferred from the record in the absence of any excuse for the omission. In such case the prior use cannot

be said to be established beyond a reasonable doubt. We therefore conclude that the prior use contended for, as shown in this Nelson pipe, is not made out with the certainty required in such case.

In view of the prior art, it is evident that appellee's device is very close to the line which separates invention from mere mechanical skill.

It would not be invention to remove a device from the washtub art (if it be an art) and adapt it to the faucet and service-pipe art (if such an art there be). It will be observed that Glauber's device is not by any of his claims limited to use with faucet-spuds and service-pipes. This meaning is by the witness and counsel deduced, first, from the statement that the patent applies to open plumbing, and, second, by the expert witness McIntyre (page 209, Record), from the fact that he did not know of any other use to which the nickel-plating, etc., of the invention could be put. That open plumbing is a matter of whim or taste and may be and is applied to any indoor work, as, for instance, tank connections in water-closets, drain-pipes from basins and tubs, etc., would seem to be a matter of common observation, which may be considered by the court and given as much evidentiary force as the expert's declaration based on his want of knowledge.

The patent to Smith contains in its claim and specification, as above quoted, language which is strangely like that of Glauber. It is elbow-shaped, and of the same cross-section from end to end. It calls for flanged and unflanged ends, coupling-nuts, telescoping, or slip-joints, universal application, to be made by any workman, the doing away with cutting and measuring and soldering, and winds up with Glauber's statement, in substance, that "this system also overcomes the danger of becoming loosened and water escaping." It lacks the tapering gasket because it could not be used in that connection, but it can hardly be assumed that, were it used in connection with a tapering seat, any one skilled in the art would not know enough to use a tapering gasket.

The devices of the Schamp patent, the Tyden patent, the Cornelius patent, the Murdock patent, and others, shown in evidence, are termed by appellees as tail-pieces. Many of them, however, lack only the idea of spanning the distance from a faucet to a service-pipe.

The device of the Tyden patent, though called a tail-piece by appellee, is termed by the patentee "the customary form of joint." It shows, as far as it goes, a section of Glauber's unitary pipe. Thus, the idea of a one-piece or unitary coupling is not new, but is abundantly accomplished in the prior art to the extent the devices involved required it. Was it invention on Glauber's part to substitute the tapering gasket of the prior art for Tyden's washer, and then extend the lower limit of his coupling into slip-joint or solder connection with the service-pipe?

Undoubtedly, the device of the patent as described therein is a most convenient contribution to the householder; it practically claims to make every man his own plumber. Whether as a separate unitary article of commerce, or in combination with the two pipes to be

coupled thereby, it places in the hands of the user all the parts required to make the connection. That was never done before, so far as the record shows. It was new and seems to have accomplished all that is claimed for it when made in accordance with the terms read into the patent by the appellee and his experts. But, as above stated, this may not be done. So far as appears from the patent, we have to do with a coupling-joint which cannot be assumed to be made with off-size, thin-walled, or annealed pipe—one which cannot readily be bent in order to secure adjustment to spuds and service-pipes. For the purposes of this proceeding, it is just a plain piece of ordinary pipe, one arm of which will telescope into the service-pipe, while the other arm is constructed so as to extend to and fit into the tapering seat of the faucet or other spud. It is evident that the size of the service-pipe and the location and angle of the spud-arm must be first determined before the coupling-pipe can be deemed a complete unitary article of trade adapted to all cases. This can only be arrived at by actual measurement, or by the fact, if it be such, that in ordinary plumbing work these conditions are uniform and well known. Thus construed, the question of patentable novelty is a very close one, as above stated. In view, however, of the presumption arising from the grant, the further fact that the prior art fails to disclose any device showing the same combination, the further fact that its utility is such that it has come into demand, together with the rule of law which requires that doubt be solved in favor of the validity of the patent, it is our opinion that the patent discloses patentable novelty, though of a low order, and it is therefore sustained.

There seems to be no doubt of the fact that defendant's device infringes claims 3 and 4. Its coupling-pipe is not of the same cross-section from end to end, and therefore does not come within the language of claims 1 and 2. The fact that defendant's coupling is constructed of off-sized pipe having a thin wall, and being readily adjustable by bending, especially when annealed, does not in our judgment relieve it from the charge of infringement. The idea is, in substance, identical, and all these features can, at most, be held to be nothing more than improvements.

The decree of the Circuit Court is therefore affirmed.

ASBESTOS SHINGLE, SLATE & SHEATHING CO. et al. v. H. W. JOHNS-MANVILLE CO.

(Circuit Court, S. D. New York. December 3, 1910.)

1. PATENTS (§ 65*)—ANTICIPATION—PRIOR PATENTS.
A patent must do more than to make untested suggestions or pregnant surmises to constitute an anticipation of a later patent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 80; Dec. Dig. § 65.*]

2. PATENTS (§ 65*)—ANTICIPATION—PRIOR PATENT.
Where the disclosures of a process patent in regard to the machines and method employed are so uncertain that they can only be spelled

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

out tentatively, such patent is not an anticipation of a later one for a definitely described process.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 80; Dec. Dig. § 65.*]

3. PATENTS (§ 144*)—REISSUES—CONCLUSIVENESS OF DECISION OF PATENT OFFICE.

The ruling of the Patent Office on an application for reissue that the failure of the patentee to include certain features of his invention was due to accident, inadvertence, or mistake cannot be reviewed by the courts on the facts.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 215–217; Dec. Dig. § 144.*

Conclusiveness and effect of decisions of Patent Office in proceedings on application, see note to Novelty Glass Mfg. Co. v. Brookfield, 95 C. C. A. 530.]

4. PATENTS (§ 141*)—REISSUES—IDENTITY OF INVENTION—PROCESS AND PRODUCT.

A patent for the product of a process is for the same invention as the process itself, and a reissue of a process patent, containing a new claim for the product, is not a departure from the original invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 206–213; Dec. Dig. § 141.*]

5. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PROCESS OF MAKING ARTIFICIAL STONE PLATES.

The Hatschek reissue patent, No. 12,594 (original No. 769,078), for a process of making artificial stone plates and the product of such process, which consists of mixing together, in a great bulk of water, hydraulic cement and asbestos or other fibrous material, agitating the same for some time until the cement takes on a peculiar condition, termed in the patent "colloidal," then pouring the mixture into the receiving vat of a cardboard machine, by means of which plates of the required thickness are formed which are then pressed and cured, was not anticipated, discloses the process with sufficient completeness, and the reissue is valid. Also, *held* infringed by the process practiced and the product made by the use of the machine of the Sillman patent, No. 829,770.

In Equity. Suit by the Asbestos Shingle, Slate & Sheathing Company and Ludwig Hatschek against the H. W. Johns-Manville Company. On final hearing. Decree for complainants.

Clifton V. Edwards, for complainants.

A. Parker-Smith, for defendant.

HAND, District Judge. This case comes up on final hearing upon the ordinary bill in equity for infringement of the complainant's reissue patent No. 12,594, covering a certain invention, process, and product, relating to artificial stone plates. The process consists of mixing together, in a great bulk of water, hydraulic cement and asbestos fiber, or other fibrous material. By sufficient agitation continued for some time the cement takes on a peculiar condition termed in the patent "colloidal," about the exact molecular structure of which the highest scientific authorities differ. It is conceded that, whatever be the correct analysis of the change physically speaking (there being thought to be no atomic change), its gross aspects include a swelling in bulk to a noticeable extent. It is further agreed that the "setting"

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

of the cement is markedly delayed, and, indeed, if the agitation in a great bulk of water be continued for three hours, the defendant's expert, Norton, believes the result will be wholly to destroy its "setting" power.

After the asbestos fiber and cement have been thoroughly mixed in a great bulk of water, the mixture is poured into the receiving vat of a cardboard machine. Within this vat is a wheel upon the circumference of which is a fine wire gauze. The vat is drained from the inside of the wheel in such way that the thin paste to escape must pass through the wire mesh. The cylinder is revolved, and to the outer side of it, as it rises, clings the solid portion of the paste. At the top of its revolution, the cylinder comes in contact with a felt belting which takes off the paste and carries it forward, drying it on the way, until it comes in contact with a "coucher" roll, having itself a wire gauze upon the circumference, which takes the paste from the felt belting onto itself. Each revolution of the coucher roll adds a layer of paste to its periphery and so builds up a plate of increasing thickness. When the proper thickness is obtained, the paste is slit longitudinally on the coucher roll, taken off, pressed under high pressures, and removed to suitable rooms, where it is cured. The process of curing practiced by the defendant extends over considerable time, and its perfection has been the subject of some experiment, the details of which will appear later, but which do not appear in the patent in suit.

The first patent was taken out on August 30, 1904, and a reissue on January 15, 1907. The reissue was applied for on August 20, 1906 —therefore within two years of the original patent. The specifications of the reissue are substantially the same as those of the original patent, except that on pages 2 and 3 of the reissue there are added, page 2, lines 30–130, and page 3, lines 1–15. These do not add to the description of the process, but do add statements about the character of the product. The original claims were two in number, corresponding verbatim to claims 2 and 3 of the reissue. The reissue claims 4 and 5 are substantially similar to claims 2 and 3. Claims 6 and 7 are for the product of the invention, and claim 1 is of a different and wider character, which it will not be necessary to consider for the determination of this controversy.

The proportions of the mixture are nowhere stated definitely. On page 1, lines 78–82, occur the words:

"In such a way it is possible to produce an article which contains 80 to 90 per cent. of cement to 20 to 30 per cent. of fibrous material."

And in the example given of the mixture specific proportions are used in the relation of five parts by weight of cement to one part of asbestos to the dry mixture, and there is added five or six times in amount of water. In speaking of the product on page 2, lines 70–74, the patentee, in speaking of the difference of his own product from that of others, says that his own product is different from that of others "because of its composition, containing within the limits heretofore stated, say 85 per cent. of hydraulic cement and 15 per cent. of asbestos."

The defendant after January 15, 1907, and for a period which does not definitely appear, used the process of manufacture exactly as disclosed, except that, in place of the ordinary cardboard machine, mentioned in the patent, it used a machine patented under the Sillman patent, No. 829,770. In this machine the mixture was made to flow through a trough and under a roller directly upon the felt without the interposition of the rolling cylinder of the ordinary cardboard machine. The only difference which this produced in the substance was as follows: In the patentee's process, when the paste first flows upon the wire gauze of the revolving wheel, the cement, being more finely divided than the fiber, flows through with the water until the agglomeration of asbestos fibers upon the gauze is fine enough to hold the cement, the result being that each layer which is taken off on the felt is not of strictly homogeneous character, one side of it having more fibers and less cement than the other. This fact is mentioned in the reissue patent, page 2, lines 80–105. When made by the Sillman machine, the layers are necessarily homogeneous, as they have not been strained through any gauze. The defendant, by virtue of this difference, makes some question of infringement; but I do not think that it is of any importance. Although the Sillman machine is not strictly a cardboard machine and may well be an improvement upon the applicant's method, it is to my mind very clearly the equivalent of that method, and produces substantially the same product in precisely the same way. The only difference is in the way in which the paste is carried to the belt. That is a step in the process which has no pregnant significance under the patent itself. The process continues in precisely the same way, and the product is built up in layers just as in the patent in suit. If the patent required limitation through the prior art, the question might be more serious; but, as I shall show, I cannot find anything in the art which requires such limitation.

The third claim is as follows:

"The herein-described process of producing artificial stone plates, consisting of first mixing asbestos fibers and hydraulic cement in the presence of a great bulk of water, then forming therefrom a series of thin layers of the mixed cement and asbestos superposed on each other until the required thickness is secured, then pressing the same and allowing the material to set or harden, substantially as set forth."

I have no trouble in finding that the Sillman machine infringes this claim.

The seventh claim is as follows:

"A product of the invention hereinbefore set forth, being a composition containing hydraulic cement which has been rendered colloidal."

I do not interpret this claim as meaning any product containing hydraulic cement which has been rendered colloidal, for the claim is clearly limited to the product of the invention thereinbefore set forth. Indeed, the last words might have been omitted from the claim without injuring its effectiveness. Being a claim added on reissue, it would be valid only in case it was for a product of the process previously patented, and I so construe it; ut res magis valeat quam pereat. As such it covers the product of the Sillman machine, because under this

claim no question arises in regard to the layer like structure of the product, except that it is, of course, necessary that it should be made by a process of deposit in layers. I need not therefore, take up the question raised by the expert Norton (Defendant's Record, folios 284, 285), whether the patent includes the product of Mr. Norton's own company, which is made up in quite a different way. On the evidence, this is necessarily a moot question, and the defendant cannot properly ask for its determination. Therefore I decline to pass upon it. Should the complainant misuse this decree, that would be a subject for independent consideration, if it were brought to the court; but such a possibility cannot justify an expression of opinion upon matters which are not properly before the court.

The question then turns upon the validity of the patent, which is attacked upon three grounds: First, its lack of novelty; second, the incompleteness of the disclosures; third, the invalidity of the reissue. These questions I shall take up in this order.

The use in paper making of a binder in the form of plaster was very old in the art. There is an English patent to Hooper, in the year 1787 (No. 1,622), which shows how plaster may be added to the improvement of paper. The use also of asbestos in paper making was old, as appears from the British patent to Maniere (No. 1,413), in the year 1853, and in which the patentee recommends the substitution of asbestos when reduced to pulp for other fibrous material. Moreover, the combination was not new of asbestos with an inert filler, as infusorial earth, even in combination with a binder and used in the usual paper machine, as appears from American patent to Brown, in 1884, No. 296,722. In this patent, however, hydraulic cement was not a factor, although Brown suggests the possibility of the use of lime or other cementitious material. Prof. Chandler, a high authority, says flat-footedly that infusorial earth is an inert substance and has itself no binding power (Complainant's Record, folio 198). Norton speaks of infusorial earth in combination with lime (Defendant's Record, folio 215), as though it would set somewhat; yet there is no question but that it is a very different combination from the hydraulic cement. The substitution of cement for this combination may have been an obvious step, but no one took it before Hatschek. Besides, the mere substitution of cement was by no means enough without an agitation in a large bulk of water, of which Brown had not the slightest idea. An examination of the product itself shows how absolutely different Brown's patent was from the patent in suit.

Imachenetzky also disclosed a way of making asbestos cardboard upon a cardboard machine, although this was not new. His invention (Nos. 629,567 and 631,719) consisted in mixing silica with asbestos and then by suitable additions making colloidal the form of the silica. This he did in various ways, as appears by his American patents; but nowhere does he suggest the use or the possibility of the use of hydraulic cement. His machine (British patent, No. 18,747, 1899; French patent No. 293,247, 1899; and American patent No. 668,562, 1901) was a very ingenious way of effecting a double impregnation of the silica as the plate was being made upon the coucher

roll; but nowhere is the possibility of using cement even suggested. As in the case of Brown, the character of the result shows how absolutely different were the two processes. The usual argument as to their "obviousness" is met by the usual answer:

"If it was obvious, why did no one else think of it after the time came when it was so profitable?"

The reason may be, as Hatschek says, that nobody supposed hydraulic cement would tolerate so long a process and still set at the end of it. However, no court is required to speculate as to the reasons. It is enough that no one did it, though there was for some years prior to Hatschek's discovery a great field of use for cement. Another reason may be that all prior users of the cardboard machine approached the matter from the aspect of asbestos cardboard; the experiments being in the filler and binder. Hatschek was trying to make slate and stone, not paper; and stone he succeeded in making. It is easy now to show that a paper maker could have made the obvious substitution, but that is because of Hatschek's original inventive conception.

In 1888, Lee, an Englishman, obtained a patent (British patent No. 3,708 of that year) for a mixture of asbestos with cement while in a liquid condition, out of which he proposed to make "slabs, blocks, parts, and structures of this material, the asbestos fiber permitting me to make, for example, slabs and paneling much thinner and stronger than would be the case if the cement or composition were used without the said ingredient of asbestos fiber." There is no indication, however, of the manufacture of these on a cardboard machine or of any other way than by treating them as a thick plaster and molding them accordingly. Mr. Norton is satisfied that Lee must have used a cardboard machine. Perhaps he did; but he said nothing about it, which is the point. It is surely somewhat ingenuous to ask a court to hold the art already enriched by what an inventer, like Mr. Norton, after "much thought" and "much time in experimenting upon it," has now discovered must have been the undisclosed method. So to hold would be to fail adequately to recognize the skill and ingenuity of the inference, which is certainly quite beyond the powers of the usual skilled artisan.

In 1895 another Englishman, Hitchins (British patent No. 1,256 of that year), also invented a machine which would deliver a composition of fiber and cement from a mixing vat in a continuous layer so that it could be chopped off into convenient sizes. The delivery was made from the vat upon a table, where the mass was at once pressed between a series of rollers over the surface of which ran felts, between which the plastic mass itself moved. There was no suggestion, however, of making up the paste in layers, nor was there any similarity between the machine used and a cardboard machine. This patent defendant cites to show that the Sillman machine does not infringe; but the citation is irrelevant, for, even though it showed that Hitchins anticipated Sillman in making a direct delivery from the vat upon the felt, it was in no sense an anticipation of the process of building up a cement slab in layers upon a coucher roll.

This disposes of the only patents cited in the prior art except two, and these are much the most important. The first is the British patent to Sachs, No. 4,787 of 1880; and the second is a series of patents to Simmons & Bocks in Germany, France, and England. Sachs' patent was primarily for the purpose of treating slack-wool, or slag, a by-product of glass manufacture. The principal purpose of his patent was to show how the slag could be purified and its lighter fibers separated from its heavier and shorter fibers through a machine which he discloses. In stating the uses for his purified fiber, he uses the following language:

"The mass thus obtained may be used for the manufacture of papier-maché, or such like materials used in the arts for the manufacture of roofing felt, of packings for engines, apparatus, and tubing, for the manufacture of card and pasteboards and papers with or without the addition of other materials which may serve as binding materials, such, for example, as glue, starch, alumina-resinate, gypsum, soluble silicate of soda, cements, and the like."

He also speaks of using the material as combined with asbestos.

The defendant's theory is that Sachs must have meant, by cements, hydraulic cements; that by the manufacture of cardboards he must have meant the use of the usual machines; and that by the suggestion which he made of the uses of his substance he therefore disclosed completely all that Hatschek did. That is not enough; the art must be enriched by more than fruitful intimations, untested suggestions, or pregnant surmise before the subsequent comer who has elaborated and proved the invention may be deprived of his right. Happy intuition is no doubt necessary to an inventor, but it is not the whole of his endowment; to benefit his art he must show to other men by more than mere sketchy suggestion how they may practice what he has discovered. Perhaps Sachs' patent might have served as a good starting point for real addition to the art, but as it stood it was no more than that. Cf. American Graphophone Co. v. Leeds & Catlin Co., 170 Fed. 327, 331, 95 C. C. A. 511, 515, in which the court says:

"The naked assertion that a certain result has been accomplished without stating how, without describing the means which produce the result, is insufficient as an anticipation."

Similar cases are Loew Filter Co. v. German-American Filter Co., 164 Fed. 855, 90 C. C. A. 637, and Naylor v. Alsop Process Co., 168 Fed. 911, 94 C. C. A. 315.

The great reliance of the defendant is upon the patents to Simmons & Bocks. The first of these patents appeared in Germany on April 20, 1900. This patent describes a process of making fireproof and waterproof sheets. A thickish mass is to be made by a mixture of asbestos, zinc oxide, and cement with glue water, which is to be spread out on both sides on some kind of mesh, by means of a carding or other suitable machine. When both sides have so been coated, the sheets are to be pressed in rollers, and the compressed sheets, when dried and impregnated with aluminum phosphate, are ready for use. The pulp can best be fed to the press by endless conveyers, and indeed the process could have been well carried out on the Hitchins machine above mentioned.

There is certainly in this patent absolutely no suggestion of the patent in suit, and no indication that the process could have been used upon a cardboard machine. It is undoubtedly true that the words "carding or other suitable machine" are inapt, and somewhat confusing; but, whatever they meant, they did not mean a cardboard machine. It would be an absurd use of words to speak of the cardboard machine as spreading out this thickish mass on both sides of the mesh.

On the 8th of September, 1899, Simmons & Bocks filed provisional specifications for their patent in England and on the 22d of November, 1899, they filed similar specifications in France, which was granted on May 9, 1900. These two patents are practically translations one of the other. Although not absolutely literal, there can be no question to my mind that the process described by the patentees in each was intended to be absolutely the same, and the parallelism between them is almost absolute. The English patent is more detailed than the German patent already cited, but it starts off in somewhat the same way. The process is to make slabs and bricks to resist fire and water, and the materials to be used are asbestos treated in a rag engine, and cement. I cannot doubt that the rag engine is used simply to treat the asbestos, and that the cement is not intended to be mixed in with it till after it is treated. Mr. Little, one of the defendant's experts, speaks of this position as follows:

"To any one familiar with paper making, such an assumption is simply too foolish for consideration." Defendant's Record, folio 408.

This somewhat categorical opinion begs the question by assuming that Simmons & Bocks were in fact engaged in a paper-making process, which I think it appears quite clearly that they were not. The position of the phrase "treated in a rag engine" in all three patents is the same, and in the French patent the gender of the word "asbestos" (l'amiante) prevents any construction other than the one which I have adopted. The remainder of the process shows quite clearly that the purpose of treating the asbestos is to reduce it to shredded form. Finally, in the first example the asbestos is spoken of as "digested," and in the French patent still more definitely as "passée à la pile à cylindres." I think the intent is clear to indicate that the asbestos before being used must be thoroughly disintegrated, and that that is all the patentees mean.

The patent then prescribes that the asbestos and cement shall be thoroughly mixed with suitable adhesives, and with the addition of fillers and fire-resisting ingredients, and then made into a thick paste, after which it is to be pressed in suitable molds; a mesh being inserted if desired. Then follows the description of the method of impregnating the product to make it resist water. This is the general description of the invention and must be supposed to cover all of the four examples afterwards given. These four examples of the process are shown in detail.

In the first the "digested" asbestos and the cement are mixed with zinc oxide and with weak glue water to a paste. This is coated upon both sides of a mesh, which process is effected preferably "by means of a suitable scraping or spreading device." The plates so made are

then pressed and passed through another process. This clearly has no reference to the patent in suit, nor is it claimed to have; but it is important to observe that the "scraping or spreading device" is the same as the phrase "un dispositif de cardage," in the French patent, which means a carding machine and shows beyond peradventure that the word "cardage," used in the French and German patents, is used advisedly, does not mean a cardboard machine, and does mean a scraping or spreading device.

The second example provides that asbestos, cement, zinc oxide, and sulphate of alumina are to be mixed to a thin paste with water. A wire mesh is coated with this paste "and the plate made by spreading in the same way as pasteboard." This is then pressed, and "the pressure is repeated at intervals first in layers, when the separate coatings are applied."

In the French patent the important phrase is as follows:

"This paste is then applied (appliquer) to a metallic mesh and the plate is made by drawing off (puisage) like cardboard; then it is pressed, etc. The pressing takes place at several intervals first by layers as the layers are applied."

Now it is impossible upon an automatic cardboard machine to press the plates till they are all done, because the plate must be cut longitudinally and taken off the machine. Just what is the process here described is not perfectly clear; but the most reasonable interpretation of the language in both patents is that the thin paste is still thick enough to be spread over the mesh even though one may speak of "drawing it off." The word "puisage" literally means drawing a liquid from one receptacle by means of another. If this be the correct interpretation of this example, it does not suggest the patent in suit, and the words "in the same way as pasteboard" only mean "built up in layers like pasteboard," which is what I think they do.

In the third example of the process a somewhat different mixture is prescribed. The important words are the following:

"In order to avoid fracture, the plates are made in a spreading or pasteboard machine according to the method described in the first example."

The spreading machine was in fact referred to in the first example, but a cardboard machine was not there referred to, and it is unquestionably the fact that the reference is puzzling. In the French patent the phrase is "dans la machine à carton," which, although it means a pasteboard machine, likewise seems to refer unmistakably to "un dispositif de cardage," since that is the only machine mentioned in the first example. The English patent seems to try to bridge the difficulty by using both the word "spreading" and the word "pasteboard," which is even more confusing. Considering the whole disclosure, it would seem most reasonable to suppose that "machine à carton," which is the same as "dispositif à cardage," means a spreading machine which will build up the plates "in the same way as pasteboard"; that is, in layers, "couches." It is true that there is some violence done to the language of the French patent in so construing "machine à carton"; but it is less than the violence to German, French, and English patents in

supposing that "dispositif de cardage" means the usual cardboard machine, which certainly could not work with a thick paste.

It is perhaps possible, though it is somewhat far-fetched, to suppose that the patent contemplated the use of a hand-dipping cardboard machine; the paste to be conglomerated with the mesh integrally. If this were so, I should still not regard the patent as an anticipation. It might be that to change from hand to automatic cardboard machine would not be invention, but that was not the only necessary change upon this hypothesis. The process remained one in which the mesh was imbedded in the paste, and the mesh is essential in all those processes which prescribe a "machine à carton," or a "dispositif de cardage," and there is no indication anywhere that the patentees supposed it possible to disentangle the mesh from the cement when such a machine was used. The very purpose of the patent in suit was, however, to make a plate upon, and not around, the mesh of the coucher roll. The suggestion is mistaken which supposes that the mesh is to be run in upon the cardboard machine, even assuming that this is possible. Except in the second example, it is quite clear that thick paste was to be used, which would not have worked on a cardboard machine. In the second example, as I have already said, there could be no "pressure repeated at intervals, first in layers when the separate coatings are applied," because the plate cannot be taken off the coucher roll without slitting it and could not then be put back; at least, it is absurd to suppose that anything of the kind was meant.

Even if this analysis is not certain, the very difficulty of determining what the patent does mean is enough to prevent its being an anticipation. Whatever the disclosures in regard to machines and methods, they can only be spelled out tentatively. It is clear enough that the patentees thought only of the mixture and expected the paste to be applied in any convenient way in layers. The claims do not contain any reference to the kind of machine or the method of making up the plates. It would take much less uncertainty than appears to hold this to be an anticipation of Hatschek.

In considering this patent, I have assumed—what is by no means satisfactorily shown—that the mixture used by Simmons & Bocks was essentially the same as cement and asbestos. Little says that the oxide of zinc used was for color; that the sulphate of alumina "tends to harden the finished sheet." Norton says that the zinc oxide is put in to make the plate waterproof (Defendant's Record, folio 533); that the water glass and sulphate of alumina serve to furnish an active cementing substance; "but that the real fundamental disclosure was the combination of asbestos and cement" (Defendant's Record, folio 539). Prof. Chandler, on the other hand, regards these additions, in the light of the previous art, as having an important function as hardening agents (Complainant's Record, folios 136–138). They had been used by earlier makers of artificial stone, and the more reasonable interpretation is to assume that Simmons & Bocks added them to reinforce the action of the cement. At least it would be unwarrantable to say that they were put there merely as inert substances, or for other purposes, unless the purposes were disclosed. If the defendant takes that

position, it is incumbent on him to show that it is true, and that he has not done. At best, the disclosure is ambiguous, and requires some new invention, at least some ingenuity, to piece out what was described.

There is still a third reason why Simmons & Bocks did not anticipate the patent. The cement was not stirred or beaten in a large bulk of water. Little says the contrary, but he was misled by the phrase "travaillée au cylindre à broyer," and "passée à la pile à cylindres." Without such a process, the cement does not assume "colloidal" form and cannot be treated successfully by the Hatschek patent. It is not a case of using a process without knowing what actually occurred. There is no indication that the process was used. Therefore this patent is not in any respect a valid anticipation.

Hatschek's discovery remains, therefore, quite untouched by any prior patent. It is true that scientists had for some time known that cement, when stirred in a large bulk of water, would take on this so-called colloidal form; that is, would swell in size, and become starch-like or stiff, after the manner of many colloids. It is of absolutely no consequence whether in fact the substance in that form was a true colloid or not. Upon the scientific controversy Hatschek does not commit himself at all:

> "The hydraulic cement of the mixture seems to swell up, taking the appearance of a more or less colloidal, starch, or pastelike mass." (Page 1, lines 52–55).

This is surely not the way to state a scientific dogma. All that concerned him was that he should be able to delay the "set" of the cement while the process lasted, and that he did. It makes not the slightest difference that he did not discover this property of cement, for he was the first to use it fruitfully and practically upon a cardboard machine. Nor is it of any consequence either if Norton mixes his cement to a thick paste and presses it at once. That may be a better process, and, if it does not infringe, Norton is of course free to use it; but it does not touch this controversy. What is revelant here is that there is no suggestion that any one before Hatschek used the cardboard machine to make such plates. Whether good or useless, the process should be his.

The next objection is as to the validity of the disclosures. The patent discloses the necessity of high pressure (page 1, lines 28–30). "The cardboard like plates obtained are then pressed under high pressure" (page 2, lines 13–15). The plate is "pressed to the desired shape, whereupon it is caused to set in suitable rooms." Each of claims 2, 3, 4, and 5 contains the following words: "Then pressing the same, and allowing the material to set or harden." The defendant relies upon the cross-examination of Jewett, a hostile witness, and upon some conclusions of Norton, to show that these disclosures are not enough to guide the maker. The trouble with Jewett's testimony is that he did not originally follow the patent when he got the bad results. At first he did not press the plates at all, as he was directed, and put them in artificially heated rooms, each plate separated from the other with dry currents of air flowing between them. When he began

to apply high pressures, and to set them close together in normal atmospheric temperatures, they improved and became merchantable. It may be that it was natural for him at first to follow the analogy of asbestos millboard; but the fact remains that he did not follow the patent, and that if he had he might have saved his six months of experiment. All that is necessary is to press the plates and stack them in the open air. Sometimes they are wet down, sometimes not. There is no evidence of any virtue in the open air beyond the usual temperature "of suitable rooms." At most one can only say that the higher pressures of 20 to 40 tons may have improved the product, though it does not even appear then what were the pressures common in the prior art, except as Jewett pressed asbestos millboard. The whole contention seems to me elaborately fictitious and artificial.

The last question is that of the reissue. The grounds for reissue were within the discretion of the commissioner. His ruling that Hatschek's failure to include his product was due to accident, inadvertence, or mistake is not reviewable here on the facts. Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33; Russell v. Dodge, 93 U. S. 460, 23 L. Ed. 973; Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658. The only question which can arise is as to the identity of the two inventions. Claim 7 is limited to the product of precisely the process described. That product is the same invention as the process itself. James v. Campbell, 104 U. S. 356, 26 L. Ed. 786; Powder Co. v. Powder Works, 98 U. S. 136, 25 L. Ed. 77. It is quite true that in both these cases the rule is laid down obiter, but it is quite deliberate, citing a decision of Mr. Justice Grier in Goodyear v. Central Ry. Co. of N. J., 2 Wall. Jr., 356, Fed. Cas. No. 5,563, and I should feel bound by it as authority even if it did not seem true in principle. In other countries, it is even unnecessary to claim the product separately, nor would it have been less desirable had our own law developed in the same way.

It will be unnecessary to consider the validity of claim 6 under the estoppels of the original file wrapper, because this case is disposed of if claims 3 and 7 are upheld. I think them both valid and infringed by the Sillman process and product.

Let the usual interlocutory decree pass upon these claims, with costs.

GAY et al. v. HUDSON RIVER ELECTRIC POWER CO. et al.
(two cases).

NATIONAL CONTRACTING CO. et al. v. GAY et al.

(Circuit Court, N. D. New York. January 6, 1911.)

RECEIVERS (§ 188*)—APPEAL—SECURITY.

Where, pending insolvency proceedings against a corporation, a claimant instituted an action to recover damages for breach of contract, and its right to recover had been once sustained by the New York Court of Appeals, and damages in amounts, ranging from more than $500,000 in the first trial to $310,036.12 in the third trial, had been allowed by various referees of high standing, and pending such proceedings not only

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

the corporation but its sureties on a bond given to pay the judgment finally recovered, if any, had become insolvent, and the corporation, after decision of the first referee, but before judgment entered thereon, had placed a second mortgage on all its assets, which the claimant claimed was in fraud of its rights, the corporation's receivers would not be permitted to prosecute a further appeal from the last judgment entered on the last report of the referee in favor of claimant to the Court of Appeals at the instance of the bondholders under such second mortgage, unless such bondholders would give security to both the claimant and the receivers to pay the costs and expenses of the appeal.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 378; Dec. Dig. § 188.*]

Insolvency proceedings by Eben H. Gay and another against the Hudson River Electric Power Company and others, and by the Knickerbocker Trust Company, as trustee and cross-complainant, against Gay and others, in which the National Contracting Company and others intervened for the collection of a judgment against the Hudson River Company. Certain bondholders having induced the receivers to perfect an appeal, the National Contracting Company applied for an order directing the receivers to withdraw the appeal, or in case such relief was denied that they be required to give security for the payment of any judgment that might be finally rendered, or for costs and expenses of the appeal. Order for security from the bondholders allowed, and, in default thereof, that the appeal be withdrawn.

See, also, 182 Fed. 904.

Motion by cross-complainants, the National Contracting Company et al., in the above-entitled actions for an order directing that the Hudson River Water Power Company or its receivers, George W. Dunn, Charles W. Andrews, and Milton De Lano, as receivers of the said company, withdraw the appeal of the Hudson River Water Power Company from the judgment entered against it December 23, 1909, in favor of the National Contracting Company for the sum of $323,387.55, or that there be deposited with some trust company or with this court the sum of $385,023.62, the amount paid over by the special trustee and Standard Trust Company July 30, 1907, pursuant to an order of court filed July 29, 1907, or such portion thereof as will satisfy the above-named judgment, or that a bond be given sufficient to secure the National Contracting Company in the collection of the said judgment, and for such further order and relief as may be just and proper.

Kellogg & Rose, for National Contracting Co.

Tyler & Young, for Boston Bondholders Committee.

Winthrop & Stimson, for Guaranty Trust Co. of New York, formerly Morton Trust Company.

RAY, District Judge (after stating the facts as above). The first trial on the merits of the action brought by the National Contracting Company against the Hudson River Water Power Company, December 8, 1900, resulted in a judgment, April 4, 1905, of $554,680.43 for the plaintiff. The second trial resulted in a judgment, September 24, 1906, of $386,185.07 for the defendant on its counterclaim with a finding of $312,426.77 in favor of the plaintiff in case the law of the case as it might be settled by the appellate court gave to the plaintiff, and not the defendant, a cause of action. Ex-Judge Alton B. Parker, the referee, in substance stated that he had made the findings

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of fact as to damages thus complete and comprehensive so that, in case the higher court should find that under the law the plaintiff was entitled to recover, judgment could be given in its favor without the expense and delay of a new trial. The Court of Appeals reversed this judgment in favor of the defendant, holding the plaintiff was right on the law of the case, but sent it back for a new trial. The case was thereupon referred to a new referee, Mr. Rushmore, who has found in favor of the National Contracting Company and fixed its damages at $310,036.12, and a judgment for $323,387.55, December 23, 1909, was entered.

The first affirmative judgment for plaintiff was for $554,680.43.

The second affirmative judgment for plaintiff is for $323,387.55.

The intermediate finding as to plaintiff's damages was, if plaintiff was entitled to recover, $312,426.77.

The present finding is the most favorable of the three to the Hudson River Water Power Company. The receivers were appointed shortly after the last decision of the Court of Appeals and before the third trial had progressed far.

This court was at first under the impression that that trial was to be a mere assessment of damages, but, on the statement of Mr. Augustus N. Hand, supported by that of his father, Richard L. Hand, both eminent and reliable members of the bar and both engaged in the former trials, confirmed by Mr. Curtiss, one of the counsel for the receivers, became satisfied that relying on the question or questions of law, in which they had every confidence, they had not given that thorough attention to the question of plaintiff's alleged damages they otherwise would have done. This court thereupon directed the employment of Mr. Richard L. and Mr. Augustus N. Hand to act with Mr. Curtiss in defending the suit, which was done with instructions to employ necessary expert witnesses and contest the case thoroughly on both the law and the facts. This too was done.

On the written request of Tyler & Young, of Boston, representing varied and diverse and in some cases apparently conflicting interests, Mr. Curtiss, attorney of record under the receivers, has taken and perfected an appeal by direction of the receivers. Mr. Curtiss states in an affidavit that in his opinion a finding on an item of damage allowed the plaintiff by Mr. Rushmore for something like $133,000 is not sustained by the evidence, and that there are other items which "might possibly be reversed by the Appellate Division" of the Supreme Court.

I have given the record careful perusal and consideration, including the opinions of the Court of Appeals and those of the referees and Appellate Division, and am of the decided opinion that the decision of the Court of Appeals is decisive except on the question of the amount of damages, with which it did not deal, and the chance of reducing damages is quite remote.

The plaintiff the National Contracting Company moves for an order directing the receivers to discontinue the appeal as without merit in view of the prior decisions and findings and of the last decision of the Court of Appeals and that of Referee Rushmore, or that, if the

appeal is continued, security be given for the payment of the judgment, or at least costs, etc., incurred hereafter, and that a deposit be made for reasons hereafter stated. The cause of action is for damages by reason of the breach by the Hudson River Water Power Company of its contract with said National Contracting Company for the construction by it of the dam at Spiers Falls on the Hudson river. At the time of the breach of contract complained of and for which damages have been awarded as stated, the Hudson River Water Power Company had mortgaged its properties in the sum of $2,000,000 to secure certain issues of bonds. The property is good, it is conceded, for this sum and much more. The National Contracting Company claims that its judgment is good and collectible, but that it will be necessary to set aside a certain other mortgage for some $5,000,000 given to secure an issue of bonds of about that amount of the Hudson River Electric Power Company, but which it is claimed was given in fraud of creditors, especially of the said National Contracting Company. This last-mentioned mortgage was given a few days after the announcement of the decision, that of Judge Bookstaver, in favor of the Contracting Company, but before judgment was entered. The first mortgage is now in process of foreclosure. This default is the act of the court under circumstances and conditions not necessary to detail. This act was the result of a bitter and acrimonious contention that it was necessary to the protection of the various bondholders. Four days before the first judgment of $554,680.43 was entered (on the decision of Judge Bookstaver), but four days after that decision was rendered, the Hudson River Water Power Company gave a mortgage of $5,000,000 to the Knickerbocker Trust Company to secure bonds to that amount issued by the Hudson River Electric Power Company. This mortgage is claimed to be void as to creditors.

May 10, 1905, and about 30 days after the entry of the said judgment in favor of the National Contracting Company—execution having been returned unsatisfied—a petition in bankruptcy was filed against said Hudson River Water Power Company in the court of bankruptcy, Northern district of New York, and a receiver of the property of said company was appointed. To obstruct this proceeding the company itself instituted, or caused to be instituted, certain insolvency proceedings in the state court, and a receiver was there appointed who refused to surrender the property of the Hudson River Water Power Company. Thereupon contempt proceedings were instituted and a motion made to dismiss the bankruptcy proceedings for want of jurisdiction and on the ground only two creditors had united in the petition and possibly on other grounds. The property was turned over to the receiver appointed by the bankruptcy court. A master was duly appointed to take evidence and on the coming in of his report, or possibly before it was made, but after the evidence was taken, a settlement was arranged and a stipulation made in open court, reduced to writing and filed, and an order of the court made approving same, and in accordance therewith, whereby it was stipulated and agreed that, "in order to relieve the property of the Hudson River Water Power Company from the custody and control of the receiver

heretofore appointed and to have such receiver discharged," by July 19, 1905, $250,000 cash was to be deposited by said company with a trustee named by the court; that the agreement of the said Hudson River Water Power Company to pay such trustee $15,000 on the 20th of each month and certain security to issue such payment was to be delivered to said trustee; that a bond should be given by said company to such trustee named by the court with Eugene L. Ashley and Eben H. Gay as sureties conditioned to pay the claim of the National Contracting Company secured by bonds of the Hudson River Electric Power Company to a certain amount, same to be delivered to the said trustee; also an agreement of E. H. Gay & Co. to take up such bonds so that the trustee would have in his hands the full amount of the judgment. This agreement and stipulation further provided for the substitution of cash for the bonds deposited as security, and further that:

"All of the moneys, bonds, securities or agreements hereinbefore mentioned to be held by the said trustee as security for the payment of the judgment or claim of the National Contracting Company against the Hudson River Water Power Company, and when said judgment is finally established or the claim is finally determined or settled said money or so much thereof as may be necessary is to be applied to the payment of such claim."

The accounts of the receiver were to be settled and the papers and exhibits in the hands of the receiver to be returned to the company and kept subject to the order of the bankruptcy court and the property turned back. The injunction on the Hudson River Water Power Company was to be dissolved, but to stand as to the Hudson River Electric Power Company and the receiver appointed in the state court. It was also stipulated that, if at any time a judgment was obtained against the Hudson River Water Power Company, and not secured or paid within 30 days, then the said court in bankruptcy might appoint a receiver. There were other stipulations not pertinent here.

This stipulation was signed by the Hudson River Water Power Company by Eugene L. Ashley, president, and Eben H. Gay, treasurer, and by Taylor L. Arms and Geo. B. Curtiss, their counsel, and also by said Ashley and Gay personally.

The motion to dismiss the proceedings in bankruptcy was denied and the deposits made and the bond given and the injunction dissolved, the receiver discharged, and the property, books, and papers turned back to the company.

The Hudson River Water Power Company prosecuted an appeal from the said judgment, and same was reversed by the Appellate Division of the Supreme Court of the state of New York (National Contracting Company v. Hudson River Water Power Company, 110 App. Div. 133, 97 N. Y. Supp. 92) on the ground the defendant was entitled to a judgment dismissing the complaint based on the following proceedings in the case which had taken place prior to any trial on the merits, viz.: In its answer the defendant set up and pleaded three defenses. The plaintiff replied as to the first and second defenses, but demurred as to the third, thus admitting the facts in that defense stated. The Special Term sustained the demurrer (34 Misc.

Rep. 652, 70 N. Y. Supp. 585), the Appellate Division affirmed (67 App. Div. 620, 73 N. Y. Supp. 1142), but the Court of Appeals reversed and overruled the demurrer. No application was made at that time for leave to withdraw the demurrer and plead to the third defense, and the judgment of the Court of Appeals was made the judgment of the Supreme Court, and the case went to trial before Referee Bookstaver with the pleadings in that shape; that is, with a demurrer in the case to the third defense admitting the allegations of fact therein contained. Under the Code of Civil Procedure of the state of New York, as held by the Appellate Division, this entitled defendant to a dismissal of the complaint. The Appellate Division having reversed that judgment on that ground, the plaintiff National Contracting Company applied to the Court of Appeals for an amended remittitur, and the motion was so far granted as to permit the plaintiff to apply to the Supreme Court for permission to withdraw its demurrer, which it did, and the motion was granted on payment of costs, and the demurrer was withdrawn. The case was then referred to Ex-Judge Alton B. Parker.

The following statement will show the various events in this case in order, viz.:

Chronological Events in Suit of National Contracting Company v. Hudson River Water Power Company.

1900.
Dec. 8. Action commenced for balance due for work done on contract, and damages for breach of same, $615,548.32.

1901.
Feb. 13. Answer served with a counterclaim subsequently increased to $383,352.60.
Feb. 23. Reply and demurrer to third defense.
May 2. Demurrer sustained by Special Term (34 Misc. Rep. 652, 70 N. Y. Supp. 585).
Dec. 24. Judgment on demurrer affirmed by Appellate Division (67 App. Div. 620, 73 N. Y. Supp. 1142).

1902.
April 8. Demurrer overruled by Court of Appeals (170 N. Y. 439, 63 N. E. 450).
June 4. On decision of Court of Appeals made April 8, 1902, on appeal demurrer was overruled. Held good on face, but demurrer subsequently withdrawn by leave of court, but not until after trial before Judge Bookstaver.

1903.
April 23. Case referred to H. W. Bookstaver.

1905.
April 4. Decision by Judge Bookstaver for plaintiff, damages $547,696.40.
April 8. Hudson River Water Power Company, after above decision, but before judgment was entered, gave mortgage to Knickerbocker Trust Company to guarantee and secure the bonds of the Hudson River Electric Power Company, up to $5,000,000.
April 10. Said Water Power Company gave another mortgage of $2,000,000 to secure an alleged debt.
April 12. Judgment for plaintiff, $554,680.43.
April 17. Execution on said judgment issued and returned unsatisfied.
May 10. In United States District Court, petition in bankruptcy filed against Hudson River Water Power Company and Chas. W. Andrews, of Syracuse, N. Y., appointed receiver.
Contempt proceedings to obtain property.

July 19. Stipulation made and order entered thereon by which property held by receiver was to be released on money and bonds being deposited, and bond of E. L. Ashley and Eben H. Gay given as security for the payment of the claim when finally adjudicated, not the judgment merely. Bankruptcy proceedings to stand.

1906.

Jan. 2. Judgment of Appellate Division reversing said judgment for plaintiff, and new trial granted (110 App. Div. 133, 97 N. Y. Supp. 92). This decision went on the ground that plaintiff had not withdrawn demurrer, and, as it had been held good, and admitted the facts stated in that defense, defendant was entitled to a dismissal, whereupon plaintiff obtained leave to withdraw demurrer, and did so, and answered to that defense. Referred to Hon. A. B. Parker as referee to hear and determine.

Sept. 24. Judgment for defendant on its counterclaim on decision of Judge Parker, for $386,185.07, he following what appeared to be the decision of the Court of Appeals on the law when considering the demurrer; but he also found plaintiff's damages to be $312,426.77 in case he (the referee) was in error in construing the decision of Court of Appeals, made when demurrer before it, and the court should hold plaintiff was entitled to recover.

Nov. 26. Decision of court in bankruptcy refusing to release security (In re Hudson R. W. Pr. Co. [D. C.] 148 Fed. 877).

Dec. 28. Order of bankruptcy court releasing all of deposit except $379,750.

1907.

April 15. On stipulation reducing the judgment for defendant to $287,253.68, such judgment for defendant was affirmed by the Appellate Division (118 App. Div. 665, 103 N. Y. Supp. 641).

July 19. Order of bankruptcy court releasing the balance of deposit made under stipulation as security for the claim. Also order made denying motion to dismiss the bankruptcy proceedings, with leave to renew after a decision by Court of Appeals on appeal from said judgment in favor of the Hudson River Water Power Co. v. National Contracting Co.

1908.

May 19. Judgment in favor of the defendant in the action on its counterclaim reversed by Court of Appeals and May 22, 1908, that judgment of reversal was made the judgment of the Supreme Court (192 N. Y. 209, 84 N. E. 965); the Court of Appeals holding that the change in the work directed and insisted upon by the Hudson River Water Power Company was a fundamental change and justified the plaintiff in abandoning the work—in substance that defendant, not the plaintiff, was guilty of a breach of the contract.

1909.

Dec. 1. Decision for the plaintiff against Hudson River Water Power Company by Chas. E. Rushmore, referee, finding plaintiff's damages at the sum of $310,036.12.

Dec. 23. Judgment on such decision in favor of National Contracting Co. v. Hudson River Water Power Co. for the sum of $323,387.55.

1910.

Jan. 20. Appeal taken by receivers without direction of the court.

It is noted that there have been three trials on the merits, viz.: One before Referee Hon. H. W. Bookstaver, who found plaintiff's damages to be $547,696.40; one before Referee Hon. A. B. Parker, who found plaintiff's damages to be $312,426.77; and the third before Referee Hon. Chas. E. Rushmore, who has fixed plaintiff's damages at the sum of $310,036.12.

The litigation, as shown, has covered a period of ten years. The case has been twice in the Court of Appeals, once on a demurrer to one of the defenses, and once on the merits when the law was settled,

and three times in the Appellate Division. I have referred to these various decisions and to the book where reported in the above chronological statement.

In the courts of the state of New York there is a settled rule that when a case has been three times tried and a verdict rendered on a question of negligence and damages, and as often set aside as against the weight of or as unsupported by the evidence, the court will not again interfere. Here the findings of the several referees in favor of the plaintiff have not been disturbed on the ground the damages were excessive or not supported by the evidence in whole or in part, and three referees, all of the highest character and standing in the profession, have placed the plaintiff's damages all the way from $310,036.12 up to $547,696.40. This is quite conclusive evidence that the plaintiff's damages as now fixed by the judgment have been reduced to the lowest figure possible. Courts, referees, and juries, respectively, rarely arrive at the same conclusion on the same evidence as to the amount of damages where successive trials are had.

The defendant Hudson River Water Power Company is now insolvent, and all its property will be taken by the bondholders if all the mortgages referred to are held valid. The plaintiff has no security whatever; the bond of Ashley and Gay being worthless, or substantially so, and the deposit made having been surrendered to Gay, treasurer of the Hudson River Water Power Company, by order of the bankruptcy court, and a motion to restore having been denied after the last decision of the Court of Appeals but prior to the fixing of plaintiff's damages by the new trial before Referee Rushmore with leave to renew after such decision should be rendered. At that time it was represented and believed by the court at least that the Hudson River Water Power Company was solvent, and that Gay and Ashley were solvent and of sufficient ability to answer to the plaintiff on their bond. But now the situation is changed. Both Gay and Ashley are hopelessly insolvent, as is the Hudson River Water Power Company. The property of Gay is in the hands of a trustee in bankruptcy, and that of the Hudson River Water Power Company is in the hands of receivers appointed by this court, and the mortgages are being foreclosed. I do not see how this court can order a restoration of the deposit from the property of that company to answer the stipulation and agreement. If the National Contracting Company has an equity, an equitable lien, or a right of priority, it seems to me it can be determined and established on the cross-bill filed by it, and that the court should not undertake to establish any such lien on a mere motion.

The only party requesting an appeal from the judgment entered on the decision of Referee Rushmore is Tyler & Young, who represent what is known as the Boston Bondholders Committee which holds or represents a large number of the bonds guaranteed by the mortgage of $5,000,000 given April 8, 1905. The trustee named in that mortgage as representing the holders of the guaranteed bonds is, of course, interested. I do not see that any other party defendant in this action is interested in the appeal. It seems to me that the expense of all this litigation regarding this claim of the National Con-

tracting Company should be borne by the ones interested in defending it and who request the appeal, and that such party or persons should assume the expense of the appeal and indemnify the receivers before they proceed with it. Then again, in view of the expense the National Contracting Company has been put to, the fact that three referees have found for the plaintiff in large sums as stated, and that the Court of Appeals has virtually held that the plaintiff is entitled to recover, the only real question being the amount of damages, and that the plaintiff has been deprived of its security on the understanding that the company and Ashley and Gay were amply responsible, it would seem that it should have security for all costs and expenses of such appeal at least; the defendant company being wholly irresponsible except in contingencies referred to.

Prima facie the judgment is just and in accordance with law, and this presumption is supported by the prior findings of the referees and the decision of the Court of Appeals. Receivers are officers of the court and under its direction and are not justified in extending litigations into appeals without the sanction of the court. In view of the amount of this judgment and the request made of the receivers, I am inclined to let the appeal stand and direct the receivers to proceed therewith on condition, however, that the Boston Bondholders Committee or the Knickerbocker Trust Company or the parties represented by Tyler & Young and requesting this appeal who are interested in the litigation secure and indemnify by deposit of money in court or bond with sureties to be approved by this court not only the receivers for their costs, expenses, disbursements, and counsel fees on such appeal, so as to charge the expense of such appeal on the one or ones interested in and benefited by the appeal, but the plaintiff the National Contracting Company as well, in case the appeal does not result in the final defeat of the claim of the National Contracting Company. Mr. Richard L. Hand and Mr. Augustus N. Hand have been in this litigation from the first, representing the Hudson River Water Power Company, and the order will provide that such security in the sum of $5,000 to the National Contracting Company and $5,000 to the receivers be given within 15 days from the entry of the order hereon, and that in case it is given that the appeal be prosecuted, and that Mr. Curtiss, Mr. Richard L. Hand, and Mr. Augustus N. Hand be employed by the receivers for that purpose, and that in case such security is not given the appeal will be discontinued or withdrawn. The parties or party requesting this appeal must also understand that its prosecution may involve delay in the pending foreclosures, the responsibility for which they assume in insisting thereon.

There will be an order accordingly.

In re BORG.

(District Court, D. Minnesota, Third Division. December 16, 1910.)

1. JUDGMENT (§ 270*)—NECESSITY OF ENTRY.

Where, in proceedings in a state court by a bankrupt's trustee against the bankrupt and his wife to declare and enforce an alleged secret trust concerning property conveyed by the bankrupt to his wife, findings of fact were made in favor of the bankrupt, and judgment was ordered, but no judgment was ever entered, and, in proceedings in bankruptcy before the referee in resistance of the bankrupt's discharge, the evidence on which the state court's findings were based was not presented, the proceedings had in the state court were inadmissible.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 501–503; Dec. Dig. § 270.*]

2. MORTGAGES (§ 32*)—CONVEYANCE TO WIFE—ABSOLUTE DEED AS MORTGAGE.

Where a bankrupt prior to bankruptcy conveyed certain real estate to his wife, not as a gift, but to secure her for money alleged to have been contributed to the construction of buildings thereon, as against the bankrupt's subsequent creditors, the conveyance, though absolute in form, was at most a mortgage, and the omission of such real estate from the schedules is ground for refusing a discharge.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60–66; Dec. Dig. § 32.*]

In the matter of bankruptcy proceedings of Samuel Borg. On objections to the bankrupt's discharge. Sustained.

John R. Donohue, for bankrupt.
B. H. Schriber, for petitioning creditors.

WILLARD, District Judge. This case stands upon the report of the referee, as special master appointed to hear the evidence in support of the objections of Benjamin O. Chapman, a creditor, to the discharge of the bankrupt.

The specifications mention several grounds, but the one relied upon now charges the bankrupt with omitting from his schedules and concealing from his trustee real estate held in trust for him at the time his petition was filed.

It appears from the evidence that on July 23, 1906, the bankrupt, through the intervention of a third person, conveyed to his wife nine pieces of real estate. The value of this real estate was then $20,000. It was incumbered to the extent of $5,000, and the title to all of it now stands in the name of the bankrupt's wife, except three tracts which have been sold. At the time of the conveyance, the property included therein constituted all the property real or personal which the bankrupt then owned. He was not then indebted to any one. He was at that time doing business for himself under the name of Samuel Borg & Co., but he had no partner, and the Samuel Borg & Co. was in fact Samuel Borg. He continued business under that name, and kept a bank account in that name until May 1, 1909.

Chapman, the objecting creditor, commenced a suit against Borg prior to May, 1909, and obtained a judgment on March 18, 1909, for $754.55, which was duly allowed in these proceedings. After the suit

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

was commenced, and on May 1, 1909, the bankrupt changed his bank account to Samuel Borg, Agent, and thereafter did business under that name. He filed a voluntary petition in bankruptcy on March 4, 1910. The only debts scheduled were the judgment in favor of Chapman, and one debt to the Selby garage for about $29. The schedules showed no assets at all except his own wearing apparel.

It appears from the findings of Judge Lewis in the case hereafter referred to that supplementary proceedings were had by Chapman upon his judgment, that the bankrupt was examined in those proceedings, and on March 1st was notified that an application would be made on March 12, 1910, for the appointment of a receiver. He filed his petition on March 4th. For reasons hereafter stated, however, this fact cannot be considered, as it was not shown by competent evidence in the proceedings before the referee. Nevertheless, it admits of no doubt that the object of the bankruptcy proceedings was to get rid of the Chapman judgment.

This proceeding does not attack the conveyance to the wife on the ground that it was made for the purpose of delaying and defrauding subsequent creditors, but it is based upon the idea that the property conveyed, or a part of it, is still the property of the bankrupt, and is held by the wife in trust for him.

The important question therefore is: What was the purpose of the conveyance? The bankrupt testified upon that point as follows:

"Q. In the building of those flats and the other houses which are now owned by Dorothea S. Borg, did Dorothea S. Borg furnish any of the money? A. Yes, sir.

"Q. What part of it? A. The major part of it.

"Q. And why did you convey this property to Dorothea S. Borg? (Objected to as incompetent, irrelevant, immaterial, and no foundation laid.) A. I conveyed the property to Dorothea S. Borg, because she held a major interest in that property, and I felt that at the time, in July, 1906, I contemplated going into real estate partnership with somebody in the Pioneer Press Building, and it is a party that I did not know very well and a party that I don't believe was responsible, and I did not think it was, just as long as she was interested in this property, that I should jeopardize anything that she was interested in, if a partner of mine should contract any debts.

"Q. Then you conveyed this property to her to protect her interests? A. Yes, sir."

When the bankrupt was asked by the counsel for the creditor how much money Mrs. Borg had furnished to build these houses, he stated that he could not say exactly; he further stated that he had furnished some of it. He was further interrogated as follows:

"Q. Do you know how much your wife put in? A. Not exactly.

"Q. Where did she get it? A. I don't know where she received all of it. I know she had money when I married her.

"Q. Do you know how much? A. No, sir.

"Q. Do you know where she got any money after you married her? A. No, sir.

"Q. And you don't know how much money she put into this property? A. No, sir."

He had before that in the examination stated that a brother-in-law had furnished half of the money to build the apartment house on the corner of Hague and Fisk avenues, and that he had furnished the bal-

ance. This apartment house was completed before the conveyance to his wife. As to the house at 892 Dayton avenue, which was built in 1901 and 1902, he says in one place that he furnished all the money for it. It seems hardly possible that his wife could have furnished that large amount of money for the construction of these houses, and the husband not have known where she had obtained it. But passing that point, and assuming for the purposes of this decision that his testimony was true, to the effect that she had furnished the major part of the money to build the houses, it nevertheless appears that he furnished the rest, and, moreover, there is still left all of the ground upon which the houses stand, for the purchase of which she did not contribute anything, and upon which she had no claim at the time the conveyance to her was made. It is very evident that the property conveyed to her far exceeded in value the money which she had furnished, even upon the bankrupt's own testimony.

What was his intention with reference to this excess over her interests when he made the conveyance? He nowhere says that he intended to give it to her. There is no statement in the evidence that he made a present of it to her. He states repeatedly that at the time of the conveyance he received no money consideration therefor. He not only does not say that he intended to give the excess to her, but he says, on the contrary, that the conveyance was made for the purpose of protecting her interest. If her interest is protected by the conveyance, it follows that the purpose thereof has been fully accomplished. His statement therefore is entirely consistent with the idea that the deed of July 23, 1906, was intended as a mortgage, and it is entirely inconsistent with the idea that it was intended as a gift of his interest in the property. Under such an agreement as he testified to, he could undoubtedly maintain an action against her to have the deed declared a mortgage. He would be allowed to redeem by paying her the amount of money which she had furnished towards the construction of the buildings. Hudson v. Mercantile National Bank, 119 Fed. 346, 56 C. C. A. 250, decided in the Circuit Court of Appeals of this circuit November 19, 1902.

His actions since the conveyance are entirely consistent with the idea that it was intended as a mortgage, and are inconsistent with the idea that it was intended as a gift. He made leases of the property in his own name as if he were the owner, and collected all the rents using them to pay his household expenses.

It is true that he denies that he now has any interest in the property, and denies that it is held in trust by his wife for him. Such denials are to be expected. If no conveyance of this kind could be set aside when such denials are made, it would follow that all of them would stand. Such agreements, as was suggested by counsel for the creditor at the argument, are not generally made in the presence of witnesses. The conduct of the parties since the conveyance is of more probative force than the statements now made by them.

The case of Dorwin v. Patton, 101 Minn. 344, 112 N. W. 266, cited by the bankrupt, was an action to set aside a conveyance, on the ground

that it was fraudulent as to the creditors, and the facts were not the same as the facts which appear in this case. The facts are not stated in the case of In re Dauchy, 130 Fed. 532, 65 C. C. A. 78, cited by the referee.

At the hearing before the referee the bankrupt offered in evidence the proceedings in a suit brought in the state court by the trustee in bankruptcy against the bankrupt and his wife, to have the conveyance here in question set aside as fraudulent, and on the ground that the wife held the property in secret trust for the bankrupt. It appears in that case that findings of fact were made in favor of bankrupt, and judgment was ordered to that effect; but no judgment has ever been entered therein. The case therefore cannot be considered as an adjudication of the rights of the parties, and that is not claimed by the bankrupt's counsel. Nor can the findings be considered in this proceeding, because the evidence upon which they were based, presented in the state court, was not presented before the referee.

The question here presented must be decided upon the testimony received before the referee. That testimony shows to my satisfaction that the bankrupt has now, and had at the time he filed his schedules, an interest in the real estate which still stands in his wife's name. He therefore should have included that interest in the schedules, and his failure to do so is ground for refusing his discharge. Hudson v. Mercantile National Bank, 119 Fed. 346, 56 C. C. A. 250.

It is therefore ordered that the bankrupt's application for his discharge be, and the same hereby is, denied.

UNITED STATES v. LURIA.

(District Court, S. D. New York. January 27, 1911.)

1. ALIENS (§ 71½,* New, vol. 7, Key No. Series)—NATURALIZATION—CERTIFICATE—FORFEITURE—STATUTES—CONSTRUCTION.
   Act Cong. June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1909, p. 485), providing for the cancellation of a certificate of naturalization, does not forfeit the naturalized alien's right to citizenship, but merely confers jurisdiction on the courts of naturalization to cancel a previous certificate for fraud or illegal procurement in its inception.

2. ALIENS (§ 71½,* New, vol. 7, Key No. Series)—NATURALIZATION—CANCELLATION—"ILLEGALLY PROCURED."
   The words "illegally procured," as used in Act Cong. June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1909, p. 485), authorizing the cancellation of a certificate of naturalization illegally procured, means procured by subornation or some other illegal means used to impose on the court, and not that the certificate was issued through error of law.
   [Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 3388.]

3. ALIENS (§ 71½,* New, vol. 7, Key No. Series) — NATURALIZATION — VACATION—FRAUD—STATUTES—JURISDICTION.
   Since jurisdiction to naturalize aliens was originally bestowed by Congress on state courts, Act Cong. June 29, 1906, c. 3592, § 15, 34 Stat. 601

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

(U. S. Comp. St. Supp. 1909, p. 485), providing for the vacation of a naturalization certificate obtained by fraud or illegal procurement in its inception, is not unconstitutional because it gives one court power to pass on and annul the proceedings of another.

4. CONSTITUTIONAL LAW (§ 55*)—LEGISLATIVE POWERS—ENCROACHMENT ON JUDICIARY—PRESUMPTIONS.

Act Cong. June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1909, p. 485), authorizing the cancellation of a naturalization certificate, obtained by fraud or illegal procurement in its inception, is not unconstitutional because it declares that in such a proceeding evidence of the acquisition of a new domicile by the naturalized citizen within five years shall be prima facie evidence of fraud; such presumption being within the power of Congress to create as a rule of procedure.

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

5. CONSTITUTIONAL LAW (§ 311*)—DUE PROCESS OF LAW—PRESUMPTIONS.

In a particular case a statutory presumption applied to the trial of an issue determined by the facts which occurred before the presumption existed was nevertheless due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 932; Dec. Dig. § 311.*]

6. ALIENS (§ 71½,* New, vol. 7, Key No. Series)—NATURALIZATION—CANCELLATION OF CERTIFICATE—FRAUD—COMPLAINT.

A complaint by the United States to cancel an alien's naturalization certificate for fraud was insufficient, where it failed to tender the material issue of fraud, alleging merely a change of residence, which by statute is only prima facie evidence on that issue.

7. ALIENS (§ 71½,* New, vol. 7, Key No. Series)—NATURALIZATION—CANCELLATION OF CERTIFICATE—EVIDENCE.

Defendant's expressions of a definite desire to retain his citizenship in the United States during his continued residence in a foreign country was not determinative of his residence.

8. ALIENS (§ 71½,* New, vol. 7, Key No. Series)—NATURALIZATION CERTIFICATE—CANCELLATION—EVIDENCE—STATEMENT OF CONSULAR AGENT.

In proceedings to cancel a naturalization certificate for fraud, statements of consular agents abroad that defendant had established a permanent residence abroad, etc., were admissible under Act Cong. June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1909, p. 485).

9. DOMICILE (§ 4*)—RESIDENCE—INTENTION.

Where a person's intention to reside abroad is limited to a period itself determined by some definite event, even though the occurrence of that event may be uncertain, it is insufficient to establish a new domicile, particularly where a person goes abroad to stay until his health is restored, in which case he has no intention of indefinite residence; but, if he does not expect to return at all, he loses his original domicile regardless of the fact that he cannot live in the country from which he came.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 5–23; Dec. Dig. § 4.*]

10. ALIENS (§ 71½,* New, vol. 7, Key No. Series)—NATURALIZATION—FRAUD—DOMICILE—CHANGE.

In a proceeding by the United States to cancel an alien's certificate of naturalization for fraud, evidence *held* to justify a finding that the alien within five years after being admitted to citizenship left the country

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

and had taken up his permanent residence in South Africa, and that the government was therefore entitled to decree of cancellation.

11. JURY (§ 14*)—RIGHT TO JURY TRIAL — NATURALIZATION CERTIFICATE —VACATION—FRAUD.

A proceeding by the United States to vacate a naturalization certificate for fraud is a proceeding in equity as to which the defendant is not entitled to a jury trial.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 14.*]

Suit by the United States against George A. Luria. Decree for complainant.

This is a suit to cancel a certificate of naturalization under section 15 of the act of June 29, 1906 (34 Stat. 601, c. 3592 [U. S. Comp. St. Supp. 1909, p. 485]). It was heard upon the following agreed state of acts:

(1) This action was commenced by the filing of a præcipe in the office of the clerk of this court, and the issuing of a summons thereon on the 18th day of September, 1909. The complaint was filed in the office of the clerk of this court on the 20th day of September, 1909. The defendant appeared by Albert M. Friedenberg, his attorney, and filed his answer in the office of the clerk of this court on the 28th day of January, 1910; a summons having been served upon the defendant by publication in accordance with an order directing such service to be made, entered on the 21st day of September, 1909.

(2) That the defendant, George A. Luria, was born at Wilna, Russia, on the 22d day of February, 1868.

(3) That the said George A. Luria emigrated to the United States, sailing on board the steamship Werra, from Bremen, Germany, on the 28th day of April, 1888, and arriving at the port of New York on or about the 8th day of May, 1888.

(4) That the said George A. Luria matriculated as a medical student at the Medical College of New York University in the city of New York, on the 7th day of May, 1889, and attended said college as a medical student during the sessions of 1889–1890, 1890–1891, 1891–1892, and 1892–1893, and received a degree of M. D. therefrom on the 4th day of April, 1893.

(5) That on the 30th day of June, 1892, the said George A. Luria declared his intention to become a citizen of the United States of America and to renounce forever all allegiance and fidelity to the Czar of Russia, of which he was at the time a subject, in the Superior Court of the City and County of New York, in the State of New York, a copy of which declaration of intention is hereto annexed and marked Exhibit "A."

(6) That on the 3d day of July, 1894, the said George A. Luria applied to be admitted to become a citizen of the United States of America, in the Court of Common Pleas for the City and County of New York, and took the oath of allegiance and renunciation, and that on the 3d day of July, 1894, the said Court of Common Pleas made and entered its decree or order admitting the said George A. Luria to be and become a citizen of the United States of America, and that thereupon a certificate of citizenship was issued to him by the said court, copies of which application, affidavit, oath, and order or decree are hereto annexed and marked Exhibit "B."

(7) That on the 27th day of August, 1894, the said George A. Luria applied to the Department of State of the United States of America for a passport for himself, a copy of which application is hereto annexed and marked Exhibit "C," and that on the 29th day of August, 1894, a passport numbered 16,093, was issued to the said George A. Luria upon the said application, by the said Department of State.

(8) That during the year 1894 and for some time prior thereto the said George A. Luria owned a drug store at No. 482 Sixth avenue in the city of Brooklyn, county of Kings, state of New York, which drug store he sold on or about October 24, 1894, to one Dr. I. I. Lourie.

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

(9) That on the 19th day of June, 1893, the said George A. Luria applied for membership in the New York County Medical Association, which association is composed of persons practicing medicine in the county of New York, but he was never elected to membership.

(10) That on or about the 21st day of November, 1894, the said George A. Luria left the United States and arrived at the Transvaal, South Africa, on or about the 22d day of December, 1894.

(11) That the said George A. Luria sojourned in the city of Johannesburg, South Africa, continuously from the said 22d day of December, 1894, to some time in the spring of 1907, he claiming that his health was impaired, and that it was therefore necessary for him to sojourn in a climate similar to that of South Africa; and that during the said period the said George A. Luria, for the purpose of earning his livelihood, practiced his profession as a physician in the said city of Johannesburg and joined the South African Medical Association composed of persons practicing medicine in South Africa, and also served in the Boer War.

(12) That during the said period from 1894 to 1907 the said George A. Luria applied to the United States Consular Officers at Pretoria and Johannesburg, South Africa, on three separate occasions, to wit, June 29, 1899, March 20, 1902, and February 6, 1905, for passports, copies of which applications are hereto annexed and marked Exhibits "D," "E," and "F," respectively, and that passports numbered 29, 151, and 168 were issued to him upon such applications by the United States Consular Officers.

(13) That in the spring of 1907 the said George A. Luria returned to the United States and remained in the United States until on or about the 21st day of August, 1907.

(14) That from the 18th day of June, 1907, to the 30th day of July, 1907, the said George A. Luria attended a six weeks' course in general at the Postgraduate Medical School and Hospital in the city of New York, and that he gave as his address upon entering the said school post office box 188, Johannesburg, South Africa.

(15) That on or about the 25th day of June, 1907, the said George A. Luria applied to the Department of State of the United States of America for a passport, a copy of which application is hereto annexed and marked Exhibit "G," and that on the 26th day of June, 1907, passport No. 36,693 was issued to him upon the said application.

(16) That during the said spring and summer of 1907 the said George A. Luria did not practice his profession as a physician in the city of New York, and stated to several persons in New York City that he did not then expect to stay in the United States, but was going to return soon to South Africa, giving no reason therefor.

(17) That on or about the 21st day of August, 1907, the said George A. Luria left the United States for the Transvaal and arrived at Cape Town, South Africa, on or about the 17th day of September, 1907, and left immediately for the city of Johannesburg, South Africa, where he has since continued to sojourn and to practice his profession as a physician; it being necessary to enable him to earn his livelihood, he having no other profession or business.

Addison S. Pratt and John N. Boyle, for the United States.
Albert M. Friedenberg, for defendant.

HAND, District Judge (after stating the facts as above). This case raises, and is meant to raise, only one question—the constitutionality of section 15 of the act of June 29, 1906. The act does not forfeit the defendant's right of citizenship as he supposes; it merely gives jurisdiction to the courts of naturalization to cancel a previous naturalization for fraud, or illegal procurement in its inception. "Illegally procured" means procured by subornation or some other ille-

gal means used to impose upon the court; it does not mean that the certificate was issued through error of law. The causes upon which the suit lies are therefore those for which any court may cancel its own judgments, and all that the act does is to give one court such a power over the proceedings of another. Since the original bestowal of jurisdiction was by Congress, this is a mere procedural regulation, no different because state courts are included than if the jurisdiction was wholly vested in District Courts. The substance of the relief remaining the same, i. e., proof of some original fraud or illegal means, it is no substantial invasion of the function of a court to permit the suit to be brought in another tribunal. Indeed, the defendant does not assert that this makes the act unconstitutional. The real challenge is because in the suit so prescribed Congress has established one presumption and one rule of evidence.

The presumption is that evidence of the acquisition of a new domicile, i. e., "permanent residence," within five years shall be prima facie evidence of fraud. The only ground to question this is because it denies due process of law, or interferes with a judicial function. A presumption is only a rule of procedure. It provides that certain evidence shall throw upon the other side the duty of showing his hand, if he has any, or of losing his case, and that is all it does. If once the defendant puts in material evidence of his own, then the evidence which constitutes the presumption merely takes its place as such for whatever probative force it may have, and the tribunal which judges the facts need not regard it as having any further weight than if no presumption existed. Once the issue be opened, the facts are judged like any other facts. Any other rule would require some quantitative valuation of testimony which is in almost every case unknown to our law. Therefore a presumption does not either take from the court its duty to decide upon the facts, or even take from the moving party the burden of proof, i. e., the requirement of satisfying the judgment of the tribunal of fact upon each of the essential facts which together make up the "cause of action."

Being a rule of procedure, such a presumption is within the power of a Legislature. Fong Yue Ting v. U. S., 149 U. S. 698, 729, 13 Sup. Ct. 1016, 37 L. Ed. 905; Ex parte Fisk, 113 U. S. 713, 721, 5 Sup. Ct. 724, 28 L. Ed. 1117. Even in criminal cases. People v. Cannon, 139 N. Y. 34, 34 N. E. 759, 36 Am. St. Rep. 668; Board of Com'rs of Excise v. Merchant, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep. 705; Com. v. Williams, 6 Gray (Mass.) 1; Com. v. Rowe, 14 Gray (Mass.) 47; State v. Day, 37 Me. 244; State v. Sheppard, 64 Kan. 451, 67 Pac. 870; Com. v. Minor, 88 Ky. 422, 11 S. W. 472. It is true that in this case the presumption applies to the trial of an issue determined by facts which occurred before the presumption existed. That is nevertheless due process of law. Webb v. Den, 17 How. 576, 15 L. Ed. 35; Howard v. Moot, 64 N. Y. 262; Rich v. Flanders, 39 N. H. 304. This is only a species of the general regulation of procedure which the Legislature may always change even when, as in the case of criminal statutes passed by the states, it is

subject to the prohibition against ex post facto legislation. Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; Thompson v. Missouri, 171 U. S. 380, 18 Sup. Ct. 922, 43 L. Ed. 204.

No doubt there must be some relation in fact between the evidence constituting the presumption and the presumption itself. The evidence must be such that one may say the presumption is a reasonable inference from it. People v. Cannon, supra. Here if the period was three months, no one could question the propriety of the presumption. It must be conceded that the inference is weak of an absence of intention to become a citizen on a given date, because the applicant at the end of four years and eleven months acquires a new domicile; but that only concerns the periods which Congress may fix. It is a question for large latitude, and no court, certainly not a court of first instance, may say that it is so clearly beyond any reasonable relation to the fact presumed as to be merely arbitrary. A man becoming a citizen should intend to live here permanently, and, if he changes within five years, I cannot say that there is no possible inference from it that he never meant to live here permanently. If he has had an actual change of intent, he can show it.

Now it is true that in this case the complaint does not tender the material issue, which should have been fraud; the change of residence being only prima facie proof upon that issue. As a consequence, the issue tendered is not the fact upon which the relief depends and which the United States was bound to establish to the satisfaction of the court as the ultimate fact. It can, of course, recover only secundum allegata, and its allegations are therefore deficient and the complaint is bad. That point, however, was not raised, and I suppose the defendant does not mean to raise it. It is only a question of pleading at best.

The question, however, still arises as to whether the government has established the fact that the defendant did indeed "take permanent residence" in South Africa. The words of the statute mean the "permanent residence" from which a domicile results, and upon this question some of the agreed facts bear. The defendant has now resided in South Africa for sixteen years with the exception of one interval of four or five months, during the spring and summer of the year 1907. He has there continuously practiced his profession, and in 1900 he served in the Boer War, presumably upon the side of the Boer republics. These facts alone justify the inference as matter of fact that his intention was indefinitely to reside in South Africa, and they do not require in corroboration the conclusion of the consul that he has taken a permanent residence there. There are no contradicting facts except the defendant's expressions of a definite desire to retain his citizenship in the United States. That, however, does not determine his residence. Udny v. Udny, L. R. 1 Sc. App. 441, despite the remarks of Lord Cranworth and Lord Kingsdown in Moorhouse v. Lord, 10 H. L. C. 272. His residence is determined independently of that fact, upon the factum of his physical residence in the foreign country, coupled with his intention to remain in that country for an

indefinite period, which means a period not limited in his mind by any expected event, except of course the expectation of all men that in time they must die.

The contradictory evidence upon his residence is as follows: First, there are the sworn statements made by the defendant on August 27, 1894, before he left the country; those made on June 29, 1899, on March 17, 1902, on February 6, 1905, in Johannesburg, and that made on June 25, 1907, while in New York. All these statements were contained in applications for a passport, and they all contain the statement either that the defendant was about to go abroad temporarily or was temporarily residing in Johannesburg. Also, they all stated that the permanent residence of the defendant is in New York City, and that he intends to return to the United States within two years. These were formal allegations upon printed forms necessary to be filled out by an applicant for a passport, and they are competent evidence of his intention on the question of his domicile. Mitchell v. U. S., 21 Wall. 350, 22 L. Ed. 584.

Next is the agreed statement of fact that he originally went to South Africa claiming that his health was impaired and that it was necessary for him to sojourn in a climate similar to that of South Africa. Next is a statement of the American Consular Agent at Johannesburg, verified on the 23d of November, 1907, in which he stated, among other things, that his conclusion was that the defendant had established a permanent residence in Johannesburg. Further there is a statement of the United States Consul at Pretoria stating that the defendant had offered to him an affidavit saying that his residence abroad was for reasons of health and business, but failing to state that he intended to return to the United States permanently to reside; also stating that the Consul declines to believe his statement that he came to South Africa to regain his health; and finally stating that he has become a permanent resident of South Africa. There is a further statement on February 15, 1909, from the Consul at Johannesburg, containing annexed to it the certificate of two physicians, one of which says that he has treated the defendant for a naso-pharyngeal affection, which he has benefited by his residence in the rarefied atmosphere of the uplands of South Africa, and the other of which states that he has been treated for a pulmonary affection which required a high altitude, that he had already benefited by his residence, and that it was, in the physician's judgment, essential to his continued health that he should continue to reside in a warm and dry climate such as that country afforded.

The statements of the Consular Agent and Consul are made evidence under section 15, and, although of course they are not on that account conclusive, Congress has the power to make them competent evidence, and, as such, the United States should be entitled to whatever probative force the tribunal in fact before whom the issue arises may give them. Indeed, at common law, the statements of an official are admissible in evidence if they relate to acts within his personal knowledge and recorded in the performance of his duties. While it

is true that this would not come within those rules, it is nevertheless of a kind somewhat similar and not without the power of Congress in the exercise of its control over the rules of procedure and evidence. The statements of the Consul, therefore, are admissible. It may be a question whether anything but his mere conclusion upon the question of permanent residence is properly admissible under the statute; but, so far as his other statements are concerned, they aid the defendant, who cannot therefore complain of the addition. I shall therefore consider all the testimony before the court.

From all this evidence it is quite apparent that the defendant's statements of an intention to return within two years cannot be taken at their face value. His position is that he went to South Africa for the benefit of his health, and his physicians' certificates presented by him to the Consul state that he must permanently reside in some such climate. That conclusion is inconsistent with his repeated declarations that he intended to return within two years, and as a question of fact I cannot accept those declarations as true. A more reasonable inference in my judgment is that, whatever may have been his intent when he originally went to South Africa, he had, before this suit was brought, made up his mind for an indefinite period to remain in South Africa. It is true that his motive in going there was apparently to re-establish and maintain his health, which was affected by his residence here; and it may also be taken as true that it is essential for the continuance of his health that he should live either where he is, or in another place of a similar kind. Assuming that to be his motive, the question arises as to whether that affects his intention and therefore his residence. The authorities in this respect, it must be conceded, are not clear. If the person's intention is limited to a period itself determined by some definite event, even though the occurrence of that event may be uncertain, he has not the requisite intention. This is particularly true of a person who goes to a place for the purpose of staying until he is restored to health. Although he is unable to know just when his restoration will occur, his residence is determined by that fact which he expects to occur, and therefore he has no intention of indefinite residence. On the other hand, if he does not expect to return, it is of no consequence that the reason for this is that he can never live in the country from which he came. This is the effect of Hoskins v. Matthews, 8 DeG. M. & G. 13; Firth v. Firth, 50 N. J. Eq. 137, 24 Atl. 916; Atty. Gen. v. Winans, 85 L. T. R. 508.

In Moorhouse v. Lord, 10 H. L. C. 272, the judgment of Lord Cranworth certainly proceeds upon a different understanding of the law; but Lord Chelmsford's judgment is determined by his conclusion that the testator intended to return. The third judgment was that of Lord Kingsdown, which seems to concur with that of Lord Cranworth, although the case which he mentions is that of a man laboring under a mortal disease. This, too, was the fact in Dupuy v. Wurtz, 53 N. Y. 556, in spite of some expressions which seem to indicate a confusion between an intent to reside and an intent to

change one's citizenship. The case of one sfricken with a mortal illness, who goes to some other place to die, is analogous to that of one who goes to a place with the intention of staying there only until his health was restored, in spite of the fact that the expected outcome is just the opposite, for the residence in each case is limited by an expected event, which, although uncertain in time, will be controlled by existing facts which the person knows, or supposes he knows, to exist. In spite of the disagreement of authorities, the statement of Mr. Dicey on pages 143–146 of his Conflict of Laws (1896) seems to me the best statement of the law and the only one which can stand on principle. If so, it is quite apparent that the defendant's health may be disregarded as a factor in his intent, however much it may be a motive for his conduct. I therefore conclude that the government has established the fact that he is permanently residing in South Africa.

There remains only the question of the right to a jury trial. The issue is of fraud; the relief is to vacate the order of a court—call it judgment or what one will. That issue and that relief have from time immemorial been granted in courts of equity and are equitable in character, if anything can be. A suit based upon that issue is not within the constitutional requirement of a trial by jury. U. S. v. Mansour (D. C.) 170 Fed. 671.

Let a decree pass canceling the certificate of the defendant.

UNITED STATES v. LOUIE LEE.

(District Court, W. D. Tennessee, W. D. February 1, 1911.)

No. 1,160.

1. ALIENS (§ 32*)—CHINESE DEPORTATION PROCEEDINGS—APPEAL—EFFECT.
   An appeal from an order of deportation suspends execution until after determination of the appeal.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. § 32.*]

2. ALIENS (§ 32*)—CHINESE DEPORTATION PROCEEDINGS—APPEAL—TRIAL ON APPEAL—HEARING DE NOVO.
   On appeal from a United States commissioner's deportation order in exclusion proceedings, the case is to be heard de novo.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. § 32.*]

3. ALIENS (§ 32*)—CHINESE DEPORTATION PROCEEDINGS—NATIONALITY OF DEFENDANT—PROOF—AFFIDAVIT.
   An affidavit made by a United States Chinese inspector charging defendant with being a Chinese laborer unlawfully within the United States without a certificate of registration, on which a warrant was issued for defendant's arrest, was not evidence at the hearing to prove that defendant was a Chinese person.
   [Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.*]

4. ALIENS (§ 32*)—EXCLUSION—CHINESE PERSONS—PROOF.
   Act May 5, 1892, c. 60, § 3, 27 Stat. 25 (U. S. Comp. St. 1901, p. 1320), provides that any Chinese person, or person of Chinese descent, arrested

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

under the act, or acts extended, shall be adjudged to be unlawfully within the United States unless he shall establish by affirmative proof his lawful right to remain in the United States, and section 6, as amended by Act Nov. 3, 1893, c. 14, § 1, 28 Stat. 7 (U. S. Comp. St. 1901, p. 1320), required all Chinese laborers within the United States, who were entitled to remain before the passage of the act, to obtain a certificate of residence. *Held*, that the burden was on the United States, in proceedings to deport a Chinese person as unlawfully within the United States, to show by affirmative proof that defendant was a Chinese person.

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

5. ALIENS (§ 32*)—CHINESE PERSONS—DEPORTATION—PROOF OF NATIONALITY.
Where a person named Louie Lee was arrested on complaint of a United States Chinese inspector in deportation proceedings, and on appearing in court was attired in the ordinary street apparel of an American gentleman, with his hair worn as an American and with nothing to indicate that he was a Chinese except his color and features, which were more or less common to all Mongolians, his name not being distinctively Chinese, his appearance was insufficient to establish that he was a Chinese person within the exclusion acts.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. § 32.*]

6. ALIENS (§ 32*)—CHINESE—EXCLUSION PROCEEDINGS—MOTION TO DISMISS.
Where the government rested in Chinese deportation proceedings without introducing any evidence that defendant was a Chinese person, whereupon defendant moved to dismiss the proceedings and for his discharge, he was entitled to have the motion determined on the record as it stood when the motion was made, and hence the government's application for permission then to introduce evidence to prove the fact was denied.

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

Chinese deportation proceedings by the United States of America against Louie Lee. From the Commissioner's order of deportation, defendant appeals. Reversed, and defendant discharged.

Casey Todd, U. S. Dist. Atty.

C. G. Bond and Frank S. Elgin, for defendant.

McCALL, District Judge. On the 30th day of November, 1910, S. L. Whitfield, a United States Chinese inspector, made a complaint in writing under oath before A. G. Mathews, United States commissioner, that one Louie Lee, yeoman, of Madison county, Tenn., and within this district, on the 30th day of November, 1910, "being a Chinese laborer, was found unlawfully in the United States, without a certificate of registration, under the act of May 5, A. D. 1892 [Act May 5, 1892, c. 60, § 6, 27 Stat. 25] as amended by the act of November 3, A. D. 1893 [Act Nov. 3, 1893, c. 14, § 1, 28 Stat. 7 (U. S. Comp. St. 1901, p. 1320)], wherefore, and for the cause mentioned in said information," it is prayed that "said Louie Lee, being unlawfully within the United States, be deported from the United States to the place from which he came."

On the same day, the United States commissioner issued a warrant, directed to the marshal of the Western district of Tennessee, commanding him to apprehend the said Louie Lee, and forthwith bring

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

his body before the said commissioner, or some other commissioner, to answer the charge and be dealt with as the law directs in such cases.

Indorsed upon the warrant is the following:

"On this day, the within named Louie Lee was brought before me for hearing upon the within charge of being a Chinese laborer unlawfully within the United States. The said Louie Lee denied being unlawfully within the United States, but failed to prove that he was not so unlawfully therein, and, from the further proof submitted by the United States, I find that said Louie Lee is unlawfully within the United States, and he is hereby ordered deported from same to the country from which he came to the United States. This, December 1, A. D. 1910.

"[Signed] A. G. Mathews, United States Commissioner."

On the 3d day of December, 1910, the said Louie Lee prayed an appeal, from the judgment of the commissioner, to the judge of the United States District Court from said judgment of deportation, "to the end that said judgment may be annulled and vacated, and your petitioner may be restored to his rights and liberties as provided by law, and asks the honorable commissioner to grant said appeal." The appeal was granted on the same day.

The effect of this appeal was to suspend the judgment of the United States commissioner, and the case is before me to be heard de novo.

If any evidence was introduced before the commissioner, the same was not certified to this court. On the other hand, it was agreed in open court that no evidence of any character was offered or heard before the commissioner.

When the case was called to be heard in this court, the following occurred, in substance: The district attorney stated that a warrant was issued, charging that Louie Lee was a Chinese laborer, and being unlawfully within the United States. After reading the affidavit on which the warrant of arrest was based, he stated that he had no other evidence to offer, unless it should become necessary to offer evidence in rebuttal, after the defendant had closed his proof. Thereupon counsel for the defendant moved the court to discharge the defendant, upon the ground that there was no evidence introduced by the government to support the charge made in the warrant to the effect that the defendant was a Chinese person.

The district attorney contended that the act of Congress under which the proceeding was brought only required of the government to cause the alleged Chinese person to be arrested and brought before the court, and that the burden is upon such person to show that he is lawfully within the United States, and that, if the defendant introduced no evidence, that a judgment of deportation should be pronounced by the court.

Upon the other hand, the defendant's counsel contended that the burden was upon the government to prove that the defendant was a Chinese person, and then the burden shifted to the defendant, in order to avoid a judgment of deportation, to show that he was lawfully here.

Section 3 of the act of May 5, 1892, provides:

"That any Chinese person, or persons of Chinese descent, arrested under the provisions of this act, or the acts hereby extended, shall be adjudged to

be unlawfully within the United States, unless the person shall establish by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States."

Section 6 of said act, as amended by the act of November 3, 1893, provides that all Chinese laborers within the limits of the United States, who are entitled to remain in the United States before the passage of the act, shall apply to the collector of internal revenue for a certificate of residence—

"and any Chinese laborer within the limits of the United States who shall neglect, fail or refuse to comply with the provisions of this act, and the act to which this is an amendment, or who, after the expiration of said six months, shall be found within the jurisdiction of the United States, without such certificate or residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any * * * United States * * * marshal, or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States, * * * unless he shall establish clearly to the satisfaction of such judge that by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of said United States judge, and by at least one credible witness other than Chinese that he was a resident of the United States on the fifth of May, 1892, and if, upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted, upon his paying the costs."

The only question for decision now is whether or not the burden is with the government to first prove to the satisfaction of the court that the accused is a Chinese person, before it is necessary that he shall be required to offer evidence tending to show that he is lawfully within the United States.

Under the acts of Congress and the decisions of the courts, it is clearly the duty of this court, when it appears to its satisfaction that the accused is a Chinese person, to order him deported, unless he affirmatively shows by clear and convincing evidence that he is lawfully here, under one or more of the provisions of the Chinese exclusion act. The acts do not themselves undertake to provide how the party's nationality shall be made to appear to the satisfaction of the court.

In the instant case, the government undertook to establish the fact that the person accused was a Chinese person only by reading an ex parte affidavit made by the Chinese inspector, upon which the warrant for his arrest was issued. If the burden is upon the government to make it appear to the satisfaction of the court that the party is a Chinese person, then I am of the opinion that the ex parte affidavit made by the inspector is not competent for that purpose. The affidavit performed its function when the warrant of arrest was issued, and it was not evidence tending to prove the truth of the charges made in the warrant. It follows, therefore, that the result is that the government has offered no evidence tending to support the allegation in the affidavit and warrant that the defendant is a Chinese person.

Upon the other hand, if the mere charge on the part of the government that the defendant is a Chinese person is all that is necessary to establish its right to an order of deportation, then such order should

be made in this case, for the reason that the defendant offered no testimony of any character.

If an order of deportation is to be granted in this case, it must be done upon the court's assuming, without any competent evidence to so satisfy it, that the defendant is a Chinese person, in the absence of any law of Congress authorizing such course, and in the absence of any decision of the Supreme Court of the United States or Circuit Court of Appeals of the Sixth Circuit to that effect.

I am unwilling to say that the defendant in this case is a Chinese person. A casual observation of the face of the person whom I recognized as the defendant as he sat in the courtroom shows that he is of the Mongolian race; but whether he is a Chinese, a Korean, or a Japanese, I am wholly unable to say. He was attired in the ordinary street apparel of an American gentleman, with his hair worn as an American, and nothing to indicate that he is a Chinaman, except his color and features, which are more or less common to all Mongolians. Nor is his name distinctively a Chinese name. In the total absence of any other evidence, I do not think this sufficient, even if competent for any purpose, to authorize the court to say that he is a Chinaman, or of Chinese descent.

I am of the opinion that it was incumbent upon the government to first introduce testimony showing to the satisfaction of the court that the defendant is a Chinese person, in order to sustain its jurisdiction and justify an order of deportation. This it did not do, and the motion by counsel to discharge the defendant is allowed.

The opinion of the Circuit Court of Appeals of the Sixth Circuit in the case of the United States v. Hung Chang, 134 Fed. 19, 67 C. C. A. 93, I think, sustains this conclusion.

In that case, as here, a United States commissioner had entered an order of deportation, from which there was an appeal taken to the United States District Court. There at the hearing the United States offered evidence tending to prove that Hung Chang was a Chinese person, all of which was excluded by the court as being incompetent. The accused offered no evidence, and an order reversing the order of the commissioner and discharging the defendant was entered, and an appeal and writ of error were taken to the Circuit Court of Appeals for a review of the action of the District Court.

The case was reversed upon the ground that the evidence which was excluded by the district judge was competent and sufficient to satisfy the Court of Appeals that Hung Chang was a Chinese person, and the order of the commissioner, deporting him, was affirmed.

In discussing that case, Judge Richards said:

"Hung Chang was arrested and tried under section 13, subject to the regulations established by section 3 (referring to section 13 of the act of Congress of September 13, 1888 [Act Sept. 13, 1888, c. 1015, 25 Stat. 479, U. S. Comp. St. 1901, p. 1317] and section 3 of the act of Congress of May 5, 1892). His plea of 'not guilty' put in issue two questions: First, was he a Chinese person, or a person of Chinese descent? Second, was he entitled to be and remain in the United States? If found to be a Chinese person, or person of Chinese descent, it then becomes his duty to establish his lawful

right to remain in the United States, and this he was to do by 'affirmative proof, to the satisfaction of such justice, judge or commissioner.'"

And again:

"It is not required to do more than satisfy the commissioner or judge by affirmative proof that the one under arrest is a person of Chinese descent. * * * Undoubtedly it is necessary for the commissioner and the court to find that the defendant is a person of Chinese descent, in order to sustain their jurisdiction and justify the deportation."

It should be said that the Hung Chang Case, supra, is different from the instant case in this: There the charge was that the accused was a Chinese person, while here the charge is that the accused is a Chinese laborer. I do not think this difference in the charge made affects the question as to the burden of proof in relation to the nationality of the party, since in both cases it must be made to appear that the accused is a Chinese person. U. S. v. Chin Ken (D. C.) 183 Fed. 332.

This conclusion has been reached after a careful examination of the case of Fong Yue Ting et al. v. United States, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905. In that case it is said that when, in the form prescribed by law, an executive officer, acting in behalf of the United States, brings a Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country decided, "the case is duly submitted to the judicial power, * * * and, if no evidence is brought by the Chinaman, the judge makes the order of deportation as upon a default." But that opinion of the court is based upon the assumption that a Chinese person is brought before the judge. That is the very question under consideration here. Is this defendant a Chinese person? While the Fong Yue Ting Case is more nearly an authority for holding that it is not necessary for the government to first prove the defendant a Chinese person than any other case I have found, yet I am of the opinion that it does not go that far, but it only holds that it is the duty of the judge to make an order of deportation when a Chinese person is brought before him, if he fails to produce competent evidence to satisfy the court that he is lawfully here, but the court must first be satisfied by competent evidence that such person is a Chinese.

After the government's proof in chief was closed, and the motion to discharge the defendant, upon the ground that no competent evidence had been offered to show that the defendant was a Chinese person, had been made and argued, the United States district attorney asked permission to offer such evidence.

This, I think, came too late. The defendant was entitled to the ruling of the court on his motion, upon the record as it stood when the motion was made. The application was therefore denied.

An order will be entered consistent with these views.

AMERICAN TRUST CO. v. CANEVIN.

(Circuit Court of Appeals, Third Circuit. February 13, 1911.)

No. 1,403 (No. 77).

1. BILLS AND NOTES (§ 253*)—NEGOTIABLE INSTRUMENTS LAW—IRREGULAR INDORSEMENT.

Pennsylvania Negotiable Instruments Law (P. L. 1901, p. 203) § 64, providing that a person, not otherwise a party to an instrument payable to the order of a third person, is liable as indorser to the payee and to all subsequent parties, changed the prior Pennsylvania rule that an irregular indorsement of a third person imported a liability as second indorser and made such irregular indorser's liability prior to that of the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 612, 613; Dec. Dig. § 253.*]

2. EVIDENCE (§ 459*)—PAROL EVIDENCE—DESCRIPTIO PERSONÆ—"TRUSTEE"—PERSONAL LIABILITY.

Pennsylvania Negotiable Instruments Law (P. L. 1901, p. 198) § 20, provides that where an instrument contains, or a person adds to a signature, words that he signed for or in behalf of a principal, or in a representative capacity, he is not liable on the instrument, if he was duly authorized, but that the mere addition of words describing him as an agent or as filling a representative capacity, without disclosing his principal, does not exempt him from personal liability. *Held*, that where a Roman Catholic Bishop held title to the property of the diocese as trustee in accordance with the rules and regulations of the church, and for the purpose of raising money for the benefit of a congregation indorsed the note of the congregation as an irregular indorser with the word "trustee," after his name, he being authorized in his representative capacity to bind the property to the diocese, he was entitled to show, by parol, that he intended to sign in his representative capacity only, and that the payee and indorsee had knowledge of the fact, and that the addition of the word "trustee" was not mere descriptio personæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2110; Dec. Dig. § 459.*

For other definitions, see Words and Phrases, vol. 8, pp. 7128–7133; vol. 8, p. 7822.]

Holland, District Judge, dissenting.

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

Action by the American Trust Company against Regis Canevin. Judgment for defendant, and plaintiff brings error. Affirmed.

Gordon & Smith, for plaintiff in error.

A. B. Reid, J. R. Cray, A. V. D. Watterson, and Chas. D. Gillespie, for defendant in error.

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

LANNING, Circuit Judge. This is an action by the American Trust Company against Regis Canevin as indorser of a promissory

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

note. The following is a copy of the promissory note with its indorsements:

$15,000. New Salem, Pa., Feb. 26, 1908.

One year after date ..... promise to pay to the order of Fidelity Funding Company, at the First National Bank of New Salem, fifteen thousand dollars, without defalcation. Value received.

[Signed] St. Thomas R. C. Congregation,
By Rev. Ign. Ostaszewski, Treas. & Pastor.

[Indorsed] St. Thomas R. C. Congregation at Footedale,
By Rev. Ign. Ostaszewski, Pastor.
Regis Canevin, Trustee.
Fidelity Funding Co.,
By P. J. Keiran, Vice Pres't.

After the note had been delivered to the payee, the Fidelity Funding Company, it placed its indorsement under the name of Regis Canevin and transferred the note before maturity and for value to the plaintiff, the American Trust Company. The action is against Canevin only, and he is sued as indorser.

The form of the note presents the question whether there is, above the indorsement of the Fidelity Funding Company, one indorsement (that of the St. Thomas Roman Catholic Congregation at Footedale, verified by the signatures of Rev. Ign. Ostaszewski, Pastor, and Regis Canevin, Trustee), or whether there are two indorsements (one by the St. Thomas Roman Catholic Congregation at Footedale, verified by the signature of Rev. Ign. Ostaszewski, Pastor, and the other by Regis Canevin, Trustee). The affidavit of defense, however, expressly admits that, before the note was delivered to the Fidelity Funding Company, there was an oral agreement that the defendant should indorse it, although it is further said that the agreement was that the indorsement should be "as trustee for said congregation." And the case was tried on the theory that the defendant's signature constituted a separate indorsement. Consequently we must dispose of the case upon that theory.

Prior to the enactment by the Pennsylvania Legislature of the negotiable instruments law of May 16, 1901 (P. L. 1901, p. 194), the courts of the state of Pennsylvania held that an irregular indorsement, like that before us, imported a liability as second indorser, unless a different liability could be established by competent written evidence; parol evidence not being admitted because of the Pennsylvania statute of frauds. Slack v. Kirk, 67 Pa. 380, 5 Am. Rep. 438; Eilbert v. Finkbeiner, 68 Pa. 243, 8 Am. Rep. 176; Temple v. Baker, 125 Pa. 634, 17 Atl. 516, 3 L. R. A. 709, 11 Am. St. Rep. 926; Central Nat. Bank v. Dreydoppel, 134 Pa. 499, 19 Atl. 689, 19 Am. St. Rep. 713. Under that rule such an indorser, on payment of the note to a holder obtaining title through the indorsement of the payee, might recover from the payee as first indorser regardless of the actual order of the indorsements, provided the payee could not establish by proper written evidence a prior liability on the part of the irregular indorser. Under that rule, therefore, if the word "trustee" be rejected as a mere descriptio personæ, Canevin would be liable to the plaintiff as second indorser.

But section 64 of the negotiable instruments law declares:

"Where a person, not otherwise a party to an instrument, places thereon his signature in blank, before delivery, he is liable as endorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. * * *"

This statutory rule modifies the previous rule in Pennsylvania by making the liability of an irregular indorser, of the kind now before us, prior to that of the payee.

But the question remains: Must the word "trustee" be rejected as a mere descriptio personæ, or may the defendant show, by parol evidence, that he intended, by adding the word "trustee" after his name, to make a restrictive indorsement as trustee for the St. Thomas Roman Catholic Congregation at Footedale?

Section 20 of the negotiable instruments law is as follows:

"Where the instrument contains or a person adds to his signature words indicating that he signed for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent or as filling a representative character, without disclosing his principal, does not exempt him from personal liability."

This section was construed in Birmingham Iron Foundry v. Regnery, 33 Pa. Super. Ct. 54. In that case the note sued on was signed "Catasauqua Rubber Company of Penna., Wm. W. Wilson, Secy. and Treas.," the payee was "Birmingham Iron Foundry," and the indorsement, which was in blank, was "Jas. Regnery, Prest." In the supplemental affidavit of defense it was averred that the plaintiff knew that James Regnery was the president of the Catasauqua Rubber Company, "and that when he indorsed his name as president on said note it was known to the plaintiff that it was a restrictive indorsement and was not intended to bind the indorser individually." On a rule to show cause why judgment should not be entered against the defendant for want of a sufficient affidavit of defense, the trial court discharged the rule, holding that parol proof of the defense set up was competent. When the case reached the Superior Court, it said, after quoting section 20 of the negotiable instruments law:

"The last clause, in terms at least, is simply declaratory of the established law; it introduces no new rule, and the rule that it does embrace is obviously not a complete statement of the law whereby the question of the personal liability of one who signs in the manner described may be determined. The 'mere' addition of certain words will not exempt from personal liability; but the statement of the law in this form, instead of in the form of an affirmative declaration that doing this or that shall create a personal liability, indicates that the Legislature did not intend to establish a fixed and rigid rule to be applied without regard to other facts, and particularly the intention of the parties to the instrument. The words imply that a signing in the manner described, taken in connection with other facts, may exempt from personal liability to the payee in the instrument. As there is nothing in the context to show the conditions under which there will be such exemption, resort must necessarily be had to the authoritative decisions in which such conditions are described. Presumably, the Legislature did not intend to abrogate the law, which, under the decisions cited in the opinion of the learned judge below, was applicable to such a state of facts as is set forth in the original and supplemental answers. The material clause of the supplemental answer is quoted in his opinion, and in connection with that should be read the explicit averment of the original answer that the plaintiff took, received,

and acquired the note upon the credit and as the undertaking of the Catasauqua Rubber Company, and consented to, and acquiesced in, and recognized the indorsement thereupon as that of the said company through its president, the defendant. The fact that the construction contended for by the appellee's counsel would give the instrument no additional value by reason of the indorsement would properly be considered in determining as to the truth of the appellee's averments. Upon the trial of the case it would be a reason for scrutinizing the testimony with care. But, whatever doubt may be created as to the defendant's allegation by this construction, it would not be sufficient to warrant us in holding that the affidavits taken together are insufficient to prevent summary judgment."

In Kerby v. Ruegamer, 107 App. Div. 491, 95 N. Y. Supp. 408, it appears that Kobbe and Manneck were erecting new buildings on lands in Brooklyn. Finding themselves unable to complete the improvements, they conveyed the property to the three defendants in trust to complete the buildings, settle claims against them, rent, sell, or mortgage the property, and apply the proceeds to the claims of the creditors, paying the surplus, if any, to Kobbe. The note sued on was given by the defendants for materials used in making the improvements. To their names, as makers, they added the words "as trustees, etc." The plaintiff, who was the payee, knew all the facts concerning the trusteeship of the makers, whom he sued personally. The Supreme Court said:

"The purpose of section 39 of the negotiable instruments law [Laws 1897, c. 612], which provides that, 'where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized, but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability,' is limited to putting the payee of such a note in possession of the knowledge that in the execution and delivery no personal liability was intended to be assumed by the makers; and where, as in this case, the payee knows that the makers are trustees, and the objects and purposes of their trust, as well as their powers thereunder, and has contracted with them in their representative capacity and furnished certain property to be used in furtherance of their trust duties and requests a note as an evidence of the indebtedness so created, it is not necessary, as to him, and the makers are not required (to relieve themselves from personal liability on such note), to repeat to him in writing upon the face of the instrument, or orally, information that he already possesses."

In Megowan v. Peterson, 173 N. Y. 1, 65 N. E. 738, the payees brought suit upon a promissory note made by "Charles G. Peterson, Trustee." The firm of Johnson & Peterson had become insolvent. The creditors appointed Peterson as trustee to manage the business. Thereupon Johnson conveyed all his interest in the partnership property to Peterson. The note sued on was given by Peterson to plaintiff for lumber purchased by Peterson and used by him in the erection of buildings which the firm had contracted to erect. The action was against Peterson individually. His defense was that the note was given, and understood by the plaintiffs to have been given, in his representative capacity, and that he was not personally bound. At the trial the plaintiffs insisted that they were entitled to go to the jury on the controverted question whether the plaintiffs gave credit to the defendant in his representative capacity, or as an individual. The trial court, however, directed a verdict for the defendant. The Court

of Appeals, after referring to the section of the negotiable instruments law above quoted, said:

"In this case, as we have seen, the defendant signed the note and then added to his signature the word 'trustee.' He did not, in the instrument itself, disclose the fact that he was trustee for the creditors of Johnson & Peterson, so that, under the provisions of the statute, he would become personally liable upon the note unless he could show that at the time of the delivery of the note to the plaintiffs he disclosed the fact that the consideration for which the note was given was for the benefit of the creditors of Johnson & Peterson, and that he gave the note as the trustee for such creditors. It is contended on behalf of the plaintiffs that his representative character must be disclosed upon the face of the note. This may be so in so far as innocent purchasers for value are concerned, but as to the payees named in the note we think a different rule prevails. * * * We do not understand that the statute to which we have alluded was designed to change the common-law rule in this regard, which is to the effect that, as between the original parties, and those having notice of the facts relied upon as constituting a defense, the consideration and the conditions under which the note was given may be shown."

In many cases a trustee has no power to bind his trust estate. In many other cases he has such power. If, in a case where he has the power, he enter into a contract, adding to his name the word "trustee" merely, he will nevertheless be personally liable unless the party with whom the contract is made understands that he intends to bind only the trust estate and not himself. If there be such an understanding, we see no reason why the liability of the person acting as trustee should not be limited according to the intention of the parties. In Taylor v. Davis, 110 U. S. 330, 4 Sup. Ct. 147, 28 L. Ed. 163, it appeared that the defendants, who had signed a contract as "Trustees of the Cairo City Property," had undertaken to pay a conceded balance due to the plaintiff's intestate whenever there should be a certain surplus of trust funds in their hands sufficient for that purpose, and that they had had such surplus and had used it for other purposes. The court held that they were personally liable for the breach of their undertaking. The strong language of that case to the effect that a trustee is not an agent, and that when one contracts as a trustee he is personally bound, must be read with the particular facts of the case in mind. Indeed, the court there said that:

"If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate."

It is not said that the stipulation must in every case be expressed on the face of the contract.

In the light of these authorities, we think it was competent for the trial court in the present case to inquire whether the indorsement by Regis Canevin of the note here in suit was understood between him and the Fidelity Funding Company to be an indorsement pledging only the credit of the property which he held in trust for the St. Thomas Roman Catholic Congregation at Footedale, and, if so, whether the plaintiff accepted the note from the Fidelity Funding Company with notice of that fact. There is uncontradicted evidence in the case that the defendant Regis Canevin is the Roman Catholic

Bishop of the diocese of Pittsburgh; that the rules and regulations of the Roman Catholic Church in that diocese require the bishop to act as the trustee of all Roman Catholic Church properties within his diocese; that the property of the St. Thomas Roman Catholic Congregation at Footedale is in Fayette county; 'that on February 8, 1905, the common pleas court of Fayette county, by its order, appointed Bishop Canevin, the successor of Bishop Phelan, then deceased, "trustee of the various pieces of real estate within Fayette county, owned by the Roman Catholic congregations, associations and institutions, within said county"; that the title to the real estate of St. Thomas Roman Catholic Congregation thereupon became vested in Bishop Canevin as trustee for that congregation; that, in accordance with the rules and regulations of the Roman Catholic Church in the diocese of Pittsburgh, the pastor and a committee of the congregation at Footedale applied, on March 1, 1908, to Bishop Canevin for permission to borrow, from the Fidelity Funding Company, for the purpose of paying off an indebtedness created in the improvement of its buildings and property, the sum of $15,000; that on the same day the congregation applied to the Fidelity Funding Company by a written application for a loan of $15,000, to be secured in part by a mortgage on its real estate; that the congregation agreed to obtain the written authority of the bishop for the loan; that the Fidelity Funding Company accepted the application on March 13, 1908; that the note in suit represented the same indebtedness which the mortgage was to secure and was delivered to the Fidelity Funding Company, with the defendant's indorsement thereon, after the defendant had approved the application; and that, notwithstanding no money was ever advanced to the congregation, possibly because no mortgage had yet been delivered, the Fidelity Funding Company, on July 30, 1908, transferred the note to the plaintiff as collateral security for a loan.

We have no doubt but that the officers of the Fidelity Funding Company who transacted the business with the Footedale Congregation had actual notice that the title to the real estate of the congregation was vested in the bishop, and that his consent to borrow the $15,000 was necessary. In any event, the Fidelity Funding Company could maintain no action on the note against the defendant, for the reason that it never gave anything for it. While that fact is no defense, as against the present plaintiff, it appears that when Mr. Fessenden, president of plaintiff company, was negotiating with Mr. Keiran, vice president of the Fidelity Funding Company, for the note, Mr. Fessenden learned from Mr. Keiran that the defendant was bishop of the diocese of Pittsburgh. The following excerpt from Mr. Fessenden's cross-examination is pertinent:

"Q. Did he (Mr. Keiran) not inform you that he (the defendant) was the Bishop of the Roman Catholic Diocese in Pittsburgh?

"A. He did.

"Q. And he signed and indorsed the note in that capacity for the property of the parish under the rules of the diocese in Pittsburgh?

"A. He did."

In his deposition taken previous to the trial, Mr. Fessenden further testified as follows:

"Q. Well, you had no idea then that his signing his name, as you thought as Bishop of Pittsburgh, made him personally liable, did you? It was not on any personal responsibility of his that you made the loan, was it?
"A. No, I don't think it was."

With these facts before the court below, it submitted the case to the jury to determine whether the defendant should be held personally liable. Their verdict was that he should not, and on that verdict judgment was entered in the defendant's favor.

In Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665, where judgment was entered against the defendant on default upon a check which he had signed "W. G. Williams, V. Prest.," and a bill was filed to set aside the judgment on the ground of surprise, Mr. Justice Bradley said:

"The ordinary rule undoubtedly is that if a person merely adds to the signature of his name the word agent, trustee, treasurer, etc., without disclosing his principal, he is personally bound. The appendix is regarded as a mere descriptio personæ. It does not of itself make third persons chargeable with notice of any representative relation of the signer. But if he be, in fact, a mere agent, trustee, or officer of some principal, and is in the habit of expressing, in that way, his representative character in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents thus made and used as his personal obligations, contrary to the intent of the parties."

The negotiable instruments law has been enacted in a large number of our states. Its uniform construction is most desirable. We are not dealing now with the indorsement of an executor, or administrator, or testamentary trustee, who, ordinarily at least, has no power to bind his trust estate by a contract enforceable in a court of law, but with the indorsement of one who holds, in trust, the property of a religious society which, observing the rules and regulations of the society, he may sell or mortgage, or subject to liability for the payment of debts incurred by him in his representative capacity. In the present case, the society applied to the bishop for permission to borrow $15,000 from the Fidelity Funding Company. The application was made in the manner required by the rules and regulations governing the society. The bishop, under those rules and regulations, had the authority to approve the application and, as trustee for the society, to indorse the note on which it was intended to obtain the loan. The twentieth section of the negotiable instruments law declares that:

"Where * * * a person adds to his signature words indicating that he signed * * * in a representative capacity, he is not liable on the instrument if he was duly authorized, but the mere addition of words describing him * * * as filling a representative character, without disclosing his principal, does not exempt him from personal liability."

Here, the authority was complete, and the question submitted to the jury was whether the plaintiff knew that the indorsement was intended to be a restrictive one carrying with it merely the credit of the property of the society held in trust by the defendant. We think such a submission was in accord with the construction given to the section by the courts of New York and Pennsylvania above referred to. Mr. Fessenden admits that when he accepted the note in suit for the plaintiff company he knew that the defendant was the Roman Catholic

Bishop of Pittsburgh, and that he did not understand that the bishop was personally bound by his indorsement. He gave credit to the property which the bishop represented as trustee and not to the bishop personally. To construe the indorsement, in such circumstances, as the personal obligation of the defendant, is contrary to the intent of the parties, and, we think, contrary to the intent of the twentieth section of the negotiable instruments law.

Our conclusion is that the judgment of the Circuit Court should be affirmed, with costs.

HOLLAND, District Judge, dissents.

IRVINE v. DELAWARE, L. & W. R. CO.

(Circuit Court of Appeals, Third Circuit. February 11, 1911.)

No. 1,429 (No. 90).

1. CARRIERS (§ 280*)—INJURIES TO PASSENGERS—CARE REQUIRED.

While a carrier of passengers is not an insurer of their safety, it is bound to use the utmost care to guard against the possibility of accident arising from the condition of its road, machinery, and appliances used in transportation, or from the conduct and control or any defect in such conduct or control of its transportation business.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085–1117; Dec. Dig. § 280.*]

2. CARRIERS (§ 316*)—INJURIES TO PASSENGERS—BURDEN OF PROOF.

In an action against a carrier for injuries to a passenger, the burden of proof in the first instance rests on the plaintiff; but, under certain circumstances, it may shift to the defendant to rebut a presumption of negligence arising from such circumstances.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261–1294; Dec. Dig. § 316.*]

3. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—RES IPSA LOQUITUR.

Where, in an action for injuries to a passenger while attempting to board a train, the sole issue raised by the evidence was whether there had been any such sudden movement or jerk of the train as alleged, the court properly refused to charge that, if plaintiff was a passenger and was injured while she was in the exercise of ordinary care, such facts were prima facie evidence of defendant's negligence and liability; the rule of res ipsa loquitur being unavailable to create a liability not within the issues as made.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1326–1343; Dec. Dig. § 321.*]

4. CARRIERS (§ 321*)—INJURIES TO PASSENGERS.

Where, in an action for injuries to a passenger by an alleged premature start of the train throwing her to the ground, the jerk of the train was denied, and the court charged that, if there was no jerk, there was no negligence, in which event defendant was not bound to show how plaintiff's hip was broken, whether she fell from the platform or caught her skirt, etc., there was no error in granting defendant's further request to charge that if plaintiff accidentally slipped from the steps of the car to the ground, or stumbled and fell before reaching the steps, she could not recover.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1326–1343; Dec. Dig. § 321.*]

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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 New Jersey.

Action by Laura A. Irvine against the Delaware, Lackawanna & Western Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Louis Hicks, for plaintiff in error.

M. M. Stallman, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge. The action in this case was brought by the plaintiff in error against the defendant in error, to recover damages for personal injuries which the plaintiff alleged she sustained while a passenger on defendant's railroad. The declaration is in two counts, the first charging that the plaintiff, having purchased a ticket from the defendant entitling her to be carried as a passenger from East Orange to Hoboken, boarded a car of the defendant company for that purpose as a passenger, at the station maintained by defendant at East Orange, and that defendant, failing in its duty, etc., negligently, carelessly, etc., operated and ran its said car and locomotive attached thereto, and by reason of such negligence, etc., of defendant and its servants, plaintiff was violently thrown from said car to the ground, and thereby sustained the injuries complained of, without any fault or contributory negligence on the part of the plaintiff. The second count, with the same preliminary statement, charges that, after plaintiff had paid to the defendant her fare, in consideration therefor the defendant invited the plaintiff to enter upon a car of said train as a passenger; that thereupon, pursuant to said invitation, plaintiff stepped upon the steps of said car, and while she was ascending the same, defendant, without warning to plaintiff, and without allowing to plaintiff sufficient time within which to ascend the steps of said car, negligently, carelessly and recklessly started and jerked said car and its locomotive attached thereto, by reason of which negligence, etc., plaintiff was violently thrown to the ground and thereby sustained the injuries complained of. And this, without fault or contributory negligence on her part.

The only testimony adduced by plaintiff in support of this charge, was that of the plaintiff herself and of the coachman who had driven her to the station, and who was sitting in his carriage some distance from the train at the time of the accident. The plaintiff testified that, as she was in the act of boarding the train, and was on the first or lower step of one of the cars, and was about to place one foot upon the second step, the car gave a sudden jerk or movement, which loosened her hold upon the hand rail and threw her to the ground, whereby she sustained the injuries complained of. The coachman, in his testimony, corroborated that of the plaintiff, especially as to the jerk or movement of the train. Twelve or thirteen witnesses were called by the defendant, including the conductor and trainmen. Others were passengers on the train, all of whom, or the greater number of whom, testified that they recalled the accident and declared with more or less

positiveness that there was no jerk or other movement of the train after it stopped at the station and while the plaintiff was boarding the car. It thus appears from the record that the case throughout was tried upon plaintiff's theory, as stated in the second count of her declaration and supported by her own testimony and that of the coachman who had driven her to the station, viz., that she was thrown by a sudden movement or jerk of the train from the steps of the car she was attempting to enter. Upon this evidence, the court submitted the case to the jury, who returned a verdict of "not guilty." The trial court allowed, and subsequently discharged, a rule to show cause why the verdict should not be set aside.

The assignments of error, all except two, are founded upon exceptions to the refusal of the court below to charge as requested by the plaintiff. In different forms, they raise two principal questions. The gravamen of most of them, however, is involved in the second assignment of error, which is, that the plaintiff having requested the court to charge the jury as follows:

"If the jury find from the evidence that plaintiff was a passenger upon the car of defendant and was there injured while she was in the exercise of the ordinary care of a reasonably prudent person in her situation, such facts are prima facie evidence of defendant's negligence and liability."

The court refused this request, except as charged.

As shown above, the case was tried upon the narrow issue presented by the pleading and the plaintiff's own testimony. The act of the defendant complained of was the sudden jerk or movement of the car as plaintiff was boarding it. No other cause of the accident which befell her was suggested, and every other possible cause of the accident, resulting from the conduct of the defendant, or from happenings over which it had control, was thus, so far as its presentation by plaintiff was concerned, eliminated from the case and from the consideration of the jury. In submitting this narrow issue to the jury, the court was entirely fair to the plaintiff. It presented the case to them with the instruction, that, if they believed the train was jerked or moved as described by the plaintiff in her testimony, the defendant had not explained the same or rebutted the presumption of negligence arising therefrom. As a matter of fact, the defendant did not attempt to rebut such presumption of negligence as would have arisen from the fact of the bump or jerk, as described by the plaintiff as having occurred, but denied the happening itself of any such movement or jerk of the train, and produced the testimony of numerous witnesses in support of this denial. In the course of its charge, the learned judge of the court below said to the jury:

"Now, it has not been denied on the part of the defendant that if this testimony is true, that if the accident had happened under such circumstances, the defendant company would be liable. It was practically so admitted by the defendant in the opening of the case. You understand what their defense is. If Mrs. Irvine was injured in the way she has testified and thrown from the platform to the ground, it would call for an explanation by the defendant, and if it was not explained you would have to find negligence on the part of the defendant company."

Further on in his charge, the trial judge said:

"Now, gentlemen, that is the crux of this case—the sudden jerk of the car which caused this injury. If you find that this start or jerk took place and the plaintiff was thereby thrown, the plaintiff is entitled to a verdict, and if not, the defendant is entitled to it. So far as the defendant is concerned, all their witnesses say that it didn't."

The theory upon which the case was submitted to the jury is further shown in the opinion of the trial judge, in refusing the motion for a new trial. He says:

"The point at issue was a narrow one, and the clear weight of the evidence apparently lay with the defendant. * * * The only allegation of the declaration, however, relied upon at the trial, and towards which the evidence was directed, was that the train of the defendant's cars suddenly jerked and started while the plaintiff was on the steps of one of them, in the act and with the intention of entering it as a passenger. * * * So far as the evidence discloses, the defendant was negligent in the respect mentioned, or not at all. Aside from that, there is absolutely no evidence in the case showing that the defendant was negligent or otherwise lacking in any duty which it owed her as a passenger. Plaintiff's counsel contends, if I understand his argument, that the doctrine of res ipsa loquitur applied. If this were admitted, the res was nevertheless explained, * * * so far as it could be explained, by showing that the train did not jerk or start. Of course, if the jerk or start had been admitted, or not denied by the defendant, a case of prima facie negligence would have been shown, which, in the absence of explanation, would have required a verdict for the plaintiff, unless she was guilty of contributory negligence."

Under the facts and circumstances of the case, as disclosed by the pleadings and evidence, we think the learned judge of the trial court was right in his conception of the law applicable thereto. Counsel for plaintiff in error seems to have misconceived the true reason and philosophy of the rule as to the burden of proof in the present case and the class of cases he has cited to the court. There was no controversy in the court below, nor is there any here, as to the measure of duty imposed upon a common carrier to the passenger whom it has undertaken to carry for hire. It is well settled that, while the common carrier of passengers is not an insurer of the safety of its passengers, yet it is bound to use the utmost care to guard against the possibility of accident arising from the condition of its road, machinery and appliances used in transportation or from the conduct and control, or defect of such conduct or control of its transportation business.

Neither can there be any controversy that, while in an action by a passenger against a carrier for alleged negligence resulting in injury to the passenger, the burden of proof as to negligence rests, in the first instance, upon the plaintiff, that burden may, under certain circumstances, shift to the defendant to rebut a presumption of negligence arising from such circumstances. It might perhaps be said that, even in such a case, it is not so much a shifting of the burden of proof as the permitting of a presumption, which is, after all, a species of evidence, or at least a substitute for evidence, to be availed of by the plaintiff in supporting his own burden of proof. Be this as it may, and it is merely academic as far as this case is concerned, the impor-

tant matter for present determination is, what are the circumstances upon which such a presumption of negligence may arise?

The first instruction asked for by the plaintiff below, the refusal of which is the ground for the second assignment of error, is, as already quoted:

"If the jury find from the evidence that plaintiff was a passenger upon the car of the defendant, and was there injured while she was in the exercise of ordinary care, * * * such facts are prima facie evidence of defendant's negligence and liability."

This is the proposition to which the plaintiff in error's counsel has devoted the principal part of his argument before the court, and as set out in his brief. If the word "injured" or "injury" is used, not in its juristic sense, as connoting a tort and therefore implying the wrongful act of some one by which another suffers, but, in its colloquial sense, meaning any "hurt" or "damage," as in this case, to the person of the passenger (and that seems to be the contention of the plaintiff in error), it hardly needs argumentation to show its fallacy. The law is not so unreasonable in the trial of an action in tort, as to found a presumption of guilt on facts or occurrences entirely dissociated by the pleadings or evidence from the defendant's agency as the proximate cause thereof. But, according to the contention of the plaintiff in error, a passenger who by reason of weakness or momentary vertigo, or by reason of the ordinary and regular movement of the train, should fall in the aisle of the car and suffer hurt or damage, would be permitted, in an action against the carrier company, to rest upon a presumption of negligence, as arising from the mere fact that he was injured or hurt, and to throw upon the defendant the burden of negativing negligence on its part. Such a proposition is as unsupported by authority as it is by reason. The counsel for the plaintiff in error has founded his argument upon what we have said was a misconception of the true meaning of the doctrine established by the decisions to which he has referred. This misconception has apparently arisen from considering certain language in the reported opinions of the cases, apart from the facts and circumstances with reference to which the opinions were announced. The case upon which much reliance is placed, is Railroad Co. v. Pollard, 22 Wall. 341, 346 (22 L. Ed. 877). It must therefore be critically examined. The report, so far as the question now before us is concerned, is very meager, and there was little or no discussion of that question by the Supreme Court, and, as it appears, little or none by the trial judge of the court below. It is stated that, at the close of the evidence in the court below, plaintiff's counsel requested the court to charge:

"That while the plaintiff was bound to satisfy the jury that the injury was caused by the negligence of the defendants, if from the evidence the jury were satisfied that the injury was occasioned while Mrs. Pollard was a passenger on defendant's road, and that she was in the exercise of ordinary care, namely, that degree of care which may reasonably be expected from a person in her situation, this would be prima facie or presumptive evidence of the defendant's liability; and that the plaintiff would not be required to show by what particular acts of misconduct or negligence on the part of the defendants the injury was occasioned."

It also stated (page 346 of 22 Wall., 22 L. Ed. 877) that:

"The court charged that the law, as decided by this court in Stokes v. Saltonstall, 13 Pet. 181 [10 L. Ed. 115], was in accordance with what the request thus made assumed it to be."

Defendant excepted to this charge of the court, and the only thing said by the Supreme Court in regard to the exception was (page 350 of 22 Wall., 22 L. Ed. 877):

"It is conceded that the part of the charge excepted to is fully sustained by the decision of this court in Stokes v. Saltonstall. We see no necessity for reconsidering that case."

Before leaving this case, it is necessary to look at the facts of the case, as they appeared in the trial court, and as stated in the report of the case before the Supreme Court. The plaintiff was journeying as a passenger from Philadelphia to New York, in one of the trains of the defendant company. When within about 100 yards of the depot at Jersey City, the whole train was switched off upon a siding, and in the operation of "drilling" the four passenger cars backwards and forwards, in one of which was the plaintiff, one car bumped against another with a certain degree of force, and the plaintiff, who was standing, was thrown against the arm of the seat in which she had been sitting, receiving the injuries complained of. The case, therefore, both in the court below and in the Supreme Court, must be considered with reference to the facts stated to have been alleged and proved.

We now turn to the Saltonstall Case, upon which the Pollard Case, as regards the point now under consideration, was rested by the Supreme Court. In that case, the plaintiff was a passenger in a stagecoach of the defendants, who were common carriers of passengers. While being driven on an open road in daylight, the coach was upset, whereby the plaintiff received the injuries complained of, and the Supreme Court, in affirming the judgment of the court below, in favor of the plaintiff, decided, among other things, that:

"The facts that the carriage was upset and the plaintiff's wife injured, are prima facie evidence that there was carelessness or negligence, or want of skill on the part of the driver, and cast upon the defendant the burden of proving that the accident was not occasioned by the driver's fault."

Here, then, as in the Pollard Case, there was a distinct act or happening in the course of the conduct of the business of the defendant, out of the ordinary routine of that business, when properly conducted, upon which the presumption of negligence rests, throwing upon the defendant in the one case the burden of showing how the car in which the passenger was riding came to be violently struck or "bumped," thus occasioning the injury; and in the other, how the coach came to be upset when proceeding along the highway. Both of these happenings were connected with the operation of the carrier's business, and constitute the facts or circumstances on which a presumption of negligence is allowed.

The rule of presumption of negligence applied in both of these cases, is entirely different from that contended for by the plaintiff in error. The learned counsel for the plaintiff in error also cites, in support

of his contention, Gleeson v. Virginia-Midland R. Co., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458. In that case, the plaintiff, a railway postal clerk, while traveling in a postal car of the defendant and over its road, was injured by reason of the train being derailed by a landslide which had occurred in a railway cut, the force of the collision having thrown the plaintiff against a stove and letter box. Here again, we have a distinct fact, viz., the derailment and collision of the train while being operated by the defendant, a happening not usual in the ordinary and properly conducted operation of the carrier's business—a distinct proximate cause of the injuries complained of, and presumably connected with the business of the defendant. The plaintiff's counsel, however, dwells upon the following language of the Supreme Court, as supporting his contention:

"Since the decisions in Stokes v. Saltonstall, and Railroad Co. v. Pollard, it has been settled law in this court that the happening of an injurious accident is in passenger cases prima facie evidence of negligence on the part of the carrier, and the passenger being himself in the exercise of due care, the burden then rests upon the carrier to show that his whole duty was performed. * * * When he (the plaintiff) proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation."

It is necessary to again observe that the language of the court must be applied to the facts of the case, and that this case is, no more than the preceding, an authority for the proposition contended for by the plaintiff in error.

Mr. Justice Lamar, who delivered the opinion of the Supreme Court in this case, cites approvingly the leading and often cited case of Kerney v. London, etc., Ry., L. R. 6 Q. B. 759. There, the plaintiff had been injured while walking along a public highway, by a brick which fell from a pier in defendant's bridge. A train had just passed, and counsel for defendant submitted that there was no evidence of negligence. There, the doctrine of res ipsa loquitur was applied by Chief Justice Cookburn. The falling of the brick was something out of our ordinary experience, as bricks in such structures are expected to remain in the places in which they are set, and the falling out was presumably due to want of proper inspection and care by the defendant. This and other cases referred to by the learned justice fully displayed the principle upon which the doctrine of res ipsa loquitur is applied. It should be noted, however, in passing, that the word "accident," as used in this case and many others, is not to be held to mean merely the wound or damage to the person of the defendant, but signifies the unexpected or unusual happening or event which causes such hurt or damage, and an injurious accident is, therefore, a happening which causes injury, i. e., hurt or damage, and in the connection in which we are now considering the word, it imports an efficient and proximate cause of the hurt or damage suffered by the complainant. A man is run over in the street by a vehicle. It is spoken of as an accident. The sudden and unexpected and unintended impact of the carriage against his person constitutes the accident which may, or may not, have been caused by negligence; it is not merely the hurt resulting therefrom to such person. The case at bar, as presented by the plain-

tiff to the trial court, is a good example of the distinction we are dwelling upon. She there asserted and produced testimony tending to prove that she was thrown down by the sudden and unexpected jerk of the car she was boarding. This was an exterior cause, presumably within the control of the defendant, connected with the transaction of its business, and upon this accident is properly raised the presumption of negligence. It is hardly necessary to quote at length from the cases cited by counsel for the plaintiff in error on this point. We have examined them all, and in every one of them in which this rule of presumption has been stated, it will be found, as pointed out by counsel for defendant, the fact of an accident or injurious act was admitted or not denied, and it was with reference to this act of the defendant that the question of presumption of negligence arose, and not to the mere hurt or damage of the plaintiff.

In Cincinnati Traction Co. v. Leach, 169 Fed. 549, 95 C. C. A. 47, the plaintiff fell from the rear platform of a trolley car, on which he was permitted to ride, by reason of defective fastenings.

In So. Pac. Ry. v. Cavin, 144 Fed. 348, 75 C. C. A. 350, the train was derailed by a washout, for which liability was denied.

In Inland & Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, the plaintiff was injured by the steamboat coming into violent collision with her pier.

In Bryce v. Southern Ry. (C. C.) 122 Fed. 709, the car in which plaintiff was riding was derailed and rolled down the embankment.

In Southern Ry. v. Myers, 87 Fed. 149, 32 C. C. A. 19, a sleeping car was derailed and rolled down the bank.

In T. & P. Ry. v. Gardner, 114 Fed. 186, 52 C. C. A. 142, the train started before the plaintiff could board it.

In all these cases, it will be observed that the happening or act is connected with the conduct or business of defendant, and constitutes the injurious accident complained of. There is nothing we have found in the books to controvert the distinction we have been endeavoring to make or to support the contention of the plaintiff in error. A recent writer on Negligence thus sums up the principles to be deduced from the long list of cases cited by him:

"In such cases, the rule of res ipsa loquitur applies, and when that which causes the injury is shown to have been under the management and control of the carrier or its servants, and furnished and applied by it, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care, and there is said to be a presumption of negligence sufficient to entitle the plaintiff to go to the jury." Moore on Carriers, 772.

Thompson, in the last edition of his exhaustive work on Negligence (volume 3, § 2756), says:

"It has been pointed out by an able judge, that the presumption which arises in this case does not arise from the mere fact of injury, but from a consideration of the cause of the injury. Thus it was said by Ruggles, J.: 'A passenger's leg is broken while on his passage in the railroad car. This mere fact is no evidence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies also that it was caused by a crush in a collision with another train of cars belonging to the

same carriers, the presumption of negligence might arise—not however from the fact that the leg was broken, but from the circumstances attending the fact. * * * As shown by other decisions, the meaning of the foregoing doctrine is, that the mere fact that a passenger has sustained some injury of an unknown or obscure character, proceeding from an unknown or obscure source, while in transit in the carrier's vehicle, does not of itself raise the presumption that the injury proceeded from the negligence of the carrier. The presumption arises from a consideration, collectively, of the fact of the injury, and of the kind or source of it. The fact of an injury alone is not sufficient. It must be traced to the carrier.' "

The rule of presumption thus so clearly stated by these text writers, is in entire consonance, as we have already shown, with the decisions of the Supreme Court in Railroad v. Pollard, Stokes v. Saltonstall, and Gleeson v. Railway Co., supra, and with every other of the numerous cases in federal and state courts that have been brought to our attention. We close the discussion of this point with the following extract from the opinion of Judge McPherson in Kefauver v. Phila. & R. Ry. (C. C.) 122 Fed. 966, which expresses with great clearness the rule applicable in the class of cases we have been considering:

"It is no doubt true that a presumption of negligence arises against a carrier as soon as it has been proved that the injury which a passenger complains of was chargeable to an appliance of transportation; but by the very statement of the rule it is necessarily implied that the essential fact of chargeableness must be proved before the presumption arises, and the ordinary burden of proof is upon the plaintiff to establish the fact upon which he must rely as the basis of the presumption."

The only other point that requires our attention, is that raised by the assignment of error to the affirmance by the court of the defendant's request to charge as follows:

"If the plaintiff accidentally slipped from the steps to the ground, or stumbled or fell before reaching the steps, she cannot recover."

The court had previously said in its charge:

"If there was no jerk, then there was no negligence on the part of the defendant. They were not obliged under these circumstances to explain how she broke her hip, whether she fell from the platform or caught her skirt. They were not obliged to show that."

The language of the request affirmed by the court was merely in line with this statement of the court to the jury, and further, it illustrated by a concrete example that, under the evidence and presentation of the case, they were confined to the consideration of the question, whether the accident happened by reason of a jerk or sudden movement of the car of the defendant's train. If the jury were properly confined to this issue, it could not be error to tell them that, if the plaintiff fell by reason of some other accident, or stumbled before she reached the car, she could not recover.

There are no other assignments of error that require our consideration, and for the reasons stated, the judgment below is affirmed.

WASHINGTON-ALASKA BANK v. STEWART et al.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,818.

1. COURTS (§ 433*)—JOINDER OF ACTIONS—IMPLIED CONTRACT—REPAYMENT OF USURY—STATUTES.

Causes of action to recover usury paid at different times and on different loans, being regarded as actions to enforce an implied contract to repay the amount unlawfully collected, were properly joined under the Alaska Code, providing that plaintiff may unite several causes of action on contract, express or implied, in the same complaint.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 433.*]

2. USURY (§ 133*)—RECOVERY—ASSIGNEE FOR BENEFIT OF CREDITORS—JOINDER.

Where a debtor, after having paid usury, made an assignment for the benefit of creditors, his assignee was properly joined as a party plaintiff in an action to recover usury.

[Ed. Note.—For other cases, see Usury, Dec. Dig. § 133.*]

3. PLEADING (§ 359*)—ANSWER—SHAM.

Plaintiff sued defendant bank to recover usury. Defendant answered alleging that before the commencement of the action plaintiff had transferred the cause of action to S., who was the real party in interest; such answer being verified by the same officer who, after plaintiff had obtained leave to join S., filed a new answer alleging under oath that neither plaintiff nor S. was the real party in interest, but that S. was the agent and employé of a grocery company which was the real party in interest in fact, without making any explanation of such inconsistent averments. *Held*, that such amended answer was properly stricken as sham, since, if true, it showed that S. was trustee of an express trust and as such authorized to sue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1120–1128; Dec. Dig. § 359.*]

4. USURY (§ 137*)—RECOVERY—STATUTES—SCIENTER.

Civ. Code Alaska, § 256, providing that, if usurious interest is received or collected, the person paying the same or his legal representative may recover from the person receiving double the amount of the interest so received or collected, does not require that the usury be knowingly received in order to justify a recovery thereunder.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 420–423; Dec. Dig. § 137.*]

5. USURY (§ 111*)—ACTION TO RECOVER—COMPLAINT—SCIENTER.

A complaint to recover usury, alleging that the charging, collecting, and receiving of the interest was done by defendant with full knowledge that the same was illegal and wrongful, sufficiently charged that the usury was knowingly collected.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 272–306; Dec. Dig. § 111.*]

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

Action by C. J. Stewart and another against the Washington-Alaska Bank to recover usury. Judgment for plaintiffs, and defendant brings error. Affirmed.

The defendant in error C. J. Stewart brought an action against the plaintiff in error, a banking corporation, setting forth six separate causes of action, in each of which he alleged that at different dates specified the bank loaned to him a certain sum of money, and charged and collected from him

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

interest thereon at the rate of 2 per cent. per month, which was in excess of the amount allowed by law and was made illegal by section 256, c. 27, p. 408, of Carter's Civil Code of Alaska; that the aggregate of the usurious interest so charged and paid was $1,843.01. The prayer of the complaint was for the penalty imposed by section 257 of the statute in double the amount of the interest so paid. The bank demurred to the complaint on the grounds that several causes of action were improperly united, that neither of the separate counts set forth facts sufficient to constitute a cause of action, and that the court had no jurisdiction of the subject of the action. The demurrer was overruled, and the bank answered alleging that, before the commencement of the action, the plaintiff therein assigned the causes of the action to C. M. Shaw, who was the holder thereof at the time of the commencement of the action, and ever since, and is the real party in interest. Thereupon Stewart obtained leave of the court to amend his complaint by adding the name of C. M. Shaw as a party plaintiff, and by adding the averment that the "charging, collecting, and receiving of said interest was done by said defendant in the district of Alaska and with full knowledge that the same was illegal and wrongful," and by adding the further averment that after the payments of interest, and before the commencement of the action, Stewart assigned to Shaw all his property of whatever name and description, including his books of account and choses in action, for the purpose of enabling Shaw to collect the assets and pay the debts of Stewart and to pay the surplus remaining, if any, to Stewart.

To the amended complaint the bank demurred on the ground that several causes of action had been improperly united, and that in none of them were facts stated sufficient to constitute a cause of action. The demurrer was overruled, and the bank answered alleging, in substance, the following: That neither Stewart nor Shaw was the real party in interest, but that the West Coast Grocery Company, a corporation of Tacoma, Wash., was the real party in interest; that prior to the filing of the amended complaint Stewart had assigned and transferred to that corporation all right, title, claim, and interest in the cause of action and the proceeds thereof, and any judgment that might be recovered therein; that Stewart is so largely indebted that he is insolvent, and all his assets, together with the total amount claimed in said bill of complaint, will not pay his debts and liabilities to said corporation and other creditors; that he has no interest in said cause of action; that the same has been brought at the instance and on behalf of the West Coast Grocery Company, in the name of the plaintiffs, to avoid the defense that the said cause of action is not assignable; that it was the understanding and agreement that that company would pay all costs and expenses and attorney's fees in the action; that that company has employed, at its own expense, the attorney who is prosecuting the same; and that the plaintiffs have no interest in the subject-matter of said cause of action. Thereafter Stewart and Shaw filed a motion, supported by the affidavit of Stewart, to strike said answer from the records, and for judgment on the ground that the answer was sham and frivolous, and not interposed in good faith. The bank moved to strike the affidavit from the records on the ground that it could not properly be considered by the court upon the plaintiff's motion. The court overruled the bank's motion to strike out the affidavit, and granted the plaintiff's motion to strike out the bank's answer and for judgment, and thereupon rendered judgment against the bank, in favor of Stewart and Shaw jointly, for the sum of $3,686.02, and for costs and disbursements.

Wickersham, Heilig & Roden, Campbell, Metson, Drew, Oatman & Mackenzie, and E. H. Ryan, for plaintiff in error.

L. P. Shackleford and Alfred Sutro, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). Were several causes of action improperly united in the amended complaint? The Code of Alaska (Code Civ. Proc. § 84) provides that the plaintiff

may unite several causes of action in the same complaint when they all arise out of:

"First: Contracts express or implied; or
"Second: Injuries with or without force to the person; or
"Third: Injuries with or without force to property; or
"Fourth: Injuries to character; or
"Fifth: Claims to recover real property with or without damages for the withholding thereof; or
"Sixth: Claims to recover personal property, with or without damages for the withholding thereof; or
"Seventh: Claims against a trustee by virtue of a contract or by operation of law."

At common law joinder was permitted of all actions requiring the same plea and judgment. The Codes, however, have generally classified the causes of action which may be united in a complaint, and have permitted the joinder of those which fall within certain designated classes. The classification in the Code of Alaska is similar to that of most of the Codes. In view of the common-law rule which existed before the adoption of the Codes, it ought to be presumed that, when classes of causes which may be united are specified in a Code, it is the intention of the lawmakers to include therein under one or other of the heads all kinds of civil actions which may be brought. In 23 Cyc. 408, it is said:

"Actions for the recovery of statutory penalties are usually regarded as upon contract, and several causes of action, therefore, against the same defendant, may be joined"—citing Carter v. Wilmington, etc., Ry. Co., 126 N. C. 437, 36 S. E. 14; Maggett v. Roberts, 108 N. C. 174, 12 S. E. 890; Katzenstein v. Railroad Co., 84 N. C. 688; Railroad Co. v. Cook, 37 Ohio St. 265.

In the first three of these cases joinder of actions in one complaint to recover penalties was permitted on the ground that they were "actions arising out of contract express or implied." In Railroad Company v. Cook, an action to recover statutory penalties for overcharges for the transportation of passengers, it was held that several causes of action might be joined under the classification "injury with or without force to person or property." In Snow v. Mast, 65 Fed. 995, Judge Sage followed the decision in Railroad Co. v. Cook, and said that the statute providing for the joinder of actions should be construed liberally for the purpose of preventing multiplicity, and that different causes of action for penalties under a state statute might be united in the same petition.

The plaintiff in error cites Brown v. Rice, 51 Cal. 489, and Louisville & Nashville Ry. Co. v. Commonwealth, 102 Ky. 300, 43 S. W. 458, 53 L. R. A. 149, in which it was held, under Code provisions similar to those under discussion here, that no provision was made for joinder of causes of action to recover penalties, and State v. Yellowjacket Silver Mining Co., 14 Nev. 220, in which it was held that the right of a state to recover taxes did not arise from contract, and that the joinder of such causes of action was not permitted by the Code. In the first two of these cases, there is no discussion whatever of the grounds of decision. In the Nevada case, we find the better reasoning in the dissenting opinion of Beatty, C. J., whose view was that the obligation to pay a tax rests upon the implied promise

of the taxpayer, and the causes of action to enforce payment thereof arose out of an implied contract. We see no difficulty in the way of holding that the causes of action here sued upon arise under an implied contract. When the plaintiffs paid to the defendant interest in excess of the amount allowed by law, there arose an obligation tantamount to an implied promise to repay the amount so unlawfully exacted, and in addition thereto the law imposed an obligation to pay an equal amount. That obligation was enforceable under the Code pleading as a promise to pay, just as at common law assumpsit lay on an implied promise to discharge a legal obligation created by statute. Hillsborough County v. Londonderry, 43 N. H. 451; Bell v. Burrows, Bull, N. P. 129; Brookline v. Westminster, 4 Vt. 224; Bath v. Freeport, 5 Mass. 325. In Mayor, etc., of Balt. v. Howard, 6 Har. & J. (Md.) 383, 394, it was said:

"Where the law gives a claim to one against another, it raises an implied assumpsit on the legal obligation to pay."

There was no error in permitting the complaint to be amended to bring in Shaw as a party plaintiff. Both he and Stewart had an interest in the subject-matter of the action, and in the relief demanded, Shaw as the assignee for Stewart's creditors, Stewart as having a contingent interest, in reducing the assigned demands to judgment, and in obtaining a possible overplus after the payment of his debts. The parties stood in the attitude of trustee and cestuis que trust, the joinder of whom as parties plaintiff in actions affecting the trust property has always been permitted under the Codes. 30 Cyc. 118, and cases there cited.

Nor did the trial court err in striking out as sham and frivolous the answer of the plaintiff in error to the amended complaint. That answer was in the nature of a plea in abatement, alleging that neither Stewart nor Shaw was the real party in interest, but that the cause of action had been assigned, at some time unknown to the pleader, to the West Coast Grocery Company. The verification of this pleading was made by the same officer of the plaintiff in error who had in the first answer made oath that Shaw and not Stewart was the real party in interest. In the answer to the amended complaint there is no explanation of these inconsistent averments, and no allegation of mistake or misinformation. In the language of a proffered amendment which the plaintiff in error sought to have incorporated in the answer, alleging "that said C. M. Shaw is, and at all times mentioned in said amended complaint was, the agent and employé of said West Coast Grocery Company," we may find the ground on which it was alleged that the West Coast Grocery Company was the real party in interest. Taking it to be true, it shows that Shaw was the trustee of an express trust, and that as such he had the right to maintain the action on behalf of the grocery company. In this connection error is assigned to the refusal of the court to strike out the affidavit of Stewart which was filed in support of the motion to strike out the answer to the amended complaint, and it is urged that the affidavit had no place in the pleadings and could not properly be considered by the court. But there is nothing to show that the ruling of the

court was influenced by the affidavit. The order to strike out the amended answer was clearly sustainable upon the grounds above indicated.

It is contended that the demurrer to the amended complaint should have been sustained for want of an averment that the bank knowingly received usurious interest. Cases are cited which sustain the rule that the complaint must contain such an allegation where the statute makes recovery of the penalty depend upon the defendant's knowledge that usurious interest was knowingly charged or collected. There is such a provision in section 5198 of the Revised Statutes (page 3493, Comp. St. 1901) governing national banks, and under its terms it was held, in Schuyler National Bank v. Bollong, 24 Neb. 821, 40 N. W. 411, Garfunkle v. Bank of Charleston, 79 S. C. 404, 60 S. E. 942, and Henderson National Bank v. Alves, 91 Ky. 142, 15 S. W. 132, that the complaint must allege that the usurious interest was knowingly collected. The statute of Alaska contains no such, or equivalent, expression. It declares that, if usurious interest be received or collected, the person paying the same, or his legal representative, may recover from the person, firm, or corporation receiving the same double the amount of the interest so received or collected. But if, indeed, the statute were otherwise, and had made it a condition to the right to recover the penalty that the usurious interest was knowingly collected, we think the allegation of the amended complaint would be sufficient, for it is alleged that the "charging, collecting, and receiving of said interest was done by said defendant with full knowledge that the same was illegal and wrongful."

We find no error.

The judgment is affirmed.

IDAHO & W. N. R. R. v. WALL et al.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,843.

1. RAILROADS (§ 275*)—INJURIES TO PERSONS WORKING ON OR ABOUT CARS—INSTRUCTIONS AS TO MANNER OF WORKING—WAIVER.

Where defendant railroad company had instructed decedent, a scaler for a lumber company, not to scale the logs on the ground as they were being loaded onto cars, but to do the scaling on the cars after the logs had been loaded, but both decedent and the scaler employed by the railroad company continued to scale on the ground up to the time decedent was struck by a log and killed, and it also appeared that, because the logs were loaded flush with the ends of the cars, a scaler could not measure the ends of the logs without standing on the drawbar which was unsafe, the order given by defendant that the scaler should not work on the ground was waived.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 873; Dec. Dig. § 275.*]

2. RAILROADS (§ 282*)—INJURIES TO PERSONS WORKING ON OR ABOUT CARS—ACTIONS—ISSUES.

Where, in an action against a railroad company for death of a log scaler employed by a sawmill company to scale logs as they were being

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

loaded onto cars by the railroad company for transportation to the mill, defendant neither in its answer nor by suggestion at the trial nor in its motion for a directed verdict raised the question that defendant's duty to decedent was limited by the fact that he was not an employé of defendant, but a bare licensee or trespasser, and the court charged that, while the decedent was not employed by defendant, yet in a measure the same rules applied to him as though he had been, and that the work of the two companies was so intimately commingled that the decedent was practically engaged with defendant's employés, defendant's duty to decedent if he had been a bare licensee or a trespasser was not in issue.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 921; Dec. Dig. § 282.*]

3. RAILROADS (§ 275*)—INJURIES TO PERSONS WORKING ON OR ABOUT CARS—CARE REQUIRED—APPLICATION OF RULE OF LIABILITY OF MASTER TO SERVANT.

Where defendant railroad company loaded and transported logs for a lumber company, and both the railroad company and the lumber company employed a separate scaler to scale the logs as they were loaded onto the cars, the scaler employed by the lumber company was so intimately connected with the work of the railroad company that the court, in an action for his death by being struck by a log alleged to have been negligently loaded, properly charged that the railroad company owed to decedent practically the same duty as it owed to its own employés, and was bound to furnish, as to him, reasonably safe appliances for carrying on the work.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 873; Dec. Dig. § 275.*]

4. RAILROADS (§ 275*)—INJURIES TO PERSONS WORKING ON OR ABOUT CARS—CARE REQUIRED.

Where decedent was employed by a lumber company to scale logs as they were loaded by defendant railroad company onto cars for transportation to the mill, defendant was bound to exercise ordinary care for decedent's safety, under the rule that a railroad company is bound to exercise such care as to all persons who may lawfully be on its premises transacting business with it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 873; Dec. Dig. § 275.*]

5. RAILROADS (§ 282*)—INJURIES TO PERSONS WORKING ON OR ABOUT CARS—ACTIONS—NEGLIGENCE—QUESTION FOR JURY.

In an action for death of a log scaler by being struck by a log which fell from the hoisting tongs of a derrick used by defendant railroad company for loading the logs onto flat cars, evidence *held* to require submission to the jury of defendant's alleged negligence in permitting the log tongs to become so dull that they would not hold a log, and in failing to use a log chain in loading small logs.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 918; Dec. Dig. § 282.*]

6. RAILROADS (§ 282*)—INJURIES TO PERSONS WORKING ON OR ABOUT CARS—ACTIONS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

A request that if decedent in scaling logs for a lumber company voluntarily placed himself in a dangerous position, while the logs were being loaded by defendant railroad company, and did so unnecessarily when there was another place where he could have performed his duty in safety, then plaintiffs could not recover for his death, was properly refused as pretermitting the question whether defendant was negligent in permitting the tongs with which the logs were loaded to become so dull and out of repair as to render their use dangerous, or in failing to use a

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

bunching chain in hoisting small logs like that being hoisted at the time decedent was struck and killed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 921; Dec. Dig. § 282.*]

7. RAILROADS (§ 282*)—INJURIES TO PERSONS WORKING ON OR ABOUT CARS—ACTIONS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Decedent, a log scaler for a lumber company, was killed by the fall of a small log from the tongs of a steam log loader, as the log was being loaded onto one of defendant's flat cars. The court charged that it was the duty of one engaged in dangerous work to adopt the method that was least dangerous, and hence it might become important to determine whether it was less dangerous to scale on the cars as defendant contended or on the ground, but that, however the jury resolved the question, it was necessarily important for them to find whether defendant in hoisting such logs was negligent, and, if so, whether decedent in performing his duties observed such precautions as ordinarily prudent men observe to guard against consequences which might naturally be expected to result; that if the danger would have been perfectly apparent to a reasonably prudent and careful man, and decedent could by the use of ordinary care have avoided the danger, and still have performed his duties, then he could not recover. *Held*, that such instruction was correct, since plaintiffs were not barred, if decedent's death resulted from the negligence of defendant in hoisting the logs, either in an improper manner, or with dull tongs superadded to the ordinary danger of the situation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 921; Dec. Dig. § 282.*]

8. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL OF REQUEST.

It is not error to refuse a request to charge covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

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

Action by Melissa Wall and others against the Idaho & Washington Northern Railroad. Judgment for plaintiffs, and defendant brings error. Affirmed.

Action by Melissa Wall for and on behalf of herself as surviving widow and as guardian ad litem for the three minor children of James Wall, deceased, to recover damages for the death of the said James Wall caused by the alleged negligence of the defendant.

The plaintiff in error is a railroad company operating a line of railroad between the cities of Newport in Idaho and Spokane in the state of Washington. At the time of the death of James Wall on October 31, 1908, this railroad was engaged in hauling logs for the Panhandle Lumber Company. The logs were delivered by the lumber company alongside of the defendant's tracks at a point about three or four miles south and west of the city of Newport, and were loaded by the defendant upon its cars for transportation to the mill of the Panhandle Lumber Company at Spirit Lake, Idaho. In loading the logs the defendant employed a large steam-driven log loader, carried upon a flat car. This loader consisted of a swinging arm or derrick, lifting chains, and hooks or tongs, and when in operation the hooks or tongs seized the logs on the ground, lifted them from their place by the side of the track, and carried them and deposited them upon the car. At whatever point the loading of the logs might be carried on two scalers were employed whose duty it was to measure the logs and so ascertain the quantity carried as they were placed on the cars. One of these scalers was employed by the railroad company and the other by the lumber company. For some time prior to October 31, 1908, James Wall had been employed by the Panhandle

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

Lumber Company as a scaler at different points along defendant's track, where it was engaged in loading logs for the lumber company, and he was so employed on that day. The logs at that time were being loaded from the ground some 20 feet below the cars; the defendant's track being upon an embankment at that point, and the logs in a slight excavation by the side of the embankment. There was testimony tending to show that the scaling of the logs might be done either by the scaler standing on the car and measuring the logs after they were placed thereon, or by standing on the ground and measuring the logs before they were picked up by the loader; but whether it was safer to scale the logs then being loaded after they had been loaded on the cars was a subject of conflicting testimony. Prior to the accident all the scaling had been done on the ground. There was evidence tending to show that the general manager of the defendant had warned Wall that scaling on the ground was dangerous and should be done on the cars; that he had disregarded this warning and continued to scale on the ground. At the time of the accident Wall was standing on a pile of logs from which the logs were being taken by the loader. He had scaled a yellow pine log about 16 feet long and between 8 and 10 inches in diameter at the small end. The log had not been freshly cut. The tongs of the hoisting machinery were placed on the log and the log raised from the pile of logs where it had been lying. Wall was engaged in writing down the scale in a book which he held in his hand, and when the log had been raised a short distance it slipped from the tongs, and in falling it struck Wall and killed him. There was evidence tending to show that the tongs were dull, and for that reason failed to hold the log securely as they would have done if the points had been sharp and penetrated the wood so as to firmly grasp the log. The case was tried before a jury which rendered a verdict in favor of the plaintiffs for $5,000, upon which judgment was entered. The case is here upon writ of error.

Charles L. Heitman, Frank H. Graves, Will G. Graves, and Albert Allen, for plaintiff in error.

F. C. Robertson and Fred Miller, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The defendant has raised in this court the question as to the duty which the defendant owed to the deceased. It is contended that this duty was limited by the fact that the deceased was not an employé of the defendant, but was a bare licensee or trespasser on the premises where defendant was engaged in loading logs, and it is contended in this behalf that, while the defendant may be charged with having invited the deceased to the employment of scaling logs for the Panhandle Lumber Company as the logs were being loaded on the cars, the invitation was coupled with the instruction that the work of scaling the logs should be done on the cars; that, when the deceased disregarded these instructions and scaled the logs on the ground, he was no longer a licensee, but a trespasser to whom the defendant owed no duty beyond that of refraining from doing him a willful injury. It does not appear, however, that this instruction was insisted upon as a condition for the continuance of the work. The evidence shows that, notwithstanding the instructions or warning that it was dangerous to scale on the ground and that the scaling should be done on the cars, both scalers (the one employed by the defendant as well as the deceased) continued to scale on the ground up to the time of the accident. This evidence tends to show that the defendant waived the instruction for which there was apparent reason, as there was testi-

mony tending to show that the logs were loaded flush up with the end of the cars, and there was no place for the scaler to stand and measure the ends of the logs unless he stood on the drawbar connecting the cars; that the engine was always attached to the train as they loaded moving backwards and forwards, no warnings were given, and the scaler was liable to fall in between the cars. A witness on behalf of the plaintiff who was employed as a scaler testified that he was thrown off once and hurt, and he refused to scale on the cars any more. But, aside from this evidence, was the question of the limited duty of the defendant to the deceased an issue in the case?

The question does not appear to have been presented to the court below. The complaint charged that the defendant "negligently and carelessly permitted and suffered the tongs that were being used for the loading of said sawlogs to become dull, worn, and out of repair, so that the same would not readily hook into the said sawlogs which were then and there being loaded upon flat cars by the defendant, and negligently and carelessly attempted to lift a small sawlog with said tongs, derrick, and cable upon a flat car near where the said James Wall was engaged as aforesaid, said log being too small to be safely handled with said dull and defective tongs as aforesaid; that the proper manner of handling sawlogs was to chain two or three together, but said defendant and its employés negligently and carelessly attempted to load said small log with said old defective tongs well knowing that the same could not be safely loaded by said means or process, and, when the same had been lifted from the ground and was suspended in the air, the same, because it was too small and the tongs were dull, defective, and out of repair, slipped from said tongs and fell against and upon the said James Wall, killing him instantly."

The defendant in its answer denied the allegations of negligence and carelessness as charged in the complaint, and charged that Wall was guilty of contributory negligence in carelessly and unnecessarily undertaking and engaging in scaling logs at and below and beneath where the said logs were being hoisted; that the place was a dangerous place, and well known by Wall to be dangerous; and that he had been forbidden to scale logs in that place.

At the close of the testimony, the defendant moved the court to instruct the jury to return a verdict for the defendant on the ground that the deceased was guilty of contributory negligence which caused the injury; that he continued in the employment in which he was engaged at the place he was engaged with a knowledge of the dangers and assumed the risk of the employment. This motion was denied. No issue was raised in defendant's answer, and no suggestion was made either during the trial or in the motion for an instructed verdict that the duty which the defendant owed to the deceased was limited by the fact that he was not an employé of the defendant, but was a bare licensee or trespasser. The court instructed the jury that, while the deceased was not employed by the defendant, yet, in a measure, the same rules applied to him as though he had been; that the work of the two companies was so intimately commingled that the deceased was practically engaged with the employés of the defendant.

To this instruction no objection was made or exception taken by the defendant. This of itself was sufficient to eliminate any question as to the deceased being a bare licensee or trespasser. The further instructions of the court clearly indicated that the first question to be determined was whether the defendant had been guilty of negligence. If that question was determined against the defendant, then the remaining question was whether the deceased had been guilty of contributory negligence. For the purpose of determining these questions, the court instructed the jury that the defendant was required to furnish reasonably safe appliances for carrying on the work which it was engaged in. This, it was said by the court, had often been referred to as the rule of ordinary care. This duty the court further said could not be delegated to others and avoid responsibility, for it was a positive duty which the law imposed. It did not mean that the defendant was an insurer of the safety of the deceased. It meant that the defendant was under obligation to use that degree of skill, care, and diligence in furnishnig safe appliances that reasonably careful and prudent persons ordinarily use. If it failed in this regard, the court said the defendant was guilty of negligence; if it performed this duty, then its responsibility ended, and it was not accountable for the results. In referring to the question of contributory negligence charged against the deceased, the court said:

"If you find the defendant negligent, it does not necessarily follow that, because the deceased lost his life, there can be a recovery here. It sometimes occurs that both parties are negligent. When such a state of facts is presented, the inquiry is as to the immediate, proximate, or directly moving cause of the accident. * * * Your inquiry therefore should be as to how this injury was brought about—what was the cause of it—was it the defendant's want of care in the respects charged in the complaint, or was it the failure of the deceased to take precautions for his own safety which reasonably prudent men ordinarily take? Remembering now that the deceased himself was under the same obligation to watch out for his own safety as the defendant was to watch out for it, it is for you to say whether the negligence of the defendant, if you find it was negligent, was the proximate cause of the injury, or was the negligence of the deceased one of the proximate causes, and did it directly contribute to the unfortunate result? If the evidence shows it did, there can be no recovery."

If the defendant wished to rely upon any supposed limitation of its duty to the deceased by reason of the fact that he was not in its actual employment at the time of his death, but was a trespasser or bare licensee, it was for the defendant to raise that issue by its answer, as the burden was upon the defendant to establish that fact. Failing to do this, it was not an issue in the case, and the evidence justified the court in instructing the jury that the work of the company employing the defendant was so intimately commingled with the work of the defendant that the deceased was practically engaged with the employés of the defendant; that is to say, the duty the defendant owed to the deceased was practically the same it owed to its own employés, and that was to furnish reasonably safe appliances for carrying on the work in which it was engaged.

We do not wish to be understood as intimating that a different result might have been reached had the defendant's theory of its duty

to the deceased been presented as an issue to the court below. The deceased was lawfully upon the premises, where he was killed, on business with the defendant. In such case the rule is that the railway company is chargeable with the exercise of ordinary care towards all persons who may lawfully be upon the premises transacting business with it. In Cooley on Torts (3d Ed.) pp. 1258, 1259, the rule is stated as follows: When one "expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." This rule was expressly approved by the Supreme Court of the United States in Bennett v. Railroad Co., 102 U. S. 577, 580, 26 L. Ed. 235. The present case was submitted to the jury upon the theory that the defendant was chargeable with ordinary care; a less degree of care would not have been required had the deceased been a trespasser. Grand Trunk R. R. Co. v. Richardson, 91 U. S. 454, 471, 23 L. Ed. 356. We are therefore of the opinion that in any view of the evidence the defendant was not prejudiced by the theory upon which the case was tried and submitted to the jury.

There was evidence tending to show that the tongs used by the defendant at the time of the accident were dull and did not hook into the log that was being lifted, and that, because the tongs were dull, the log slipped from the tongs, and, falling to the ground, killed Wall. There was also evidence tending to show that in hoisting small saw-logs it was safer to chain two or three together rather than hoist them singly. This was evidence tending to show that the dull tongs or the method of hoisting the logs singly was the proximate cause of the injury, and that by reason of the defendant's negligence in using tongs in that condition or in hoisting the logs singly it was liable for the consequences, unless the deceased was guilty of contributory negligence with respect to that danger, and such contributory negligence was the proximate cause of the injury. This was a question of fact for the jury to be determined under appropriate instructions. The defendant requested the court to instruct the jury:

"That if the jury found from the evidence that the deceased, James Wall, in scaling logs for the Panhandle Lumber Company voluntarily put himself into a dangerous place, and did so unnecessarily when there was another place where he could have performed his duty which was safe, then I instruct you that the plaintiffs cannot recover, and you should return a verdict for the defendant."

The refusal of the court to give this instruction is assigned as error. The instruction was not sufficient. It omitted all reference to the question whether the defendant was guilty of negligence in permitting the tongs to become dull and out of repair or in failing to use the bunching chain in hoisting small logs.

In the instruction which the court gave the jury this question was properly called to their attention:

"It is the duty of one engaged in dangerous work to adopt that method which is the least dangerous; hence under some phases of this case it might become an important inquiry on your part as to which was the less danger-

ous—scaling upon the cars or upon the ground. Again, however you resolve that question, it would necessarily be important to find whether the defendant, through the defects in the tongs or failure to use the bunching chain for hoisting logs, was guilty of negligence, and, if so, did the deceased in performing his duties observe those precautions which ordinarily prudent men observe to guard against consequences which might naturally be expected to result? If the danger would have been perfectly apparent to a reasonably careful and prudent man, and the deceased could by the use of ordinary care himself have avoided the injury and still have performed his duties, then, as you have already been advised, there could be no recovery."

There was unquestionably a certain amount of danger in the work in which the deceased was engaged; but there was evidence that, superadded to this danger, was the danger arising from the dull tongs used by the defendant in hoisting the logs on board the cars and in hoisting the logs singly. Was this danger apparent to a reasonably careful and prudent man? This was the question the jury was called upon to determine, under proper instructions, and such instructions were given.

The distinction required to be made between a situation that is general in its character and a superadded situation that is charged to be the proximate cause of the injury has been stated in many cases, but in none more clearly than by Lord Chief Justice Cockburn in Gallagher v. Humphrey, 6 L. T. (N. S.) 684, 685, a case somewhat similar to the present one. In that case a passageway over defendant's premises was used to the knowledge of the defendant by the plaintiff and others to pass and repass and use the same as a way to certain wharves. The plaintiff on the day when the accident happened was on his way through the passage as usual and passed under a crane erected on the defendant's premises and there employed in lowering barrels of sugar from a warehouse belonging to the defendant. As the plaintiff was passing the crane, a chain connected with the crane broke, and a barrel of sugar fell upon him, inflicting the injuries with respect to which the action was brought against the defendant for damages. There was evidence tending to show that the crane was negligently operated by the defendant. It was contended on the part of the defendant that the passageway was the defendant's private property and no one had any right to be there without his express or implied permission. It was also contended that the lowering of heavy goods from the warehouse by cranes was manifestly dangerous business, and persons using the way took upon themselves whatever risks might be incidental to that business. Chief Justice Cockburn refused to determine the liability of the defendant upon the narrow ground raised by the question whether the plaintiff had the permission of the defendant to pass along the way, but placed the decision upon the answer to the broader question whether the evidence of defendant's negligence in operating the crane did not determine his liability. The Lord Chief Justice said:

"I quite agree that a person who merely gives permission to pass and repass along his close is not bound to do more than allow the enjoyment of such permissive right under the circumstances in which the way exists; that he is not bound, for instance, if the way passes along the side of a dangerous ditch or along the edge of a precipice, to fence off the ditch or precipice.

The grantee must use the permission as the thing exists. It is a different question, however, where the negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The plaintiff took the permission to use the way subject to a certain amount of risk and danger, but the case assumes a different aspect when the negligence of the defendant—for the negligence of his servants is his—is added to that risk and danger. The way in question was a private one leading to different wharves. * * * The plaintiff is passing along the passage by permission of the defendant, and, though he could only enjoy that permission under certain contingencies, yet when injury arises not from any of those contingencies, but from the superadded negligence of the defendant, the defendant is liable for that negligence as much as if it had been upon a public highway."

The refusal of the court to give a second instruction in the same general terms as the one just referred to is assigned as error. We think the instructions given by the court stated the law applicable to the evidence in the case.

The judgment of the lower court is therefore affirmed.

LEW QUEN WO v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,853.

1. ALIENS (§ 24*)—CHINESE—EXCLUSION—"LABORERS."

Chinese Treaty, Nov. 17, 1880, 28 Stat. 826, and Act May 6, 1882, c. 126, 22 Stat. 58 (U. S. Comp. St. 1901, p. 1305), in aid thereof, provided for the exclusion of Chinese laborers, and the Geary act (Act Cong. May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319]), defined "Chinese laborers" to include both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrying, and those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. *Held*, that a Chinese person owning a $500 interest in a general merchandise store, but operating a fruit farm as a tenant and selling the fruit grown thereof by his own labor, was a "laborer," and not entitled to enter or remain in the United States.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 76–80; Dec. Dig. § 24.*

For other definitions, see Words and Phrases, vol. 5, pp. 3952–3968; vol. 8, p. 7700.]

2. ALIENS (§ 32*)—CHINESE PERSONS—EXCLUSION—IMMIGRATION COMMISSIONER'S ORDER—COMMISSIONER OF ALIENS—CONCLUSIVENESS.

Since there is no statutory provision that a decision of the appropriate immigration or customs officer favorable to the admission of a Chinese alien is conclusive on the United States, the admission of a Chinese alien as a merchant is not conclusive against the United States on the application of the alleged merchant's son to enter, and did not prevent the son's exclusion on the ground that the father, while having a financial interest in a mercantile establishment, was in fact a laborer engaged in fruit culture as a tenant.

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

3. ALIENS (§ 29*)—DEPORTATION—CHINESE PERSONS—PROCEEDINGS.

Where the complaint in deportation proceedings against a Chinese person duly alleged that he was a Chinese manual laborer within the United

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

States without a certificate of residence, it was not material to the right of the government to deport him that he came into the United States at a time when it was impossible to obtain a certificate of residence.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 91; Dec. Dig. § 29.*]

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

Deportation proceedings by the United States of America against Lew Quen Wo. From an order for judgment of deportation, affirmed by the District Court, defendant appeals. Affirmed.

On April 1, 1909, the appellant was arrested on the complaint of an immigration inspector on the charge of being a Chinese manual laborer within the limits of the Northern district of California without the certificate of residence required by the acts of Congress. Upon a hearing before the United States commissioner, the latter found that the appellant was a native and subject of the Chinese Empire; that on July 30, 1907, he arrived at the port of San Francisco, and was landed by the commissioner of immigration as the minor son of Lew Fong, who was found by the immigration officers to be a Chinese merchant having an interest of $500 in a Chinese general merchandise store in Alameda, Cal., and that he acted as salesman in conducting the business of said firm; that, notwithstanding such finding of the immigration officers, the United States commissioner found from the testimony produced before him that at the time of the entry and landing of the appellant, and at least one year next preceding that date, and from that time until the time of the hearing, Lew Fong, the father of the appellant, "did engage in the performance of manual labor other than was necessary in the conduct of his business as such merchant, in this, to wit, that he was in the neighborhood of Ophir in this district, actually engaged in farming, orcharding, plowing, raising, and marketing fruit, and performing all kinds of manual labor in the culture, raising, and marketing of fruit; that said Lew Fong was the lessee of the premises on which he performed such labor and performed the same upon his own account; and that his mercantile status is not otherwise modified." Thereupon an order and judgment of deportation was entered from which an appeal was taken to the District Court, and that court upon the record and a stipulation of the facts affirmed the judgment of the commissioner. The appellant appeals to this court.

George A. McGowan and Alfred L. Worley, for appellant.

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

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

GILBERT, Circuit Judge (after stating the facts as above). It is contended that Lew Fong, the father of the appellant, was not, at the time when the appellant was permitted to land in the United States, a laborer within the meaning of the exclusion acts (Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 8 [U. S. Comp. St. 1901, p. 1322]), for the reason that he was a merchant and was not engaged in manual labor for wages or for hire, but worked upon his own account, and not as the employé of any one, in farming and raising and marketing fruit on land which he had rented. While some of the earlier decisions under the Chinese exclusion laws give color to the appellant's contention that the meaning of the word "laborer" as used in those laws is one who works for another for wages (In re Ho King [D. C.] 14 Fed. 724), the later decisions are harmonious in holding that

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

the term should not be so restricted. This is held in view of the language of the treaty to give force to which the legislation was enacted, and in view of the more recent enactments of Congress. In Lee Ah Yin v. United States, 116 Fed. 614, 54 C. C. A. 70, we held, upon a consideration of the memoranda submitted and discussed in the negotiations between the high contracting powers which culminated in the adoption of the treaty of 1880 (Treaty with China, No. 17, 1880, 28 Stat. 826), and the subsequent legislation of Congress to carry out the provisions thereof, that the words "Chinese laborers" as used were intended to designate all immigation to the United States from China other than that of the privileged classes, who were, by the terms of the treaty, permitted to come for the purpose of teaching, trade, travel, study, and curiosity, and we held that the Geary act, approved May 5, 1892 (Act May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319]), adopted the words "Chinese laborers" with the meaning attached thereto by the treaties.

That Chinese laborers who work for hire only are not the only laborers excluded within the meaning of the acts of Congress is shown by Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 8 (U. S. Comp. St. 1901, p. 1322), in which it was declared that the words "laborer or laborers" "shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying or otherwise preserving shell or other fish for home consumption or exportation." By this statute, which was intended to make certain as included within the designation of laborers those whose occupation might, in some aspects, be regarded as belonging to the mercantile class, Congress enumerated as within the term "laborers" those who were working upon their own account and not for hire in certain mentioned occupations, the product of which was sold to others. The act does not declare, and its meaning is not to say, that those only who are engaged in those occupations so specified shall be deemed laborers. It was perhaps impossible to enumerate all the classes of occupations of the general nature of those mentioned, but the act clearly intends to make a distinction between merchants who buy and sell goods at a fixed place of business, and all those who sell goods which are the product of their own labor, or who sell goods which they have purchased to vend at no fixed place of business. Now, the farmer or fruit grower, who leases land and tills the same and labors in the production of a crop which he sells to others, is engaged in an occupation similar to that of those who are engaged in mining, fishing, or drying fish for home consumption or exportation. Lew Fong, as the owner of an interest of $500 in a general merchandise store, would have been a merchant within the meaning of the acts, and his status as a merchant would not have been affected had he performed only manual labor such as might have been necessary in the conduct of his business as a merchant; but here the labor which he performed was aside and entirely distinct from his business as a merchant, and therefore, at the time when the appellant was landed in the United States, Lew Fong was not one of the privileged class

of persons who are entitled to enter the United States, and therefore the appellant was not entitled to admission.

It has been held that a Chinese who kept a restaurant and a lodging house was a laborer (United States v. Chung Ki Foon [D. C.] 83 Fed. 143; In re Leung, 86 Fed. 303, 30 C. C. A. 69); that a Chinese holding an interest in a mercantile firm, but who was also a cook in a restaurant of which he was part owner, was a laborer (Mar Bing Guey v. United States [D. C.] 97 Fed. 576); that a Chinese merchant who worked in a laundry was a laborer (United States v. Yong Yew [D. C.] 83 Fed. 832); that a Chinese who during half his time was engaged in cutting and sewing garments for sale by a firm in which he was a member was a laborer (Lai Moy v. United States, 66 Fed. 955, 14 C. C. A. 283); that a Chinese alien who owned an interest in a mercantile firm, but was engaged in operating a laundry and was part owner of a restaurant, was a laborer (United States v. Yee Gee You, 152 Fed. 157, 81 C. C. A. 409).

It is urged that the order of the commissioner of immigration admitting the appellant into the United States estops the government to deny the legality of his entry, and constitutes a bar to this proceeding, and reference is made to the language of the opinion in Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, in which the court sustained the finality of the decision of the immigration officers upon a hearing concerning the right of a Chinese to land in the United States, and said that thereafter the merits of the case were not open. But that case, and other decisions of the Supreme Court, go no further than to hold that the right of a Chinese applying for admission into the United States is determinable by the proper immigration authorities, that their decision when adverse to the applicant, and the hearing has been properly had, and the applicant's remedy has been exhausted upon an appeal to the Secretary of Commerce and Labor, is final, and there is no right of recourse to the courts. The court in so holding gave effect to the statute of August 18, 1894 (Act Aug. 18, 1894, c. 301, 28 Stat. 390 [U. S. Comp. St. 1901, p. 1303]), which provides that the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final unless reversed on appeal to the Secretary of the Treasury. There is no statutory provision that the decision, if favorable to the applicant for admission, shall be final. The decisions have been to the contrary. United States v. Lau Sun Ho (D. C.) 85 Fed. 422, and cases there cited; Mar Bing Guey v. United States (D. C.) 97 Fed. 576. Nor is the certificate of identity which was issued to the appellant after the commissioner of immigration had passed upon his right to admission, an instrument of such effect as to stand in the way of his deportation. It is not like the certificate of residence provided for in the act of 1893, which defined the method by which Chinese in the United States might obtain evidence of their right to remain. Those certificates were registered as the solemn act of the government, and were intended to furnish evidence of the right of the holders thereof to remain in

the United States, and to be conclusive evidence of that right, and they are not subject to collateral attack. In re See Ho How (D. C.) 101 Fed. 115; In re Tom Hon (D. C.) 149 Fed. 842. The object of the exclusion acts, as Mr. Justice Field said in Re Ah Sing (C. C.) 13 Fed. 286, was not to expel Chinese laborers already in the United States, but to prevent the further immigration of Chinese laborers.

It it contended that the appellant could not lawfully be deported upon a complaint which charges him with being a Chinese manual laborer in the United States without the certificate of residence required by the act of Congress, etc., for the reason that he did not come into the United States until after the expiration of the period within which Chinese laborers were permitted to register. But the complaint clearly defined the status of the appellant and truly stated that he was a Chinese manual laborer within the United States without a certificate of residence, and it was immaterial that he came to the United States at a time when it was impossible to obtain a certificate of residence. The evidence sustained the charge of the complaint, and there was no error in the judgment of the District Court that the appellant be deported.

The judgment is affirmed.

GAY et al. v. HUDSON RIVER ELECTRIC POWER CO. et al.

(Circuit Court of Appeals, Second Circuit. January 9, 1911.)

No. 116.

1. APPEAL AND ERROR (§ 101*) —APPEALABLE ORDERS — ORDER IN RECEIVERSHIP PROCEEDINGS.

An order of a federal court of equity having possession of the property of a corporation through its receivers, denying to a mortgagee the right to have the property sold, given by the terms of the mortgage in case of default, is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 681–687; Dec. Dig. § 101.*]

2. CORPORATIONS (§ 481*)—MORTGAGES—RIGHTS AND DUTIES OF TRUSTEES.

The trustee in a corporation mortgage required by the terms of the mortgage to foreclose in case of default in payment of interest on the request of the holders of two-fifths in interest of the bonds secured is not relieved from such duty nor deprived of the right by the fact that a majority of the bondholders do not favor the proceeding, nor is it chargeable with laches which deprives it of the right because it waited until after several defaults in the hope of a reorganization of the corporation which would obviate the necessity of foreclosure.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 481.*]

3. CORPORATIONS (§ 481*)—MORTGAGES—RIGHTS OF TRUSTEES.

A court of equity has no power to deny to the trustee under a corporation mortgage the right to foreclose on default, expressly given by the contract, on the ground that a sale of the mortgaged property at the time and under the particular circumstances will work a hardship to other creditors of the mortgagor and other affiliated corporations.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 481.*]

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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 Northern District of New York.

Suit in equity by Eben H. Gay and others against the Hudson River Electric Power Company, the Empire State Power Company, and others. The New York Trust Company, as trustee, appeals from an order denying it leave to sell the property of the Empire State Power Company, under the terms of a mortgage. Reversed.

See, also, 182 Fed. 904.

This cause comes here upon an appeal from an order of the Circuit Court, Northern District of New York, denying the application of the New York Trust Company, trustee under a mortgage of the Empire State Power Company, for leave to sell the mortgaged property; there having been default in payment of interest and of sinking fund moneys due under the mortgage.

The Empire State Power Company owns a dam, power house, river rights, and four or five dam sites on the Schoharie river, and is engaged in the generating of electricity for light, heat, and power and the sale thereof in the city of Amsterdam, N. Y., and immediate vicinity. All of its property is subject to the mortgage which was executed May 1, 1900, to secure an issue of bonds of which $210,000 are outstanding. It is a first mortgage on said property. Two of its clauses read as follows:

"Eleventh. In case default shall be made in the payment of any interest on any of said bonds secured hereby, as and when such interest shall become due and accrued, such default shall continue for six months, or in case default shall be made in the payment of the principal of any of said bonds when the same shall mature or otherwise become payable, then, and in every such case, the trustee may, and upon the request of the holders of two-fifths in interest of the bonds hereby secured and then outstanding, by an instrument or concurrent instrument in writing, signed by them or their attorneys in fact duly authorized for that purpose, shall, with or without entry, sell all the premises, estate, property, rights and franchises hereby conveyed, or so intended to be, at public auction in the city of Amsterdam, N. Y., after giving notice of such sale as required by law, and also notice by publication in at least two newspapers published in the county of Montgomery, at least once a week for six consecutive weeks next preceding such sale, and from time to time to adjourn such sale or sales, in its discretion, and without further notice to hold such adjourned sale or sales, and upon any sale or sales hereunder to make and deliver to the purchaser and purchasers of the premises, estate, property rights and franchises so sold a good and sufficient deed or deeds for the same, which sale shall be a perpetual bar, both in law and in equity, against the said Empire State Power Company and all persons or corporations lawfully claiming, or to claim by, through or under it, and, upon the making of any such sale, the principal of all the bonds hereby secured and then outstanding shall forthwith become due and payable, anything in said bonds to the contrary notwithstanding, and upon the making of any such sale, the said trustee shall apply the proceeds thereof as follows, to wit:

"1. To the payment of the costs and expenses of such sale or sales, including a reasonable compensation to such trustee, its agent, attorney and counsel, and all expenses, liabilities and advances made and incurred by such trustee in managing and maintaining the property hereby conveyed, or intended to be, and all taxes and assessments superior to the lien of these presents.

"2. To the payment of the whole amount of principal and interest which shall then be owing or unpaid upon the bonds secured hereby, without any preference or priority whatever, whether the said principal by the tenor of said bonds, be then due or yet to become due; and in case of the insufficiency of such proceeds to pay in full the whole amount of such principal and interest owing and unpaid upon the said bonds, then to the payment of such principal and interest pro rata, without preference or priority, but ratably, to the aggregate amount of such principal and accrued and unpaid interest.

"3. To pay over the surplus, if any, to whomsoever may be lawfully entitled to receive the same.

"In the event of any sale under or by virtue of the power of sale herein contained, or by virtue of judicial proceedings or decree of foreclosure and sale, the whole of the property hereby mortgaged shall be sold in one parcel and as an entirety, unless the holders of a majority in amount of the bonds hereby secured, then outstanding, shall in writing request the trustee to cause said premises to be sold in separate parcels, in which case the sale shall be made in such parcels as may be specified in such request, so far as the law may allow. It is further provided, declared and agreed that in case any sale shall be made of the said premises, property, rights, franchises and estate under or in execution of the provisions hereof, the purchaser or purchasers at said sale shall be entitled, in making settlement for and payment of the purchase money, to deliver to the person or persons legally appointed and qualified to receive the payment of such purchase money, and to turn in and use any of the bonds and coupons secured by these presents then matured and unpaid, towards the payment of said purchase money, reckoning and computing said bonds or coupons for that purpose at a sum, equal to and not exceeding that which would be payable out of the net proceeds of said sale to the purchaser or purchasers, as the holder or holders of said bonds or coupons for his or their just share and proportion in that character of said net proceeds, and a due apportionment and distribution thereof, and after allowing for the proportion of payments which may be required by the court to be paid in cash for the expenses of the trust, and of the sale, or for other purposes."

"Thirteenth. In case default shall be made in the payment of the principal or interest of any of said bonds when the same shall become due and payable, or in the observance or performance of any covenant or condition in said bonds or herein contained on the part of the party of the first part, and such default shall continue for six months, it shall be the duty of, and it is hereby made obligatory upon, the trustee, upon the request in writing of the holders of two-fifths in interest of said bonds hereby secured and then outstanding, and upon proper indemnification, to proceed forthwith to enforce the rights of the said trustee and of the bondholders hereunder, by sale or entry, or both, according to such requisition, or by judicial proceedings for such purpose, as it, being advised by counsel learned in the law, shall deem most expedient in the interest of the holders of the bonds secured hereby."

Subsequent to the execution of the mortgage and the issue of the bonds, a majority of the stock of the Empire State Company came into the hands of various other companies (and individuals interested therein) engaged in similar enterprises, and the Empire State thus became one of the members of the system of companies which were operating in common when, in the fall of 1908, the United States Circuit Court, Northern District of New York, appointed receivers for all the property of all the companies in the suits above entitled. Some reference to the interrelations of these companies will be found in our opinion in In re Hudson River Power Transmission Co. (filed in December last) 183 Fed. 701.

In consequence of these proceedings, all the property of the Empire State Company is now in the custody of the Circuit Court through its receivers. There are mortgages on the several properties of the allied companies, and in the course of the receivership proceedings the court on July 7, 1909, made an order allowing these various trustees, including the petitioner, to intervene in the suit—a creditor's bill—under which receivers were appointed, and to file cross-bills or ancillary bills for the foreclosure of these mortgages. Most, if not all, of the several trustees have begun suits in foreclosure; but this petitioner has not done so.

Morgan M. Mann, for appellant.

Davies, Stone & Auerbach (C. E. Hotchkiss, of counsel), for Knickerbocker Trust Co.

Abram J. Rose and George B. Curtiss, for receivers.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The reason why petitioner has not brought a foreclosure suit, but applies instead for leave to sell under the eleventh clause, is quite apparent from an examination of the two clauses above quoted. Under the thirteenth clause foreclosure can only be had for defaulted interest; the principal cannot be declared due upon any such default, however long continued; there can be no foreclosure which will protect the principal until it falls due in 1930. Under the eleventh clause, however, if defaulted interest is not paid by the time of sale, the principal shall ipso facto become due and payable, and the proceeds of the sale be used to pay it.

The property being actually in the custody of the federal court, and the trustee therefore being powerless itself alone to make delivery to a purchaser, it made this application to the court. There seems to have been a general impression upon the hearing below that the application was in effect to turn the property back to the trustee to conduct the sale, marshal the proceeds, and dispose of them. The phraseology of the prayer of the petition is calculated to give such an impression, since it asks leave for the "petitioner to sell the property in accordance with provisions of said paragraph eleven"; and it would seem from respondent's brief and their counsel's statements on the argument before us that petitioner's counsel did nothing in the court below to dissipate this impression.

Here, however, we have a very different state of affairs. Appellants' counsel conceded on the argument, and there is nothing in his brief inconsistent with the concession, that the federal court having custody of the property will retain such custody until the rights of all parties interested are determined and disposed of.

This concession disposes of a large part of respondent's brief. There is no "request for permission to withdraw to the state court the controversy which had originated in the Circuit Court"; there is no suggestion of withdrawing from the latter court "all questions in reference to the disposition of the surplus." All that is asked is that the sale be had forthwith in accordance with the terms of the mortgage and the provisions of statute relating to such a sale of real estate located within this state. Should there by any surplus left after paying the expenses of sale and the amount due under the mortgage, application for instructions as to its disposition will be made to the Circuit Court. It is necessary only to consider some further objections which have been raised to a present sale.

We have no doubt that the order is appealable. The "discretion" exercised, in the form expressed in the order, practically denied to the trustee for bondholders all opportunity to avail of the rights secured by the eleventh paragraph, including the right to have principal sum declared to be presently due, by confining the trustee to remedies under the thirteenth paragraph, which postponed any right of foreclosure for unpaid principal for a period of 20 years. The question whether such an order does or does not "invade the established rights of the petitioners contrary to law, in such a manner that they can have no relief except by an appeal," is certainly presented upon the record; and for that reason the cause is within the principle laid down in Farmers'

Loan & Trust Company, 129 U. S. 206, 9 Sup. Ct. 265, 32 L. Ed. 656.

In an affidavit of one of the solicitors for the Knickerbocker Trust Company there is a suggestion that there may be a "question of the priority of the mortgage of the Hudson River Electric Power Company, Knickerbocker Trust Company as trustee (executed January 2, 1904), over the mortgage of the Empire State Power Company to the New York Trust Company as trustee." A similar statement is made as to a mortgage of the Hudson River Power Transmission Company. Since it appears that the mortgage given by the Empire State Company was executed in 1900, and all the bonds now outstanding were issued and bought before that company had any connection with any of these other companies, this suggestion is too vague and shadowy for present consideration. But if there be any equity outstanding in any one, superior to this mortgage, that would be no reason for denying any right of sale secured to the mortgagee; the lien will either adhere to the property sold or will attach to the proceeds.

It is contended that the trustee should be denied the relief prayed for because a majority of the bondholders appeared by counsel and assented to the order allowing the trustee to file a cross-bill of foreclosure under paragraph 13. There is no force in this contention, the trustee represents minority bondholders as well as the majority, and we know no reason why bondholders who thought at first of availing of one remedy, secured to them by the mortgage, but have not in fact availed of it, may not change their mind and resort to what subsequently seems to them a more efficient remedy. Nor is there any merit in the suggestion that because the trustee has waited till after several defaults have occurred, in the hope that some reorganization would straighten everything, it is to be denied the relief accorded by the mortgage upon any theory of laches.

The fundamental ground of objection is that because these various allied companies have been operated together as a single system, and because there are many different classes of creditors, some secured by the property of one company, others by the property of another, others again by the properties of some or all of the companies and also various classes of unsecured creditors, and because the best chance of preserving the system as an operative whole apparently lies in holding it together without allowing any part of it to break off, the court will secure the greatest good of the greatest number by so doing. But, although a court of equity will be astute to protect all equitable interests, there is a limit beyond which it may not go. In the case of successive mortgages upon a single piece of real estate, it may often be a great hardship to the holder of a junior mortgage to have the property sold under foreclosure of the first mortgage at a time when general financial distress will preclude any hope of enough being realized to pay more than the amount secured under the first mortgage, while, if all action could be suspended for two or three years, the property would sell for a price sufficient to pay both mortgages in full. But there is no power in a court of equity to abrogate the right of foreclosure and sale for which the first creditor stipulated, which is incorporated in the contract and on the strength of which

he lent his money. So, in the case at bar, it may be "selfish" for these bondholders to insist upon a present sale of the property, at a time when junior incumbrancers and unsecured creditors deeply interested financially are "so tied up by this litigation that it is impossible for them to protect themselves." It may be a "grievous wrong" to them to permit such sales; but, if it is the clear right of the mortgagee to have such a sale go on, the court may not deny him his right, however great may be the hardship to others. Nor must it be forgotten that these others gave credit with full knowledge; the mortgage with its two paragraphs was on file advising them of the situation of the debtor at the time they trusted it.

Nothing is disclosed in this record affecting the validity of this mortgage or controverting the right of the representative of bondholders to avail of its terms.

The order should be reversed, and cause remanded, with instructions to allow a sale of the property forthwith in accordance with the terms of the mortgage and in conformity to the statutes, with the provision that the surplus, if any, be held to await further instructions of the Circuit Court. Of course, if the defaulted interest and sinking fund payments are made by receivers to keep the property intact—and a clause in the opinion of the Circuit Court judge indicates that this will probably be done—the right of sale is lost, until a new default, continuing for six months, may revive it.

In re E. A. KINSEY CO.

(Circuit Court of Appeals, Sixth Circuit. February 3, 1911.)

No. 2,061.

1. BANKRUPTCY (§ 262*)—SALE OF PROPERTY—POWERS OF COURT—LIENS.

   A court of bankruptcy has power to order property of a bankrupt which has come into the possession of his trustee sold free of liens, and to transfer all claims against it to the proceeds, notwithstanding the objection of one claiming a lien thereon.

   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 365; Dec. Dig. § 262.*]

2. BANKRUPTCY (§ 258*)—COURTS OF BANKRUPTCY—JURISDICTION OVER LIEN CLAIMANTS.

   One claiming a lien on personal property of a bankrupt, which is in the possession of his trustee, may be brought into the court of bankruptcy by service of a rule to show cause for the purposes of a petition by the trustee for an order to sell the property free of liens and transferring all liens to the proceeds.

   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 358; Dec. Dig. § 258.*]

Petition to Review an Order of the District Court of the United States for the Southern District of Ohio.

In the matter of the American Architects Tube Company, bankrupt. On petition of the E. A. Kinsey Company to review an order of the District Court. Affirmed.

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

Stewart & Stewart and Herron, Gatch & James, for petitioner.

Watson, Stouffer & Davis and Vorys, Sater, Seymour & Pease, for trustee.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

SEVERENS, Circuit Judge. This is a petition to review an order made by the District Court in a proceeding in bankruptcy.

The American Architects Tube Company was adjudicated a bankrupt on October 9, 1908. On November 8th following, the E. A. Kinsey Company, a creditor of the bankrupt, commenced a suit in the court of common pleas for Franklin county, Ohio, for the foreclosure of a lien it claimed to have on certain property which belonged to the assets of the bankrupt. By the direction of the District Court, and by the permission of the court of common pleas, the trustee intervened to defend the foreclosure proceeding of the E. A. Kinsey Company in the latter court. At the time when the court of common pleas allowed the intervention of the trustee, it also ordered the receiver whom it had appointed to take charge of the property in another suit against the American Architects Tube Company, and who was made a defendant in the foreclosure case, to be discharged, and that the trustee be substituted in his place and given leave to answer. His answer denied all knowledge of the matters alleged in the petition for foreclosure. From the preceding statement, it will be perceived that at the date of the adjudication the court of common pleas did not have possession of the property for any purpose involved in the foreclosure suit. Through its receiver it had control of the property for the purposes of another suit to which the E. A. Kinsey Company was not a party. The transfer of possession from the receiver to the trustee, however it may have affected other parties, did not affect the E. A. Kinsey Company. The court of common pleas never took actual possession for the purposes of its suit. The trustee filed a motion in the court of common pleas that all further proceedings in the foreclosure case be stayed pending the determination of the bankruptcy case, and the motion was allowed. The trustee then filed a petition in the bankruptcy court for leave to sell the assets (which were all personal property) free of all liens, and also that the E. A. Kinsey Company be made a party to the proceeding and set up its claims, and that they be determined by the court in respect to their amount, validity, and priority. A rule to show cause was made and served upon the E. A. Kinsey Company. Whereupon it appeared and filed the following motion:

"Now comes the E. A. Kinsey Company, a corporation duly incorporated and organized under the laws of Ohio, for the purpose of this motion only, and not entering or intending to enter its appearance herein, but objecting to any jurisdiction or exercise of jurisdiction of this court over it, and moves the court to quash and hold for naught the pretended service of process upon it and to dismiss it from this action on the ground that this court has neither jurisdiction over said the E. A. Kinsey Company or the subject-matter of the action."

The motion was denied. The cause came on to be heard, and the order now under review was made. It reads as follows:

"This day this cause came on to be heard upon the petition of Gilbert L. Fuller as trustee to sell all of the property described in said petition, free and clear of all liens and incumbrances and the hearing on said application and petition having been adjourned from the 21st day of January, A. D. 1909, from time to time until this day, August 20, 1909, and 10 days' notice by mail of said hearing having been given to all creditors, and of which petition due service of notice by rule to show cause was made upon the E. A. Kinsey Company, defendant herein, upon consideration whereof the court finds that the allegations of the petition are true except as to the nature or existence of the lien of the E. A. Kinsey Company, if any, which is not determined, and that it is for the best interest of the creditors of the said estate and of all parties interested in said proceeding that said property be sold either at private or public sale at the discretion of the trustee, free and clear of all liens and incumbrances of every kind whatsoever.

"It is therefore ordered, adjudged, and decreed that the said prayer of the said petition be and is hereby granted, and that the said trustee is directed to sell said property, free and clear of all liens and incumbrances either at private or public sale, upon the premises where said property is located, and that said trustee give due notice of public sale, if such be had, by publication of notice in the Columbus Evening Dispatch and the Ohio State Journal for a period of one week by three insertions, and that said sale be made subject to the approval of this court.

"It is further ordered, adjudged, and decreed that whatever lien, if any, may be hereafter determined to exist against the said property in favor of the E. A. Kinsey Company, be and is hereby transferred to the fund derived from the sale of said property."

It will be observed that the court did not undertake to determine the validity of the petitioners' claim of lien or its amount or rank. It simply ordered the property to be sold free of liens, and that the claim of the E. A. Kinsey Company be transferred to the proceeds.

Two questions of law are presented:

(1) Did the court have jurisdiction to make the order?

(2) Did it get jurisdiction of the petitioner, the E. A. Kinsey Company, by what it denominates "the pretended service of process upon it"?

The petitioner denies both of these propositions.

The property came to the hands of the trustee. It was ordered to be delivered to him by the court of common pleas in whose possession it was, and whether it was properly so ordered is not a question to be determined by the bankruptcy court nor by this court. It could only be questioned in a court which has appellate jurisdiction of the decrees and orders of the court of common pleas. The court of common pleas was a court of general jurisdiction, and we think had power to make the order. It was the property of the bankrupt, and the bankruptcy court had undoubted authority to order it sold and converted into money. But there was a claim of lien against it. Whether it was a valid lien or for how much was an open question, the existence of which would seriously affect the price that any purchaser would pay for it. This impediment would be eliminated if the property were sold free of liens. The lien could be adjudicated and the holders paid from the proceeds, if the lien was held valid. Thus the whole value would be saved. And the lienholder would suffer no substantial injury. The only difference from the course it desires to pursue consists in nothing more than a choice of the two courts by which its right is determined and the property is sold. It has long been the practice of the equity courts to adopt

such a procedure in conditions such as this. And the courts of bankruptcy have adopted it, as is shown by a large number of cases cited in leading text-books on the subject. Loveland on Bankruptcy (3d Ed.) § 256d; Collier on Bankruptcy (8th Ed.) p. 838. In the latter book, the author says:

"Sales free of incumbrance were authorized by the statute of 1867. The present law has no such provision. This has cast doubt on the power of the court to authorize such a sale. The cases are quite uniform, however, in declaring that such sales can be authorized, and by the referee as well as by the judge. The bankruptcy courts, having like power with that of courts of equity, may and often have exercised it for the benefit of the creditors while no substantial injury to lien claimants is done."

If the possession had remained in the court of common pleas, and that court had declined to surrender its jurisdiction over it, an obstacle would have been presented, and the bankruptcy court might have delayed further action until the state court should have determined the matter of the lien and enforced it. The surplus, if any, would be transferred to the District Court upon the trustee's application and be there administered.

As to the other question, whether the court could bring the petitioner before it by service of a rule to show cause why the petition should not be granted, we entertain no doubt. The essential feature of mesne process is that the respondent shall have notice of the claim the establishment of which may affect his interest, and of the time and place for hearing. A plenary suit is not absolutely required, and is not usual when the trustee is in possession of the property, and the controversy is only of a matter of procedure in administration, and the substantial rights of the parties are not affected. Lake Shore & M. S. Ry. Co. v. Felton, 103 Fed. 227, 43 C. C. A. 189; Horn v. Pere Marq. Ry. Co. (C. C.) 151 Fed. 626; City of Shelbyville v. Glover, 184 Fed. 234 (decided by this court). The reason why the bankruptcy court would refrain from interfering with the proceedings in a state court and anticipate its judgment is the obligation of the comity necessary to be observed to avoid conflict between the state and federal courts, and this reason would be wanting if the other court waives its priority of right to possession, as was done in the present case.

The order under review should be affirmed.

BOWMAN v. ATCHISON, T. & S. F. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. December 19, 1910.)

No. 3,307.

1. RAILROADS (§ 384*)—PERSONS ON OR NEAR TRACK—DEATH—CONTRIBUTORY NEGLIGENCE.

Decedent was run over and killed by a passing engine belonging to defendant about 9 o'clock at night in front of defendant's passenger depot and hotel. His employment required his presence in the immediate vicinity of the accident and he was well informed concerning the customary movements of trains and engines over the tracks at that place.

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

The night was dark, but the space on which the tracks were laid between the depot and hotel and opposite buildings was brilliantly lighted. The view was unobstructed for more than a mile in the direction from which the engine came, except as limited by the darkness, and there were no other moving engines or cars to confuse him or distract his attention. Other witnesses saw the engine approaching at distances ranging from 250 to 500 feet, and another witness saw deceased and the engine at the moment of the accident at a distance of 200 feet. *Held*, that decedent was negligent as matter of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1294; Dec. Dig. § 384.*]

2. TRIAL (§ 342*)—DIRECTION OF VERDICT—ENTRY.

Where a motion to direct a verdict is sustained, a verdict should be actually returned and entered as directed.

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

3. APPEAL AND ERROR (§ 274*)—EXCEPTIONS—SCOPE.

A general exception to the sustaining of a motion to direct a verdict and to the final judgment was insufficient to justify a review of the court's failure to require the actual rendition and entry of a verdict in accordance with the direction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1631–1645; Dec. Dig. § 274;* Trial, Cent. Dig. §§ 258, 375, 406, 691–693.]

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

Action by Sarah F. Bowman against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Charles R. Bosworth, H. N. Hawkins and E. F. Richardson, for plaintiff in error.

Henry T. Rogers, Daniel B. Ellis, Lewis B. Johnson, Pierpont Fuller and George A. H. Fraser, for defendant in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and CARLAND, District Judge.

HOOK, Circuit Judge. This was an action by Sarah F. Bowman against the railway company for damages for the death of her husband. At the conclusion of plaintiff's case the trial court sustained defendant's motion for a verdict. The evidence was solely that on behalf of the plaintiff, and it showed contributory negligence of the deceased beyond any reasonable question. He was run over and killed by a backing engine about 9 o'clock at night in front of the passenger depot and hotel building at La Junta, Colo. The duties of the service in which he had been engaged were performed in the immediate vicinity of the accident, and he was well informed regarding it and of the customary movement of trains and engines over the tracks at that place. The speed of the engine was variously estimated at from two or three to eight miles per hour. It had recently stormed and the night was dark, but the space on which the railroad tracks were laid, between the depot and hotel building and the company buildings on the opposite side, was brilliantly lighted by arc lights and by the illumination of the adjacent structures. There were also arc lights in the

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

distance. His view was unobstructed by physical obstacles for more than a mile in the direction from which the engine came, though, of course, it was limited by the darkness. There were no other moving engines or cars to confuse him or distract his attention. Two witnesses standing in front of the hotel saw the engine approaching, one of them when it was between 250 and 300 feet away and the other when it was about 500 feet distant. The latter said any one looking in that direction could have seen the engine that far away. The deceased was nearer to it than either of them and had better opportunity for observation. Another witness saw the deceased and the engine at the moment of the accident more than 200 feet away. All this was uncontradicted, and it was supplemented by descriptive details. Three witnesses testified the engine bell was ringing and two were unable to say whether it was or not. The conclusion is irresistible that the deceased, carelessly inattentive, walked directly in the way of the engine of the approach of which he could have learned had he exercised ordinary care. There is a suggestion, and it does not amount to more, that he may have been caught in a decayed place in a crossing plank, but there is nothing to support it in the evidence that reaches the dignity of proof. The applicable principles of law are so familiar and have been applied so many times by this court that it is unnecessary to restate them or cite the cases.

The court sustained the motion for a directed verdict and added: "Enter judgment for the defendant as on the verdict of the jury." No verdict of the jury appears in the record, and the fair inference is the court dispensed with one. The plaintiff excepted generally to the ruling and the final judgment, but the court was not informed that complaint was made because a verdict was not taken in conformity with the ruling on the motion. And, though it is made the subject of assignments of error, they are not relied on in the brief. Our attention is, however, directed to the practice. We agree with counsel that the practice is objectionable. A serious question would have been presented had the trial court been distinctly advised that exception was taken to it and an opportunity given to correct it. In Hodges v. Easton, 106 U. S. 408, 1 Sup. Ct. 307, 27 L. Ed. 169, issue being joined in an action at law upon all the averments of the complaint, there was a jury trial and a special verdict in answer to certain questions propounded by the court. There was no general verdict. Judgment for plaintiff was rendered "upon the special verdict of the jury, and facts conceded or not disputed at the trial." The special verdict alone was insufficient to support the judgment. The defendants not having preserved the evidence by bill of exceptions, it was urged by plaintiffs that in conformity with the local practice it should be presumed that "the facts conceded or not disputed at the trial" and those found in the special verdict were when taken together sufficient to support the judgment. But upon that the Supreme Court said:

"We then have a case at law, which the jury were sworn to try, determined, as to certain material facts, by the court alone, without a waiver of jury trial as to such facts. It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the Constitution of the United States. They might have waived that

right, but it could not be taken away by the court. Upon the trial, if all the facts essential to a recovery were undisputed, or if they so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a peremptory instruction to find for plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court. The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and, itself, determine the remainder without a waiver by the defendants of a verdict by the jury."

See, also, Baylis v. Insurance Co., 113 U. S. 316, 5 Sup. Ct. 494, 28 L. Ed. 989. What we said in Moore v. Petty, 68 C. C. A. 306, 135 Fed. 668, is not in conflict. In that case the record did not disclose that any writing in the form of a verdict was signed by anyone acting as foreman of the jury, but the journal of the court recited that a motion for a directed verdict was sustained, and that the jury returned one accordingly. Our observations were addressed to the absence of a written verdict, and the practice presumably followed was not approved.

Affirmed.

CURRIER et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 19, 1910.)

No. 3,130.

CONTRACTS (§ 131*) — PUBLIC BUILDINGS — PRIVATE CONTRIBUTION — PUBLIC POLICY.

Under the rule that, where a public institution must be located or structure built, private contributions on condition that a particular location is selected are not against public policy, it was no objection to the selection of a site worth exceeding $32,000 for the location of a post office building by the Secretary of the Treasury that Congress has restricted the amount of public funds to be paid therefor to $15,000, and that private citizens had agreed to donate the balance if the more valuable site were selected; there being no claim that the Secretary was not wholly free from any influence, save his judgment of the suitableness of the location and the donations towards the cost.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 131.*]

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

Proceedings by the United States of America to condemn certain lands in Greeley, Colo., for a site for a post office building, to which Henry F. Currier and others filed objections. From a decree in favor of the government, objectors bring error. Affirmed.

Charles R. Brock (Robert T. McNeal and Milton Smith, on the brief), for plaintiffs in error.

Harry N. Haynes, Special U. S. Atty. (Thomas Ward, Jr., U. S. Dist. Atty., and Harry E. Churchill, Sp. U. S. Atty., on the brief), for the United States.

Before VAN DEVANTER and HOOK, Circuit Judges, and CARLAND, District Judge.

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

HOOK, Circuit Judge. Plaintiffs in error, who are owners of property in Greeley, Colo., which was selected as a site for a post office building, seek to defeat the condemnation proceeding instituted by the government to acquire it because the Secretary of the Treasury was induced to choose that particular location by an agreement of owners of neighboring property to pay the cost thereof in excess of the sum appropriated by Congress. The trial court held against them. The act authorized the Secretary to acquire a suitable site by purchase, condemnation, or otherwise within the limit of $15,000. The award in condemnation slightly exceeded $32,000. The restriction imposed by the act of Congress was in the amount of public funds that could be used, and it was observed; but the objection made is that it is against public policy for private citizens to make donations under such circumstances, and the fact they did so invalidates the proceedings of the government. The plaintiffs in error invoke the familiar rule against agreements which tend improperly to influence those engaged in the performance of public duties, or to induce them to subordinate the public welfare to individual gain.

Assuming that we can take cognizance of their objection in a case like this, we think it is untenable. There is no charge of the receipt of a personal consideration by any representative of the government connected with the transaction, and for that reason most of the cases cited for plaintiffs in error are inapplicable. The action of the Secretary was wholly free from any influence, save his judgment of the suitableness of the location and the donations towards its cost. Those donations were to the government, the public itself, not to an official, and we perceive nothing in them that would tend to public detriment. Even if they influenced him, it does not follow the public interest was not subserved. All reasonable inferences are to the contrary. Obviously a site at least as suitable and convenient could be procured with the larger means as with the smaller, and in all reasonable probability a better one, notwithstanding any claim to the contrary. Every influence upon official action is not against public policy. It is only that which is immoral in its conception, or tends to impair official fidelity, or otherwise contravenes the established interest of society. The right of the complaining parties, which was accorded, was that their property should not be taken, except for a public use, and that they be paid just compensation. They had no legal right to have the competition confined to sites actually worth $15,000 or less. If one worth $30,000 could be obtained for half that amount in public funds, why should the government not avail itself of the opportunity? It is not against public policy for the owners of a very valuable location to reduce the price to the sum appropriated by Congress for the sake of profiting by an increase in value of their adjacent property, or for the owners of adjacent property to pay direct to the owners of the property selected, and thereby reduce the cost to the government. A contribution to the government itself cannot be different in principle.

A public building was to be erected in Greeley, and a site satisfactory to the Secretary of the Treasury had to be selected. The donations in question inured to the benefit of the public. They were not given

to any official for the purpose of influencing his judgment, nor to an individual to influence the judgment of an official charged with a public duty, nor was their tendency to affect the exercise of the judgment of an official contrary to the public interest. There is abundant authority for the rule that, if a public institution must be located or structure built, private contributions on condition that a particular location is selected are not against public policy. Island County v. Babcock, 17 Wash. 438, 50 Pac. 54; State v. Elting, 29 Kan. 397; Pepin County v. Prindle, 61 Wis. 301, 21 N. W. 254; Thompson v. Supervisors, 40 Ill. 379; Wisner v. McBride, 49 Iowa, 220; State v. Johnson, 52 Ind. 197; Stilson v. Commissioners, 52 Ind. 213; George v. Harris, 4 N. H. 533, 17 Am. Dec. 446. See, also, Ford v. North Des Moines, 80 Iowa, 626, 45 N. W. 1031; Dishon v. Smith, 10 Iowa, 212; Wells v. Taylor, 5 Mont. 202, 3 Pac. 255.

The judgment is affirmed.

HARLAN v. UNITED STATES.

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

No. 1,695.

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

W. S. Harlan was convicted of peonage, and brings error. Affirmed.

See, also, 214 U. S. 519, 29 Sup. Ct. 700, 53 L. Ed. 1065.

Application for writ of habeas corpus was denied, and denial affirmed by the Supreme Court (218 U. S. 442, 31 Sup. Ct. 44, 54 L. Ed. 1101), and thereafter application was made for pardon, and the following is a copy of the memorandum of the President in passing on such application:

W. S. Harlan is the manager of a great lumber and turpentine company doing business in Florida and Alabama. With two or three other employés of the company he was indicted in the United States court for Florida for conspiracy to violate the peonage statutes—that is, to compel a laborer against his will to return to the company and work out a debt owing by the laborer to the company. He was tried and convicted, with two others, and was sentenced to 18 months in prison and to pay a fine of $5,000. The judgment was carried for review to the United States Circuit Court of Appeals of the Fifth Circuit, and was there affirmed; one judge, Judge Pardee, dissenting. An application to the United States Supreme Court for a writ of certiorari to review the judgment was denied.

Upon application for pardon, I signed a memorandum directing the Attorney General to prepare for my signature a formal warrant commuting the imprisonment part of the sentence to six months. A proceeding in habeas corpus was then begun and carried to the Supreme Court to test the validity of the sentence collaterally, and the sentence was upheld. Application for pardon has now been renewed.

Mr. Harlan is a man of great enterprise and of good business reputation, and has invoked and secured the sympathy and assistance of all who favor the industrial development of the country in the neighborhood of his activities in the South, as well as of many prominent citizens of Iowa, where he was born and lived for a large part of his life. They have intervened with much earnestness in his behalf. All this has led me to examine the case with great care.

Mr. Harlan was indicted on two charges of conspiracy. He was tried twice on different indictments. He was convicted on the first indictment, and acquitted on the second. The two cases covered the same general subject-matter, and the records in the two cases embraced 1,800 printed pages of evidence. I have read the records in full in each case.

The offenses charged grew out of the effort of Mr. Harlan's Company to secure 180 laborers from New York, including quite a number of recent Hungarian, Bulgarian, and other immigrants. They were brought in parties of from 12 to 25 by sea to Savannah, and thence to the company's plant, situate partly in Alabama and partly in Florida, near the line between the states. The contract of the company with each laborer stipulated for a certain wage per day, and provided for a repayment to the company out of wages earned of the cost of his transportation, $18, from New York. The evidence clearly showed that on the way from Savannah to the company's settlement a number attempted to escape, and were physically detained and brought to the place of work. There was also much evidence to show that physical punishment, if escape were attempted, was inflicted, among the foreign laborers at the turpentine and logging camps of the company, by whipping those who attempted to leave the company's employ before working out their debt to the company. The testimony was specific and detailed in cases of attempted escape of such laborers, showing their pursuit, capture, terrorism by display of revolvers, and, in one or more instances, actual whippings.

The first indictment charged against Harlan and others a conspiracy to arrest and return to peonage and service one Rudolph Lanninger. Lanninger was one of those who attempted to escape on his way to the camp from Savannah. He was captured and carried to the camp. It was his second attempt to escape and his capture that formed the basis of the indictment on which Mr. Harlan was convicted.

Mr. Harlan's counsel and his earnest advocates and friends urge that the evidence does not connect him with the pursuit of Lanninger, his capture, or his compulsory return to service, or with any system of terrorism, and they deny his knowledge or responsibility for them, and affirm his complete innocence.

I am sorry to disagree entirely with this view. The men who actually pursued, terrorized, arrested, and returned to service Lanninger and the others were in the employ of the company doing its business. Harlan was general superintendent, and the men who acted were his subordinates. It is true that the company's business was divided into a mill plant, a turpentine camp, and a logging camp four or five miles apart, and that Mr. Harlan's office was at the mill, and that the escapes and whippings were at the camps or in the woods; but it is very clear that Mr. Harlan arranged for bringing these foreigners, that he was actively interested in arranging for their work, that he directed by telegram the arrest of two foreigners who were reported to him to have escaped, and that he instigated four or five illegal and unfounded criminal prosecutions in a justice court against employés, in order to compel them to return to the company's employ and resume work under a contract.

Finally, he wrote a letter to a newspaper, in which he denied charges of cruelty and mistreatment of men by his subordinates, but in which he in effect admitted that men had attempted to escape from his employ, and that, where they were under contract, they were constrained to remain.

After reading all the evidence in the case in which Mr. Harlan was convicted, I am convinced beyond reasonable doubt that the pursuit, capture, return to service, and forcible retention of Lanninger was only one act of a number of similar acts which were in pursuance of a well-understood and approved plan, authorized by Mr. Harlan, to secure and retain needed labor of this imported kind for his business. It is utterly immaterial that he may never have known nor heard of Lanninger, or of the particular subordinates who pursued and arrested him, if, as was the fact, it was all done in pursuance of a system or plan he approved.

Complaint is made of the conduct of the trial by the District Judge. I cannot find that the defendant was prejudiced by the judge's course.

Upon the suggestion that Mr. Harlan had not made as complete a defense

in the first case, when he was convicted, as in the second case, in which he was acquitted, I have read the second case through, and my conviction that Mr. Harlan was privy to the whole peonage plan has been strengthened.

The government of the United States has been at great pains and cost to suppress peonage. It is much more likely to be maintained successfully where, as in these cases, the laborers are foreigners, and do not speak English, and hardly know their rights. It is a kind of offense that is regarded lightly in some communities. If permitted to live at all, it will spread rapidly its demoralizing influence. When, therefore, a man of high business standing and large enterprises is convicted of the offense, the punishment should be such as to deter others from the practice. Fines are not effective against men of wealth. Imprisonment is necessary. I am well aware of the grievous character of confinement in jail to a man of Mr. Harlan's standing, and I should be glad to yield to the urgent appeals of his many friends, but I cannot do so. I believe him to be guilty of the charge of which he has been convicted. To retain and enforce the imprisonment part of the sentence will operate powerfully to prevent a recurrence of such offenses by men of large affairs and business standing. To relieve such a one from the penalty of imprisonment, when properly convicted and sentenced, would be to break down the authority of the law with those of power and influence, and would tempt on their part further breaches. What is worse, it would give real ground for the contention so often heard that it is only the poor criminals who are really punished.

As I have already said, I signed, upon a previous application for pardon, a memorandum directing the preparation of formal papers reducing the imprisonment part of the sentence from 18 months to 6 months. The counsel for the applicant learned of this fact, and in the habeas corpus proceeding, which was brought before Judge Jones, one of the grounds for the release of the defendant, Mr. Harlan, was that I had issued an order of commutation reducing the imprisonment from 18 months to 6 months, and that, as a sentence of 6 months could not, under the law, be executed in the penitentiary to which Mr. Harlan had been sentenced, it could not be executed anywhere, and therefore he must be given his liberty. As a matter of fact, the instrument commuting Mr. Harlan's sentence from 18 months to 6 months was never executed. The sentence of 18 months is therefore in full force. In order to prevent the use of such a technicality in the future to avoid the sentence, I shall make no order of commutation, but shall allow the sentence to stand until after the defendant is imprisoned, and then shall exercise such executive clemency as I may be advised that the case requires.

The present application is denied, and the sentence will be executed.

[Signed] Wm. H. Taft.

W. W. Flournoy, E. C. Maxwell, and L. J. Reeves, for plaintiff in error.

W. W. Howe, Rufus E. Foster, R. P. Reese, and John P. Stokes, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In the opinion of a majority of the judges, no reversible error is patent on the face of the record. The judgment of the Circuit Court is therefore affirmed.

Certiorari to review this decision was denied by the Supreme Court. 214 U. S. 519, 29 Sup. Ct. 700, 53 L. Ed. 1065.

HUXLEY v. PENNSYLVANIA WAREHOUSING & SAFE DEPOSIT CO.

(Circuit Court of Appeals, Third Circuit. January 19, 1911.)

No. 31.

INTERPLEADER (§ 11*)—RIGHT TO INTERPLEADER—ACTION AGAINST WAREHOUSEMAN.

Where, in an action in a Circuit Court of the United States in Pennsylvania against a warehousing company to recover damages for the alleged conversion of certain automobiles, the defendant promptly presented a petition to the court disclaiming any interest in the machines, alleging that it received and held them in storage, that they were claimed by the receiver in bankruptcy of the original depositor, who threatened suit if they were surrendered to plaintiff, and offering to bring them into court, or to dispose of them as the court should order, the court properly made an order of interpleader between plaintiff and the receiver in bankruptcy, directing defendant to hold the machines subject to its order, and discharging it from further liability to either plaintiff or the receiver, under Act Pa. March 11, 1836 (P. L. 76), which provides specifically for such procedure; and it is no objection to such order that the holding of the machines in storage would result in large deterioration in their value, in view of the fact that the parties could have petitioned the court to sell them and substitute their proceeds for the machines.

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

In Error to the Circuit Court for the Eastern Division of Pennsylvania.

Action at law by Norman S. Huxley against the Pennsylvania Warehousing & Safe Deposit Company. From an order of interpleader, plaintiff brings error. Affirmed.

Joshua R. Morgan, Rudolph M. Schick, and Edwin O. Michener, for plaintiff in error.

Joseph H. Taulane and White, White, & Taulane, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Norman S. Huxley, a citizen of Delaware, brought an action on May 26, 1908, against the Pennsylvania Warehousing & Safe Deposit Company, a corporation of Pennsylvania, to recover $6,600, being the value of six automobiles. These automobiles he claimed, in his statement filed June 8th, to own by virtue of six separate storage certificates therefor, issued by the Warehousing Company, and which had been transferred to, and were now owned by, him. He further alleged that on May 22, 1908, he had tendered storage charges thereon, and demanded, and been refused delivery of, the automobiles by the Warehousing Company. He then averred a conversion by the defendant on May 22d. On June 22, 1908, the defendant, having meanwhile been served, but before it pleaded, presented a petition to the court below setting forth that it disclaimed any and all title to the automobiles; that it was engaged in the public warehousing business; that it had

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

received these machines on storage from the Dragon Automobile Company, and had issued to it the certificates in question; that that company had been adjudged bankrupt in the District Court, and its receiver, James A. Hayes, Jr., claimed the automobiles were its property, that the warehouse receipts had been unlawfully transferred to the plaintiff, that he demanded delivery of the same to him, and that, if the Warehousing Company surrendered them to Huxley, the receiver would sue it for damages; that, while petitioner was endeavoring to adjust the conflicting rights of these claimants, Huxley brought suit. The petition concluded:

"That your petitioner has no interest in the said six automobiles, and is thus liable to be put to the expense of defending two actions, and is subject to the risk of being compelled to pay twice damages in the amount of the value of the said machines. Whereupon your petitioner needs relief. Your petitioner offers to bring the said six automobiles into court, or dispose of them as the court shall order, and humbly prays: (a) That this honorable court will order the plaintiff and the Dragon Automobile Company and James A. Hayes, Jr., receiver in bankruptcy thereof, to interplead."

Subsequently the court, after notice, ordered an interpleader and directed a feigned issue be framed between Hayes, receiver, as plaintiff, and Huxley, as defendant—

"to determine the right of property of the said six automobiles on the 22d day of May, 1908; and it is further ordered that the Pennsylvania Warehousing & Safe Deposit Company have leave to bring the said six automobiles into court, by holding the same subject to the further orders of the court, and that no further proceedings be had against the said Pennsylvania Warehousing & Safe Deposit Company, and the said Pennsylvania Warehousing & Safe Deposit Company is discharged of all liability to the said Norman S. Huxley, the Dragon Automobile Company, and James A. Hayes, Jr., receiver of the Dragon Automobile Company, touching the said six automobiles so claimed in this case, and they and each of them and their attorneys are enjoined and restrained from proceeding in any manner against the said Pennsylvania Warehousing & Safe Deposit Company for or on account of the said six automobiles so claimed in this case. And the court reserves the question as to all further orders."

Thereupon Huxley sued out this writ, and assigned for error the entry of such decree.

We are of opinion the court below made no error by entering that order. The facts alleged showed a case which the Pennsylvania interpleader act of March 11, 1836 (P. L. 76), was meant to cover. The object of that act was to relieve stakeholders, who disclaimed all interest in property to which there were contesting claimants. It, inter alia, provided:

"The defendant in any action which shall be brought in the said court for the recovery of money, or of any goods, chattels or the value thereof in damages, which shall have come lawfully to his hands or possession, may, at any time after the declaration filed, and before plea pleaded by a suggestion to be filed of record, disclaim all interest in the subject matter of such action and offer to bring the same into court, or to pay or dispose thereof as the court shall order, and if he shall also allege, under oath or affirmation, that the right thereto is claimed by, or supposed to belong to some person not party to the action (naming her or them), who has sued or is expected to sue for the same, or shall show some probable matter to the court to believe that such suggestion is true, the said party (court) may, thereupon, order the plaintiff to interplead with such third person, and make such rules

and orders in the cause, and issue such process for the purpose of making such third person party to the action, and for carrying such proceeding to interplead into full and complete effect, and may render such judgment or judgments thereon, as shall be agreeable to the rules and practices of the law in such cases."

The facts alleged brought this case literally within the terms and wholly within the spirit of that statute. The Warehousing Company, being sued and threatened with another suit, at once applied to the court for relief, disclaimed interest in the machines, and offered to dispose of or hold them as the court directed. Having complied with the statutory requirements, it was entitled to the statutory relief the court decreed.

It is contended, however, by the plaintiff in error, that if his claim is eventually sustained in the interpleader a wrong will be done him, in that these automobiles were worth $6,600 when the alleged conversion took place, while now they are out of style and their value depreciated or gone, and that the court should not have discharged the Warehousing Company from further liability. We cannot agree with this contention. Not only is there no ground in fairness or equity for holding a custodian of goods responsible, after a disclaimer and offer of surrender, for the damages arising from subsequent litigation, but the very purpose of the act was to save a stakeholder from further litigation and further responsibility. Moreover, if such depreciation has happened, the Warehousing Company is in no way to blame for it, and it is no more entitled to lose by depreciation than it would have been to profit by appreciation in the value of the machines. Had its clear legal rights of disclaimer and surrender been at once acceded to, or even if they were contested, the two claimants of the machines, or either of them, could have asked the court, in view of the manifest depreciation that would occur by holding the machines, to make an order for their immediate sale. Had this been done, the automobiles could have been sold at once, and the parties relegated to that fund.

After careful consideration, we think the court below committed no error, and its decree should be affirmed.

NORTHERN PAC. RY. CO. v. VIDAL.

(Circuit Court of Appeals, Eighth Circuit. January 10, 1911.)

No. 3,410.

1. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—ACTION FOR INJURY—QUESTIONS FOR JURY.

Evidence considered in an action against a railroad company to recover for an injury to plaintiff, received while she was crossing defendant's tracks at a street crossing in an automobile, which was struck by cars being switched, and *held* to warrant the submission of the case to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1152; Dec. Dig. § 350.*]

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

2. RAILROADS (§ 345*) — ACTION FOR INJURY AT CROSSING — CONTRIBUTORY NEGLIGENCE.

Where plaintiff, in an action to recover for an injury received when she jumped or was thrown from an automobile, which was struck by a car on a railroad crossing, did not allege whether she jumped or was thrown out, she was not confined to proof that she was thrown, but was entitled to recover in either case, on proof of defendant's negligence, provided she acted as a reasonable and prudent person would under the circumstances.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1113-1116; Dec. Dig. § 345.*]

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

Action at law by Grace H. Vidal against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Aubrey Lawrence (C. W. Bunn and Ball, Watson, Young & Lawrence, on the brief), for plaintiff in error.

Seth Richardson (Barnett & Richardson, on the brief), for defendant in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and CARLAND, District Judge.

HOOK, Circuit Judge. Grace H. Vidal recovered a judgment against the Northern Pacific Railway Company for injuries sustained in an accident at a crossing, and the latter prosecuted this writ of error.

The errors assigned on the denial by the trial court of defendant's motions for a directed verdict at the close of plaintiff's case, for a judgment in its favor notwithstanding the verdict, and for a new trial, are disposed of by familiar rules of practice, which need not be stated.

The denial by the trial court of defendant's motion for a directed verdict at the close of all the evidence challenges its sufficiency to sustain the verdict. There was substantial evidence of the following facts: The plaintiff was riding on a public street in Fargo, N. D., in an automobile owned and driven by her husband. She and two friends were on the rear seat. Another sat with her husband in front. As they approached the crossing an engine pushing some freight cars was moving on the railroad track towards the street. A switchman came around the end of the nearest car and called to them to stop. They did so, close to the track. At that time the engine and cars had stopped; the nearest car being about the middle of the street. The switchman then called for the vehicle to proceed, and when it was on the track there was a collision with the cars, which again moved up. The plaintiff jumped or was thrown out, and was injured. It is not denied that there was direct and positive proof of these facts by plaintiff's witnesses; but it is insisted that their accounts are improbable and incredible.

We do not think the testimony is incredible, nor improbable, when regarded by itself and with the surrounding conditions. Its proba-

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

bility, when measured with the conflicting testimony of witnesses for the defendant, was certainly a question for the jury; and it would open up a forbidden field if we should review their decision and decide the case according to our own notions. That there should be some inconsistencies in the testimony of the witnesses is quite natural; but they were not of controlling importance, and were in part doubtless due to the confusion attending the accident. Again, statements of distance and speed of moving objects by persons inexperienced in judging of such matters are not always to be taken as exact. If a number of average persons affected with the excitement of a collision should afterwards agree precisely upon such details, it would at least suggest rehearsal.

The plaintiff, who sat at the end of the rear seat farthest away from the cars, testified that she was preparing to jump, and that when the collision occurred she was thrown out quite a distance. It is argued that this is contrary to well-known natural laws, because the impact would have caused her to fall backward into the vehicle. That does not follow; for if, in preparing to jump, her body was inclined in the direction of the applied force, she may have been thrown forward and out.

Complaint is made that the court charged in substance that it was immaterial that plaintiff jumped, instead of being thrown out, if in a time of supposed imminent danger she acted as a reasonable and prudent person would under like circumstances. It is not alleged in her complaint whether she jumped or was thrown out, and her case does not depend on its being one or the other, save as she may be bound by her testimony. A party may ordinarily be so bound; but we think the plaintiff should not be held to the nice estimate and analysis to which her testimony is subjected. The important fact is there was a collision, and she alighted on the ground violently and was injured. If defendant was negligent and she was not, its liability did not depend upon just how she got out of the vehicle. The jury may well have believed that her movement was in part voluntary and in part the result of force, and that her condition of mind at the time was such that she did not accurately comprehend what she did. At any rate, the rights of the defendant were carefully safeguarded by the instructions, the jury found for the plaintiff on the essential issues, and their finding was supported by substantial evidence.

Complaint is made of the denial of a request for an instruction which contains the proposition that there could be no recovery unless the driver of the vehicle had "reached a conclusion to stop and not cross the track," and thereafter changed it because of the direction of the switchman. The driver need have formed no conclusion on approaching the crossing, save, as is frequently the case, that of adapting his course to developments as they arose before getting in a place of danger. If then he relied on the direction of the switchman, as a reasonable and prudent man would have done, it was sufficient.

The judgment is affirmed.

BAUMAN v. ESCHALLIER.

(Circuit Court of Appeals, Third Circuit. February 7, 1911.)

No. 1,383 (76).

1. ATTORNEY AND CLIENT (§ 95*)— SCOPE OF ATTORNEY'S AUTHORITY — PURCHASE OF PROPERTY AT EXECUTION SALE.

While an attorney has large discretionary powers in the conduct of a suit, he has no power, by virtue of his mere authority to conduct a suit and collect the judgment, to purchase property for his client under the judgment, and thereby substitute such property for the money.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 185; Dec. Dig. § 95.*]

2. ATTORNEY AND CLIENT (§ 98*)—UNAUTHORIZED ACTS OF ATTORNEY — LIABILITY OF CLIENT.

Defendant, by her son, placed a real estate mortgage in the hands of an attorney for foreclosure. He took judgment on the bond, had an execution issued and the property sold thereunder, and bid it in for defendant for a sum exceeding the judgment. He afterward agreed to sell the property to plaintiff, and received the greater part of the purchase money, which he converted to his own use. As he did not pay his bid, the sheriff returned the execution, with a certificate that the property had not been sold. Defendant did not authorize the attorney to buy in the property for her, and had no knowledge of his agreement for its sale to plaintiff, and, while her son knew of the purchase after it was made, it did not appear that he was authorized to act in the matter for defendant, or that he in fact knew of or undertook to ratify the sale to plaintiff. *Held*, that there was no evidence on which defendant could be held liable to plaintiff for the money paid by him to the attorney.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 98.*]

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

Action at law by Philip A. Eschallier against Hannah Bauman. Judgment for plaintiff, and defendant brings error. Reversed.

Langfitt & McIntosh, for plaintiff in error.

R. P. Tannehill, for defendant in error.

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

LANNING, Circuit Judge. This writ is prosecuted to reverse a judgment against the plaintiff in error, Mrs. Hannah Bauman. Having through her son, Garrett Bauman, delivered for foreclosure to Joseph R. McQuaide, a lawyer in Pittsburg, Pa., a mortgage on a house and lot in that city, McQuaide caused judgment to be entered on the bond, which the mortgage secured, for the sum of $2,467.50, and caused the house and lot to be sold by the sheriff under execution issued upon the judgment. He had the property struck off by the sheriff to Mrs. Bauman, the plaintiff in the suit, for the sum of $3,100. Later he orally agreed to sell the house and lot to the present defendant in error, Philip A. Eschallier, for $3,350. Meantime, as McQuaide had failed to respond to the sheriff's demand for the $3,100, the sheriff returned the writ of execution, with a certificate that the property

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

had not been sold. Of course, no deed passed from the sheriff to Mrs. Bauman. Eschallier paid to McQuaide $3,180 on account of the agreed consideration of $3,350, upon the promise by McQuaide that a deed should be delivered to Eschallier. No deed having been delivered, Eschallier brought this action against Mrs. Bauman for the amount paid to McQuaide, and, as already stated, recovered judgment.

If Mrs. Bauman is liable, it is because McQuaide received the $3,180 as her agent. We find nothing in the record to support such a conclusion. McQuaide was her agent to foreclose the mortgage and have the mortgaged property sold by the sheriff; but he was not authorized to bid for Mrs. Bauman at the sheriff's sale. His relation to Mrs. Bauman was that of attorney to client. While an attorney has large discretionary powers in the conduct of a suit, he has no power, by virtue of his mere authority to conduct a suit and collect the judgment, to purchase property for his client, and thereby substitute such property for the money. Savery v. Sypher, 6 Wall. 157, 18 L. Ed. 822.

But it is contended that, though no authority was given to McQuaide to purchase the property for Mrs. Bauman or to sell it for her, the acts of McQuaide were subsequently ratified by Mrs. Bauman's son. This contention falls for two reasons: First, because there is no evidence to show that Mrs. Bauman's son had authority to represent her in any purchase or sale of the property; and, second, because, assuming he had such authority, there is no legal evidence that he ever ratified such purchase or sale. There is some evidence to the effect that the son had been informed that McQuaide had agreed to sell the property for $1,000 in cash and a mortgage for $2,000; but the case is wholly barren of any evidence that Mrs. Bauman's son ever knew the terms of the agreement between McQuaide and Eschallier until after McQuaide had fled from Pittsburg. No one can be held to have ratified the unauthorized act of an agent, unless he has knowledge of all the material facts. It is not pretended that Mrs. Bauman had any personal knowledge of an agreement by McQuaide to sell to Eschallier; and though it is claimed that her son had sufficient knowledge of the facts to bind Mrs. Bauman, the claim is not supported, for the reason that it assumes that knowledge by the son that McQuaide had agreed to sell the property for $1,000 in cash and $2,000 in a mortgage was a ratification of a sale for $3,350 in cash.

In our opinion there was no legal evidence of ratification of McQuaide's agreement with Eschallier, either by Mrs. Bauman or her son. We think the question of ratification was erroneously submitted to the jury. The judgment should be reversed, and judgment notwithstanding the verdict should be entered in favor of the plaintiff in error.

The plaintiff in error is entitled to costs.

O'CONOR v. SUNSERI.

(Circuit Court of Appeals, Third Circuit. February 13, 1911.)

No. 1,451.

BANKRUPTCY (§ 274*)—TRUSTEE—FINAL ACCOUNT—FAILURE TO FILE—CONTEMPT—REVIEW.

A bankrupt's trustee having failed to file his final account pursuant to an order requiring him to do so, the court on October 27, 1910, ordered that unless he filed his final account on or before November 15, 1910, at 10 o'clock a. m., he should then be committed to jail until he filed the same. On November 14, 1910, the trustee obtained the allowance of a petition to revise the order so made. *Held*, that the order must be considered as of the date of the allowance of the petition, and, not being erroneous in so far as it required the filing of the account, and not being a final judgment of commitment prior to the expiration of the time allowed for filing the account, it would be dismissed.

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

Petition to Revise Order of the District Court of the United States for the Western District of Pennsylvania.

In the matter of bankruptcy proceedings of Salvatore Sunseri. On petition to revise an order requiring C. P. O'Conor, as the bankrupt's trustee, to file his final account in the office of the referee on or before November 15, 1910, at 10 o'clock a. m., on pain of being committed to jail for contempt. Dismissed.

C. P. O'Conor, in pro. per.

Edward B. Vaill, for respondent.

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

LANNING, Circuit Judge. The petitioner, C. P. O'Conor, is the trustee of the bankrupt estate of A. Sunseri. He is also a member of the bar, and argued his own case in this court. He ought to know, and we think does know, the nature of the relation which a trustee in bankruptcy bears to the court whose officer he is. On October 20, 1909, a rule was served on him to show cause before the referee in bankruptcy on October 30th why he should not file his final account as trustee. On the return of the rule he filed his answer, setting up voidable preferences by the bankrupt to relatives; that he was unwilling to incur the expense of suits to recover the alleged preferences, unless the principal creditors would agree to become responsible for the costs of the litigation; that he had communicated with the creditors, and was awaiting their answers; and that the petition on which the rule had been granted was filed on behalf of the petitioner, by one who had been the attorney of the bankrupt and of creditors who were relatives of the bankrupt. A hearing was thereupon had, and the referee, on October 30th, made an order "that the said trustee file his final account in this estate within 10 days from service hereof." A copy of the order was served on him November 2, 1909. Having given no attention to it, the referee, on December 9th, certified the proceedings to the District Court for such action as that court might deem proper. On a

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

subsequent hearing before the court, it, on February 7, 1910, affirmed the order of the referee. No account having been filed by September 9, 1910, the court, on the petition of Salvatore Sunseri, a creditor of the bankrupt (who had received his discharge in bankruptcy in September, 1909), granted a rule requiring the trustee to show cause on September 24, 1910, why he should not be attached for contempt. On the return day of the rule O'Conor filed this answer:

"That the order made by the referee, William R. Blair, in this case, is not a lawful order; that the allegations of fact in the answer of respondent to the original petition for rule to show cause why he should not file a final account have not been denied, and are admitted as facts upon the record; that without the taking of any testimony the original order of the referee was made immediately upon the return day, and without any hearing, and in the absence of respondent from the city of Pittsburg; that the estate of the said bankrupt is not administered; that the hearing before this court upon the certification of the papers by the referee was without notice to respondent or his counsel, and that said order of the referee was confirmed without hearing respondent or his counsel; that the said order of the referee was in plain violation of the provisions of the bankruptcy act, which make it the duty of the trustee under section 47a (8) to 'make final reports and file final accounts with the court fifteen days before the day fixed for the final meeting of the creditors.'"

The contempt matter was thereupon heard by the District Court on the petition and answer. Concerning the answer the court, in its opinion, says:

"The averments in said answer with respect to want of notice to the respondent of the proceedings are directly contradicted by the records, and are directly contradictory to proofs of service on file among the records of this court. The respondent personally appeared before this court in his own behalf at the argument of the rule. From a consideration of his argument, and of the condition of the record, we are of opinion that the averments of fact in the answer are so evasive and uncertain that they are not sufficient of themselves to cause this court to discharge the rule."

The court thereupon, on October 27, 1910, ordered:

"That unless C. P. O'Conor file his final account as trustee in this estate in the office of William R. Blair, Esq., referee, on or before November 15, 1910, at 10 o'clock a. m., he shall then be committed to the common jail of Allegheny county, in this district, until he shall so file the same."

The above recital of facts shows that O'Conor held up the final settlement of this estate, in spite of the orders of the referee and the District Court, for more than a year before the date of the last order. After carefully reviewing the facts in its opinion above referred to, the court concluded as follows:

"Whether the disobedience of those orders by the respondent has been due to a mistaken, but honest, belief in the correctness of his position, or has been due to a willful disregard of his duty toward the court and of the trust reposed in him, may not at this late day be doubtful. But, lest the court may be mistaken in respect to respondent's motives, the court will give him until the 15th day of November next, at 10 o'clock a. m., in which to file in the office of William R. Blair, referee, his final account as trustee of said bankrupt, in default of which he shall then be committed to the jail of Allegheny county, at Pittsburg, in this district, until he shall so file the same."

On that opinion, the above-mentioned order of October 27, 1910, was made. The record discloses to us no excuse for the trustee's disobedience of the court's orders.

But we are not dealing with an order which adjudges him guilty of contempt. The case has been brought to this court, and argued here, as if it were a contempt case. It is not. The order of which the trustee complains required him to file his final account on or before November 15, 1910. He was not adjudged guilty of contemning the authority of the court by reason of any disobedience of former orders, and he could not be adjudged guilty of contemning its authority by reason of any disobedience of the order of October 27th before November 15th. This petition to revise was allowed on November 14th. We must therefore deal with the case as of that date. The order, in so far as it requires a final account to be filed, is not erroneous. In so far as it relates to a commitment to jail, it is not to be presumed that the court intended to issue a commitment before judgment of contempt should have been pronounced.

As the errors complained of are all based on the supposition that the petitioner was adjudged guilty of contempt, and as the record discloses no such judgment, the petition to revise must be dismissed, with costs against the petitioner. The record will be remanded forthwith, to the end that there may be no further delay in the proceedings designed to compel the trustee to perform his plain duty.

ADAMSON v. UNITED STATES.†

(Circuit Court of Appeals, Eighth Circuit. December 19, 1910.)

No. 3,365.

1. CRIMINAL LAW (§ 406*)—EVIDENCE—ADMISSIONS BY ACCUSED.
   On the trial of a criminal case, it was competent to prove a statement made by defendant to the effect that he could implicate another in the offense, as one against interest.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 894–927; Dec. Dig. § 406.*]

2. CRIMINAL LAW (§ 695*)—TRIAL—SUFFICIENCY OF OBJECTION TO EVIDENCE—ON JOINT TRIAL.
   Where two defendants were being tried together, it was not error to overrule an objection, made on behalf of both defendants jointly, to testimony which was competent and admissible against one.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1637; Dec. Dig. § 695.*]

In Error to the Supreme Court of the Territory of New Mexico.

Carl Adamson was convicted of a criminal offense. The judgment was affirmed on appeal by the Supreme Court of New Mexico (106 Pac. 653), and defendant brings error. Affirmed.

W. C. Reid (J. M. Hervey, on the brief), for plaintiff in error.

D. J. Leahy, U. S. Atty. (S. B. Davis, Jr., Asst. U. S. Atty., on the brief), for the United States.

Before VAN DEVANTER and HOOK, Circuit Judges, and CARLAND, District Judge.

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

† Rehearing denied January 21, 1911.

HOOK, Circuit Judge. Adamson and one Sullivan were jointly indicted, tried, and convicted of a conspiracy to violate the laws of the United States relating to the exclusion of Chinese. Adamson appealed to the Supreme Court of the territory of New Mexico, where the sentence was affirmed, and he then prosecuted this writ of error.

At the trial defendant Sullivan, who testified for the defense, was asked on cross-examination by counsel for the government whether, about the time the indictment was returned, he did not say to a Mr. Barringer that he did not think he would have any trouble in making bond, and that if there was any he could implicate a prominent man, but that he would rather serve a term in jail than do so. An objection that the matter was immaterial was overruled, and Sullivan denied the conversation. The government then produced Barringer, who testified, over objection, that Sullivan made the statements. The objections were that the evidence called for was incompetent and immaterial, and that there was no foundation for impeachment, because no place was designated in the question put to Sullivan. We need not stop to consider this as impeaching testimony. The statements by Sullivan were against interest, and could have been proved without his previous denial.

It is urged that, as they were made after the arrest, they were inadmissible against Adamson, his co-conspirator. But no objection on that score was made, except as it might be included in the general one, "incompetent and immaterial." Moreover, the objections were on behalf of the defendants jointly. No request was made to confine the effect of the testimony to Sullivan, and, as it was admissible against him, the objections were properly overruled. This applies, also, to the request to charge the jury to disregard the testimony. Being admissible against Sullivan, it should not have been wholly disregarded.

The Supreme Court of the territory said in its opinion that the record presented no other question than the above, and it was the only one considered. Various other matters are now urged upon us; but we think the record is not in condition for their examination. Section 31, c. 57, Laws N. M. 1907, relating to civil actions, provides that whenever it is desired to review the action of a trial court upon any point or points not necessarily involving all of the record or evidence, and the parties have not agreed as to what shall be shown, the appellant shall file in the office of the clerk of the trial court a precipe setting forth the questions he desires reviewed and those portions of the record he deems necessary for that purpose, "and he shall be bound in the Supreme Court by the precipe so filed." The opposite party is given the right to have additional parts certified, if he considers them essential to the review sought. Section 52 adapts the procedure to appeals in criminal cases, and section 54 dispenses with assignments of error.

In the case before us the official stenographer of the trial court certified "that the foregoing is a correct transcript of those portions of the testimony which it purports to be a record of"; and the certificates of the trial judge and clerk are that it is a transcript of such of the record as was asked for by the appellants. The record before us does not show the precipe provided for by section 31; but the certificates

of the judge and court officials indicate that the partial transcript was obtained in that way. This is confirmed in a measure by the recital in the opinion of the Supreme Court of the territory that but one point was raised by the record. Assignments of error in that court were unnecessary; but the section dispensing with them did not authorize the short transcript. For the adoption of that practice a special provision required a precipe setting forth the questions to be reviewed. The precipe thereupon became a limitation upon the scope of the review in the Supreme Court of the territory, and in this court as well.

But, if it be said the absence of a precipe shows that practice was not followed, the final result would be the same. We would have an incomplete record, and the familiar presumptions in favor of the action of the trial court.

The judgment is affirmed.

SEARWAY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 19, 1910.)

No. 3,308.

1. WITNESSES (§ 389*)—IMPEACHMENT—INCONSISTENT STATEMENTS—FOUNDATION.

   Where a witness on cross-examination was asked if he had not sworn to the contrary at the preliminary examination of accused, and testified that he did not remember, it was sufficient to authorize the admission of the prior conflicting statements, under the rule that a categorical denial by a witness is not an essential preliminary to his impeachment.

   [Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1245; Dec. Dig. § 389.*]

2. CRIMINAL LAW (§ 377*)—CHARACTER OF ACCUSED—RELEVANCY TO ISSUE OF GUILT OR INNOCENCE.

   Evidence of the good character of accused is admissible in all criminal trials, whether the other evidence leaves the mind in doubt or not; and, when established, it becomes a fact in the case, to be considered with all other facts in determining the final issue of guilt or innocence.

   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 840; Dec. Dig. § 377.*]

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

Francis E. Searway was convicted of passing counterfeit coin and having other like coin in his possession with intent to defraud, and he brings error. Reversed and remanded.

Ralph Talbot, for plaintiff in error.

Ralph Hartzell, Asst. U. S. Atty. (Thomas Ward, Jr., U. S. Atty., on the brief), for the United States.

Before VAN DEVANTER and HOOK, Circuit Judges, and CARLAND, District Judge.

HOOK, Circuit Judge. At the trial of the accused for passing counterfeit coin and having other like coin in his possession with intent to defraud, a witness for the government testified to certain con-

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

duct at his arrest which tended to show a consciousness of guilt. When asked on cross-examination if he had not sworn to the contrary at the preliminary examination, the witness answered that he did not remember. The accused offered evidence of the prior conflicting statements; but the trial court excluded it, because the witness had made no denial. This was error. The rule is general and well settled that a categorical denial by a witness is not an essential preliminary to his impeachment. It is sufficient, his attention being properly directed, if there is forgetfulness, partial admission, or an uncertain, evasive, or indefinite answer. The important thing is the inconsistency in the statements as affecting the credit of the witness, and the preliminary inquiry is merely to give opportunity for explanation. 2 Wigmore on Ev. § 1037.

There was evidence of general reputation of the accused for good character. The court denied his request to charge the jury that such evidence might of itself create a reasonable doubt of guilt, though without it no such doubt would exist; that upon the question of guilt such evidence was to be considered with all the other facts and circumstances of the case. On the contrary, the court charged that the fact "that a defendant may bear a good reputation among his neighbors and those who know him of being a law-abiding, honest, upright citizen, is no ground on which he should be acquitted, if you find and believe from the other evidence in the case, beyond a reasonable doubt, that he committed the acts charged against him." It will be perceived that the evidence of good character was put aside and deprived of its probative force, and the question of the innocence or guilt of the accused was left to the other evidence in the case. In Edgington v. United States, 164 U. S. 361, 17 Sup. Ct. 72, 41 L. Ed. 467, the trial court charged in substance that evidence of good character could only be considered if the rest of the evidence created a doubt of guilt; but the Supreme Court said:

"Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered, unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing."

In Humes v. United States (decided at this term) 182 Fed. 485, Judge Adams, speaking for this court, said:

"It is now the settled law in this country that good character of a person accused of crime may be shown in all criminal trials, whether the other evidence leaves the mind in doubt or not; and when it is established it becomes a fact in the case, to be considered with all other facts in determining the final issue of guilt or innocence of the accused."

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

CUMMINGS v. SYNNOTT.

(Circuit Court of Appeals, Third Circuit. February 2, 1911.)

No. 1,372 (10).

BANKRUPTCY (§ 136*)—ACCOUNTING BY BANKRUPT—MONEY FRAUDULENTLY CONVERTED, BUT UNIDENTIFIED.

Where a bankrupt sold stock of a corporation, a part of which was owned by him and a part by others, for whom he acted as agent, and received the proceeds, which fact he concealed from the other owners, who after his bankruptcy were unable to trace the money into any particular fund or property, and who filed their claims as general creditors, the bankrupt cannot avoid accounting to his trustee for the proceeds of all of the stock, on the ground that a part did not belong to his estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

Petition to Revise Order of the District Court of the United States for the Eastern District of Pennsylvania.

In the matter of John E. Cummings, bankrupt. On petition to revise an order requiring the bankrupt to pay over a sum of money to his trustee, Clayton E. Synnott. Affirmed.

Henry N. Wessel and Alfred Aarons, for petitioner.

M. Hampton Todd, for respondent.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

LANNING, Circuit Judge. After taking a very large amount of testimony and employing the services of an expert accountant, the referee in bankruptcy found that John E. Cummings, the bankrupt, at the time of his adjudication, which was in a voluntary case, had in his hands or under his control the sum of $69,317.44, for which he had failed to account to his trustee. Accordingly, on November 18, 1909, the referee made an order directing Cummings to pay that sum forthwith to his trustee. The order was carried to the District Court on a petition to review, and on February 21, 1910, that court affirmed the referee, giving the bankrupt until March 1, 1910, to comply with its terms. The matter now comes to us for consideration.

The bankrupt complains that in the account stated against him by the referee he has been erroneously charged with items not belonging to his estate, and also that the referee failed to give him credit in the account for all he claims. We do not deem it necessary to consider the items in detail. The referee, in a very carefully prepared report, has done so, and we concur with the District Court in the judgment that the account as prepared by the referee is in all respects amply supported by the proofs.

The principal charge against the bankrupt is one of $200,000. It appears that the bankrupt sold certain shares of the capital stock of the Atlantic Match Company for that sum, and that he received the cash. This is conclusively proven, and, indeed, is not denied. Three-eighths of the shares were owned by him, and five-eighths by Thomas W. Synnott and Charles H. Graham. Synnott and Graham had au-

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

thorized him to act as their agent in making the sale, and he had fraudulently concealed from them the fact that he had received such cash payment. His present contention is that five-eighths of the $200,000 belongs to Synnott and Graham, and not to his estate, and that it is beyond the power of the court to require him to pay what is due to them over to his trustee in bankruptcy. A sufficient answer to this contention is that Synnott and Graham, being unable to trace the proceeds of the sale of their stock into any particular fund or property, have not attempted to enforce any trust in their behalf, but have put in their claims against the bankrupt's estate as general creditors.

The order is clearly right. The bankrupt's counsel has treated the case, in argument, as though it were one of contempt. It is not. No proceedings to have the bankrupt punished for contempt have yet been instituted.

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

JAMES STEWART & CO. v. FULTON et al.

(Circuit Court of Appeals, Fifth Circuit. February 7, 1911.)

No. 2,108.

WORK AND LABOR (§ 14*)—EFFECT OF CONTRACT—ACTION FOR SERVICES—SPECIAL CONTRACT.

When there is an express contract for services, and for a stipulated amount and mode of compensation, the plaintiff cannot abandon the contract, and resort to an action for a quantum meruit on an implied assumpsit; nor can he take all advantages of the contract, and at the same time claim for services clearly within its scope.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 29–33; Dec. Dig. § 14.*]

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

Action at law by James Stewart & Co. against John H. Fulton and others, liquidators, etc. Judgment for defendants, and plaintiffs bring error. Affirmed.

Edgar H. Farrar and Abraham Goldberg, for plaintiffs in error.

R. J. Schwarz, W. S. Lewis, and Edwin T. Merrick, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The plaintiff sues to recover for services rendered under a special contract. While he avers that they were extra services, he does not show, nor in fact claim, that they were extra in the sense of being other than the exact kind the contract called for.

When there is an express contract for a stipulated amount and mode of compensation and services, as is shown in this case, the plaintiff cannot abandon the contract and resort to an action for a quantum

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

meruit on an implied assumpsit. See 2 Bouv. Law Dict. verbo "Quantum meruit."

Still less can he take all the advantages of the special contract, and at the same time claim for services clearly within the scope of it.

The judgment of the Circuit Court is affirmed.

LANGAN v. WARREN AXE & TOOL CO.

(Circuit Court of Appeals, Third Circuit. February 2, 1911.)

No. 1,443 (72).

PATENTS (§ 328*)—VALIDITY—GRAB-HOOKS.

The Langan patent, No. 595,181, which, as stated in the claim, is for a combination of grab-hooks of a peculiar form and a draft device, is void, as not for the invention described in the specification, which is an improved form of grab-hook alone, to which the claim as it reads cannot be limited, and also because there is no novelty in the combination itself, which was old.

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

Suit in equity by David H. Langan against the Warren Axe & Tool Company. Decree for defendant (181 Fed. 143), and complainant appeals. Affirmed.

William N. Cromwell (C. A. Snow and C. E. Doyle, of counsel), for appellant.

C. W. Stone & Son and James Hamilton, for appellee.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

LANNING, Circuit Judge. The patent in suit is No. 595,181, issued to David H. Langan on December 7, 1897, for alleged new and useful improvements in grab-hooks employed in skidding logs. The specification, after stating the manner of making such hooks in the prior art and their alleged defects, declares:

"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."

The specification then describes the construction and form of the hook, states that in use a pair of the hooks is connected by intervening links or chains to the usual draft appliance, and then sets forth the alleged advantages of the hooks.

It will be observed that in this specification, which, except as to one or two verbal corrections, is in the same form as when the application

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

was first filed in the Patent Office, there is no suggestion that any part of the patentee's invention resides in a combination of the grab-hooks and the draft appliance. The connection between the grab-hooks and the draft appliance by means of links or chains is mentioned, but such connection was as old as grab-hooks themselves, and the patentee expressly states that his invention consists, not in any such combination, but "in the particular and peculiar form of hook herein described and pointed out in the claim." In the specification as it originally existed the word "claim," just quoted, was "claims," and to the specification were annexed six claims, each of which referred merely to the construction and form of an "improved grab-hook." The first five of these claims were rejected in the Patent Office, and the sixth claim was criticised as incomplete. Thereupon the patentee canceled all the claims and inserted a new claim, which was subsequently allowed, and is the only claim of the patent, and the one now in suit. It is as follows:

"The combination with the 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."

The Circuit Court found the patent void and decreed that the bill be dismissed. See opinion, 181 Fed. 143. In that opinion we concur. Not only is the claim for a combination foreign to what is set forth in the specification, but there is no new coaction or co-operation of the elements of the combination. The grab-hooks and draft appliance of the patent, in combination, coact as grab-hooks and draft appliances have always done. The grab-hook of the patent, by reason of its peculiar construction and form, is very probably an improvement of no little utility. But the patentee cannot, merely because of that fact, have a patent for a combination which shall have, as one of its elements, a pair of such grab-hooks. He did not invent the combination. He invented, if he invented anything, an improved grab-hook. Indeed, this is conceded by the patentee's counsel, and he argues that because the patent examiner, when the original claims were before him, said "claim 6 is incomplete without the links, and the eye in the end of the shank is useless without the other elements," the claim as it now stands should be construed as one describing, as the real invention, a specific form of grab-hook. Manifestly, we cannot so construe it. The claim is for a combination of grab-hooks, of a peculiar form, and a draft device. We are not at liberty to distort its plain language. It may be, as the patentee's counsel declares, that the criticisms of the examiner led to the present form of the claim. But if the examiner's criticisms were unsound, the patentee could have had them reviewed by an appropriate appeal. This is not a case where there was a mere change of phraseology to suit the views of an examiner. The structure of the claim was remodeled in a fundamental respect. It was changed from a claim for an improved grab-hook to a claim for a combination of an improved grab-hook and a draft device. We are therefore compelled to read the claim as one for a combination, and

not for an improved grab-hook. So read, it is clear that there is no error in the decree of the Circuit Court.

The decree is affirmed, with costs.

ALLIS-CHALMERS CO. v. WESTINGHOUSE ELECTRIC & MFG. CO.

(Circuit Court of Appeals, Third Circuit. February 6, 1911.)

No. 1,412 (88).

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ELECTRIC RAILWAY MOTOR. The Schmid patent, No. 609,977, for an electric railway motor, while not of a fundamental character, covers an improvement of utility in the art, and discloses patentable invention; also *held* infringed.

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

Suit in equity by the Westinghouse Electric & Manufacturing Company against the Allis-Chalmers Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 180 Fed. 751.

Thomas F. Sheridan, Clifton V. Edwards, and Lawrence K. Sager, for appellant.

W. K. Richardson and H. F. Lyman, for appellee.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the court below in a suit in which the appellee was the complainant and the appellant the defendant. The bill of complaint asserted the ownership of the complainant in two patents, granted respectively for claimed improvements in electric railway motors. The first of these letters patent is No. 609,977, granted August 30, 1898, to the complainant, as assignee of A. Schmid, and the second is No. 546,560, granted September 17, 1895, to S. H. Short. The bill of complaint charged infringement by the defendant of both these patents, and the answer denied infringement and alleged invalidity of the patents in suit. In its decree, the Circuit Court ordered that the bill be dismissed as to patent No. 546,560, granted to Short, and from that portion of the decree no appeal has been taken. As to claims 1, 2, 3, 4, and 6 of the Schmid patent, No. 609,977, the court decreed the same to be valid and infringed by the apparatus made by the defendant.

In his specifications, the patentee states:

"Another object of my invention is to supply a novel form of separable field-magnet admitting of complete protection and inclosure of the armature and at the same time of ready access to the interior parts of the field-magnet itself.

"Another object of my invention is the provision of a form of motor wherein the field-magnets may be readily inspected and repaired without the removal of the armature from the motor and car, either side of the separable field-magnet being thus capable of inspection and repair.

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

"By the use of my invention I am further able to dispense with all framework, except that necessary for the carrying of the reduction gears, to cheapen the construction, and to gain certain other advantages more fully set out hereinafter."

Of the eight claims of this patent, those in issue are as follows:

"1. In a railway-motor, the combination with an armature, of a field-magnet constructed in two sections, the upper section being supported by the car-truck and the lower section being hinged to and supported by the upper section and adapted to swing downward, substantially as and for the purpose set forth.

"2. In a railway-motor, the combination with an armature, of a field-magnet constructed in two sections, the upper section being spring-supported on the car-truck and the lower section being hinged to and supported by the upper section and adapted to swing downward, substantially as and for the purpose set forth.

"3. In an electric car, a motor having a horizontally-divided field-magnet, one member of which is sleeved at one end upon an axle of the car, the other member being hinged to the first named member at one end and removably fastened thereto at its other end independently of the axle-bearing, substantially as described.

"4. An electric motor, having a horizontally-divided field-magnet, the upper portion of which is provided with an axle-bearing at one end and the lower portion of which is hinged to said upper portion, independently of said axle-bearing, whereby it may be swung downwardly without disturbing said bearing.

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"6. In a motor for electric cars, the combination with the armature, of a field-magnet comprising an upper section supported by the car-truck and a lower section hinged to said upper section, and means whereby the armature may be supported by either section when the lower section is swung downward, substantially as described."

Much testimony was introduced by the defendant, in support of his contention that this patent is invalid, by reason of anticipation and for want of patentable invention, in view of the prior art, and counsel for the defendant have supported this contention with much ingenuity and ability. The clear and satisfactory discussion of this and other defenses by the learned judge of the court below, renders it unnecessary to support by a separate opinion the conclusions reached by that court (180 Fed. 751), with which, after a careful consideration of the record and arguments, we agree.

We content ourselves with saying, as to the question of patentable novelty, that the patent in suit, though by no means fundamental or basic in its character, sets forth and describes in the claims referred to and the accompanying specifications, a form of electric railway-motor that has approved itself as a new and useful improvement in the art. A number of the elements of this combination are undoubtedly old, but, by reason of its compact unitary structure and easy accessibility for purposes of inspection and repair, and other advantages, it has achieved a result which entitled it to be characterized as an advance in the art for which patentable invention is properly claimed.

Agreeing with the court below, that this patent has been infringed, the interlocutory decree appealed from is hereby affirmed.

In re EFFINGER et al.

(District Court, D. Maryland. November 25, 1910.)

1. BANKRUPTCY (§ 342*)—RE-EXAMINATION OF CLAIMS—LACHES—WAIVER.
Where certain creditors of a bankrupt four months after the declaration of a dividend on a claim which had been allowed against the estate filed a petition objecting to the payment of any dividend on such claim until other creditors had been paid in full, which petition was referred to the referee and heard without objection on the part of the claimant, who appeared and offered testimony, he thereby waived the right to object on the ground that the petitioners had not acted in time and were estopped by laches.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 342.*]

2. BANKRUPTCY (§ 342*)—PARTNERSHIP—RE-EXAMINATION OF CLAIM OF PARTNER—RIGHT OF INDIVIDUAL CREDITORS TO BE HEARD.
Where creditors of the estate of a bankrupt partnership filed a petition for the reconsideration of a claim filed by one of the partners for the benefit of his individual estate and his trustee did not oppose such petition, creditors who have proved claims against the individual estate, and who are alone beneficially interested, are entitled to an opportunity to appear and be heard.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 342.*]

In the matter of Charles H. Effinger and George B. Aiken, copartners as Effinger & Aiken and individually, bankrupts. On exceptions to referee's report on claims of Charles H. Effinger against the partnership estate. Exceptions sustained conditionally.

Hyland P. Stewart, for claimant Chas. H. Effinger.
Benjamin Rosenheim, for trustee.
Myer Rosenbush, for excepting creditors.

ROSE, District Judge. On February 9, 1909, the partnership and each of the partners individually were adjudicated bankrupts. The individual estate of neither of the partners will suffice to pay his individual debts. The partnership debts exceed the partnership assets.

On April 12, 1909, the bankrupt Effinger in his own name filed a claim against the partnership estate for $6,954.97, the aggregate amount of three sums of cash which between October 19, 1906, and December 3, 1907, he had lent to the firm. He claimed interest on such principal sum from June 1, 1908, up to which last-mentioned date interest had been paid by the copartnership. In November, 1909, the same bankrupt filed a second claim against the partnership estate, in substance as follows:

Rent from claimant's individual property at Lexington, Va., from February 5th to date	$ 81 25
To cash realized to Henry Brunt, trustee in bankruptcy, from the sale of the individual property of Charles H. Effinger at Lexington, Va., and paid over to the National Exchange Bank of Baltimore in partial liquidation of a debt due by the copartnership to said bank	5,800 00
Total	$5,881 25

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

Each of these claims were filed merely as the individual claim of Charles H. Effinger. In neither is it in any wise stated that it was on behalf of his individual estate. With each was filed a power of attorney by which the bankrupt Effinger assumed to appoint his counsel, Mr. Stewart, his attorney, with power to vote at creditors' meetings, to receive dividends, etc. The referee has allowed the first claim for $6,954.97 and $289.79 interest, or a total of $7,244.76, and has awarded a first and second dividend thereon for sums aggregating $2,786.30 to the bankrupt Effinger. He has allowed the second claim for $5,510.27, and has awarded dividends thereon to the same bankrupt aggregating $2,119.22. In each of these accounts there was attached to the award of dividends upon each claim a note that the dividends were "to be credited to the individual estate of Charles H. Effinger (see section 5g of the bankruptcy act) and held by the trustee." By a first trustee's account in the individual estate of the bankrupt Effinger, which account was filed simultaneously with the second account of the partnership estate, the dividend on these two claims, which together total $4,905.52, are, after deducting some $97 of expenses, distributed between two individual creditors of the bankrupt Effinger. One of these creditors is Hutzler Bros. Their claim is $42.34 for merchandise furnished the bankrupt or his family. The other is Lucy W. Massie, a niece of the bankrupt. She claims $7,833.87 as a balance due her for services rendered the bankrupt as housekeeper during a period of many years under a verbal agreement fixing her compensation at $50 per month. Certain partnership creditors are objecting to the allowance of these dividends to the bankrupt Effinger and to the distribution of them as assets of his individual estate.

Three questions are raised:

First. Have not the partnership creditors estopped themselves by laches from now objecting to the allowance of the first claim and to the award of dividends thereon?

Second. Should the first claim have been allowed?

Third. Should the second claim have been allowed?

The first of these must now be disposed of. Is it now too late for the objecting partnership creditors to question the award of dividends upon the first claim of the bankrupt Effinger? It appears that, when the claim was first presented, objection to it was made by the same creditors now before the court. The referee allowed it. No exception was taken to his so doing. The trustee's account which awarded the first dividend to the bankrupt Effinger was filed June 25, 1909. It was not excepted to so far as this claim in question was concerned and was finally ratified July 7, 1909. Some four months afterwards, on November 10, 1909, the objecting creditors filed a petition in this court. In it they said that the first claim of Effinger had no right to participate in the distribution of the firm assets until all the partnership creditors had been paid in full. They objected to the allowance out of the firm assets of a dividend on that claim. They claimed that the amount of such dividend should be distributed among the partnership creditors. On the day this petition was filed Judge Morris referred it to the referee. The order directed the referee to take testimony and to report his findings of law and fact. In July, 1910, the referee reported that

the first claim of Effinger had been properly allowed. The objecting creditors promptly excepted to the referee's conclusions. These exceptions are now before the court.

I am of opinion that under all the circumstances of this case the petition of November 10, 1909, was filed in time. By it the creditors uniting in it were entitled to challenge the allowance of Effinger's first claim. There is, of course, no question that their objections to his second claim were seasonably made. Ordinarily a creditor who objects to the allowance of a claim or seeks to have revoked an allowance once made applies to the referee. If the referee decides against him, he files with that officer his petition setting forth the error, and the referee forthwith certifies the question presented to the judge. In this district a rigid adherence to this practice has not been insisted on. It may well be that local usage cannot modify the rule of practice which it is insisted by Effinger is indicated or prescribed by General Order No. 27. It is not necessary to pass on that question in this case. Those orders are after all merely rules of practice. They may give rights to the parties which cannot be taken from them without their consent, but the person for whose benefit they are made can waive their protection. He may do so either expressly or by implication. I have no hesitation in saying that Effinger has waived any right he might otherwise have had to object that the creditors had not acted in time. He never sought to have the court reconsider the order of November 10, 1909, referring the creditors' petition to the referee. The referee's report shows that Effinger appeared before him by counsel and offered testimony and was heard on the facts and on the law. It dos not appear that any objection was made to the reopening of the question of the allowance of the claim, nor was any assertion then made that neither the court nor the referee any longer had any jurisdiction over the matter. The failure to make such objection has the same effect as has the general appearance of a defendant sued out of his district, or the action of a plaintiff who without objection goes on with his case in the federal court to which the case had been removed by a defendant, although the petition for removal had not been filed in time. Matter of Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904; Martin's Administrator v. B. & O. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311.

The general jurisdiction of the court over the subject-matter of reopening the allowance of claims is given by the statute, which expressly says that claims which have been allowed may be reconsidered for cause and allowed or rejected in whole or in part, according to the equities of the case, before, but not after, the estate has been closed. Section 57k, Bankr. Act July 1, 1898, c. 541, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444). Section 57*l* makes provision for recovering dividends which have been paid creditors on claims, the allowance of which has subsequently been reopened and revoked.

It is, however, unnecessary to pursue the discussion because the only objection to a reconsideration of the allowance of the claims is being made by the bankrupt Effinger, who has no interest in the matters before the court, and therefore cannot be heard upon them. Since the hearing of these questions on the 2d of November, 1910, the

bankrupt has filed a petition in which he says he presented these claims for the benefit of his individual estate alone, and not for his own benefit, and that his trustee has always objected to the allowance of these claims. The petition prays that the court require the trustee formally to claim the benefit of such dividends or that the court pass an order ratifying and approving the proceedings of the bankrupt in the matter of these claims, and that the court appoint counsel to represent the individual estate of the petitioning bankrupt. The petition was denied. The time in which claims against the individual estate could in ordinary course be filed has long since expired. As already stated, two such claims, and only two, have been filed. The holders of these claims are the only persons who have any interest whatever in maintaining the allowance made by the referee. If they wish to uphold the allowance of such claims, they should be heard. It is not believed that there can be any technical difficulties which can prevent them from having their day in court. It certainly would be the duty of the court to use all its discretionary powers to see that they had a chance to make good their case if they have one, and if they want to set it up. Some form of procedure could surely be found in which they could under the usual liability of litigants for costs try their right to have dividends allowed on the bankrupt's claims against the partnership estate, and to have such dividends distributed between them. But although they have filed their claims, and although the one of them whose claim is of large amount is represented by an attorney, neither one of them has made any application to the court in the premises. Whatever may be doubtful in this case, it is clear that the bankrupt Effinger has no interest in the matter and is charged with no duty concerning it. He therefore is not entitled to be heard upon it.

Either the sums allowed as dividends on the claims in question should be divided pro rata among the individual creditors or among the partnership creditors. The latter are in court asserting that they are entitled to them. The individual creditors are also in court to the extent at least that their claims have been filed and allowed. Although the firm creditors asserted their claims something more than a year ago, the individual creditors have thus far been silent. Ordinarily it might well be held that their silence was equivalent to acquiescence in the justice of the contention made by the firm creditors. I am not prepared to take that view under all the circumstances of this case. If the two claims filed in the name of the bankrupt Effinger are entitled to dividends out of the partnership estate, Miss Massie will receive some $4,700, which will otherwise be distributed among the firm creditors. I do not believe that either Miss Massie or the firm creditors should under the circumstances be deprived of the right to try out on their merits the interesting and important questions upon which the ultimate disposition of so considerable a sum of money depends, although neither Miss Massie nor the firm creditors have in all respects hitherto been as vigilant in asserting their rights as they might and perhaps should have been. It may be that neither of the individual creditors will care to oppose the contentions

of the partnership creditors. That is for them to say. I do not feel that I should go further in this matter until their attention has been specifically called to it, and until they have notice that, unless they appear to oppose the contentions of the copartnership creditors, the latter will be upheld because unopposed.

I shall therefore sign an order sustaining the exceptions of the objecting creditors to the referee's report and to the accounts, and directing that no dividend shall be allowed upon either of the claims in question until after the partnership claims have been paid in full, unless the individual creditors of the bankrupt Effinger or one of them shall within 15 days from the date of the order apply for leave of this court to enter her or their appearance, and to be heard in opposition to the passage of such order. Such leave, if applied for, will be granted on such terms as will secure to both parties a hearing on the merits unembarrassed by any question of laches or delay.

It will give to the individual creditors the opportunity of asserting any rights they might in any way or in any name have asserted or have caused to be asserted against the copartnership estate.

In re EFFINGER et al.

(District Court, D. Maryland. January 9, 1911.)

1. BANKRUPTCY (§ 351*)—PARTNERSHIP—CLAIMS OF PARTNER—ALLOWANCE.
Bankr. Act July 1, 1898, c. 541, § 5g, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), provides that the court may permit proof of the claim of a partnership estate against the individual estate of the partners, and vice versa, and may marshal the assets of the partnership estate and individual estate so as to prevent preferences and secure the equitable distribution of the property of the several estates. *Held* that, though a partner who has lent money to the firm in excess of the amount he was bound to contribute as his share of the capital was entitled to prove a claim therefor against the partnership estate in bankruptcy, he is not entitled under such section or at all to share in the distribution of the partnership estate until all the partnership creditors are paid.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 563, 564; Dec. Dig. § 351.*]

2. BANKRUPTCY (§ 351*)—PARTNERSHIP—ESTATE OF INDIVIDUAL PARTNER.
An insolvent partner's individual estate does not contribute to the payment of partnership debts until after all his individual creditors have been paid in full.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 563, 564; Dec. Dig. § 351.*]

3. BANKRUPTCY (§ 351*)—PARTNERSHIP—SURETYSHIP OF PARTNER—NATURE OF INDIVIDUAL ESTATE.
Where an individual partner became surety on the firm's note to a bank, and also mortgaged individual real estate as additional security, and on bankruptcy intervening the bank proved its entire claim against the estate of the firm and received dividends thereon, but before settlement of the partnership estate the bank foreclosed the mortgage on the real estate and obtained an amount which with the dividends more than paid its claim in full, the estate of the bankrupt partner was entitled to an allowance out of the firm property as against firm creditors equal to

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

the amount remaining of the bank's dividends after taking therefrom an amount which, with the proceeds of the mortgaged property, was sufficient to satisfy the bank's claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 563, 564; Dec. Dig. § 351.*]

In Bankruptcy. In the matter of Charles H. Effinger and another, copartners trading as Effinger & Aitken. On exceptions of partnership creditors to the allowance of dividends on certain claims preferred by the bankrupt Effinger, on behalf of his individual estate as against the partnership creditors. Sustained.

Benjamin Rosenheim, for trustee.
Myer Rosenbush, for excepting creditors.
Hyland P. Stewart, for bankrupt and creditor of individual estate.

ROSE, District Judge. Upon the handing down of the foregoing opinion (184 Fed. 724), an order was entered in conformity therewith. Miss Massie was the only individual creditor of the bankrupt, Effinger, for any considerable sum. She availed herself of the permission given by the order, and intervened. It becomes necessary, therefore, to decide whether either of the two claims mentioned in the opinion heretofore delivered is entitled to participate pro rata with the firm creditors in the distribution of firm assets. The first of these claims is for money advanced to the firm by the partner, Effinger, in excess of his agreed contribution to its capital. The learned referee allowed the claim by reason of what he conceived to have been the change in the previously existing law effected by clause 5g of the present bankruptcy act. Act July 1, 1898, c. 541, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424). That clause reads:

"The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."

He cites in support of his conclusion the statement of Collier on Bankruptcy, p. 129, "Any claim which one member of a firm has against it may be proven against the firm and vice versa," and what is said in Lowell on Bankruptcy at page 361, to the effect:

"Under the decisions in England and the United States, a partner cannot prove against the bankrupt firm or the separate estate of another partner except for a debt totally disconnected with firm affairs, unless all the joint debts are paid, because, as it is said, he would be proving against his own creditors. An exception is made of a partner who has fraudulently abstracted firm property. In that case the other partners are allowed to prove against his estate. This rule of law so far as it relates to cases where the firm and its partners are bankrupt is abrogated by paragraph 'g,' which allows the proof of a claim of a partner's estate against the partnership estate, and puts the partners on the same footing as creditors with regard to proof against the firm when both are bankrupt."

No authorities, other than the language of the act, are cited by either of the authors above quoted.

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

The referee also says that Remington on Bankruptcy, § 2237, is to the same effect. What Remington did say in those sections of his original edition is:

"Partnership debts are 'provable' against the individual estates of the several members, either in partnership cases or in individual cases; and likewise individual debts are 'provable' against the partnership share of the individual members either in partnership or individual cases."

But he adds:

"The priority of right to share in the particular fund does not affect the provability."

I think the learned referee overlooked the significance of the last clause of the above quotation from Remington, and has put a broader construction upon what was said by the other text-writers cited by him than was intended by them.

The claim of a partner for money lent to the partnership in excess of the amount he was bound to contribute as his share of the capital is unquestionably provable against the partnership estate, but it cannot share in the distribution of that estate until all the firm creditors are paid. In the third or supplementary volume of Remington, at page 669, § 2247¼, the learned author says:

"Nor is a partner's contribution to the capital of the firm a provable debt against the partnership assets. * * * But his excess of contribution may be proved against the other partner's individual estate."

We shall see that the cases hold that section 5g authorizing the proof of such claims does not intend to change the previously existing law as to the priority of right to share in the distribution of assets. It is not true, as is contended by the counsel for the individual creditor in this case, that such a construction deprives clause 5g of all significance. In point of fact its enactment abolished a technical rule of bankruptcy procedure which in the past had at times worked real injustice.

An English partnership was dissolved in April, 1864. In March, 1865, the partner, who subsequently became bankrupt, became indebted to his former partner in the sum of £59. Two months later the bankruptcy took place. The solvent partner tendered proof for the debt of £59. The evidence showed that the assets were £50,000. while the debts did not exceed £30,000. For the solvent partner it was said:

"The debt for which it is tendered is quite distinct from any partnership debt, having been incurred since the partnership was dissolved. The joint creditors are amply secured by the joint estate. We are quite willing that the dividends should be kept in suspense, but the proof ought to be admitted. Otherwise this will be a debt for which the creditor will have no remedy whatever, although, when all the joint debts shall have been paid, nothing whatever will distinguish it from any other debts."

It was held by Lord Justices Turner and Cairns, as expressed by the latter:

"I do not think the fact, if it be so, that the joint estate is amply sufficient to pay the joint debts, makes any difference; it is merely tantamount to saying that there is ample security. The joint creditors are entitled to any surplus of the separate estate and if this proof, as it might, were to diminish that surplus, the creditor would be competing with his own creditors." Ex parte Bass, 36 Law Journal, Bankruptcy, 39.

Under our present law claims cannot be proved subsequent to one year after adjudication. Except for section 5g, it would be impossible to prove claims of the partnership estates against the individual estates, or vice versa, until the individual or the firm debts, as the case might be, had been paid in full. Before this could take place, the time in which the claims could be filed at all would usually have expired. The act, after expressly permitting the proof of such claims, says:

"The court may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."

There is no indication in this clause, taken as a whole, that there was any intent on the part of Congress to change the rules of distribution which had heretofore been held to be equitable. The intent was simply to remove all arbitrary rules of practice and procedure which had interfered with the distribution of the estates in accordance with the settled principles of equity. Such was the conclusion reached by Judge Dayton. He said:

"Clause 'f' states the precepts of the law. Clause 'g,' relates to the procedure under it. The law in 'f' demands that 'the net proceeds shall be appropriated' as directed by it, while 'g' provides simply that in carrying out these precepts, and as an aid in doing so, the court may do certain things, to wit, permit proof of claims of partnership estates against individual estates, and vice versa, and marshal the assets of such estates so as to prevent preferences and secure equitable distribution of such estates." In re Henderson (D. C.) 16 Am. Bankr. Rep. 91, 142 Fed. 588, affirmed by the Circuit Court of Appeals for the Fourth Circuit, sub nomine Euclid National Bank v. Union Trust Co., 17 Am. Bankr. Rep. 838, 149 Fed. 975, 79 C. C. A. 485.

The books of many partnerships show that one or more of the partners have not drawn from the firm all they were entitled by the articles to take out of it. Upon the sum so remaining the firm usually pays interest. If the contention now made on behalf of Miss Massie is sound, the individual creditors of every such partner have a right, in the event of the insolvency of the firm and of that partner, to insist not only upon the proof and allowance of a claim against the partnership estate for such excess contribution, but that such claim shall be permitted to participate on equal terms with the firm creditors in the distribution of the firm assets. The present bankruptcy law was passed more than 12 years ago. Under it thousands of partnerships have been wound up. In each of hundreds of these there must have been a partner whose relation to his firm was at the time of bankruptcy legally indistinguishable from that borne by Effinger.

So far as I have been able to discover, the reports do not disclose more than five cases in which it has been claimed that the partner or his individual estate could participate in the distribution of the firm assets in competition with firm creditors. Wherever the claim has been made, it has been denied. The counsel for Miss Massie says that only two of these cases are in point because only in that number was the partner as well as the firm insolvent. Admitting this to be so, it remains true that in hundreds of cases it has been the interest of some

one to make the contention now made. It has been set up only twice. In each of these cases it has been denied by the court. It is scarcely possible to think of any set of circumstances which could constitute practically a more conclusive construction that the clause of the statute relied on does not mean what the individual creditor in this case claims that it does mean. The first of the two cases above referred to was decided by that eminent authority on bankruptcy law, Judge Lowell. Brown and Denning were partners. Both were insolvent. Brown sold his interest in the partnership to Denning, taking promissory notes for the amount to be paid. Two months later Denning was adjudicated a bankrupt. Brown offered to prove the promissory notes so that he might share in the distribution of the estate. Judge Lowell decided that this he could not do. "There are joint creditors in this case who have proved, and, until the claims of the joint creditors are settled, Brown cannot share in the distribution of his former partner's estate." He added:

"There is nothing in section 5g of the act to change this well-established rule. Some courts of bankruptcy in this country have held that the distribution of joint estate among joint creditors, and of separate estate among separate creditors, is confined to cases where the commission is joint. The contrary was held in this court in Re Wilcox [D. C.] 2 Am. Bankr. Rep. 117 [94 Fed. 84]. Moreover, section 5g of the bankruptcy act was intended, I believe, to clear up the whole matter, and to permit the court to deal with conversions of this kind so as not only to prevent preference in the technical meaning of that word, but also so as to secure the equitable distribution of the property of the several estates." In re Denning (D. C.) 8 Am. Bankr. Rep. 133, 114 Fed. 219.

The whole question was again fully considered by Judge McPherson in the Eastern District of Pennsylvania in the case of In re Rice (D. C.) 21 Am. Bankr. Rep. 205, 164 Fed. 509. In that case, as in this, the partnership and each individual member thereof was insolvent. Rice, one of the partners, filed a claim against the partnership for $5,210.07; the claim being based on four promissory notes alleged to be for moneys advanced to the firm. The referee held that the claim was not provable against the partnership estate. He therefore disallowed and expunged the claim. Judge McPherson said:

"No doubt the claim of Joseph A. Rice against the firm of which he was a member is an asset of his individual estate, but it is an asset with a particular disability, and in this respect it differs from the claims of other partnership creditors. Its disability consists in the fact that, according to the well-settled rule governing the marshaling of partnership and of individual assets, it cannot participate in the distribution of the partnership assets until other partnership creditors have been satisfied in full. For this reason, the individual creditors of the claimant cannot profit by it as completely as if he were an ordinary creditor of the firm, and not a member also. But nothing is taken away from the individual creditors to which they are equitably entitled, because the claimant himself could not share in the distribution of the partnership assets pari passu with other partnership creditors. To sustain the claimant's position would give to his individual creditors a more extensive right against the bankrupt firm than he himself possesses, and would thus do violence to the rule that the individual creditors succeed only to such equity in the firm assets as belongs to their debtor himself."

The court said that, if the individual creditors desired that the claim should be formally allowed with the qualification that it should not be

permitted to share in the distribution of the assets until such partnership creditors as were not members of the firm had been paid in full, he would modify the referee's order so that such qualified allowance could be made. I find no authority which is inconsistent with the express rulings made in the two cases above cited. There are at least three that are in harmony with them.

In a case decided by the Circuit Court of Appeals for the Third Circuit, the facts were that a corporation entered into such relations with individuals that, had it itself been an individual, it would have become their partner. By the terms of the agreement among them, it contributed to the partnership capital the sum of $15,000. It lent the firm $10,700 more. It sold and delivered goods to the partnership to the value of an additional $5,500. It claimed that it was entitled to prove for these two sums of $10,700 and $5,500, respectively. The court said:

"The $15,000 which it is admitted was 'advanced in pursuance of the agreement, and which was put in at the risk of the business,' was expressly omitted from the claim. But the distinction suggested by this concession rests upon no legal foundation. The moneys advanced in excess of the amount agreed to be contributed were, it is true, in many, if not in all, instances called 'loans,' and the merchandise supplied was no doubt regarded by the parties themselves as having been 'sold,' and it may well be conceded that upon any accounting between the partners the appellant would, after satisfaction of the firm debts, be entitled to priority of credit for its surplus advances of either kind; yet as the proof proposed would, if allowed, have reduced the fund to which the general creditors of the firm were constrained to look for the partial payment of their claims, the law imperatively required its rejection. Whatever may have been the understanding of the parties, or their respective rights inter se, there can be no doubt that in fact and in law not only the $15,000 agreed to be contributed, but also the additional money advanced and the goods supplied, were, as to creditors, embarked in the business of the firm. They augmented its capital and enhanced its credit, and therefore could not in any manner be exempted from liability for its debts." Wallerstein v. Ervin, 7 Am. Bankr. Rep. 256, 112 Fed. 124, 50 C. C. A. 129.

In the Northern District of Iowa, Judge Shiras held, in Re John A. Carmichael (D. C.) 2 Am. Bankr. Rep. 815, 96 Fed. 594:

"That, when one of the partners bought claims against the partnership, they were extinguished as claims against the partnership, and remained merely claims of the partner against his individual copartners for their contribution."

The general rule of law is unquestionably that there is no individual or separate estate in firm property except in the residuum after the payment of the firm debts. Houseal & Smith's Appeal, 45 Pa. 487. The rule is that, as between the partners themselves, the share of each in a joint fund must be subject to any demand of the other upon the partnership. The whole joint fund as it exists at the time of the bankruptcy shall be applied in payment of the joint debts before any demand arising between the several partners can be attended to. Ex parte Hargreaves, 1 Cox, Chancery Cases, 439.

Much reliance has been placed by the learned counsel for Miss Massie upon that line of decisions beginning with In re Wilcox (D. C.) 2 Am. Bankr. Rep. 117, 94 Fed. 84, which hold to the entity theory of partnership relations. He argues that that theory requires that a partner shall have the same right to prove against a partnership for a

loan made to him that a stockholder in a corporation would have to prove against the corporation for the sums lent by him to it. The answer is that upon no theory of the partnership relation does the partner occupy the same position towards it and its creditors that a stockholder in a corporation does towards the corporation and its creditors. This is not denied, but it is urged that that difference affects only the case of a solvent partner. He cannot prove against the copartnership because any money that he would get from the copartnership estate he must return to the copartnership creditors for whose debts he is liable.

It is said that the rule fails when the reason for it does not exist. An insolvent partner's individual estate does not contribute to the payment of partnership debts until after all his individual creditors are paid in full. It is argued that it follows that, if he has advanced money to the partnership beyond his agreed contribution to its capital, his individual creditors are entitled, not only to have his claim against the partnership proved and allowed, but to have it participate in the distribution of the firm assets on equal terms with the other firm creditors. This argument is avowedly based on the consequence supposed to be deducible from the principles laid down in Re Wilcox, and in the cases which have followed it. The learned judge who decided the Wilcox Case as we have seen declared, in Re Denning, that the contentions here made are not good law. Partnership creditors have a right to insist that assets which have been put by a partner into a firm and which are found in the firm at the time of its bankruptcy shall as against him and his individual creditors be held to be partnership property. A partner cannot swell the assets of his firm by contributing money or property to it, and then, when the firm becomes insolvent, assert, either in his own interest or that of his individual creditors, that what he had put into the firm was a mere loan to it, and was not part of its assets. If the contention of the individual creditor in this case is sound, little reliance could in practice be placed on partnership statements. It takes very little knowledge of human nature and very little experience in a court of bankruptcy to convince one that few partnerships when called on for statements by banks, creditors, and mercantile agencies would include in the amounts owing by them sums due to their individual partners. They would feel that those claims stood on a very different footing from their other liabilities. It is now asserted that, when bankruptcy came, such liabilities would be entitled to share equally with such other debts in the distribution of the firm assets. Individuals engaged in business not infrequently omit from their statement of liabilities sums due to their near relatives. Then bankruptcy comes. The claims of their relatives are proved. The bankrupt is asked why he omitted them from his statements. He answers, and doubtless with much truth, that he left them out because he felt that they were not like the other claims against him, in that he could have the use of the money represented by them so long as he wanted it. In many cases it is very hard to tell whether a claim presented by a near relative or connection of the bankrupt should or should not be allowed. Sometimes it is disallowed because the confidence between the parties has been so great that no sufficient evidence of the loan has ever been giv-

en. Sometimes the evidence is suspiciously perfect. The claim is necessarily allowed. In point of fact, it must frequently happen that it was fraudulent. The court which allowed it because on the evidence before it it could do nothing else may have had at the time a very strong suspicion that if all the facts had been known it would have been disallowed. If a partner should be a creditor of his firm in such sense that his individual estate could participate in the event of bankruptcy equally with the other firm creditors in the distribution of the firm assets, there would be many cases in which such doubtful claims would be made against the individual estate of the partner. It would be seldom that he would be disposed to give any assistance to the trustee in resisting them. The construction which the practice in hundreds of cases has put upon the act, the construction which has been given to it by the courts whenever the precise question here at issue has been raised, and sound policy are at one in holding that the claim of a partner against his firm for an excess contribution to its capital cannot be permitted to participate in the distribution of the firm assets until after all the partnership creditors have been paid in full.

The questions raised by the controversy as to the second claim presented on behalf of the individual estate of the bankrupt Effinger are different. The partnership had borrowed money from the National Exchange Bank and had given its promissory notes therefor indorsed by each of the partners individually. To secure his indorsement, the bankrupt, Effinger, had given to the bank a deed of trust upon real estate in Virginia belonging to him. At the time of the adjudication there was due to the National Exchange Bank on the notes so indorsed the sum of $6,386.21. The Virginia property covered by the deed of trust was sold, and, after deducting the expenses of sale, the net proceeds of $5,500 was applied by the bank on account of the indebtedness represented by the notes. The bank proved its claim for the full amount against the copartnership estate, and was allowed thereon in the first account the full dividend distributed to other creditors. The amount actually received by the bank as this first dividend was $752.58. A second dividend at the same rate allowed the other creditors would have yielded the bank $1,703.53. Before the second account was stated, it had already received the first dividend of $752.58 and $5,500, the net proceeds of the sale of the Virginia property. There was only therefore $133.63 due to it, which accordingly was all the second account awarded. The difference between $1,703.53 and $133.63, $1,569.90, was thus in effect contributed by the individual estate of Effinger to the copartnership estate. The referee, however, has allowed the individual estate of Effinger on account of this claim dividends aggregating $2,582.90. Put in another way, the copartnership owed on account of its transactions with the National Exchange Bank $6,386.21, and no more. The aggregate of the two dividends awarded the firm creditors was at the rate of 38.45453 per cent. A dividend at this rate upon the bank's claim of $6,386.21 would have amounted to $2,456.11. There has been awarded to the bank under the two accounts above stated $886.21 and the referee has, as above stated, allotted dividends to the individual estate of Effinger to the amount of $2,582.90, so that, if the referee's account shall be confirmed, the result will be

that the firm estate will pay out on account of this indebtedness of $6,386.21, $3,469.11, or $1,013 more than the ratable dividend on the total indebtedness of the firm growing out of the transactions in controversy. This is obviously error. The individual creditor relies on the right of the individual estate to be subrogated to the rights of the bank. One who is subrogated to the rights of another may take the whole or a part of those rights. He cannot get more rights than the other had.

Banks almost habitually, and other creditors not infrequently, require firm paper to be indorsed by the individual partners. Very often the individual partners do what Effinger did in this case—pledge as further security some specific portion of their individual property. I have been referred to no case, and in my own researches have discovered none, in which as a result of the individual partner assuming liability for the firm debt it has been held that the sum total of the firm obligations has been thereby increased. On the other hand, I cannot agree with the contention of the partnership creditors that the claim of the individual estate should be altogether rejected. The court is directed to marshal the assets of the partnership estate and the individual estate so as to prevent preferences and secure the equitable distribution of the property of the several estates. The bank had the right to prove its claim in full against both the individual estate and the partnership estate, but, as between the individual estate and the partnership estate, the latter was primarily liable. Had the partnership estate been distributed in full before the real estate in Virginia was sold, the bank would have received $2,546.11 as dividends on its claim against the partnership estate. When the property in Virginia was sold and produced the sum of $5,500 net, the bank would have been entitled to retain of that sum the difference between its full claim, $6,381.21, and the dividends received by it from the partnership estate, $2,456.11, or $3,930.10. The remaining $1,569.90 would have been the undisputed property of the individual estate. The mere fact that the individual property in Virginia was disposed of before the partnership assets were finally distributed must not be allowed to make any difference in the rights of the parties.

Section 5g allows the filing of claims of the partnership estate against the individual estates and vice versa, and removes all technical obstacles in the way of bringing those claims before the court to be dealt with as justice and equity require. Even under Act March 2, 1867, c. 176, 14 Stat. 517, a like equity was recognized and was worked out in spite of the technical difficulties since removed by section 5g. A copartnership borrowed money on a promissory note. One of the partners indorsed the note individually, and pledged securities belonging to him for the debt. After the bankruptcy the holder of the note sold the securities and realized $18,281, being $104 in excess of the amount due upon the notes. Judge Wallace ruled that the matter should be adjusted in precisely the same way as it would have been had the creditor first proved his claim against the partnership estate and received his dividend therefrom, had then applied it upon his indebtedness, sold the individual securities, paid himself the balance remaining due to him out of their proceeds, and turned over all that remained to the individual estate. In re Foot, 9 Fed. Cas. 355. A some-

what similar case was In re Hind & Son, L. R. Ireland, 23 Chancery, 217. The same principle has been approved under the present law by the Supreme Court of the United States in Hiscock v. Varick Bank of New York, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945.

It follows, therefore, that the exceptions of the partnership creditors to the allowance made by the referee of dividends upon the first and second claims preferred by the bankrupt Effinger on behalf of his individual estate must be sustained with costs. The accounts will be remanded to the referee, with directions to state a new account in such manner as shall allow upon the claim of the National Exchange Bank a dividend of the same percentage on its entire claim as has been or shall be allowed all other partnership creditors. So much of said sum so allowed on said claim as shall exceed the amount the National Exchange Bank is entitled to receive after crediting upon its claim the sum already paid it as a first dividend and the $5,500 received from the sale of the individual property of the bankrupt, Effinger, shall be distributed to the individual estate of the said bankrupt.

PEDERSEN v. DELAWARE, L. & W. R. R.

(Circuit Court, E. D. Pennsylvania. January 18, 1911.)

No. 1,068.

1. COMMERCE (§ 5*)—INJURIES TO SERVANT—RAILROADS—EMPLOYER'S LIABILITY ACT—CAUSE OF ACTION—REQUISITES.

Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), provides that every common carrier by railroad while engaged in commerce between any of the several states or territories shall be liable to any person injured while employed by such carrier in such commerce, if such injury results in whole or in part from the negligence of any of the carrier's officers, agents, or employés or by reason of any defect or insufficiency due to its negligence in its cars, engines, etc. *Held* that, in order to establish a cause of action under such act, the offending carrier at the time of the injury must be engaged in interstate commerce and the injury must be suffered by the employé while employed by such carrier in such commerce.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 5.*]

2. COMMERCE (§ 27*)—INJURIES TO SERVANT—RAILROAD EMPLOYÉ—EMPLOYER'S LIABILITY ACT.

Defendant railroad company engaged in interstate and intrastate business at the time of plaintiff's injury was building an additional track near Hoboken, part of which was laid on a bridge. Plaintiff, an employé engaged in the bridge construction, was injured while carrying material from one part of the work to another by a local train running between two points in New Jersey. *Held*, that the injury was inflicted by the carrier as the result of the operation of a train engaged wholly in intrastate business, and plaintiff could not recover under Federal Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), imposing a liability on carriers engaged in interstate business for injuries to employés while similarly engaged.

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

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

At Law. Action by Martin Pedersen against the Delaware, Lackawanna & Western Railroad to recover for injuries to plaintiff while in defendant's employ under Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171). On motion by defendant for judgment notwithstanding a verdict for plaintiff. Granted.

Bamberger, Levi & Mandel, for plaintiff.
James F. Campbell, for defendant.

J. B. McPHERSON, District Judge. The defendant is a common carrier of freight and passengers by rail, and does both interstate and intrastate business. At the time of the plaintiff's injury, it was engaged in building an additional track near Hoboken, N. J. Part of this track was to be laid upon a bridge, and the plaintiff was hurt upon the uncompleted structure while carrying material from one part of the work to another. The verdict establishes the facts that the negligence of a locomotive engineer was one cause of the injury, and that the plaintiff, if negligent at all, was nevertheless entitled to recover a considerable sum. The new track when finished was intended for use both in local business and in commerce between the states, but the train by which the injury was inflicted was a purely local train running between two points in the state of New Jersey. The suit is brought under Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), and the question now to be decided is whether that statute affords any relief for an injury under the foregoing facts. If the plaintiff has a remedy in the state courts, it will not be affected by an adverse decision.

In my opinion the question must be answered in the negative. The act of 1908 attempted to regulate the subject of employer's liability, but was found to be fatally defective (Employer's Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297); the majority of the Supreme Court agreeing that the act was unconstitutional because it undertook to regulate traffic and other matters within the state, and that these unconstitutional regulations could not be separated from the rest of the statute. The principal dissenting opinion was written by Mr. Justice Moody; but he conceded that, if the true interpretation of the statute embraced employés who were engaged in work that had no relation to interstate commerce, Congress had overstepped its power. The whole court were agreed upon this, he said; and the principal ground of his dissent is that the statute properly interpreted afforded a remedy (207 U. S. 519, 28 Sup. Ct. 153 [52 L. Ed. 297]) "only to the employés of foreign, interstate, and territorial carriers who are themselves engaged in some capacity in such commerce in some of its manifold aspects." Mr. Justice Harlan and Mr. Justice McKenna declared (207 U. S. 540, 28 Sup. Ct. 162 [52 L. Ed. 297]) that:

"The act reasonably and properly interpreted applies, and should be interpreted as intended by Congress to apply, only to cases of interstate commerce and to employés who, at the time of the particular wrong or injury complained of, are engaged in such commerce, and not to domestic commerce or commerce completely internal to the state in which the wrong or injury occurred."

And Mr. Justice Holmes stated his view to be (207 U. S. 541, 28 Sup. Ct. 163 [52 L. Ed. 297]) that:

"The phrase 'every common carrier engaged in trade or commerce' may be construed to mean 'while engaged in trade or commerce' without violence to the habits of English speech, and to govern all that follows."

While therefore the court was not united upon the proper construction of the act, it was united upon the proposition that, if the construction announced by the majority was correct, and if the act did apply to all common carriers whose business was interstate commerce in whole or in part, without regard to the nature of the business that was being done at the time of the injury complained of, the legislation would necessarily include intrastate business and would therefore transcend the power of Congress.

This authoritative interpretation must have been influential in determining the scope of the act of 1908; and indeed it is well known that the act was passed for the express purpose of meeting the foregoing decision. The first section bears evident signs of this purpose:

"That every common carrier by railroad, while engaging in commerce between any of the several states or territories, etc., * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or in case of the death of such employé, etc., * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employés of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, etc. * * *"

Under this section the new remedy—which, being in derogation of the common law, is to be confined to its plain meaning—is only to be available when two facts appear: First, the offending carrier must at the time of the injury be "engaging in commerce between any of the several states, etc."; and, second, the injury must be suffered by the employé "while he is employed by such carrier in such commerce." Both these facts must be present or the act does not apply—the carrier must be actually engaging in interstate commerce, and the employé must also be taking part therein. If therefore the business being done by the carrier is purely intrastate, and in the course of such business it injures an employé, the act does not apply. Neither does it apply, although the business being done by the carrier is commerce between the states, if the injured employé is engaged in work that does not properly belong to such commerce. But the act apparently does not require that the carrier and the injured employé should both be engaged in the same act of interstate business. Commerce between the states has many divisions and subdivisions, and, if the carrier while engaged in doing one kind of interstate work should injure an employé who is engaged in doing another kind of such work, the remedy provided by the act appears to be available. Difficult questions will no doubt arise in the effort to determine whether the work being done by the employé can properly be regarded as interstate commerce, and also in the effort to determine whether the carrier is also engaged in such commerce; but these questions must be met as they arise, and be decided on the circumstances presented from time to time. This much at least seems clear: The tests to be applied in determining

whether a given case falls within the statute have been laid down by Congress in language that is not ambiguous, and this language declares that a right of action does not arise unless the employé be actually engaged in interstate commerce at the time of his injury, and unless also the injury be inflicted while the carrier is conducting the same kind of commerce. Applying these tests, I am of opinion that the present action cannot be maintained. Without deciding the question whether the plaintiff was engaged in interstate commerce at the time of his injury, it seems to me beyond successful dispute that the defendant did not inflict the injury in the course of such commerce. The train was a purely local train carrying passengers between two points in the state of New Jersey, and the business was wholly intrastate.

The cases upon the act of 1908 have not been numerous, and none of them I think decides the pending question distinctly, although some of them refer to it. Fulgham v. Railroad Co. (C. C.) 167 Fed. 660, is wholly concerned with the effect of the act upon state statutes dealing with the same subject, and with the question whether the right of action survived the death of the injured employé. In Watson v. Railway Co. (C. C.) 169 Fed. 942, it appeared from the complaint—which was demurred to—that the plaintiff was a fireman on a train then engaged in commerce between the states, and that while so employed he was injured by the negligence of the conductor and engineer. The court held that the act was a valid exercise of the power granted to Congress by the commerce clause, because it was confined to common carriers by rail engaged in interstate commerce, and to employés while thus actually engaged. The question was also discussed whether the act applied to injuries caused by the negligence of a fellow servant who was not at the time engaged in interstate business, and the court expressed the opinion that such injuries were covered, although the point does not seem to have been involved. Taylor v. Southern Railway (C. C.) 178 Fed. 380, required the court to decide whether a bridge repairer was engaged in interstate commerce within the meaning of the act, and it was held that he was not so engaged. The injury was caused by a defective scaffold used in the work of repair, but the question whether it was interstate commerce to erect the scaffold was not considered. In Zikos v. Railroad Co. (C. C.) 179 Fed. 893—which also arose upon demurrer to a complaint—it was charged that the injury was sustained while the plaintiff, a repairman upon the defendant's track, was driving a spike. It was averred that the spike was worn out and defective, and that this defect was known to the defendant. Upon this branch of the case the only question considered was whether the plaintiff himself was engaged in interstate commerce. The court held that he was, and gave the following reasons for this conclusion:

"But the track of a railroad company engaged both in interstate and intrastate commerce is, while essential to the latter, indispensable to the former. It is equally important that it be kept in repair. Where the traffic itself is not in fact interstate, although upon a railroad engaged in commerce between the states, such as trains devoted entirely to local business and wholly within the boundaries of a state, a different case is presented. There it is possible to identify what is and what is not interstate; but where, as in this case, a road is admittedly engaged in both, it becomes impossible to say that

particular work done results directly for the benefit of one more than the other. Manifestly it is for the accommodation of both. To hold, then, that a workman engaged in repairs upon the track of such a carrier is not furthering interstate commerce would be to deny the power to control an indispensable instrument for commercial intercourse between the states—to deny the power of Congress over interstate commerce—but that the power extends to the control of those instrumentalities through which such commerce is carried on is not an open question. Having reference to that phase of the subject, the Supreme Court has said:

" 'That assumption is this: That commerce, in the constitutional sense, only embraces shipment in a technical sense, and does not, therefore, extend to carriers engaged in interstate commerce, certainly in so far as so engaged, and the instrumentalities by which such commerce is carried on—a doctrine the unsoundness of which has been apparent ever since the decision in Gibbons v. Ogden, 9 Wheat. 1 (6 L. Ed. 23), and which has not since been open to question.' Interstate Commerce Commission v. Illinois Central Railroad Co., 215 U. S. 452, 30 Sup. Ct. 155, 161, 54 L. Ed. 280.

" 'The power also embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and encouraged.' Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 5 Sup. Ct. 826, 828, 29 L. Ed. 158.

" 'Commerce is a term of the largest import. * * * The power to regulate it embraces all the instruments by which said commerce may be conducted.' Welton v. State of Missouri, 91 U. S. 275, 280, 23 L. Ed. 347.

"No doubt there may be situations, indeed we have the highest authority for it (Employer's Liability Cases, supra, 207 U. S. 495, 28 Sup. Ct. 141, 52 L. Ed. 297), when instrumentalities that may be used for interstate or intrastate traffic, or both, but which at the time are not being used for either, as when engines or cars are undergoing repair, or in cases of clerical work when the acts or things done are not physically or otherwise directly connected with the moving of traffic, where there could be no ground for claiming liability under the act of Congress, even though the carrier in fact be engaged in interstate as well as local traffic. But where the employment necessarily and directly contributes to the more extended use and without which interstate traffic could not be carried on at all, no reason appears for denying the power over the one, although it may indirectly contribute to the other. The particular question is an apt illustration of the intricacies to which our dual system of government often leads; but the intricacy is but an incident, and it can neither defeat nor impair the power of Congress over interstate commerce. Since the track, in the nature of things, must be maintained for commerce between the states, the work bestowed upon it inures to the benefit of such commerce. It is therefore subject to federal control, even though it may contribute to carriage wholly within the state. Being inseparable, yet interstate commerce inherently abiding in the thing to be regulated, as to the track, the state jurisdiction must give way, or at least it cannot defeat the superior power of Congress over the subject-matter whenever a carrier is using the track for the double purpose."

It is apparently assumed that the railroad was engaging in interstate commerce while it was furnishing material for the repair of the track, although this question is not discussed, and indeed may not have been considered at all.

In Hoxie v. Railroad Co., 82 Conn. 352, 73 Atl. 754, the act was declared unconstitutional on grounds that are not immediately relevant. This decision is now pending before the Supreme Court of the United States. In Colasurdo v. Railway Co. (C. C.) 180 Fed. 832, 838, it appeared that the plaintiff was engaged in repairing a switch in the defendant's yards at Jersey City. While thus engaged, he was injured by the negligence of other employés on a train that had come from Somerville, N. J., to Jersey City, and was afterwards being

shifted about on the defendant's tracks. The repair of the switch was held to be interstate business, because the switch was used indifferently in both kinds of commerce. Upon the remaining question whether the railway company was engaging in interstate commerce while doing the injurious act, the court held that it was a matter of no consequence whether or not the train that struck the plaintiff was so engaged, giving as a reason:

"It is true that the act is applicable to carriers only 'while engaged' in interstate commerce, but that includes their activity when they are engaging in such commerce by their own employés. In short, if the employé was engaged in such commerce, so was the road, for the road was the master and the servant's act its act. The statute does not say that the injury must arise from an act itself done in interstate commerce, nor can I see any reason for such an implied construction."

With much respect I am unable to agree with this construction. As it seems to me, the statute does say that the injury shall arise from an act itself done in interstate commerce; for in the light of the legislative history I am unable to find a broader meaning in the words "while engaging in commerce between any of the several states, etc." A carrier is not engaging in commerce between the states while it is doing intrastate business, and I think that Congress is not attempting in the act of 1908 to regulate intrastate business by charging such business with important liabilities. For the purposes of the commerce clause, the two kinds of business are as distinct as if they were undertaken by different corporations. One corporation, the interstate carrier, might be regulated by Congress, and therefore its acts might be charged with liability. The other corporation, the intrastate carrier, would not be subject to federal control, and Congress would have no power to affix legal consequences to its acts. This would be clear enough, I think, if the two kinds of business were actually separated, and were actually performed by two corporations respectively. The fact that only one corporation actually performs them both makes it more difficult to separate the acts and to assign the proper consequences to each, but in my opinion cannot change the rules that must be applied. It is easy to depict certain anomalies and hardships that may arise. Both are probably inevitable under the dual control exercised by the state and the federal governments over the complicated business of carriers; but this dual control is a fundamental fact in the division of legislative power between these two governments, and the distinction must be observed. In the last analysis it appears to be a question of power. Can Congress regulate the intrastate business of a common carrier? If not, I do not see how it can declare that a purely intrastate act shall subject the carrier to liability solely because such act has injured a person who at the time is engaged in commerce between the states. Clearly Congress could not so declare if the injured person had suffered while he was engaged in business intrastate in character, and I cannot escape the conclusion that the carrier's liability must be determined by considering what kind of an act did the harm, and not exclusively by the occupation of the injured person. It is the doing, or the omitting to do, some act that gives rise to a cause of action, and it would certainly be an exceptional exercise

of federal power to attempt to give a right of action for a particular wrong unless Congress was also able to forbid the wrong itself. Therefore—and in this region of controversy I express my own opinion with great deference for what may well be the better opinion of others—since Congress can neither directly forbid nor regulate the purely intrastate acts of a common carrier, I believe that it cannot reach the same result indirectly by declaring that important and burdensome consequences shall follow such acts.

Without prolonging the discussion, I conclude that the plaintiff is not entitled to recover, because he was injured by an act of the defendant done in the performance of purely intrastate business, and for this reason I direct that judgment be entered in favor of the defendant notwithstanding the verdict. Exception to the plaintiff.

In re MAHLAND.

(District Court, E. D. New York. January 19, 1911.)

1. BANKRUPTCY (§ 181*)—CHATTEL MORTGAGE—PRESENT CONSIDERATION—VALIDITY.

A chattel mortgage given by a bankrupt on payment of a present consideration in cash and also to cover an antecedent indebtedness was valid, in the absence of actual fraud shown, though made within four months prior to the filing of the petition, in so far as it secured alleged advances at the time it was made which were used for the benefit of his creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260; Dec. Dig. § 181.*]

2. FRAUDULENT CONVEYANCES (§ 62*)—CHATTEL MORTGAGE—INABILITY TO PAY DEBTS—FRAUD.

A chattel mortgagor's mere inability to pay debts does not invalidate a chattel mortgage given for a present valid consideration advanced by the mortgagee having no reason to know that a fraud will be thereby committed.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 140; Dec. Dig. § 62.*]

3. CHATTEL MORTGAGES (§ 187*)—VALIDITY—MORTGAGE ON MERCHANDISE.

Under the New York law, the validity of a chattel mortgage on a stock of merchandise remaining in the possession of the mortgagor depends on the actual intent of both the mortgagor and the mortgagee at the time of making the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 372–392; Dec. Dig. § 187.*]

4. BANKRUPTCY (§ 181*)—CHATTEL MORTGAGE—VALIDITY.

Where a chattel mortgage on the mortgagor's stock of merchandise was executed in part for a present consideration and was valid under the New York law as to such present consideration, it was also valid to that extent under the bankruptcy law (Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), though made within four months prior to the filing of a bankruptcy petition by the mortgagor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260; Dec. Dig. § 181.*]

In the matter of bankruptcy proceedings of Henry Mahland, Jr. On petition to review a Referee's determination as to the validity of

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

a chattel mortgage executed by the bankrupt. Judgment for claimant.

Charles M. Stafford, for petitioner.
Charles W. Clowe, for trustee.

CHATFIELD, District Judge. In this matter the trustee in bankruptcy attacked a chattel mortgage given to the bankrupt's father, as security for loans amounting to $700, upon certain furniture, fixtures, horses, wagon, etc., connected with a grocery store owned by the bankrupt. The trustee alleged that the mortgage was presumptively fraudulent, in that the record herein, at the time of the motion, showed a prior debt to the father of $107, which was included as a part of the consideration for the mortgage, and as the record also showed that the bankrupt had consulted his father prior to the making of this mortgage, as to his needing money to pay his debts.

This court directed the trustee to interpose such answer or other objections as he might be advised to the application on the part of the mortgagee (the father of the bankrupt) to establish the validity of his mortgage, in so far as it applied to property in the possession of the trustee.

The court thereupon made the following memorandum:

"If the testimony annexed is to be believed (and nothing has been urged against its credibility), this mortgage appears to be valid for $593. If the trustee has any evidence to offer or any issue to raise as to the advancement of that amount, he may file an affidavit and the matter will be referred,"

—which was intended to compel the trustee to raise the issue of fraud, if he had any evidence thereof. The memorandum held the mortgage prima facie valid, to the extent of the present consideration. That is, a chattel mortgage given upon the payment of cash, which cash goes into the hands of the bankrupt and is used for the purposes of his estate, and of which his creditors have the benefit, is a valid mortgage, under section 67e of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), even if made within four months prior to the filing of the petition, if no actual fraud be shown.

The mortgage in the present case was plainly invalid as to the $107, but might be proven valid as to the balance, inasmuch as it was admitted that the father had actually advanced the sum of $593 to his son at the time of making the mortgage, which sum the son received, and as to which no evidence has been produced to negative the idea that the proceeds of the mortgage went into and comprised a part of the bankrupt's estate.

The issue which the trustee desired to raise was sent to a special master, therefore, for hearing; but the special master, misunderstanding the memorandum, and holding that this court had held the mortgage to be valid as a matter of law, merely went into the question of whether or not a present consideration was given for the amount as to which the mortgage appeared to be valid.

In this the special master misconstrued both the issue which was referred and (to a certain extent) the law as to such a chattel mort-

gage. The testimony presented makes it plain that the bankrupt was in difficulties, and that about a month beforehand he had consulted with his father as to the profitability of continuing his business. Upon receiving the money in question from his father, the bankrupt continued in business for three months, verified his schedules in bankruptcy, a few weeks later disappeared, and has not been seen from that time to the present.

The trustee claims that such a mortgage is fraudulent as a matter of law, and cites the cases of Billings v. Russell, 101 N. Y. 226, 4 N. E. 531, Shand v. Hanley, 71 N. Y. 319, and Cole v. Tyler, 65 N. Y. 73, at page 78. But these cases were not dealing with the making of a mortgage for a present and sufficient consideration. In such a case the law is stated in Greenwald v. Wales, 174 N. Y. 140, 66 N. E. 665. The knowledge of the mortgagee or purchaser as to the fraudulent intent of the bankrupt, as derived from knowledge of his financial condition, is a question of fact, and mere inability to pay debts does not invalidate the mortgage, if a present valid consideration be given therefor, by one who has not reason to know that a fraud will be thereby committed.

The trustee has attempted to show such knowledge in this case, and the mortgagee has testified in an attempt to rebut the effect of his conversations with the bankrupt, as to the need of borrowing money. Both parties have attended before the referee, and under compulsion of the reference have examined and cross-examined witnesses, while protesting that neither of them was required to do so.

As was said by this court in the case of In re Davis, 155 Fed. 671, the law of the state of New York as to the validity of chattel mortgages under the New York law, upon a stock of goods remaining in the possession of the mortgagor, depends upon the actual intent of both the mortgagor and mortgagee at the time of making the mortgage. Brackett v. Harvey, 91 N. Y. 214; Greenwald v. Wales, supra. The bankruptcy law does not make a mortgage like the one at issue fraudulent, if it would be valid in whole or in part under the New York law. Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 308, 45 L. Ed. 457.

Upon the proof furnished in this case, the payment of the consideration, as has been stated, was shown. The intent of the bankrupt to make a preferential mortgage has been shown. The father, however, has apparently proven that he had no fraudulent intent and obtained a valid mortgage, and the general creditors' remedy is limited to opposing the discharge of the bankrupt.

On the referee's finding and the fact that the trustee has offered no testimony to contradict the father's sworn statement, other than to point out the ordinary improbability of a son's being insolvent when his father supposed he was going to continue in business and be able to pay his debts, it must be held upon the record that the mortgagee has sustained the burden of proof, and established the validity of his mortgage, to the extent of $593.

THE JOHN FRANCIS.

(District Court, S. D. Alabama. January 5, 1911.)

No. 1,244.

1. MONEY RECEIVED (§ 1*)—NATURE OF OBLIGATION.
To render defendant liable in a suit for money had and received, plaintiff must show that defendant holds money which in equity and good conscience belongs to plaintiff.
[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. SHIPPING (§ 177*)—DEMURRAGE—PROTECTION OF CARGO.
On the arrival of a vessel, neither the consignee nor any person in his behalf or in that of the shippers appeared to accept delivery, whereupon the master, after waiting the expiration of the lay days provided in the contract, discharged the cargo on the customhouse wharf at the port of discharge, and, being unable to obtain a proper person to hold and protect the cargo for whom it might concern, the master remained ashore with his vessel 12 or more miles distant to perform that service. *Held*, that such service of the master did not entitle him to charge demurrage after the cargo had been unloaded nor sustain a charge for demurrage as compensation for a watchman, but at most only authorized a division between the owner of the cargo and the ship of the master's board bill while ashore together with the cost of cablegrams and protest fees.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 576; Dec. Dig. § 177.*
Demurrage, see notes to Harrison v. Smith, 14 C. C. A. 657; Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.]

3. PAYMENT (§ 82*)—RECOVERY—VOLUNTARY PAYMENT.
The rule that money paid on account of an unlawful demand voluntarily and with knowledge of all the facts may not be recovered, unless paid under protest or to emancipate the property from an actual and existing duress imposed by the person to whom the money is paid, does not prevent a recovery of money paid on an illegal demand reluctantly by one without ability to regain possession of his property except by making such payment.
[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 254–266; Dec. Dig. § 82.*]

4. SHIPPING (§ 194*)—INTERPRETER'S COMPENSATION.
Where the services of an interpreter at the port of a vessel's discharge were necessary to aid a master in effecting a delivery of his cargo because the people with whom he had to deal could not speak or understand his language nor he theirs, the interpreter's compensation should be divided equally between the vessel and cargo.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 613–617; Dec Dig. § 194.*]

In Admiralty. Libel by the Tropical Lumber Company against the schooner John Francis. Decree for libelant.

Pillans, Hanaw & Pillans, for libelant.
Gregory L. & H. T. Smith, for claimants.

TOULMIN, District Judge. This is a suit corresponding to an action for money had and received. It is to recover money alleged to have been unjustly and illegally demanded and received by the master

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

of the schooner Francis for demurrage and for other items claimed by him as expenses incurred at Tuxpan, Mexico, in and about the care and protection of a cargo of lumber belonging to libelants, and shipped by them under a contract of affreightment with said schooner to Tuxpan. The cargo was to be delivered at the port of discharge to a consignee on presentation of the bill of lading issued by the schooner for the cargo and payment of the freight. The consignee was duly notified of the arrival of the vessel and of her readiness to deliver the cargo on the terms stated. Waiting the expiration of the lay days provided for in the contract, and the consignee failing to appear and accept delivery of the cargo, it was discharged by the vessel onto the customhouse wharf at the port of discharge, where it remained from October 27, 1909, the day the discharge of the cargo was commenced, until November 19th, when the freight and all charges demanded by the master were paid, under protest, by libelant's agent or representative. In the meantime the master of the vessel was communicating with the consignee, and also with the libelants by cablegrams, in an effort to have the difficulties in the way of a prompt delivery of the cargo adjusted. It appears that the difficulties referred to did not arise from any fault of the vessel, but resulted from the fault, mistake, or mishap of the libelant. The master, however, refused to deliver the cargo except on payment of the demurrage and other charges demanded by him, which demand was finally acceded to, and the cargo of lumber duly delivered.

The demurrage demanded and paid the master was for 21 days at $30.80 a day, amounting to $646.80. I find that the vessel was entitled to 11 days' demurrage, amounting to $338.80, leaving in dispute $308 claimed as excess demurrage, and all the other items of the account paid, not including, of course, the freight.

To render the defendant liable in this suit, it is necessary for the libelant to show that the defendant holds money which in equity, justice, and law belongs to him.

It may not be disputed that the vessel was not entitled to demurrage after the cargo had been unladened and separated from the vessel. But it is contended on the part of the defense that inasmuch as neither the consignee, nor any person in his behalf or of that of the shippers, appeared to accept delivery of the cargo, it was the duty of the vessel to discharge and store, or place it in charge of a proper person to hold and protect for whom it may concern, subject to all lawful charges on it; and, inasmuch as no such person could be found at the port of discharge, that it was the duty of the master of the vessel himself to remain there and to perform this service. And it is urged that said excess demurrage, which is not due as such, should be allowed for said service. If the vessel had incurred any expense for storage of the cargo, or for watchmen, I think, under the circumstances of the case, such expense would have been chargeable to the cargo and should be allowed, but no such expense was claimed to have been incurred and none charged for. It might be considered as covered by the amount claimed and paid for as board for the master while he was performing such service as he, in effect, claims he did.

The defense further contends that the charges paid, and now

claimed and sued for, were voluntarily paid, and therefore cannot be recovered in this character of action, where the plaintiff must in equity and good conscience be entitled to recover.

The rule is that a party may not recover back the amount of an unlawful demand, when he has voluntarily paid the same, with full knowledge of all the facts and circumstances, unless the payment was made under protest, or "to emancipate the property from an actual and existing duress imposed by the party to whom the money is paid." But "the action to recover back may be maintained if the payment is caused, on the one part, by an illegal demand, and made, on the other, reluctantly, and without being able to regain possession of the property except by submitting to the payment." Knudsen-Ferguson Fruit Co. v. Chicago, St. P., M. & O. R. Co., 149 Fed. 973, 79 C. C. A. 483; Lamborn v. County Commissioners, 97 U. S. 181, 24 L. Ed. 926; Maxwell v. Griswold, 10 How. 256, 13 L. Ed. 405; 2 Encyc. Plg. & Prac. 1018–1020.

I find that the payments made and complained of were made under protest. Moreover, they were exacted by the master as a condition on which he would deliver the cargo.

I find that the excess demurrage demanded and paid was an illegal demand to the extent of $308, and that the libelant is in equity and good conscience entitled to recover it back.

I also am of opinion that libelant should not be charged with and required to pay the full amount of the interpreter's compensation. He was engaged in part on the business of the vessel, and in part on that of the cargo. His services seem to have been necessary because the people with whom the master had to deal could not speak or understand his language, nor he theirs. I think it equitable to divide this expense. I also think it equitable to divide the expense incurred for the master's board while ashore. His vessel was some miles distant—12 or more I believe—from where the cargo was stored. In order to give it proper care and protection, which he was undertaking to do, it was necessary for him to stay ashore, and to incur extra expense for maintenance. His services in looking to the care and protection of the cargo were in the interest of and for the benefit of the owners of the cargo, as well as in that of the vessel. I consider it just that the libelant should be charged with at least one-half of the master's board bill, and with the cost of the cablegrams and protest fees.

The judgment of the court, therefore, is that the libelant should have a decree for $359.90.

WEST PUB. CO. v. EDWARD THOMPSON CO.

(Circuit Court, E. D. New York. March 27, 1911.)

1. COPYRIGHTS (§§ 15, 55, 61*)—INFRINGEMENT—LAW REPORTS AND DIGESTS INFRINGED BY ENCYCLOPÆDIAS.

The copyrights covering the Reporters of the National Reporter System, and the Digests of the American Digest System, *held* valid and infringed by the American and English Encyclopædia of Law, and the Encyclopædia of Pleading and Practice.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. §§ 15, 55, 61.*]

2. COPYRIGHTS (§ 87*)—SUIT FOR INFRINGEMENT—DAMAGES IN LIEU OF EQUITABLE RELIEF.

A court of equity, in a suit for infringement of copyright, may award complainant damages, to be assessed by a master, in lieu of an injunction and an accounting.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 81; Dec. Dig. § 87.*]

In Equity. Suit by the West Publishing Company, of St. Paul Minn., against the Edward Thompson Company, of Northport, Long Island, N. Y., for infringement of the copyrights covering the National Reporter System and the American Digest System, by the printing and publication of the American and English Encyclopædia of Law (first and second editions) and the Encyclopædia of Pleading and Practice. Decree for complainant.

For prior reports, see 151 Fed. 138; 152 Fed. 1019; 169 Fed. 833; 176 Fed. 833, 100 C. C. A. 303.

William B. Hale and Henry E. Randall, for complainant.

Walter Large, Frank P. Prichard, and William M. McKinney, for defendant.

An interlocutory decree was entered in this cause on May 17, 1910, reading as follows:

Whereas, on the 12th day of June, 1909, a final decree was entered herein in the office of the clerk of this court, in the words and figures following, to wit:

"This cause having come on for final hearing on the 24th day of June, 1907, upon the bill of complaint, the answer thereto, the replication, and the proofs duly taken and filed therein, and having been duly argued by Edmund Wetmore, Esq., and William B. Hale, Esq., of counsel in behalf of the complainant, and by Frank P. Prichard, Esq., and John L. Hill, Esq., of counsel in behalf of the defendant,

"Now, therefore, upon consideration thereof, and on motion of Walter Large, Esq., solicitor for defendant, and on due deliberation had, it is

"Ordered, adjudged, and decreed that the bill of complaint in the above-entitled suit be and the same hereby is dismissed upon the merits, without costs. THOMAS I. CHATFIELD, U. S. District Judge."

And whereas, an appeal was thereafter taken to the United States Circuit Court of Appeals for the Second Circuit, and in the term of October, 1909, as appears by the mandate of the said United States Circuit Court of Appeals, dated the 25th day of March, 1910, the said

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

United States Circuit Court of Appeals, by its mandate, ordered, adjudged, and decreed as follows, to wit:

"Ordered, adjudged, and decreed, that the decree of said Circuit Court be, and it hereby is, modified without costs of this court to either party, so that said decree shall not dismiss the bill of complaint upon the merits, but shall deny the injunction and accounting of profits, and shall provide that the complainant recover of the defendant its damages, without costs of the Circuit Court accruing prior to the entry of the decree, the cause to be referred to a master to take proofs and report the same with his findings as to the amount of said damages, and this cause is remanded to said Circuit Court with directions to proceed in accordance herewith. It is further ordered that a mandate issue to the said Circuit Court in accordance with this decree."

And thereupon, the defendant having interposed an objection to the making of a decree by this court, referring the said cause to a master for the purpose above stated, on the ground that the decree and mandate of the said United States Circuit Court of Appeals are irregular, erroneous, and void, and that this court, notwithstanding the said decree and mandate, has no power or authority to refer the said cause to a master as aforesaid, and that the said United States Circuit Court of Appeals has no power or authority to make said decree and issue said mandate directing such reference:

Now, on consideration thereof, and in accordance with said decision and mandate of the said United States Circuit Court of Appeals, the defendant's said objection having been overruled, it is this day:

Ordered, adjudged, and decreed, that the said mandate be filed in the office of the clerk of this court, and that the said mandate be, and the same hereby is, made the order, judgment, and decree of this court; and it is

Further ordered, adjudged, and decreed, that said prior decree of this court dismissing the bill of complaint upon the merits be, and the same hereby is, modified so as to read in full as follows:

"Ordered, adjudged, and decreed, that the injunction and accounting of profits prayed for in complainant's bill be denied, and further ordered, adjudged, and decreed, that the complainant is entitled to a judgment for an unfair use of its literary property; and it is further ordered, adjudged, and decreed, that the cause be referred to B. Lincoln Benedict, of Brooklyn, who for the convenience of the parties and because of his fitness is hereby appointed special master to take proofs and report the same with his findings as to the amount of any damages, and that upon the coming in and confirmation of said report that said complainant have judgment for the amount found but without costs prior to the entry of said decree.

"[Signed] THOMAS I. CHATFIELD,
"United States District Judge Holding the Circuit Court."

A final decree was entered in this cause on March 27, 1911, reading as follows:

This cause having been brought to a final hearing upon the bill of complaint and answer thereto, the replication, and the proofs, oral and documentary, duly taken and filed herein, and an interlocutory decree for complainant having been made and entered herein on, to wit, the 17th day of May, 1910, whereby it was adjudged that complainant was entitled to a judgment for damages against the defendant by reason of the infringement of copyrights complained of in said bill of

complaint herein, and referring this cause to B. Lincoln Benedict, Esq., as special master, to take proofs and report the same with his findings as to the amount of complainant's said damages, and the parties hereto having made and filed a stipulation in writing herein reading in full as follows, to wit:

"Whereas it has been adjudged by the interlocutory decree herein that the defendant, Edward Thompson Company, has violated and infringed the copyrights of complainant, West Publishing Company, as alleged in the bill of complaint herein, to an undetermined extent, by the printing, publication and sale of its several encyclopædias entitled, respectively, American and English Encyclopædia of Law (First Edition), American and English Encyclopædia of Law, Second Edition (first twenty-three volumes thereof), and the Encyclopædia of Pleading and Practice; and whereas, the complainant, West Publishing Company, has suffered damages by reason of said infringement of its copyrights, and a reference is now proceeding before the special master herein, to determine the amount of said damages; and whereas, said West Publishing Company has brought two additional suits against said Edward Thompson Company for infringement of complainant's said copyrights by the printing, publication and sale by defendant of the last seven volumes of its said American and English Encyclopædia of Law (Second Edition) and the first four volumes of its American and English Encyclopædia of Law and Practice, which last named suits are pending, respectively, in the Circuit Courts of the United States for the Eastern and Southern Districts of New York; and whereas, the parties hereto being desirous of speedily determining all said litigations, have entered into an agreement of compromise and settlement, whereby it is provided, among other things, that defendant's liability for its said infringement of complainant's said copyrights, and for any and all damages recoverable therefor shall be discharged and satisfied by the assignment and transfer to the complainant, West Publishing Company, of all the copyrights, stock and plates of the said American and English Encyclopædia of Law (First Edition), the American and English Encyclopædia of Law (Second Edition), and the supplemental volumes thereof, the Encyclopædia of Pleading and Practice, and the supplemental volumes thereof, and the American and English Encyclopædia of Law and Practice (first five volumes thereof), and said transfers and assignments having been duly made, executed and delivered in accordance with said agreement: Now, therefore, in consideration of the premises,

"It is hereby stipulated, by and between the parties herein, that a final decree for complainant shall be forthwith entered herein against the defendant for the costs herein since the entry of the said interlocutory decree, and that the master be discharged from further consideration of the matters thereby referred to him."

Now, therefore, upon consideration thereof, and after hearing counsel for the respective parties, and upon motion of William B. Hale, solicitor for complainant, it is hereby

Ordered, adjudged, and decreed that B. Lincoln Benedict, Esq., special master herein, be, and he hereby is, discharged from further consideration of the matters heretofore referred to him by the interlocutory decree herein, upon payment of his fees; and it is in accordance with the opinion of the Circuit Court of Appeals herein

Further ordered, adjudged, and decreed that the works of the complainant are duly covered by copyright (with certain exceptions not necessary to be considered) of which complainant is the owner and proprietor, and that defendant has violated and infringed certain of said copyrighted rights of complainant by the printing, publication and sale of its said works entitled, respectively, American and English Encyclopædia of Law, First Edition, the American and English Ency-

clopædia of Law, Second Edition (first twenty-three volumes thereof), and the Encyclopædia of Pleading and Practice; and it is

Further ordered, adjudged, and decreed, the parties hereto having adjusted, settled, and discharged said claim for the damages awarded by said interlocutory decree herein, as appears from the stipulation filed herein, that complainant recover of the defendant the costs of this suit since the entry of said interlocutory decree, to be taxed by the clerk.

[Signed] THOMAS I. CHATFIELD,
U. S. District Judge Holding the Circuit Court.

WYKES v. CITY WATER CO. OF SANTA CRUZ et al.

(Circuit Court, N. D. California. January 31, 1911.)

No. 12,697.

1. CORPORATIONS (§ 389*)—DEFENSES—ULTRA VIRES—BURDEN OF PROOF.
   The defense of ultra vires, when interposed in equity, is not regarded with favor, and will be ruled with strictness; the burden of pleading and proving facts to sustain the defense being on defendant.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1568–1571; Dec. Dig. § 389.*]

2. CORPORATIONS (§ 370*)—"ULTRA VIRES."
   In its primary sense, an act is "ultra vires" the powers of a corporation when it is wholly outside the scope of the purposes for which the corporation was formed or has its being, and which it has no authority to perform under any circumstances or in any mode. In a secondary sense, however, an act is ultra vires as it affects the rights of persons without whose consent it may not be done, or when a corporation is not authorized to perform it for the specific purpose, or in the particular manner involved, notwithstanding it may be within the scope of its general powers. If the act is ultra vires in the first sense, the defense is always available; but, when the doctrine is to be applied in the second sense, its availability depends on the circumstances of the particular case.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1511–1515; Dec. Dig. § 370.*
   For other definitions, see Words and Phrases, vol. 8, pp. 7145, 7146.]

3. MUNICIPAL CORPORATIONS (§ 350*)—ULTRA VIRES—QUASI PRIVATE FUNCTIONS.
   Acts of a city in contracting for waterworks to supply itself and inhabitants with water were performed in its quasi private capacity in which the city equally with a private corporation might be estopped to claim that certain of its acts in that behalf were ultra vires.
   [Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 879–882; Dec. Dig. § 350.*]

4. MUNICIPAL CORPORATIONS (§ 878*)—ACTS OF CITY—WATER BONDS—ULTRA VIRES—DEFENSES.
   Where a city with power to purchase, hold, and enjoy real estate, and to sell and dispose of the same for the common benefit, in order to obtain a waterworks system, conveyed certain rights of way and other property to a private corporation in order that the corporation might issue bonds secured by a mortgage on the property for an amount required to build the works beyond the limit of the city's indebtedness

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

as then fixed and after the city's debt limit was extended, the city regained control of the waterworks system in accordance with a vote of the people, it was estopped to claim that the bonds so issued by such private corporation which the city assumed were invalid, as ultra vires, because the entire scheme was a mere device to evade the debt limit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1858; Dec. Dig. § 878.*]

In Equity. Bill by George Wykes, successor to the Holland Trust Company of New York, as trustee, against the City Water Company of Santa Cruz and the City of Santa Cruz to foreclose a mortgage given by the water company to secure the payment of bonds issued by it. Decree for complainant.

This is a bill in equity to foreclose a mortgage or deed of trust given by the defendant the City Water Company of Santa Cruz, hereinafter referred to as the "water company," to the Holland Trust Company of New York, the predecessor in interest of the complainant, whereby the water company conveyed to said trust company certain property, hereinafter more particularly referred to, as security for the payment of bonds of the water company issued thereunder and now outstanding.

Picked out of a mass of somewhat tangled detail unnecessary to recite, the material facts, as to which there is no conflict, are these: The defendant the city of Santa Cruz, for convenience hereafter designated the "city," a municipal corporation of the fifth class, having full power for the purpose, determined by proper action of its common council to acquire and construct a permanent system of waterworks, to be used by the municipality for supplying its inhabitants with water. A special election was duly held, whereat a proposition was voted by the electors creating a bonded indebtedness for the purpose of $300,000; that being the limit of indebtedness which the city was, under the law as it then stood, entitled to create upon the assessed valuation of property within the municipality. These bonds were duly issued, and a portion of them sold, with the proceeds of which the city acquired certain water rights, reservoir sites, and rights of way as a nucleus for the proposed plant. Difficulties then arose in disposing of the remainder of the bonds, and it was found that the fund was insufficient to carry out the proposed work. To avoid these difficulties, and particularly to evade the then limitation against incurring a greater indebtedness, the city authorities enlisted the aid of Coffin & Stanton, a New York firm of financiers, as a result of which that firm took over the unsold bonds and entered into certain agreements with the city, whereby (ignoring unnecessary details) the city granted to it the right and franchise for the construction of a system of waterworks therein, for which, when completed and turned over to it, the city was to pay the sum of $320,000. The construction of the works was to be had through the agency of a corporation to be organized for the purpose and styled the "City Water Company of Santa Cruz," to which agency was to be assigned the franchise for constructing the works, and to which the city was to transfer its title to the water rights, reservoir sites, rights of way, and other rights theretofore acquired by it, and it was provided that the water company should, upon its organization, cause to be executed a trust deed or mortgage upon all the property so to be conveyed to it by the city in an amount not to exceed $400,000, and issue bonds thereunder bearing interest at a rate not to exceed 6 per cent. These bonds the water company was to issue and deliver to Coffin & Stanton, as necessity required during the progress of the work in sufficient amount to protect that firm, who were to furnish the funds for payment of construction, but not to exceed in all $320,000 of the bonds except upon contingency of alteration or extension of plan as provided for therein. It was then provided that, when Coffin & Stanton should have received the stipulated amount of bonds, and the waterworks were completed, that firm should deposit with a trust company, to be agreed upon, $270,000 of such bonds to be held in trust or escrow for

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

the securing of the city against a like amount of the water bonds therefore issued by it and sold to or taken over by Coffin & Stanton as heretofore stated; and finally it was provided that, when said system of works should be fully completed, the water company should convey the same, with all its property and rights of every kind pertaining thereto, to the city in absolute perpetuity, but subject, however, to the mortgage or deed of trust so to be executed by the water company, which obligation and the debt secured thereby the city was to assume and pay.

These agreements were fully and in good faith carried out in all their details; the grant of the franchise to build the works was had; the defendant water company was organized with all legal formality; a deed from the city of its water rights and property was executed to the water company; the mortgage of the latter to the Holland Trust Company was duly and regularly made, and its bonds issued thereunder and delivered as required; the waterworks constructed and installed strictly in accord with the specifications therefor and accepted by the city; and in due course the water company executed to the city, and the latter accepted, a deed conveying the completed works with all property and rights of every kind included in the system and then held by the water company. This deed was made on March 29, 1892, and formal acceptance thereof had on that date, and the deed was subsequently recorded in the records of the county of Santa Cruz at the request of the then city clerk; and since said date and the taking over of the property thereunder the city has operated, used, and enjoyed the waterworks system thereby conveyed and its revenues for its own exclusive benefit and that of its inhabitants. The deed expressed no consideration passing from the city to the water company, but it recited the existence of the mortgage or deed of trust given by the latter, and the habendum of the deed reads: "To have and to hold the same and every part thereof unto the said party of the second part, its successors and assigns, subject, however, to said mortgage or deed of trust, and all the obligations thereby imposed, which bonds, mortgage or deed of trust, and obligations, the party of the second part agrees to pay and perform."

Subsequently, on March 13, 1894, the act of the city authorities in accepting this deed with such assumption of the obligation therein recited was by the council referred to the voters of the city for their ratification or rejection in a refunding proposition which when submitted specifically described such obligation and the manner in which it had been incurred and recited: "Which bonds outstanding, were at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz, of the property known as the City Waterworks, and now are, a valid lien and charge upon said property known as the City Waterworks and became thereby a part of the bonded indebtedness of the city of Santa Cruz." At such election the action of the city authorities was ratified by a vote of more than two-thirds of the electors.

Prior to the date of the acceptance of this deed and the assuming of the obligation imposed thereby, the law fixing the limit of indebtedness authorized to municipalities of the fifth class had been amended so as to increase the maximum allowed on its taxable property from 5 per cent. to 15 per cent.; and there is nothing appearing in the record to indicate that the obligation thus assumed, together with those already existing, was in excess of the total indebtedness the city was then privileged to create.

The bonds involved are what remain unliquidated of those issued by the water company under the circumstances above set forth. Upon those bonds the city from the date of taking over the waterworks down to November 1, 1893, paid the interest as it accrued, but has defaulted therein since that date. Prior to that date the bonds had passed from the ownership of Coffin & Stanton into the hands of the present holders for value, and it is in pursuance of proper demand from the latter that the trustee brings this suit.

The defendant water company is the corporation organized in pursuance of the agreements above referred to and whose bonds are the subject of the litigation. That defendant has failed to answer the bill, and is in default.

The defendant city has answered and interposes the defense of ultra vires as to the various acts of its officers involved in the controversy. It has not

taken or presented any affirmative evidence on its behalf, but rests its defense upon the facts established by the evidence taken in behalf of complainant.

Percy R. Wilson, W. W. Middlecoff, and Edwards Mills Adams, for complainant.

James G. McGuire and Carl Lindsay, for defendants.

VAN FLEET, District Judge (after stating the facts as above). The defense of ultra vires interposed by the city is one which does not appeal strongly to a court of equity in a case such as here disclosed. It is purely legal in aspect and in a sense technical, invoking as it does a harsh and unyielding bar which, if sustained, necessarily precludes all consideration of the ethical features of a case and is thereby calculated to result in wrong to innocent parties. Hence it is that the burden of pleading and proving the facts to sustain it rests peculiarly with the defendant and is to be ruled with strictness. Brown v. Board of Education, 103 Cal. 531, 37 Pac. 503; Doland v. Clark, 143 Cal. 180, 76 Pac. 958; City of Newport News v. Potter, 122 Fed. 324, 58 C. C. A. 483.

The doctrine of ultra vires is applied in different senses. In its primary sense an act is "ultra vires" the powers of a corporation when it is wholly outside of the scope of the purposes for which the corporation was formed or has its being, and which it has no authority to perform under any circumstances or in any mode. Such an act is simply void, and the transaction builded upon it must fall as to all parties concerned. But in a secondary sense an act is also said to be "ultra vires" as it affects the rights of parties without whose consent it may not be done; or when the corporation is not authorized to perform it for the specific purpose or in the particular manner involved, notwithstanding it may be within the scope of its general powers. In applying the doctrine, these distinctions should be kept in view, as the rights of parties dealing with the corporation may differ according as the doctrine is applicable in the one sense or the other and as its application may be affected by the relationship of those dealing with it. When it is applicable in the first sense, the defense is always available; but, when it is to be applied in the second, its availability is dependent upon the circumstances of the particular case.

As stated by Mr. Justice Comstock in Bissell v. Michigan Southern R. R. Co., 22 N. Y. 262, in discussing this second phase:

"Circumstances may, and often do, exist which estop the offender from taking advantage of his own wrong. The contract may be entered into on the other side without any participation in the guilt, and without any knowledge even of the vice which contaminates it. An innocent person may part with value, or otherwise change his situation, upon the faith of the contract."

And, as said in Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300:

"From the cases cited, it very clearly appears that the question, as between stockholders and the corporation, is a very different one from that which arises between the corporation itself and strangers dealing with it, and the principle established, where the contest arises between strangers and the corporation, is whether the act in question is one which the corporation is not authorized to perform under any circumstances, or one that may be per-

formed by the corporation for some purposes, but not for others. In the former case the defense of ultra vires is available to the corporation as against all persons, because they are bound to know from the law of its existence that it has no power to perform the act. But in the latter case the defense may or may not be available, depending upon the question whether the party dealing with the corporation is aware of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance. And the test as between strangers having no knowledge of an unlawful purpose and the corporation is to compare the terms of the contract with the provisions of the law from which the corporation derives its powers, and, if the court can see that the act to be performed is necessarily beyond the powers of the corporation for any purpose, the contract cannot be enforced; otherwise, it can."

These considerations would seem to have peculiar application to this case, since it appears without controversy that the bonds in suit are now in the hands of strangers to the transaction, taking without notice and for value; and the contract which gave rise to their issuance and sale has been fully performed, with the result that the city has received the full benefit of that performance and the fruits of such sale. In such a case, if the acts of the city are not to be held void in the extreme sense first indicated, there is, upon the facts, strong and persuasive ground for holding that it cannot be heard to impeach their validity at all.

That a municipal corporation equally with a private one may be estopped from denying the validity of its contract made within the general scope of its powers, although not entered into or carried out in the precise or formal manner required by law, is well established; and especially is this true with reference to a contract relating to its proprietary as distinguished from its governmental functions—and the contract here involved falls within the latter category.

"A city has two classes of powers: The one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other proprietary, quasi private, conferred upon it not for the purpose of governing its people, but for the private advantage of the inhabitants of the city itself as a legal personality. * * * In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens. 1 Dill. Mun. Corp. 27; City of Cincinnati v. Cameron, 33 Ohio St. 336, 367; Safety Insulated Wire & Cable Co. v. City of Baltimore [66 Fed. 140, 13 C. C. A. 375] supra, and cases there cited." Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 282, 22 C. C. A. 181, 34 L. R. A. 518.

And upon the doctrine of estoppel as applied to such a contract it is said in Westbrook v. Middlecoff, 99 Ill. App. 327:

"While courts should maintain with vigor the limitations which the statute has placed upon corporate action, whenever it is a question of restraining a city council in advance from passing beyond the bounds of statutory requirement, they should, on the other hand, enforce against the city contracts of which it has received the benefit, if the subject-matter of the contract falls within the charter powers of the city. Where the statute authorizes a municipal corporation to exercise a certain power, but specifically regulates the mode in which it may be exercised, an attempt on the part of the municipal officers to override the regulations and exercise it in another manner will be restrained; but when the officers have so acted, and the municipality has received the benefits of a contract thus irregularly entered into,

it is estopped from setting up the irregular exercise of the power when called upon to pay for what it has received. East St. Louis v. East St. Louis Gaslight Co., 98 Ill. 415 [38 Am. Rep. 97]; Badger et al. v. Inlet Drainage Co., 141 Ill. 540 [31 N. E. 170]; Bradley v. Ballard, 55 Ill. 413 [8 Am. Rep. 656]; First National Bank v. Keith, 183 Ill. 475 [56 N. E. 179]; Village of Harvey v. Wilson, 78 Ill. App. 544; Dillon's Municipal Corporations, § 444, etc. The proposition is thus tersely stated by Justice Scholfield in Badger et al. v. Inlet Drainage Co.: 'The doing of a thing in a proper way is a legitimate charge upon the revenues of the municipality; and so, when it is done and is accepted and enjoyed by the municipality, the municipality gets what it had authority to get in a different way, and it should therefore pay for it what it would have paid, had it got it in the right way.'"

In Illinois Trust & Savings Bank v. City of Arkansas City, supra, the principle is thus stated:

"There is another and conclusive reason why this city cannot maintain any of the defenses that it has interposed in this suit. It is that it cannot accept the benefits and repudiate the burdens of its contract. It is that it cannot be heard to deny the truth of the representations of the existence and of the execution of this contract, which its records and its conduct have constantly made, and in reliance upon which the gas company and the water company constructed and extended the waterworks, and the bank and the bondholders loaned their money. No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself, or more salutary in its effects, than that no one may, to the damage of another, deny the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation. This principle is equitable because it forbids the untruthful or culpably negligent deceiver from profiting by his own wrong, at the expense of the innocent purchaser or contractor who believed him. It is salutary because it represses falsehood and fraud. Paxson v. Brown, 27 U. S. App. 49, 60, 61 Fed. 874, 881, 10 C. C. A. 135, 143; Pence v. Arbuckle, 22 Minn. 417; Cairncross v. Lorimer, 3 Macq. 827, 829; Dickerson v. Colgrove, 100 U. S. 578, 582 [25 L. Ed. 618]; Faxton v. Faxton, 28 Mich. 159; Kirk v. Hamilton, 102 U. S. 68, 75 [26 L. Ed. 79]; Evans v. Snyder, 64 Mo. 516. This principle is as applicable to the transactions of corporations as to those of individuals. As Mr. Justice Campbell well said in Zabriskie v. Railroad Co., 23 How. 381, 400, 401 [16 L. Ed. 488], in which the Supreme Court held that a corporation was estopped to question the validity of its void guaranty, because it had permitted the circulation of the bonds that carried it: 'A corporation, quite as much as an individual, is held to a careful adherence to truth in all their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."

See, also, City of Litchfield v. Litchfield Water Co., 95 Ill. App. 647; Higgins v. San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670.

When the specific contentions of the defendant city are examined in the light of the foregoing principles, I think it will readily be perceived that the case does not present an instance of the absence or want of power in the municipality to do the acts complained of such as to make available the defense of ultra vires in its primary sense; but merely an instance of the irregular use of existing power by a departure from the formal requirements of the law governing their action—in no respect sufficient to avoid the doctrine of estoppel above stated. Let us see.

The first proposition of counsel is that the city had no authority to sell, alienate, or mortgage the property in question, and that the ac-

tion of its mayor and common council in that regard was ultra vires. By this is clearly not meant that there was no power in the city to dispose of the property under any circumstances, for there was. Its charter expressly gave it power to "purchase, receive, hold and enjoy real estate and personal property, and sell, and dispose of the same for the common benefit." St. Cal. 1876, p. 189.

But the argument is that the property was acquired by the city charged with a public trust, that of being used by it for the purpose of building waterworks, and that the purpose was so expressed in the deeds by which it was conveyed by its former owners, and that its attempted conveyance to the water company was in violation of that trust.

But, in the first place, having general power to alienate its property for the common good, its deed was not void, even if voidable, since the purpose intended was the common good. In the next place, the conveyance, while not perhaps in pursuance of the method of securing waterworks contemplated by those selling to the city, was not in derogation of the trust, since the very purpose of the conveyance was intended as a means to secure the performance of that trust.

But, lastly, those conveying the property to the city are not here complaining of the act, and it does not lie with the city to make the objection. Moreover, the purpose sought has been accomplished, even if irregular, and no one therefore has been injured by the method pursued.

But it is argued that the conveyance to the water company being had to enable the latter to mortgage the property was in effect, though indirectly, a mortgaging of the property by the city; and that this it had absolutely no power to do, the right to mortgage not being included in the power to sell.

But assuming that the transaction amounted in effect to a mortgaging of the property by the city, and was not expressly authorized, it was had for a proper municipal purpose, that of securing the building of waterworks, something the city was expressly authorized by its charter to do (St. Cal. 1876, p. 192), and, the purpose having been accomplished, the transaction, regardless of its mere form, will be upheld (Adams v. Memphis & L. R. Co., 42 Tenn. 645). And see Middleton Sav. Bank v. City of Dubuque, 15 Iowa, 394; Adams v. City of Rome, 59 Ga. 766; 2 Dill. Mun. Corp. 676.

It is further contended that by its contract with Coffin & Stanton and the conveyance of its property to the water company the city was attempting to evade the Constitution and the statute limiting the amount of indebtedness it was authorized to incur, and, being in direct violation of law, was absolutely void. It may be conceded that the transaction in its inception was without sanction of law and could have been enjoined; and that, had its effect been to create at the time an indebtedness in excess of the legal limit, it would not have been binding on the city. But it is clear that the city never became obligated to pay any indebtedness incurred under the contract until it voluntarily took over the completed works and assumed the obligation, and possibly—a question which is immaterial—not until the action of its coun-

cil was ratified by the vote of its electorate. Until then its obligation was wholly contingent. Doland v. Clark, 143 Cal. 176, 76 Pac. 958. At those dates, as we have seen, the indebtedness it was authorized to create had been so enlarged by the statute that the limit was not exceeded by its action.

There are some further points made; but they are all covered by the general considerations above stated, and present nothing substantially tending to sustain the defense set up, or take the case out of the rule of estoppel above stated.

It results that a decree should go in favor of the complainant, and it is so ordered.

HASTINGS v. HEROLD.

(Circuit Court, D. New Jersey. July 11, 1910.)

1. INTERNAL REVENUE (§ 38*)—OLEOMARGARINE TAXES—ACTION TO RECOVER.
Where, in an action to recover oleomargarine taxes paid under protest into the hands of a deputy collector of internal revenue and by him deposited to the credit of the treasurer of the United States, the summons was issued against the collector individually, but the demand claimed was for moneys paid into his office as collector of internal revenue, and a petition for removal of the cause to the federal court alleged that defendant, acting as internal revenue collector under and by authority of the acts of Congress relating to the manufacture and sale of oleomargarine, collected the moneys in question, and the case was tried on the theory that the moneys were received by defendant as such, and it was admitted at the trial that defendant made the assessment and sent it to his deputy for collection, the summons would be considered as amended, so that it would be directed to defendant in his official capacity, or otherwise, as might be necessary.

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

2. INTERNAL REVENUE (§ 38*)—TAXES ILLEGALLY ASSESSED—RECOVERY.
No suit lay at common law on an implied assumpsit to recover taxes illegally paid, and hence an action to recover such taxes could only be maintained under and in strict pursuance of the statutes authorizing the same.

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

3. INTERNAL REVENUE (§ 38*)—TAXES ILLEGALLY ASSESSED AND COLLECTED—RECOVERY—OLEOMARGARINE ACT.
Rev. St. §§ 3221, 3226 (U. S. Comp. St. 1901, pp. 2087, 2088), relating to the return of internal revenue taxes illegally assessed, and providing that no suit shall be maintained in any court for the recovery of an internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty or sum claimed to have been wrongfully collected until an appeal shall have been duly made to the Commissioner of Internal Revenue, provided that, if the decision is delayed more than six months from the date of the appeal, suit may be brought without first having the commissioner's decision, apply to special taxes assessed and collected under the laws regulating the manufacture and sale of oleomargarine.

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

4. EVIDENCE (§ 47*)—JUDICIAL NOTICE—INTERNAL REVENUE REGULATIONS—FORMS.
Regulations of the Secretary of the Treasury adopting different forms for use on applications to his office for the abatement of an assessment of internal revenue taxes and for the return of moneys alleged to have

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

been wrongfully collected as such have the force of law and will be judicially noticed by the federal courts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 69; Dec. Dig. § 47.*]

5. INTERNAL REVENUE (§ 38*)—OLEOMARGARINE TAXES—WRONGFUL ASSESSMENT—RECOVERY.

Rev. St. § 3226 (U. S. Comp. St. 1901, p. 2088), provides that no suits shall be maintained in any court to recover an internal tax alleged to have been erroneously or illegally assessed or collected, or any penalty, until appeal has been duly made to the Commissioner of Internal Revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury and a decision of the commissioner has been had therein. *Held*, that where a person alleged to have been wrongfully assessed for oleomargarine taxes applied pursuant to internal revenue form 47 for an abatement of the assessment, which application was denied, but made no application pursuant to form 46 for a return of the moneys alleged to have been paid as such taxes under a protest, a suit brought against the collector to recover such taxes was premature.

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

Action by Henry Hensch, continued in the name of Frank Hastings, trustee in bankruptcy of Hensch, against Herman C. H. Herold, as collector of internal revenue at Jersey City, to recover special oleomargarine taxes assessed against Hensch and paid under protest. Complaint dismissed.

Merritt Lane, for plaintiff.

Harrison P. Lindabury, Asst. U. S. Dist. Atty., for defendant.

CROSS, District Judge. This suit was tried before the court without a jury; a jury having been waived pursuant to the statute. It was originally commenced in the First district court of the city of Newark, in the name of Henry Hensch, as plaintiff; but, as he was subsequently adjudged a bankrupt, his trustee was, by order of this court, substituted as plaintiff. The action was removed by certiorari from the city court to this court. The state of demand filed in that court sought to recover of the defendant the sum of $338.68, with interest from August 21, 1907, money paid to him as collector of internal revenue, by Hensch, in part as a special tax on the business of manufacturer of oleomargarine, alleged to have been carried on by Hensch at Jersey City, in this state, and for a penalty of 50 per cent. assessed under authority supposed to have been conferred by section 3176 of the Revised Statute (page 2068, U. S. Comp. St. 1901), upon the said special tax, and in part for a special stamp tax upon certain oleomargarine and for other penalties therein mentioned, growing out of the same transaction.

The allegations of the state of demand, except those pertaining to the payment of the tax and penalties under duress and to the illegality of the assessment, were admitted at the trial. It appears by the evidence and admissions of counsel that Hensch was indicted in this district for having manufactured oleomargarine without having paid the special tax therefor required by law to be paid by a manufacturer thereof, and after trial on such accusation was acquitted. The record in that case was offered in evidence, and it was admitted

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

that the offense therein charged, and of which he was acquitted, was the same as that for which he was compelled to pay the taxes and penalties above referred to. Hensch also testified in this case that, at the time charged, he was not a manufacturer of oleomargarine, and his testimony in that respect is uncontradicted. It also appears by his evidence that the sums above mentioned were paid by him only after threat by the collector of internal revenue of seizure and sale of his property, and that at the time when the payment was actually made it was made under protest. Later, and on or about March 3, 1908, he filed a verified application with the Commissioner of Internal Revenue, asking, for reasons therein given, that the assessment of said taxes and penalties should be abated, stating, among other things, that he was justly entitled, and that he asked and demanded, to have said sum of $519.50 remitted, together with the penalties and interest amounting to $19.18, which application was not granted. The tax and penalties were admittedly paid to the deputy collector at Jersey City, and by him deposited to the credit of the Treasurer of the United States.

The point is now raised by the defendant that, as this suit was commenced against the defendant individually, and as the moneys never came into his hands, but into the hands of his deputy at Jersey City, and were deposited by him as above stated, the verdict herein must be in favor of the defendant. It is true that the summons was issued against the defendant individually; but the state of demand claims the moneys of him as collector of internal revenue for the Fifth district of the state of New Jersey. Moreover, his petition for the removal of the cause into this court sets forth that the defendant, acting as internal revenue collector of the United States, under and by authority of the acts of Congress, relating to the manufacture and sale of oleomargarine, and the supplements thereto and amendments thereof, collected the moneys now in question. Again, the case was tried throughout upon the theory that the moneys were collected by the defendant as collector of internal revenue, and it was admitted at the trial that the assessment made by the Commissioner of Internal Revenue was sent to the defendant and by him sent to his deputy at Jersey City, for collection. Under the circumstances, therefore, the summons ought to, and may properly, be considered as amended, so that it will be directed to the defendant as collector of internal revenue or otherwise, as may be necessary.

It is further urged on behalf of the defendant that the plaintiff cannot recover in this case because Hensch has not complied with the regulations prescribed by the Secretary of the Treasury under authority of section 3226, Rev. St. (U. S. Comp. St. 1901, p. 2088), in that his affidavit by way of petition to the Commissioner of Internal Revenue merely asked for an abatement and remission of the assessment, and that no petition was filed by him to have the tax and penalties refunded. The plaintiff, however, contends, under the authority of Tucker v. Grier, 160 Fed. 611, 87 C. C. A. 513, that sections 3221 and 3226 of the Revised Statutes (pages 2087, and 2088, U. S. Comp. St. 1901), do not apply to a return of taxes illegally assessed under the oleomargarine act. In that case it was said that because by sec-

tion 3 of that act (Act Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2229]) sections 3232 to 3241, inclusive, and section 3243 of the Revised Statutes (pages 2091–2095, U. S. Comp. St. 1901), were expressly referred to, and made a part of the act, other sections of the law relating to internal revenue, including section 3226, were not applicable. Notwithstanding the great respect which I must and do entertain for the opinion of that court, I am constrained, contrary to my first impression, to differ from its conclusion. The foregoing sections of the Revised Statutes relating to internal revenue were by the language of the third section of the oleomargarine act, "so far as applicable, made to extend to, and include and apply to the special taxes imposed by this section and to the persons upon whom they are imposed." The conclusion is reached in the case above cited that, because the foregoing sections are specifically incorporated into the oleomargarine act, others not thus mentioned are by implication excluded. Section 3226 of the Revised Statutes is as follows:

"No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the commissioner has been had therein: provided, that if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the commissioner at any time within the period limited in the next section."

It will be noticed that this language is of the most comprehensive character—no suit shall be maintained in any court for the recovery of any internal revenue tax, etc. No suit would lie at common law upon an implied assumpsit to recover taxes illegally paid. Collector v. Hubbard, 79 U. S. 1, 20 L. Ed. 272. The plaintiff must follow the statutory method if he would prevail. An appeal to the Commissioner of Internal Revenue is a condition precedent to an action for the recovery of taxes paid. Erskine, Collector, v. Holnbach, 14 Wall. 613, 20 L. Ed. 745; Cheatham v. U. S., 92 U. S. 85, 23 L. Ed. 561. His only right to recover rests upon sections 3220 and 3226. Since that is so, he must comply with their terms, including any regulations made by the Secretary of the Treasury, pursuant to the power thereby conferred. The sections of the internal revenue law, incorporated into the oleomargarine act, relate simply and solely to the imposition of the special taxes therein referred to, and the persons upon whom they were to be imposed. The procedure requisite under sections 3220 and 3226, for the return of taxes and penalties, was independent subject-matter, and their applicability to the oleomargarine act was in no wise impaired or modified, in my judgment, by the fact that they were not specifically referred to, although other sections were. There is nothing in that act repugnant to sections 3220 and 3226. No method for the return or for a suit for the recovery of taxes and penalties illegally imposed is provided or even referred to in that act. Section 3226 was intended to, and does, in specific terms, apply to all cases like the one at bar, and is of such a comprehensive character that its

provisions cannot be disregarded in any case coming within its purview, until Congress shall have otherwise expressly provided.

In Nichols v. United States, 7 Wall. 122, 129 (19 L. Ed. 125), the importance of the matter under consideration is discussed, and so clearly that a somewhat lengthy extract is both permissible and instructive:

"The prompt collection of the revenue, and its faithful application, is one of the most vital duties of government. Depending as the government does on its revenue to meet, not only its current expenses, but to pay the interest on its debt, it is of the utmost importance that it should be collected with dispatch, and that the officers of the treasury should be able to make a reliable estimate of means, in order to meet liabilities. It would be difficult to do this, if the receipts from duties and internal taxes paid into the treasury were liable to be taken out of it, on suits prosecuted in the Court of Claims for alleged errors and mistakes, concerning which the officers charged with the collection and disbursement of the revenue had received no information. Such a policy would be disastrous to the finances of the country, for, as there is no statute of limitations to bar these suits, it would be impossible to tell, in advance, how much money would be required to pay the judgments obtained on them, and the result would be that the treasury estimates for any current year would be unreliable. To guard against such consequences, Congress has from time to time passed laws on the subject of the revenue, which not only provide for the manner of its collection, but also point out a way in which errors can be corrected. These laws constitute a system which Congress has provided for the benefit of those persons who complain of illegal assessments of taxes and illegal exactions of duties. In the administration of the tariff laws, as we have seen, the Secretary of the Treasury decides what is due on a specific importation of goods; but, if the importer is dissatisfied with this decision, he can contest the question in a suit against the collector, if, before he pays the duties, he tells the officers of the law, in writing, why he objects to their payment.

"And an equal provision has been made to correct errors in the administration of the internal revenue laws. The party aggrieved can test the question of the illegality of an assessment, or collection of taxes, by suit; but he cannot do this until he has taken an appeal to the Commissioner of Internal Revenue. If the commissioner delays his decision beyond the period of 6 months from the time the appeal is taken, then suit may be brought at any time within 12 months from the date of the appeal. Thus it will be seen that the person who believes he has suffered wrong at the hands of the assessor or collector can appeal to the courts; but he cannot do this until he has taken an intermediate appeal to the commissioner, and, at all events, he is barred from bringing a suit, unless he does it within a year from the time the commissioner is notified of his appeal. The object of these different provisions is apparent. While the government is desirous to secure the citizen a mode of redress against erroneous assessments or collections, it says to him: 'We want all controverted questions concerning the revenue settled speedily, and, if you have complaint to make, you must let the Commissioner of Internal Revenue know the grounds of it; but if he decides against you, or fails to decide at all, you can test the question in the courts if you bring your suit within a limited period of time.'"

I do not concede, and am unwilling to hold, that a "system" thus devised by Congress, declaring when and how moneys can be recovered from the United States treasury, can be properly held inapplicable to a revenue act of any kind subsequently passed for the reasons given in Tucker v. Grier, supra. The sections of the internal revenue act, constituting the "system" referred to in Nichols v. United States, supra, unless expressly excluded, in my judgment, become a part of every internal revenue act. They constitute the general law of the subject, and, since there is nothing in the oleomargarine act repugnant

to their provisions, control this case. As already stated, however, the plaintiff herein sought to comply with the terms of section 3226, and made an appeal to the Commissioner of Internal Revenue for the abatement of the assessment, but not for the return of the moneys in question. The Secretary of the Treasury has provided two forms, Nos. 46 and 47, for the purposes just mentioned. 46 is made applicable to the return of taxes and penalties illegally or improperly assessed, and 47 for an abatement of their assessment. Form 46 is applicable to cases where the taxes and penalties have been paid, and 47 to cases where they have not been paid. These regulations of the Secretary have the force of law, and the federal courts are obliged to take notice of them. Caha v. United States, 152 U. S. 211, 221, 14 Sup. Ct. 513, 38 L. Ed. 415. Furthermore, they are obviously binding upon the commissioner, and he obtains jurisdiction to pass upon a claim only when and as they have been complied with. The merits of a case come before him when a proper claim has been made. He never passed upon the merits of the plaintiff's claim as herein presented. Under the appeal presented and acted upon by him, he could only determine whether or not the assessment should be abated. Any other or further action would have been in violation of the regulations and beyond his jurisdiction. In United States v. Savings Bank, 104 U. S. 728, 26 L. Ed. 908, form 46 was recognized as appropriate where a return of taxes was sought. In Hicks v. James' Administratrix (C. C.) 48 Fed. 542, the plaintiff brought suit to recover certain taxes which it was claimed had been illegally exacted, and the question as to whether there had been a proper appeal made to the commissioner, before the suit was instituted, was raised, and the difference between an appeal taken under forms 46 and 47 clearly shown. The case was later affirmed by the Supreme Court sub nom. James' Administratrix v. Hicks, 110 U. S. 272, 4 Sup. Ct. 6, 28 L. Ed. 144.

But, if the use of form 47 by the plaintiff were permissible, the appeal was imperfect in not having indorsed thereon the affidavit and certificate required by the regulations.

The suit was prematurely brought; judgment will be entered accordingly. If a review is desired, counsel can doubtless agree upon the case; if not, they may come before me on notice to settle it.

SHEPARD v. NORTHERN PAC. RY. CO. et al.

KENNEDY et al. v. GREAT NORTHERN RY. CO. et al.

JAMES v. SAME.

SHILLABER v. MINNEAPOLIS & ST. L. R. CO. et al.

(Circuit Court, D. Minnesota, Third Division. April 8, 1911.)

(Syllabus by the Court.)

1. COMMERCE (§§ 61, 62*) — CONSTITUTIONAL LAW — CARRIERS — STATE RATES VIOLATIVE OF COMMERCIAL CLAUSE.

The acts of the Legislature of Minnesota of April 4, 1907 (Gen. Laws 1907, c. 97 [Rev. Laws Supp. 1909, §§ 2007—1 to 2007—2]), reducing passenger fares within the state about 33⅓ per cent., and of April 18, 1907 (Gen. Laws 1907, c. 232 [Rev. Laws Supp. 1909, §§ 2007—11 to 2007—17]), reducing commodity rates within the state about 7.37 per cent., and the orders of its Railroad and Warehouse Commission of September 6, 1906, reducing general merchandise rates within the state from 20 to 25 per cent., and of May 3, 1907, reducing in rates within the state to distributing points, by their natural and necessary effect substantially burden and directly regulate interstate commerce, create undue and unjust discriminations between localities in Minnesota and those in adjoining states, violate the commercial clause of the Constitution (article 1, § 8), and are void.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81–84, 89; Dec. Dig. §§ 61, 62.*

Interference with interstate or foreign commerce, see note to McCanna & Fraser Co. v. Citizens' Trust & Surety Co. of Philadelphia, 24 C. C. A. 13.]

2. CONSTITUTIONAL LAW (§ 298*)—DUE PROCESS OF LAW—RATES CONFISCATORY.

These acts and orders which prescribe maximum fares and rates, that bring from their respective Minnesota intrastate businesses to the Northern Pacific Company an annual net income of only 2.909 per cent., to the Great Northern Company an annual net income of only 3.359 per cent., and to the Minneapolis & St. Louis Company an annual net income of only 2.47 per cent., of the respective values of their Minnesota properties devoted to those businesses, prohibit a fair return upon these values, take the properties of the companies without just compensation, violate the fourteenth amendment to the Constitution, and are void.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298.*]

3. COMMERCE (§§ 5, 8*) — CONSTITUTIONAL LAW—CARRIERS—RATES—NATIONAL POWER TO REGULATE INTERSTATE COMMERCE EXCLUSIVE AND PARAMOUNT.

The power to regulate commerce among the states was granted by the people to the nation in the Constitution, is exclusive, may be exercised to its utmost extent by the use of all means requisite to its complete exercise, and no state by virtue of its police power, or any other power it possesses, may restrict this grant or the plenary exercise of this power, for these inhere in the supreme law of the land and are paramount to the powers of the states.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 3, 5; Dec. Dig. §§ 5, 8.*]

4. COMMERCE (§ 10*)—RATES IN INTERSTATE COMMERCE NATIONAL AND FREE TO THE EXTENT NOT REGULATED BY THE NATION.

The fares and rates of transportation in interstate commerce are national in character, susceptible of uniform regulation, and so far as the

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

nation has not regulated them are free from regulation by virtue of the commercial clause of the Constitution.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8; Dec. Dig. § 10.*]

5. COMMERCE (§§ 7, 8, 12*)—CONSTITUTIONAL LAW—CARRIERS—RATES—LIMITS OF NATIONAL AND STATE POWER OF REGULATION.

The nation may regulate interstate fares and rates and all interstate commerce.

To the extent necessary completely and effectually to protect the freedom of, and to regulate, interstate commerce, but no farther, it may by its Congress and its courts affect and regulate intrastate commerce.

To the extent that it does not substantially burden or regulate interstate commerce, a state may regulate intrastate commerce and the fares and rates therein within its borders, but no farther. It may enforce regulations of intrastate commerce and its fares and rates which only incidentally or remotely affect interstate commerce. But state laws, orders, and regulations concerning intrastate commerce, or the fares or rates therein, which substantially burden or regulate interstate commerce, or the fares or rates therein, are beyond the powers of the state, unconstitutional, and void.

And where the attempted exercise of the power of a state to regulate intrastate commerce, or the attempted exercise of any of its other powers, impinges upon or conflicts with the constitutional power of the nation to protect the freedom of, and to regulate, interstate commerce and the fares and rates therein, the latter must prevail, because "that which is not supreme must yield to that which is supreme."

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 3, 5, 7, 9; Dec. Dig. §§ 7, 8, 12.*]

6. COMMERCE (§ 12*)—CONSTITUTIONAL LAW (§ 70*)—CARRIERS — RATES—EFFECT, NOT TERMS, OF STATE REGULATION, TEST OF SUBSTANTIAL BURDEN ON INTERSTATE COMMERCE.

The effect, and neither the terms nor the purpose, of state regulations, determines whether they substantially burden, or only incidentally or remotely affect, interstate commerce.

And this is a judicial question, which each court must decide on its own responsibility on the special facts of the case before it, and in the decision of which it "must obey the Constitution, rather than the lawmaking department of the government."

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 7, 9; Dec. Dig. § 12;* Constitutional Law, Cent. Dig. §§ 129–132; Dec. Dig. § 70.*]

7. COMMERCE (§ 7*)—RATES—DISCRIMINATING DIFFERENCES BETWEEN STATE AND INTERSTATE RATES FORBIDDEN BY INTERSTATE COMMERCE ACT.

The nation has the power to forbid, and by the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), it has prohibited, undue discriminations between localities in different states wrought by unreasonable differences between intrastate and legal interstate rates caused by the reduction of the former by the acts and orders of the officers of a state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 3, 5, Dec. Dig. § 7.*]

8. COMMERCE (§§ 61, 62*) — CONSTITUTIONAL LAW — MINNESOTA INTRASTATE RATES IMPOSE UNCONSTITUTIONAL BURDENS ON INTERSTATE COMMERCE.

The facts considered, and *held:*

The unavoidable effect of the general and sweeping reductions of intrastate fares and rates in Minnesota, made by the acts and orders considered, was and is substantially to burden, directly to regulate, and to discriminate against the interstate commerce of the defendant companies, and to create undue and unjust discriminations between localities in

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

Minnesota and those in other states, in violation of the commercial clause of the Constitution.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81–84, 89; Dec. Dig. §§ 61, 62.*]

9. CONSTITUTIONAL LAW (§ 298*)—CONFISCATORY RATES—JUST COMPENSATION ENTITLES TO A FAIR RETURN UPON VALUE OF PROPERTY USED.

The just compensation secured by the fourteenth amendment entitles the defendant railroad companies to a fair return upon the reasonable value of their property in Minnesota devoted to the public use of transportation. Such a return is just to the public as well as to the carriers.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298.*]

10. CARRIERS (§ 18*)—CONFISCATORY RATES—VALUE OF RAILROAD PROPERTIES —COST OF REPRODUCTION NEW.

Under the evidence in these cases the cost of reproduction new of the Minnesota properties of the defendant companies devoted to the public use of transportation is more persuasive evidence of their values than the market value of their stocks and bonds, or the original cost of their acquisition and construction.

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

11. CONSTITUTIONAL LAW (§ 48*)—CONFISCATORY RATES—REASONABLENESS—PRESUMPTION OF CORRECTNESS OF MASTER'S FINDINGS SUPERIOR TO PRESUMPTION OF REASONABLENESS.

Rate making looks to the future, and is a legislative function. Rate judging, determining whether or not rates made are confiscatory, is a judicial function.

There is a presumption in the first instance that Legislatures and commissions make reasonable and just rates, and clear proof is requisite to overcome it.

But when, after fares and rates have been tried by actual use for months, after plenary proof of their effect and other facts determinative of the issue confiscation vel non, has been made before a master learned in the law, who finds the facts, the legal or judicial presumption that his findings are just and right, while not conclusive, is superior to the original presumption that the rates were just and reasonable.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

12. CARRIERS (§ 18*)—CONFISCATORY RATES—VALUATION—COST OF REPRODUCTION—INTEREST DURING CONSTRUCTION.

Interest on the cost of reproduction of railroad property at 4 per cent. per annum during one-half the time requisite to acquire and construct it is a necessary expense of reproduction and may be lawfully allowed as such.

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

13. CARRIERS (§ 18*)—APPORTIONMENT OF VALUE—REVENUE BASIS MOST EQUITABLE.

Apportionment on the basis of revenue is the most reasonable and equitable method of assigning the value of railroad property in a state used for transportation to the various classes of its business, in order to determine the reasonableness of fares and rates.

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

14. CARRIERS (§ 12*)—CONFISCATORY RATES—REASONABLENESS—FAIR RETURN IN MINNESOTA 7 PER CENT. PER ANNUM ON VALUE USED.

A net income of 7 per cent. per annum upon the value of railroad property in Minnesota devoted to the public use of transportation is not more than the fair return to which a railroad company is entitled under the fourteenth amendment to the Constitution.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

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

In Equity. Bills by one Shepard against the Northern Pacific Railway Company and others, by J. S. Kennedy and others and by H. A. James against the Great Northern Railway Company and others, and by W. Shillaber against the Minneapolis & St. Louis Railroad Company and others. Decrees for complainants.

See, also, 155 Fed. 445.

Jared How, Charles W. Bunn, Hale Holden, and Pierce Butler (Robert Thorne and William D. Mitchell, on the briefs), for complainants.

Edward T. Young and Edmund S. Durment (George T. Simpson, on the briefs), for defendants.

SANBORN, Circuit Judge. In the year 1906 the Northern Pacific Railway Company, the Great Northern Railway Company, and the Minneapolis & St. Louis Railroad Company were carrying passengers and freight within, through, and without the state of Minnesota for legal fares, rates, and charges which had been established, filed and published in accordance with the provisions of the act of Congress entitled "An act to regulate commerce," approved February 4, 1887 (24 Stat. 381, c. 104 [U. S. Comp. St. 1901, p. 3157]), and its amendments (U. S. Comp. St. Supp. 1909, pp. 1135, 1138, 1139), and these fares, rates, and charges were equable, relatively fair, and not discriminatory between interstate transportation and transportation within the state of Minnesota.

On September 6, 1906, the Railway and Warehouse Commission of the state of Minnesota by order directed a reduction of the maximum rates for the transportation of general merchandise within that state 20 to 25 per cent. below the fares and rates which these companies were then using, and on May 3, 1907, by a supplemental order it so reduced their in-rates to distributing points in the state that the reductions amounted in the case of the Northern Pacific Company to 13.58 per cent. On April 4, 1907, the Legislature of the state passed an act whereby it reduced maximum passenger fares within that state 33⅓ per cent. below the fares the companies were then using, and on April 18, 1907, it passed an act which reduced maximum commodity rates within the state 7.377 per cent. below the rates thereon in use by the companies. The laws of Minnesota required the companies, their officers and agents, to put these reductions in effect under severe and unconstitutional penalties. Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932; Gen. Laws Minn. 1907, c. 97 (Rev. Laws Supp. 1909, §§ 2007—1 to 2007—2); Gen. Laws 1907, c. 232 (Rev. Laws Supp. 1909, §§ 2007—11 to 2007—17); Rev. Laws Minn. 1905, § 1987. The companies made and have since maintained the prescribed reductions in the merchandise rates and the passenger fares, but at the suit of their stockholders this court temporarily enjoined them from reducing their commodity rates.

The complainants, stockholders respectively of these railroad companies, brought these suits against them and against the Attorney General and the members of the Railroad and Warehouse Commission of the state to prevent them from maintaining these fares and rates,

on the grounds(1) that the orders of the Commission and the acts of the Legislature described substantially burdened and regulated interstate commerce on the railroads of these companies, and (2) that their necessary effect was the confiscation of property of the companies. The cases were referred to Hon. Charles E. Otis as special master to hear and report the evidence, to find the facts, and to recommend forms of decrees. He has made a clear, concise, and exhaustive finding of the facts, has returned all the evidence to the court, and has recommended decrees for the complainants on both of the grounds they presented. Exceptions to his report have been argued, and the cases are here for decrees. In the discussion of the questions at issue the term "defendants" will be used to designate the Attorney General and the members of the Railroad and Warehouse Commission, because they alone actively assail the findings and recommendation of the master.

The first question for consideration is whether or not the orders of the Commission and the acts of the Legislature substantially burden interstate commerce, and the answer to this question must be drawn from an application of the facts which disclose their effect to the established rules of law which govern this subject.

These orders and acts by their terms relate to intrastate fares and rates only. Counsel for the defendants insist that in the police power of the state is vested plenary authority to make and enforce them because they relate to commerce within the state only, while the complainants argue that their enforcement is beyond the power of the state because the effect of their necessary operation is substantially to burden interstate commerce and hence to invade the exclusive domain of the nation, in violation of the commercial clause of the Constitution (article 1, § 8).

The principles and rules of law by which these orders and acts must be tried have been conclusively established by the decisions of the Supreme Court, and it will not be unprofitable to state them here again and to bear them constantly in mind during the consideration of the facts which must determine the issue here presented.

The power to regulate commerce among the states was carved out of the general sovereign power by the people when the national government was formed, and granted by the Constitution to the Congress of the nation. That grant is exclusive. The United States may exercise that power to its utmost extent, may use all means requisite to its complete exercise, and no state, by virtue of any power it possesses, either under the name of the police power or under any other name, may lawfully restrict or infringe this grant, or the plenary exercise of this power; for these are paramount to all the powers of the state and inhere in the supreme law of the land. The fares and rates of transportation of passengers and freight in interstate commerce are national in their character and susceptible of regulation by uniform rules. The silence or inaction of Congress relative to such a subject is a conclusive indication that it intends that the interstate commerce therein shall be free, so far as the Congress has not directly regulated it. Welton v. State of Missouri, 91 U. S. 275, 282, 23 L. Ed. 347; Brown v. Houston, 114 U. S. 622, 631, 5 Sup. Ct. 1091, 29 L. Ed. 257; Bowman v. Chicago, etc., Ry. Co., 125 U. S. 465, 485, 507, 8 Sup. Ct.

689, 1062, 31 L. Ed. 700; Walling v. Michigan, 116 U. S. 446, 455, 456, 6 Sup. Ct. 454, 29 L. Ed. 691; Hall v. De Cuir, 95 U. S. 485, 490, 24 L. Ed. 547; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 570, 573, 7 Sup. Ct. 4, 30 L. Ed. 244.

To the extent necessary completely and effectually to protect the freedom of and to regulate interstate commerce the nation by its Congress and its courts may affect and regulate intrastate commerce, but no farther.

To the extent that it does not substantially burden or regulate interstate commerce a state may regulate the intrastate commerce within its borders, but no farther.

If the plenary power of the nation to protect the freedom of and to regulate interstate commerce and the attempted exercise by a state of its power to regulate intrastate commerce, or the attempted exercise of any of its other powers, impinge or conflict, the former must prevail and the latter must give way, because the Constitution and the acts of Congress passed in pursuance thereof are the supreme law of the land, and "that which is not supreme must yield to that which is supreme." Brown v. Maryland, 12 Wheat. 419, 448, 6 L. Ed. 678; Gibbons v. Ogden, 9 Wheat. 1, 209, 210, 6 L. Ed. 23; Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U. S. 557, 573, 7 Sup. Ct. 4, 30 L. Ed. 244; Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204, 211, 212, 216, 217, 222, 14 Sup. Ct. 1087, 38 L. Ed. 962; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 327, 328, 26 Sup. Ct. 491, 50 L. Ed. 772; Cleveland, C., C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 517, 519, 521, 20 Sup. Ct. 722, 44 L. Ed. 868; Mississippi Railroad Commission v. Illinois Central R. Co., 203 U. S. 335, 343, 27 Sup. Ct. 90, 51 L. Ed. 209; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. Ed. 230; Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 24, 27, 37, 30 Sup. Ct. 190, 54 L. Ed. 355; Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 162, 30 Sup. Ct. 280, 54 L. Ed. 423; Pullman Company v. Kansas, 216 U. S. 56, 65, 30 Sup. Ct. 232, 54 L. Ed. 378; Hall v. De Cuir, 95 U. S. 485, 488–490, 497, 498–513, 24 L. Ed. 547; Bowman v. Chicago, etc., Ry. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Welton v. Missouri, 91 U. S. 275, 280, 23 L. Ed. 347; Crutcher v. Kentucky, 141 U. S. 47, 57, 58, 59, 11 Sup. Ct. 851, 35 L. Ed. 649.

Thus a part of every interstate transportation is carried on within the state of its initiation and concluded within another state, but neither state may fix or regulate the fares or rates of the part within its borders, because the authority so to do is requisite to the complete preservation of the freedom of, and to the untrammeled regulation of, that transportation, and this power is vested exclusively in the nation. Wabash, etc., R. R. Co. v. Illinois, 118 U. S. 557, 575, 7 Sup. Ct. 4, 30 L. Ed. 244.

The nation and many states provide that carriers may not charge a higher rate for a short haul than for a long haul of like articles in the same direction under similar circumstances. But where the long haul is interstate, although the short haul is entirely within a single state, such a state may not enforce such a law for the same reason.

Louisville & Nashville R. Co. v. Eubank, 184 U. S. 27, 42, 43, 22 Sup. Ct. 277, 46 L. Ed. 416.

A state has the general power to prescribe the terms under which foreign corporations may carry on business within it, but any attempted exercise of that power by statute or otherwise in such a way as to prohibit or substantially to burden the interstate commerce of a foreign corporation within its borders is unconstitutional and void. Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 27, 37, 30 Sup. Ct. 190, 54 L. Ed. 355; Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 162, 30 Sup. Ct. 280, 54 L. Ed. 423; Pullman Company v. Kansas, 216 U. S. 56, 65, 30 Sup. Ct. 232, 54 L. Ed. 378; Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, 6–11, 12, 13, 84 C. C. A. 167, 172, 177.

Subject to the constitutional limitation, which has been stated, a state may enact and enforce laws prescribing reasonable fares and rates for and otherwise regulating its intrastate commerce, although the operation of such laws remotely or incidentally affects interstate commerce, such as statutes regulating elevator charges (Munn v. Illinois, 94 U. S. 113, 135, 24 L. Ed. 77; Budd v. New York, 143 U. S. 517, 545, 12 Sup. Ct. 468, 36 L. Ed. 247); requiring track connections at a junction (Wisconsin, etc., R. R. Co. v. Jacobson, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194); prohibiting the operation of freight trains on Sunday, regulating the liability of the initial carrier beyond its line (Richmond, etc., R. R. Co. v. Patterson Tobacco Co., 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759); requiring the reasonable stopping of passenger trains at stations (Lake Shore & Michigan South. Ry. Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; Gladson v. Minnesota, 166 U. S. 427, 431, 17 Sup. Ct. 627, 41 L. Ed. 1064); requiring telegraph companies to receive messages within a state and transmit them with reasonable diligence (Western Union Telegraph Co. v. James, 162 U. S. 650, 656, 16 Sup. Ct. 934, 40 L. Ed. 1105); excluding diseased cattle by means of a reasonable inspection law (Asbell v. State of Kansas, 209 U. S. 251, 256, 28 Sup. Ct. 485, 52 L. Ed. 778); requiring reasonable connections between trains of different companies (Atlantic Coast Line R. R. Co. v. North Carolina Commission, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933); regulating reasonably the operation of passenger trains (Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472); requiring the transfer of cars to a mill near a crossing (Missouri Pacific Ry. Co. v. Larabee Mills Co., 211 U. S. 612, 620, 622, 29 Sup. Ct. 214, 53 L. Ed. 352); prohibiting the possession of game (New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 40, 41, 29 Sup. Ct. 10, 53 L. Ed. 75); requiring locomotive engineers to be examined and licensed (Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; Nashville, etc., Ry. Co. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352); requiring railway companies to fix their rates annually for the transportation of passengers and freights and to post a printed copy of such rates at their stations (Railroad Company v. Fuller, 17 Wall. 560, 21 L. Ed. 710); forbidding the consolidation of parallel or competing lines of railway (Louisville & Nashville R.

R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849); regulating the heating of passenger cars and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto (New York, N. H. & H. R. R. Co. v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853); providing that no contract made within the state shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers which would have existed if no contract had been made (Chicago, Milwaukee & St. Paul Ry. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688); prescribing rates within the state on a single article, coal (Minneapolis & St. L. R. R. Co. v. Minnesota, 186 U. S. 257, 265, 22 Sup. Ct. 900, 46 L. Ed. 1151; Northern Pacific Ry. Co. v. North Dakota, 216 U. S. 579, 30 Sup. Ct. 423, 54 L. Ed. 624).

On the other hand, the laws of a state or the orders of its commissions relating to its intrastate commerce which by their necessary or natural or probable operation have the effect substantially to burden interstate commerce are beyond its powers, violative of the commercial clause of the Constitution, and void. Of this character are statutes imposing burdensome conditions on the landing of passengers from vessels employed in foreign commerce (Henderson v. Mayor of New York, etc., 92 U. S. 259, 268, 23 L. Ed. 543); requiring carriers engaged in interstate commerce to give all persons upon their public conveyances equal rights and privileges in all parts of those conveyances without discrimination or distinction on account of race or color (Hall v. De Cuir, 95 U. S. 485, 486, 488, 490, 24 L. Ed. 547); requiring telegraph companies to deliver dispatches by messenger to the persons to whom they are addressed so far as such a statute attempts to regulate the delivery of such dispatches at places in other states (Western Union Telegraph Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187); prohibiting a higher rate for a short haul entirely within the state than that charged for a longer interstate haul (Wabash, etc., Ry. Co. v. Illinois, 118 U. S. 557, 573, 7 Sup. Ct. 4, 30 L. Ed. 244); forbidding common carriers to bring intoxicating liquors into a state without a certificate that the consignee is authorized to sell such liquors in the county (Bowman v. Chicago, etc., Ry. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700); prohibiting the sale in a state of fresh meats which have not been taken from animals inspected within the state within 24 hours before they are slaughtered (Minnesota v. Barber, 136 U. S. 313, 322, 329, 10 Sup. Ct. 862, 34 L. Ed. 455); prohibiting the sale of fresh meats from animals slaughtered 100 miles or more from the place at which they are offered for sale, unless they have been previously inspected by local inspectors (Brimmer v. Rebman, 138 U. S. 78, 81, 11 Sup. Ct. 213, 34 L. Ed. 862); prescribing tolls for the use of a bridge across a river between two states (Covington Bridge Co. v. Kentucky, 154 U. S. 204, 211, 212, 216, 217, 222, 14 Sup. Ct. 1087, 38 L. Ed. 962); requiring a railroad company engaged in interstate commerce to furnish an unreasonable number of cars to shippers in the state upon demand (Houston, etc., Ry. Co. v. Mayes, 201 U. S. 321, 327, 328, 26 Sup. Ct. 491, 50 L. Ed. 772); requiring such a company to stop

all its regular trains at county seats on its line (Cleveland, etc., Ry. Co. v. Illinois, 177 U. S. 514, 517, 519, 20 Sup. Ct. 722, 44 L. Ed. 868); requiring such a company to stop its through fast trains at a specified station in the state (Atlantic Coast Line R. R. Co. v. Wharton, 207 U. S. 328, 334, 337, 28 Sup. Ct. 121, 52 L. Ed. 230); levying a tax "equal to 1 per cent. of its gross receipts" on each railroad lying wholly within the state (Galveston, Harrisburg, etc., Ry. Co. v. Texas, 210 U. S. 217, 227, 28 Sup. Ct. 638, 52 L. Ed. 1031); and requiring foreign corporations to pay large fees as a condition of carrying on business entirely intrastate within a state, although by the orders of the charter board expressly leaving these corporations free to carry on interstate commerce in the state without any condition or restriction (Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 7, 27, 37, 30 Sup. Ct. 190, 54 L. Ed. 355; Pullman Company v. Kansas, 216 U. S. 56, 65, 30 Sup. Ct. 232, 54 L. Ed. 378; Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 162, 163, 30 Sup. Ct. 280, 54 L. Ed. 423).

The acts of the Legislature of Minnesota and the orders of its commission are so general and so far reaching in their effect that there is no doubt that they unavoidably affect the interstate commerce of the companies. In the light of the rules and decisions reviewed, the question here at issue therefore becomes: Do these statutes and orders substantially burden or only incidentally or remotely affect the interstate commerce of the companies? This question, however, may not be answered by the words or terms of the laws and orders, or by a consideration of the intent or purpose of their makers alone. The touchstone to the true answer to the question and the test of the validity of the orders and statutes is their effect upon interstate commerce.

It is the effect, and not the terms or purpose, of state regulations of its local commerce, that determines whether or not they so substantially burden interstate commerce that they violate the commercial clause of the Constitution. And this is a judicial question which each court must determine on its own responsibility on the special facts of each particular case, and in the determination and decision of which it "must obey the Constitution rather than the lawmaking department of the government." Mugler v. Kansas, 123 U. S. 623, 661, 8 Sup. Ct. 273, 31 L. Ed. 205; Henderson v. Mayor of New York, 92 U. S. 259, 268, 23 L. Ed. 543; Minnesota v. Barber, 136 U. S. 313, 319, 330, 10 Sup. Ct. 862, 34 L. Ed. 455; Brimmer v. Rebman, 138 U. S. 78, 81, 11 Sup. Ct. 213, 34 L. Ed. 862; Cleveland, etc., Ry. Co. v. Illinois, 177 U. S. 514, 522, 20 Sup. Ct. 722, 44 L. Ed. 868; Louisville & Nashville R. R. Co. v. Eubank, 184 U. S. 27, 43, 22 Sup. Ct. 277, 46 L. Ed. 416; Galveston, Harrisburg, etc., Ry. Co. v. Texas, 210 U. S. 217, 227, 28 Sup. Ct. 638, 52 L. Ed. 1031; Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 24, 27, 30, 30 Sup. Ct. 190, 54 L. Ed. 355; Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 162, 30 Sup. Ct. 280, 54 L. Ed. 423.

The counter proposition again presented in this case, that it is only where orders and statutes by their terms or by their construction by

state courts substantially or directly regulate interstate commerce, or where by their terms they disclose an intent of their makers so to do that they may be adjudged violative of the commercial clause, has been repeatedly urged upon the consideration of the Supreme Court in the cases just cited, and in many others only to be conclusively denied. In Galveston, Harrisburg, etc., Ry. Co. v. Texas, 210 U. S. 217, 227, 28 Sup. Ct. 638, 52 L. Ed. 1031, a case which involved a statute levying a tax upon a road entirely within the state which the court held to be a substantial burden upon interstate commerce and void, it said:

"Neither the state courts, nor the Legislatures, by giving the tax a particular name, or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

Only last year in the Kansas cases (216 U. S. 1, 56, 30 Sup. Ct. 190, 54 L. Ed. 355), the Supreme Court again repudiated this contention. In those cases a statute of Kansas required of foreign corporations certain fees as a condition of permitting them to conduct intrastate business in that state. The Western Union Telegraph Company, which was carrying on both intrastate and interstate business in Kansas, applied for permission to continue its intrastate business, and the charter board of the state ordered that its application be granted only on condition that it pay the fee prescribed by the statute, and "that nothing herein contained shall apply to nor be construed as restricting in any wise the transaction by the said applicant of its interstate business, nor its business for the federal government, but that this grant of authority and requirement as to payment relates only to the business transacted wholly within the state of Kansas." The officers of the state insisted that this statute and this order were valid because by their express terms they excluded interstate business, applied to intrastate business alone, and disclosed a clear purpose and intent of the Legislature and the board not to obstruct or embarrass interstate commerce in any way. But the Supreme Court reviewed several of its earlier decisions upon this subject, held the statute and the order unconstitutional, and, among other things, said:

"But the disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things." 216 U. S. 1, 27, 30 Sup. Ct. 190, 197, 54 L. Ed. 355.

And Mr. Justice White in the Pullman Company's Case, 216 U. S., at page 65, 30 Sup. Ct., at page 236 (54 L. Ed. 378), which involved the same statute, said that one of the propositions conclusively established by previous decisions of the court was that:

"Even though a power exerted by a state, when inherently considered, may not in and of itself abstractly impose a direct burden on interstate commerce,

nevertheless such exertion will be a direct burden on such commerce if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on."

And Mr. Justice Harlan in Ludwig v. Western Union Telegraph Co., 216 U. S., at page 162, 30 Sup. Ct., at page 285 (54 L. Ed. 423), discussing a similar statute of Arkansas, said:

"According to well-settled rules of statutory construction, the validity of a statute, whatever its language, must be determined by its effect or operation, as manifested by the natural and reasonable meaning of the words employed. Henderson v. Mayor of New York, 92 U. S. 259, 268 [23 L. Ed. 543]. If a statute by its necessary operation really and substantially burdens the interstate business of a foreign corporation seeking to do business in a state, or imposes a tax on its property outside of such state, then it is unconstitutional and void, although the state Legislature may not have intended to enact an invalid statute."

Here, then, is the decisive question upon this branch of these cases. Is the effect of the statutes and orders assailed substantially to burden the interstate commerce of the companies? And we turn to the facts of this case for the answer.

The Northern Pacific Railway Company is a corporation and a common carrier that on June 30, 1906, owned and was operating 7,694 miles of railroad track, of which 1,625 miles are in the state of Minnesota. Its main line extends from Superior, Wis., and Duluth, Minn., which sit side by side at the westerly end of Lake Superior, St. Paul, and Minneapolis, Minn., westerly through North Dakota, Montana, Idaho, Washington, and Oregon, to Seattle, Tacoma, and Portland on the Pacific Coast. From Duluth to other points in Minnesota reached by it the company has an interstate line passing through Wisconsin and a local line that joins the interstate line at Carlton, 20 miles westerly from Duluth. Its main line crosses the western line of Minnesota at Moorhead, Minn., and Fargo, N. D., 250 miles from St. Paul. It has two branch lines, which cross the western line of the state at East Grand Forks, Minn., and Grand Forks, N. D., 320 miles from St. Paul, and at Breckenridge, Minn., and Wahpeton, N. D., 237 miles from St. Paul, respectively.

The Great Northern Railway Company is a corporation and a common carrier that owned and was operating lines of railway comprehending on June 30, 1906, 8,528 miles of track, of which 2,779 miles are in Minnesota. Its main lines extend from Superior, Wis., and Duluth, Minn., in a westerly direction through the states of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon, to the cities of Seattle and Portland. Its line between Duluth, Minn., and other points in Minnesota reached by it, passes through the state of Wisconsin. It has five lines of railway which cross the western line of Minnesota and extend westerly into or through other states, one from Minneapolis by way of Willmar, which crosses at Breckenridge, Minn., and Wahpeton, N. D., 214 miles from St. Paul; one from Minneapolis by way of Barnesville, which crosses at Moorhead, Minn., and Fargo, N. D., 241 miles from St. Paul; one from Duluth by way of Crookston, which crosses at East Grand Forks, Minn., and Grand Forks, N. D., 296 miles from Duluth; one which leaves the Willmar main line at Benson and crosses the Minnesota line at

Nassau, 173 miles from St. Paul; one which leaves the main line at Willmar and crosses the Minnesota line at Jasper, Minn., 218 miles from St. Paul; and it also has a branch line wholly within the state of Minnesota, which leaves the main line at Barnesville and extends northerly to Noyes, 391 miles from St. Paul.

The Minneapolis & St. Louis Railroad Company is a corporation and a common carrier that owned and operated lines of railroad comprehending on the 30th day of June, 1906, 632 miles of track, and that operated by means of leases or trackage rights 396 miles of track. Its main line extends from St. Paul and Minneapolis, Minn., westerly by way of Winthrop, Minn., to Lebeau, S. D., from St. Paul and Minneapolis, southwesterly by way of Winthrop, Minn., to Storm Lake, Iowa, and from St. Paul and Minneapolis, southerly by way of Albert Lea, Minn., to Des Moines, Iowa.

The whole railroad properties of each of these companies has constituted and still constitutes a single system, and has been and is operated by each of the said companies as such. The cars, engines, and supplies of each company customarily have been and are used upon its system without regard to whether the business in which they have been or are employed has been or is interstate business or business local to a state. Each of said companies customarily has carried and does carry interstate passengers and passengers local to the state on the same train and in the same car, and interstate freight and freight local to a state on the same train, and, if less than car load freight, in the same car. There has never been any separation, and it is impracticable in the exercise of any fair economy to make and maintain any separation in the business of transporting interstate passengers and passengers local to the state, or between interstate freight and freight local to a state.

By far the larger proportion of the business of each of these companies is interstate, and by far the larger proportion of the business of each of these companies within the state of Minnesota is interstate. In the year 1906 the freight business of the Northern Pacific Company local to Minnesota was 2.67 per cent. of its entire freight business and 12.33 per cent. of its freight business touching the state, and its passenger business local to the state was 5.79 per cent. of its entire passenger business and 67.21 per cent. of its passenger business touching the state.

The conditions attending the transportation of passengers and of freight have been and are substantially the same for like distances within those portions of the states of Wisconsin, Minnesota, North Dakota, and South Dakota reached by the lines of railway operated by either of these companies, whether such transportation has been or is a business local to a state or interstate between any or all of these states.

Prior to the orders and acts here in question the fares and rates in force upon these lines of railway for the transportation of passengers and freight were lawful, for they had been adopted in accordance with the provisions of the act of Congress, were relatively fair, and were not discriminatory between interstate business and business local to any state.

Any substantial change in the basis of rates thus established and in force, or in any particular rate, due only to the fact that the transportation was interstate, or that it was local to a state, would have been actual, undue, and unjust discrimination in fact and any substantial difference in rates for the transportation of passengers, merchandise, or commodities maintained by either of said companies as between traffic local to the state and traffic which goes between the state of Minnesota and either of its neighboring states will constitute actual, undue, and unjust discrimination in fact.

Substantially all commodities and property which are the subject of transportation are classified and arranged in 10 groups with reference to their general character and value, and the cost of transportation thereof and this classification with modifications from time to time made therein has long been used by carriers in the West and Northwest as a basis for fixing rates. Commodities of each class take the same rate under like conditions, and this classification is called the "Western classification." In Minnesota, however, many commodities amounting to several hundred have by the action of the Minnesota Commission been removed from this Western classification, and given special rates, which are called "commodity rates," or have been reduced in class, so that the Western classification in Minnesota is in many respects different from the Western classification in general use. The Commission by its order made on September 6, 1906, prescribed a schedule of maximum rates for the transportation within the state of Minnesota of articles covered by this Western classification as modified by the intervention of the Commission, and required the railway companies to observe these rates. This schedule was such that each rate for each class for any distance bore such an exact relation to each other rate that, given one rate out of the schedule, any other rate could be ascertained by mathematical calculation, and without reference to the schedule itself. This is the plan of the schedule.

For first-class merchandise an allowance of 11.2 cents per cwt. is made for terminal charges, and for each five miles or fraction thereof up to 200 miles .98 of a cent for hauling charge, so that for a distance of five miles the rate is 12 cents per cwt., for a distance of 10 miles the rate is 12.98 cents per cwt., and for a distance of 200 miles the rate is 50.22 cents per cwt. After a distance of 200 miles is reached, .98 of a cent is allowed per cwt. as a hauling charge for each 10 miles or fraction thereof up to 400 miles, so that, the rate for 200 miles being 50.22 cents per cwt., the rate for 210 miles is 51.20 cents, for 220 miles the rate is 52.18 cents, and for 400 miles the rate is 69.82 cents per cwt. After a distance of 400 miles is reached, .98 of a cent is allowed as a hauling charge per cwt. for each 20 miles or fraction thereof up to 500 miles; so that, the rate for 400 miles being 69.82 cents per cwt., the rate for 420 miles is 70.80 cents, and the rate for 500 miles is 74.72 cents per cwt. There are 10 classes of merchandise provided for in this schedule. The rates for classes other than the first class are a fixed per centum of the corresponding rates for the first class, those for the second class being 83⅓ per cent., for the third class being 66⅔ per cent., for the fourth class being 50 per cent., for the fifth class being 40 per cent., for class

A being 45 per cent., for class B being 35 per cent., for class C being 30 per cent., for class D being 25 per cent., and for class E being 20 per cent. The rates thus prescribed are maximum terminal rates, and may be increased by 5 per centum for shipments between stations, neither of which is a terminal or a distributing station. The reduction in merchandise rates made by this order of September 6, 1906, was from 20 per cent. to 25 per cent. of the rates theretofore in force. Notwithstanding the extent of this reduction, all the railway companies interested put the rates prescribed by this order into effect on November 15, 1906, and they have ever since been, and still are, maintained by all the companies concerned as maximum rates for the transportation within the state of merchandise covered by the order.

On May 3, 1907, the Commission made an order supplemental to that of September 6, 1906, for the purpose of securing more favorable in-rates to a number of jobbing centers in the state of Minnesota other than St. Paul, Minneapolis, and Duluth. This order had the effect to substantially reduce the previously existing rates to the extent in the case of the Northern Pacific Company of 13.577 per cent. Nevertheless, the railroad companies put in force and have since maintained the rates prescribed by this supplemental order.

The rates prescribed for the articles specified in this Western classification as modified are called "merchandise rates."

By chapter 232 of the Laws of Minnesota 1907, approved April 18, 1907, the Legislature of Minnesota created seven new classes of commodities numbered 11 to 17. Wheat and 13 other articles were placed in class 11, corn and 37 other articles in class 12, lumber and 5 other articles in class 13, sheep in double-decked cars and cattle in class 14, sheep in single-decked cars and hogs in class 15, hard coal in class 16, and soft coal in class 17; and it prescribed and required the companies to observe maximum rates for the transportation of these articles in Minnesota which were on the average 7.37 per cent. below those then lawfully in force, and the rates on grain and coal that were then in force on the Northern Pacific and Great Northern lines had been reduced by those companies in the preceding September and October about 10 per cent. These rates are called "commodity rates" and the companies, in view of the severe penalties denounced for a failure to comply with the act, were about to put them in force when they were enjoined at the suit of the complainants.

By chapter 97 of the Laws of Minnesota 1907, the Legislature prescribed and required the companies to observe maximum rates of 2 cents a mile for passengers over, and 1 cent a mile for passengers under, 12 years of age for the transportation of such passengers within the state of Minnesota. This law required a reduction of 33⅓ per cent. of the then established lawful rates, and the companies, in view of the severe penalties prescribed for a violation of this law, put these rates in force and have since maintained them.

The average reduction of fares and rates required by these orders and acts were:

(1) On general merchandise 20 per cent. to 25 per cent. by the order of September 6, 1906.

(2) In in-rates to distributing stations amounting in the Northern Pacific case to 13.58 per cent.

(3) In maximum rates on grain, lumber, live stock, coal, etc., 7.-377 per cent.

(4) In maximum rates on passengers 33⅓ per cent.

Superior, Wis., and Duluth, Minn., are situated side by side at the western extremity of Lake Superior. Each is an important business center. Conditions attending transportation to and from either of them are the same as to or from the other. The railroad companies reaching them have always accorded them and do accord them like rates in and out. They ship and receive the same kinds of freight and to and from the same localities. Any substantial difference in the rates accorded them would destroy the commerce of the city given the higher rates. The propriety of a parity of rates to and from these localities has always been recognized.

For the same reasons, each of the couples of cities composed of Grand Forks, N. D., and East Grand Forks, Minn., Fargo, N. D., and Moorhead, Minn., and Wahpeton, N. D., and Breckenridge, Minn., have always been accorded by the railway companies serving them like rates in and out. The cities in each pair depend upon the same carriers, have substantially the same producing and consuming markets, and receive and ship the same kinds of articles. Any substantial difference in rates as between the cities composing each pair would seriously damage, if not wholly destroy, the commerce of the city given the higher rate, and would be an undue and unjust preference and advantage in fact for its neighboring city.

Failure by the Northern Pacific Company to maintain substantially as low rates between Superior and points in Minnesota as between Duluth and other points in Minnesota would seriously impair the power of the company to transact its interstate business between Superior and points in Minnesota, and would seriously depreciate the value of the company's property in Superior.

Merchandise Rates.

The schedule comprehended within the order of September 6, 1906, prescribed maximum rates for transportation within the state of Minnesota which were from 20 per cent. to 25 per cent. lower than those theretofore established by the Northern Pacific and Great Northern Companies and maintained by them up to the time of the taking effect of the order for transportation in Wisconsin, Minnesota, and North Dakota, regardless of whether such transportation was local to either state or interstate between any two of them. If these companies after the installation of the rates prescribed by the order for transportation within Minnesota had continued to maintain the former rates for transportation between Minnesota and an adjoining state, the result would have been serious discrimination against localities in the neighboring states.

For example, prior to the taking effect of the order, the rate maintained by the Northern Pacific on a 200-pound barrel of flour (fourth class) from Minneapolis to Fargo was 68 cents. The schedule fixed

54.2 cents as a maximum from Minneapolis to Moorhead. This is a fair example of the difference between the former interstate rates for transportation between Minnesota and an adjoining state and the rates prescribed by the order for transportation within the state.

On the same day that the Northern Pacific Company installed its rates in Minnesota as prescribed by the order, it reduced its interstate rates between Superior and points in Minnesota to an exact parity with its rates between Duluth and other points in Minnesota, its interstate rates between Grand Forks, Fargo, and Wahpeton, N. D., and Minnesota points to an exact parity with its rates between East Grand Forks, Moorhead, and Breckenridge, respectively, and other Minnesota points, and its interstate rates between Superior and Grand Forks, Fargo, and Wahpeton, respectively, to an exact parity with its state rates between Duluth and East Grand Forks, Moorhead, and Breckenridge, respectively. The reduction was substantial. For example, the reduction in the rate on first class from Superior to Fargo was from 65 cents per cwt. to 54.1 cents per cwt., and on fifth class from 27 cents per cwt. to 21.7 cents per cwt.

These reductions were compelled by the necessary and direct effect of the operation of the order. Had they not been made, Superior could not have competed in business in Minnesota with Duluth, Fargo, Grand Forks, and Wahpeton could not have competed with Moorhead, East Grand Forks, and Breckenridge, respectively, nor could Superior have transacted business successfully with Fargo, Grand Forks, or Wahpeton. Moreover, although the Northern Pacific suffered a substantial loss in revenue from its interstate business, it had the choice of submitting to that loss or of suffering substantial destruction of its interstate commerce in articles covered by the order between these localities.

On the same day that the Northern Pacific made these reductions in its interstate rates the Great Northern made similar reductions, although its business between Duluth and Minnesota points is interstate. The reason for its reductions from Duluth was to preserve the relation in rates from Duluth which had always existed between localities on the Great Northern and localities similarly circumstanced on the Northern Pacific, and also to meet the reduced rates on the Northern Pacific line.

Moorhead, Minn., Fargo and Bismarck, N. D., Billings and Butte, Mont., are so-called "jobbing centers." Prior to the taking effect of the order of September 6, 1906, they had always been accorded rates by the Northern Pacific Company which would allow them to compete in distribution of merchandise with their nearest neighbors and with St. Paul and Minneapolis and Duluth. The sum of car load rates from St. Paul, Minneapolis, and Duluth to these centers and the less than car load rates out from these centers to the territory geographically tributary to them, respectively, had been such as to compare favorably with rates in and out of their local competitors as well as with less than car load rates from St. Paul, Minneapolis, and Duluth into the territory geographically served by them, respectively. The order of September 6, 1906, as supplemented by the order of May 3, 1907, substantially reduced car load rates from Duluth, St. Paul, and Minneapolis to Moorhead. This reduction would have given Moorhead a

substantial advantage in territory accessible to its jobbing industry, not only as against Fargo unless car load rates to Fargo should have been similarly reduced, but also as against Duluth, St. Paul, and Minneapolis unless less than car load rates from these points to points geographically accessible to Moorhead, which included a considerable territory in North Dakota, should have been proportionately reduced. This reduction, unless accompanied by a corresponding reduction in car load rates to Fargo from the eastern terminals, would have served to build up Moorhead at the expense of Fargo, and therefore to discriminate unduly and unjustly against Fargo as a matter of fact, and would destroy the relation in rates which had theretofore existed between the sum of car load rates into Moorhead and less than car load distributing rates out on the one hand, and less than car load distributing rates from Duluth, St. Paul, and Minneapolis to localities accessible to Moorhead on the other. If Fargo were protected as against Moorhead by a like reduction in car load rates, it would have an advantage and preference over Bismarck in territory common to them both and an advantage over the eastern terminals in territory common to Fargo and them, unless car load rates from the eastern terminals to Bismarck and less than car load rates from the eastern terminals to the territory accessible to Fargo should be correspondingly reduced; and this advantage would constitute an undue and unjust preference to Fargo as against Bismarck, which competes in certain territory with Fargo, unless rates on car load lots from the eastern terminals to Bismarck should be correspondingly reduced. And so on, from distributing point to distributing point.

Every rate comprehends two terminal charges, the initial and the final, and a distance haulage charge. It is a cardinal principle of rate making that a rate for a longer distance should be proportionately smaller than one for a shorter distance; that is to say, that a rate for 500 miles should be less than twice the rate for 250 miles, if conditions of transportation be the same, because the rate for 250 miles includes two terminal charges, and, if the rate for 500 miles were twice the rate for 250 miles, it would manifestly include the equivalent of four terminal charges. Even if the haulage charge were the same per mile for a haul of 500 miles as for a haul of 250 miles, which is contrary to the rule generally applied in rate making, the rate per ton per mile for the 500 miles should be less than for the 250 miles because in the one case the terminal charges would be spread over 500 miles and in the other over only 250 miles.

Comparison of rates at present maintained by the Northern Pacific Company from St. Paul to various stations in North Dakota and Montana with those established by the order of September 6, 1906, and now maintained by the company between St. Paul and Moorhead, discloses that the Commission-made rates from St. Paul to Moorhead are in general substantially less than the proportion of the presently maintained interstate rates of the company to these various points in North Dakota and Montana, based on the mileage in Minnesota as compared to that of the entire haul. For example, the present rate maintained by the Northern Pacific on class E, merchandise from St. Paul to Miles City, 743 miles from St. Paul, is 39 cents per cwt. The rate to Moor-

head, based on the proportion of 39 cents, which the mileage of the haul in Minnesota is of the entire haul, is 13 cents. The order allows only 11 cents per cwt. from St. Paul to Moorhead, in which, of course, are included two full terminal charges. Maintaining rates, comparison of which shows this result, involves substantial, undue, and unjust discrimination in fact against the interstate localities. And a reduction of the interstate rates compelled by the reduction of the state rates substantially burdens interstate commerce and restricts its freedom.

After the installation by the Great Northern and the Northern Pacific companies of the rates prescribed by the order of September 6, 1906, it appeared that the sum of the locals from St. Paul to Moorhead and from Moorhead to many points in North Dakota was less than the theretofore established and maintained interstate rates from St. Paul to these points in North Dakota. Both companies thereupon established and now maintain rates from St. Paul to these North Dakota points as a rule no greater than the sum of the locals on Moorhead, but which are substantially lower in general than the interstate rates maintained by them at the time of the taking effect of the order. Maintaining interstate rates from St. Paul to North Dakota localities substantially greater than the sum of the locals based on the state line would have involved undue and unjust discrimination in fact.

As a matter of fact, the reasons for such reduction were to prevent transshipment at Moorhead in order to take advantage of the lower sum of the locals; to retain on its line traffic which was liable to reach Moorhead over other lines by reason of competition; and, as to less than car load lots, to enable jobbers in the Twin Cities and Duluth to compete with Moorhead and Fargo in territory which otherwise the latter would have exclusively occupied by reason of their closer proximity thereto.

It is one of the fundamental dogmas of rate making that the haulage charge per mile shall not increase with increasing distance, if conditions be the same. The order of September 6, 1906, promulgates a schedule which for first-class merchandise, for example, allows a terminal charge of 11.02 cents per cwt. and a haulage charge of .98 cent per 5 miles up to 200 miles, then a haulage charge of .98 cent per 10 miles for added distance up to 400 miles, and then a haulage charge of .98 cent per 20 miles up to 500 miles—the limit of distance covered by the order. Both the terminal charge and the haulage charge allowed for the other merchandise classes are a fixed percentage of those allowed for first. Under this schedule, a hundred pounds of merchandise transported by the Northern Pacific from St. Paul to Moorhead, 248 miles, has been hauled for 48 miles, at the rate of .98 cent per 10 miles when Moorhead is reached. If this same haulage charge of .98 cent per 10 miles be applied for the remaining distance of the haul from St. Paul to Spokane, Wash., 1,510 miles from St. Paul (which is taken as a fair example merely for the illustration of this principle), it would produce a rate from St. Paul to Spokane on first-class merchandise of $1.79 per cwt. The Interstate Commerce Commission in the Spokane Rate Case has fixed the reasonable rate on first-class merchandise from St. Paul to Spokane of $2.50. Maintaining this rate from St. Paul to Spokane and the Commission's schedule in Min-

nesota at the same time necessarily involves the raising of the per mile haulage charge after the Minnesota state line has been crossed, or the charging a higher rate within Minnesota for its mileage proportion of long haul interstate business than for business local to the state carried on over the same rails and under the same conditions, and involves necessarily undue and unjust discrimination in fact against localities westerly of the Minnesota-North Dakota boundary line.

For more than 25 years the Northern Pacific Company has maintained an equal basis of rates on merchandise between its eastern terminals and Butte and its western terminals and Butte, and between its eastern terminals and localities intermediate between them and Butte, and between its western terminals and localities intermediate between them and Butte. Other railroads reaching Butte have during the same time maintained like rates to Butte from Sioux City, Omaha, St. Joseph, and Kansas City on the east, and from San Francisco, Sacramento, and Los Angeles on the west. Butte has been as the hub of a wheel, with spokes representing equal rates to these various cities. Industries have been born and have grown in reliance upon this parity of rates. Intermediate points have had rates fixed in proportion with the Butte rates. Competition of markets and of carriers has brought this about. The Northern Pacific Company cannot maintain its present Commission-made rates between its eastern terminals and Moorhead, and at the same time its present interstate rates from its eastern terminals to Butte without substantial discrimination in fact against Butte or localities intermediate between its eastern terminals and Butte. If it lowers its rates from its eastern terminals to Butte and intermediate stations to such an extent as to obviate substantial discrimination in fact, it must, to preserve the relation which has always existed, lower to a like extent its rates from its western terminals to Butte and intermediate stations. If, then, the Northern Pacific maintains the Commission-made rates between its eastern terminals and Moorhead, it must either substantially discriminate in fact or destroy the general relation of rates which has existed for many years in the territory between the Missouri river and the Pacific Coast. In this way the reduction of the rates in Minnesota either imposes a substantial burden upon, and a regulation of, interstate commerce or compels unjust discrimination therein.

Prior to the taking effect of the order of September 6, 1906, the Great Northern and Northern Pacific Companies had established joint through rates in connection with other carriers from all localities easterly or southerly of the state of Minnesota to all points in Minnesota westerly of St. Paul and Minneapolis reached by them, respectively, and these rates were in force at the time of the taking effect of the order. After the rates prescribed by the order were installed, the sum of the locals on St. Paul from all localities southerly and easterly of Minnesota to all localities in Minnesota westerly of St. Paul and Minneapolis reached by these companies was substantially less than the then existing interstate rates between such localities southerly or easterly of Minnesota and such Minnesota localities. Maintaining such a relation of rates would have involved undue and unjust discrimination in fact against the localities easterly and southerly of Minne-

sota and an unjust and undue preference and advantage in fact for St. Paul, because merchandise could have been shipped from all localities easterly and southerly of Minnesota to St. Paul on the theretofore established and then existing interstate rates and distributed from St. Paul to all points westerly of St. Paul and Minneapolis on the rates prescribed by the order for substantially less charges in the aggregate than would have been incurred for the through haul under the then existing through interstate rates. In order to avoid this discrimination, the companies forthwith, after the taking effect of the order, withdrew the then existing interstate rates, and established a new tariff of through rates which were no higher than the sum of the locals on St. Paul. For example, the former through rates from Chicago to Wadena, Minn., on first-class merchandise, was $1.09 per cwt. The sum of the locals on St. Paul after the taking effect of the order was $1.004. The present through rate is $1.004, being a reduction of 8.6 cents per cwt. In other words, the reduction in the Minnesota rates compelled an unjust discrimination in interstate rates, or submission to the imposition of a substantial burden on interstate commerce.

Conditions attending transportation are substantially the same in Minnesota and North Dakota, whether the transportation is local to either state or interstate between them. If unjust and undue preference or advantage in rates is to be avoided, like rates must exist for like distances under like circumstances. The Northern Pacific and Great Northern Companies have prior to the taking effect of the order maintained an equable basis of rates in the territory which these two states compose without regard to state lines. For example, the interstate rates from Moorhead, Minn., westerly into North Dakota, have been the same as from Moorhead easterly into Minnesota, and no conditions have existed, or do exist, which justify a different basis of rates for east-bound to that for west-bound transportation.

Prior to the installation of the rates prescribed by the order, the rate per cwt. of first-class merchandise for 100 miles, for example, out of Moorhead, whether westerly, into North Dakota or easterly, into Minnesota, was 43 cents. For transportation westwardly into North Dakota this rate from Moorhead still exists. The rate prescribed by the order and now in effect from Moorhead eastwardly into Minnesota is per cwt. of first-class merchandise 30.6 cents. This disparity of rates for transportation under substantially similar conditions, and which disparity increases as distance easterly from Moorhead increases, constitutes an undue preference and advantage to the eastwardly localities in Minnesota, and a corresponding prejudice and disadvantage to the interstate westwardly localities in North Dakota. If the companies maintaining this relation of rates, unfair in fact, are to continue to maintain the rates prescribed by the order, they can remove the existing undue and unjust discrimination in fact against the interstate localities in North Dakota only by reducing the interstate rates from Moorhead to localities in North Dakota to a substantial parity with those maintained from Moorhead to localities at like distance in Minnesota.

The Great Northern Company owns and operates a branch line to Noyes, 391 miles from St. Paul. The line between St. Paul and Noyes

is wholly within the state of Minnesota. Conditions attending transportation of merchandise from St. Paul to Noyes are at least no more favorable than those attending transportation from St. Paul to localities in North Dakota on the main line of the company and equally distant from St. Paul. All that is claimed by complainants is that conditions are substantially alike. Prior to the taking effect of the order, the rate per cwt. of first-class merchandise for transportation on the Great Northern from St. Paul to a locality 390 miles distant and situate either in Minnesota or in North Dakota was 96 cents. The Commission-made rate from St. Paul to Noyes is 68.8 cents. Such a disparity in rates without substantial dissimilarity in conditions constitutes undue and unjust discrimination in fact.

The order of September 6, 1906, prescribes a basis of rate making. Its schedule is framed to secure a fixed relation between rates on the same class for different distances, a fixed relation between rates for the different classes for the same distance, and therefore manifestly a fixed relation between rates for different classes for different distances. These relations are so stable that, given the rate for any distance on any class, the rate for any other distance on any other class may be determined by one who knows the method upon which the schedule is constructed. An avowed purpose of the schedule is to secure equality of rates.

The Great Northern Company operates a line from St. Paul to Sioux City, Iowa, 327 miles from St. Paul, which leaves the state of Minnesota and enters the state of South Dakota at a distance approximately 218 miles from St. Paul—the distance from St. Paul to Jasper, the border Minnesota town.

It operates another line from St. Paul to Huron, S. D., 294 miles from St. Paul, which leaves the state of Minnesota and enters the state of South Dakota at a distance approximately 173 miles from St. Paul —the distance from St. Paul to Nassau, the border Minnesota town. Between St. Paul and Willmar, Minn., 102 miles from St. Paul, these lines are identical.

Under the schedule prescribed in the order, the progression of the rate—the haulage charge with increasing distance—breaks in two at a distance of 200 miles. That is to say, the haulage charge for first class (and for other classes in fixed relation) having been allowed at .98 cent for each five miles up to 200 miles is cut to .98 cent for each 10 miles beyond 200 miles, and up to 400 miles.

When the line between Minnesota and South Dakota is reached on the St. Paul-Sioux City line, the progression of the rate prescribed by the schedule is .98 cent per 10 miles for first class.

When the line between Minnesota and South Dakota is reached on the St. Paul-Huron line, the progression of the rate is .98 cent per five miles of haul.

It is apparent that, unless undue and unjust discrimination shall exist in the rates on one of these interstate lines as compared with the other, the same basis of making the rate, the same relation between rates for different distances and different classes must be maintained on one line as on the other, and that, notwithstanding that the 200-mile

point of distance on the St. Paul-Huron line is within the state of South Dakota, the progression of the rate should break in two as it has on the St. Paul-Sioux City line on which that point was reached, and that break was made within the state of Minnesota.

The schedule prescribes fixed relations between rates for different distances and different classes. If the relation must be adhered to within the state of Minnesota, it cannot be departed from substantially merely because of the intervention of a state line at one distance or another without involving undue and unjust discrimination in fact in rates.

Since the taking effect of the order of September 6, 1906, both the Great Northern and the Northern Pacific Companies have reduced their interstate rates on merchandise from their eastern terminals in Wisconsin and Minnesota to all localities in general in North Dakota. Such reductions have been made as a rule only to such extent as was necessary to remedy the discrimination resulting from the fact that the sum of the local rates from the eastern terminals to the border towns of Minnesota and from such border towns to the several localities in North Dakota was less than the theretofore established and then existing through interstate rates from the eastern terminals to the several respective localities in North Dakota, and not to such extent as to remedy the discrimination resulting from the fact that in most cases the general basis of rates on merchandise for traffic within Minnesota is substantially lower than that maintained in North Dakota or for traffic crossing the line between North Dakota and Minnesota notwithstanding the substantial equality of conditions. Such substantially lower basis of rates for transportation of merchandise within Minnesota than for that within North Dakota or for that between the two states still exists, and constitutes undue and unjust discrimination in fact.

St. Cloud, Minn., is on the Barnesville main line of the Great Northern, and is 168 miles easterly from Moorhead, at which point this line leaves the state of Minnesota and enters the state of North Dakota. Fergus Falls, Minn., is on the same line, 56 miles easterly from Moorhead. They are each distributing centers, so declared by the Commission's order of May 3, 1907. Whether discrimination, in fact, exists between rates is determined by comparison of the rates involved. If conditions are substantially the same, rates for like distances should be the same, and, if not the same, undue and unjust discrimination in fact will exist. Conditions are substantially alike so far as transportation goes for a distance on the Great Northern of 168 miles westerly of Fergus Falls as for the same distance westerly of St. Cloud. Because they are distributing centers, rates from Fergus Falls to points within that distance westerly should be the same as from St. Cloud to points of equal distance westerly. Rates on articles covered by the order of September 6, 1906, from St. Cloud westerly within such distance of 168 miles, are substantially lower than those maintained by the Great Northern to points in North Dakota of like distance westerly of Fergus Falls. Such disparity depends only on the fact that in the case of the higher rates the state boundary line is crossed and on no other condition whatsoever and it constitutes undue and unjust

discrimination in fact, not only against the shipper at Fergus Falls, but, as well, against the consumer in the North Dakota towns in question.

Commodity Rates.

The main lines and branches of the Northern Pacific and Great Northern Companies within the states of Minnesota and North Dakota lie wholly (excepting certain limited tracts in which grain cannot be grown, such as the Bad Lands of North Dakota) within grain fields, and grain is shipped in substantial quantities from nearly all stations in these fields to Duluth, Minneapolis, and Superior.

Shipments of coal originate at the head of the Lakes—that is to say, Duluth, Minn., or Superior, Wis.—and find their destination at all localities served by the companies or either of them in Minnesota and eastern North Dakota.

Shipments of lumber originate at Duluth, Cloquet, Little Falls, and other points in Minnesota, and are destined to points throughout Minnesota and North Dakota.

Shipments of live stock originate in Minnesota, North Dakota, and eastern Montana, and go to South St. Paul or Chicago.

Conditions attending transportation are substantially the same as to all these commodities moving eastwardly, whether the shipment originates in Montana, North Dakota, or Minnesota, or whether it finds its termination at one of the Minnesota terminals of the companies, or at Superior, Wis.

Conditions attending transportation are substantially the same as to all these commodities moving westwardly, whether the shipment originates at a Minnesota point or at Superior, Wis., or whether it finds its destination in Minnesota or North Dakota.

Because conditions attending transportation are substantially the same, any difference in the basis of rates charged for transportation of coal, whether the shipment originates at Duluth, Minn., or at Superior, Wis., and is destined to any locality in Minnesota or in eastern North Dakota, or in the basis of rates for transportation of grain, whether the shipment originates in Minnesota or North Dakota or is destined to Minneapolis or Duluth or Superior, or in the basis of rates for transportation of lumber, whether the shipment is destined to a point in Minnesota or to one in North Dakota, or in the basis of rates for the transportation of live stock, whether the shipment originates in Minnesota, North Dakota, or eastern Montana involves an undue and unjust prejudice and disadvantage, in fact, against the localities subject to the higher basis of rates, and an undue and unjust preference and advantage in fact to the localities given the lower basis. Establishing the rates prescribed by chapter 232, Gen. Laws 1907 (Rev. Laws Supp. 1909, §§ 2007–11 to 2007–17), and maintaining these rates for transportation wholly within Minnesota simultaneously with the maintenance of the interstate rates at present maintained for interstate traffic between Superior and localities in Minnesota, North Dakota, and eastern Montana and between localities in Minnesota and localities in North Dakota and eastern Montana, would involve on the part of the Northern Pacific and Great Northern Companies undue and un-

just discrimination in fact against shippers, receivers, and localities transacting the interstate business, and would seriously impair the interstate business of the carriers. If the companies shall be compelled to maintain within Minnesota the rates prescribed by chapter 232, they will be compelled to reduce the basis of their interstate rates between eastern Montana and North Dakota points and Minnesota points and between eastern Montana, North Dakota, and Minnesota points and Superior to a substantial parity with the basis prescribed by chapter 232, in order to avoid undue and unjust prejudice and disadvantage in fact against shippers and localities transacting the interstate business, as well as in order to protect the interstate business of carriers against serious impairment.

Such reduction must be substantial. For example, the present rate on soft coal from Duluth to Wahpeton is $2 per ton. The rate prescribed by chapter 232 from Duluth to Breckenridge is $1.31 per ton. That act provides that a minimum car load of soft coal shall be 30,000 pounds or 15 tons. So that the reduction that will be necessary to avoid discrimination against the interstate locality in the rate on soft coal will be $10.35 per minimum car load.

Duluth, Minnesota, Superior, Ashland, Green Bay, Manitowoc, Sheboygan, and Milwaukee, Wis., Gladstone, Mich., Chicago, Ill., the Peoria, Ill., district, the Springfield, Ill., district, the Streator, Ill., district, and the La Salle, Ill., district, are all competitive points for the distribution of coal into the state of Minnesota.

For many years rates on coal from the various distributing points to localities in southern Minnesota have borne such a relation as to admit of free competition of the various distributing points and of the carriers serving them.

If the rates on coal prescribed by chapter 232, Gen. Laws 1907, shall take effect, the result will be substantial reduction in rates on coal from Duluth to southern Minnesota localities. Such a reduction will deprive all these various distributing points in Wisconsin, Michigan, and Illinois of their power to compete with Duluth in its distribution of coal in Minnesota, unless the carriers serving them shall reduce their interstate rates into Minnesota to a parity with those prescribed by chapter 232 from Duluth. If such carriers shall reduce their interstate rates in Minnesota to a parity with the rates prescribed by chapter 232, the relation which now exists between rates on coal from these various distributing points and localities in northern Iowa and in South Dakota will be destroyed, unless rates shall be similarly reduced from these various distributing centers to localities in these two districts.

Interstate rates on cattle, hogs, sheep, and coarse grain would be affected by the rates prescribed by chapter 232 in the same manner as rates on wheat and coal.

Under the milling in transit privileges, so called, owners of wheat at any point in Minnesota, North Dakota, or South Dakota may pay rates equal to the sum of the rate between the point of shipment to Minneapolis and the proportional rate from Minneapolis to Chicago (for many years and at present the sum of 7.5 cents per cwt.), have it milled at Minneapolis, and within a limited period of time forwarded to Chicago as flour.

In order to allow mills located at other towns in Minnesota to compete with Minneapolis, a like milling in transit privilege has been accorded owners of wheat to ship via such other towns as via Minneapolis, and mills have been established in many such towns under a guaranty that rates into the towns in which such mills are located on wheat in and flour out to Chicago should not exceed the rates from the same points to Chicago via Minneapolis with the milling in transit privilege. Chapter 232, Gen. Laws 1907, substantially reduces rates on wheat within Minnesota. The result will be, if that law takes effect, that the milling in transit rate from points in Minnesota via Minneapolis to Chicago will be automatically reduced substantially. Unless, then, all interstate rates between Minnesota points and Chicago via some interior mill town and with a milling in transit privilege shall be reduced to a substantial parity with the reduced milling in transit rate to Chicago via Minneapolis, Minneapolis will have a substantial advantage in its interstate rates on wheat over the various mill towns in the interior of the state, and wheat in general will as a result of this advantage go to Minneapolis.

Passenger Rates.

Prior to the taking effect of chapter 97, Gen. Laws 1907 (Rev. Laws Supp. 1909, §§ 2007—1 to 2007—2), the general basis of rates for the transportation of passengers between any two points on the Northern Pacific system had been for some years 3 cents per mile for passengers of 12 years of age and over, and 1½ cents per mile for passengers under 12 years of age.

Chapter 97, Gen. Laws 1907, prescribes as a maximum for transportation of passengers wholly within the state of Minnesota 2 cents per mile for passengers of 12 years of age or over and 1 cent per mile for passengers under 12 years of age.

After the maximum rates prescribed by chapter 97 were installed, the sum of the locals between Moorhead and other Minnesota points and Moorhead and points westerly thereof was less than the then existing interstate rates between Minnesota points and points westerly thereof.

The result of this disparity between the through interstate rate over Moorhead and the sum of the locals over Moorhead was this: In the first month after the taking effect of chapter 97, the revenue for passenger business on the Northern Pacific between Moorhead and other Minnesota points increased 647 per cent. over that for the corresponding month of the preceding year, while, eliminating Moorhead business, the revenue for passenger business within the state decreased 2 per cent. In June, 1907, the second month after the taking effect of chapter 97, there were sold by the Northern Pacific Company 4,037 tickets between St. Paul or Minneapolis, on the one hand, and Moorhead or East Grand Forks, on the other, as compared with only 172 such tickets in the corresponding month of the year before; and in June, 1907, there were sold only 173 tickets between St. Paul or Minneapolis, on the one hand, and Grand Forks and Fargo, on the other, as compared with 984 such tickets in the corresponding

month of the year before. In May and June, 1906, only one cash fare was collected on a train between Moorhead and St. Paul or Minneapolis. In those months in 1907 there were 1,168 full cash fares and 82 cash half fares so collected.

Thus the necessary, immediate, direct effect of the operation of chapter 97 was to deprive the Northern Pacific Company of a substantial amount of its interstate passenger business through Moorhead.

Notwithstanding the facility with which interstate passengers could avoid the discrimination against them by making two contracts with the company, one of which should cover the mileage in Minnesota, discrimination in fact against the interstate passenger through Moorhead on the Northern Pacific still existed, and was practiced. It existed against a passenger who, applying for a through ticket, did not know that the sum of the locals on Moorhead was less than the through rate, against the passenger with a trunk which he could not check through unless on a through ticket, and against a passenger who was compelled to use a sleeping car.

As soon as it reasonably could do so, the Northern Pacific remedied this discrimination by reducing all its interstate fares for passenger transportation through Moorhead to an amount no greater than the sum of the locals over Moorhead. Meantime and before tariffs establishing the new reduced interstate rates over Moorhead had been filed, the state of Wisconsin had enacted a two cents per mile passenger fare law, and the state of North Dakota a two and one-half cents per mile law. The rates, therefore, newly established by the Northern Pacific Company between St. Paul, for example, and points in North Dakota and beyond, were in general less than the theretofore existing rates by approximately one cent per mile for the mileage of the transportation in Minnesota and one-half cent per mile for the mileage in North Dakota. And the rates newly established by the Northern Pacific jointly with other companies for passenger transportation between points easterly of Minnesota and points on the line of the Northern Pacific were in general less than the theretofore existing rates by approximately one cent per mile for the mileage of the transportation in Wisconsin and Minnesota and one-half cent per mile for the mileage in North Dakota.

These reductions in rates were compelled by the necessary, immediate, and direct effect of the operation of the laws of the respective states above recited, not only in order that undue and unjust discrimination in rates might be avoided, but, as well, in order that the companies might transact interstate passenger business freely and without impairment of volume.

Prior to the taking effect of the respective orders complained of and of the two-cents maximum passenger fare law, the tariffs of the Great Northern and Northern Pacific Companies for the transportation of passengers or merchandise in Wisconsin, Minnesota, North Dakota, and South Dakota were fair as between the different states, and the local tariffs in each state were fair as compared with the interstate tariffs between such states or any two thereof; and the

tariffs now maintained by the companies and each of them for the transportation of commodities covered by chapter 232 are fair as between these states, and the local tariffs in each state are fair as compared with the interstate tariffs between such states or any two thereof.

The installation of the rates prescribed by the respective orders destroyed that fairness as to merchandise rates, the installation of the two-cents passenger rate destroyed it as to passenger rates, and the installation of the rates prescribed by chapter 232 would destroy it as to rates on commodities covered by it.

It is wholly impossible for carriers situated as are the Great Northern, Northern Pacific, and Minneapolis & St. Louis Companies to maintain materially lower rates or a materially lower basis of rates or a different classification of subjects of transportation, or a different relation between rates for different classes of merchandise, for traffic wholly within Minnesota, than for that between Minnesota and any of its neighboring states without unjust and undue discrimination in fact against the localities in the neighboring states, and without serious impairment of the volume of the interstate business of the carriers. Such lower basis of rates within Minnesota than between Minnesota and its neighboring states would result in the promotion of the growth and prosperity of localities in Minnesota at the expense of localities in neighboring states and the enhancement of the value of property in Minnesota, and the serious impairment of the value of the property of all business men, as well as of that of the carriers themselves in the neighboring states.

Duluth and Superior, Grand Forks and East Grand Forks, Fargo and Moorhead, and Wahpeton and Breckenridge are so situated that each pair must be considered for the purpose of rate making as one locality. Both as a practical matter of the operation of a railroad and in order that undue and unjust discrimination as between the members of any pair may be avoided, each city of each pair must have rates equal to those accorded to the other city. If different rates, a different classification, or a different basis of rates be lawfully prescribed by one regulating power in or out of one city of any pair to those prescribed by another regulating power in or out of the other city of the pair, the carriers serving them both must, in order to avoid undue and unjust discrimination in fact as between them as well as to preserve their own power to transact business with each of them, adopt for each city the lower rates or basis of rates, or classification prescribed for either city.

If it should be necessary for the companies involved, in order that discrimination may be avoided, or in order that the companies may preserve the volume of their respective businesses in interstate transportation free from impairment in volume, to install for their interstate business a basis of rates no higher than these respectively prescribed in the acts and orders complained of, and to extend the rates for their interstate long-haul business upon the principle provided in said acts and orders, the result will be a substantial diminution in the revenues of the companies from their interstate business. For

example, the diminution in the revenue of the Northern Pacific Company for the year ending June 30, 1906, the last fiscal year prior to the taking effect of the order of September 6, 1906, from its interstate business in transportation of commodities covered by chapter 232 alone, if the basis prescribed by chapter 232 had been applied to its rates for such interstate business, would have been $4,193,283.04; and the loss in such interstate revenue for such year for transportation of merchandise covered by the order of September 6, 1906, if the basis prescribed by the order had been applied to its rates for such interstate business, would have been $4,119,761.96. The loss in its interstate business from passenger transportation, if the two-cents maximum rate had been applied during such year, would have been $1,444,955.35, or a total loss, on account of the acts and orders complained of, of $9,758,000.35.

If, in order to prevent discrimination as between different states, it shall be necessary for the companies involved to apply for local business within the respective states, the same basis of rates as those prescribed for business local to Minnesota by the acts and orders respectively complained of, the loss in revenue to the companies involved will be substantial. For example, in the year 1906 the loss in revenue of the Northern Pacific Company, if the basis prescribed by chapter 232 had been applied to its local business in transportation of commodities covered thereby in other states, would have been $198,540.51; and its loss in revenue, if the basis of rates prescribed in the order of September 6, 1906, had been applied to its local business in other states for transportation of merchandise covered thereby, would have been $952,644.83, or a total loss on freight of $1,151,185.34; and, if the two-cents maximum passenger rate had been applied to its local business in other states, the loss in revenue would have been $990,908.82, or a total loss, under the acts and orders complained of, of $2,142,094.16.

The facts which have been recited were found by the master, and the foregoing statement of them is, with rare exceptions, in his clear and concise language. Many exceptions are leveled at these findings, but they are sustained by clear and convincing evidence, and the only question remaining here is: Do they justify the conclusion that the effect of the acts and orders prescribing the Minnesota maximum fares and rates is to impose a substantial burden upon or to regulate or to discriminate against interstate commerce, or to create unjust discrimination between interstate localities? Counsel for the defendants insist that this question should be answered in the negative.

They argue that the prescription and enforcement of these fares and rates cannot constitute an unconstitutional burden upon or interference with interstate commerce because the orders and acts relate to commerce within the state only and the state has power to regulate its purely local commerce. This contention, however, cannot be sustained because, as has been demonstrated in the earlier part of this opinion, if, by their natural or necessary operation, these acts and orders have the effect substantially to burden interstate commerce, they fall under the ban of the Constitution and beyond the power of

the state whatever their terms or the intent of their makers may have been.

They say that, while the reduction of the local fares and rates may induce the companies to reduce their interstate rates and fares across the borders of the state to a parity with the local rates, this is the voluntary act of the companies not directly required by the laws and orders. There are, however, known and inexorable laws of commerce, and one of them is that transported articles will move at the lowest available rates. Reduce local fares and rates so that fares and rates in interstate commerce across the borders of the state are substantially higher than the sums of the locals over the Minnesota stations on or near the state boundaries and the companies must reduce their interstate fares and rates on that portion of their interstate commerce affected by the sums of the locals over the Minnesota borders to a substantial parity with the sums of the locals or their interstate commerce affected thereby will unavoidably become intrastate commerce and move at the sums of the locals. There is nothing voluntary on the part of the companies in the loss or burden imposed upon them by these reductions. That they must suffer whether they reduce their interstate rates or maintain them and permit the transformation of their affected interstate commerce into intrastate commerce by rebilling and local contracts so that it can pass at the sums of the locals. The loss of the difference in revenue between that derived from their former interstate rates and that derived from the sums of the locals is a direct and unavoidable burden upon their interstate commerce imposed by the acts and orders stated which the companies may not by any device avoid.

Moreover, the acts and orders making these intrastate reductions necessarily operate to discriminate against interstate commerce and the right of the companies to carry it on, and in that way constitute a direct burden upon such commerce. Mr. Justice White said in the Pullman Company's Case, 216 U. S. at page 65, 30 Sup. Ct. at page 236 (54 L. Ed. 378), that, though a power exerted by a state may not abstractly impose a direct burden on interstate commerce, yet such exertion will be a direct burden upon such commerce if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on. If the companies exercised their right to maintain and did maintain their former interstate rates upon that portion of their interstate commerce affected by the local Minnesota rates, they lost to local commerce that interstate commerce, because it passed by rebilling and local contracts at the sums of the locals. This necessary effect of the local maximum rates was a direct discrimination against interstate commerce and the right to conduct it, and hence a direct burden upon that commerce. If, on the other hand, to avoid this discrimination the companies reduced their rates, that reduction was a like direct burden, and no course was open to them whereby they could exercise their constitutional right to conduct their interstate commerce free from the direct regulation thereof effected by these acts and orders.

Another vicious and inevitable effect of these acts and orders is

the unjust discrimination in fares and rates between localities in Minnesota and those beyond its borders which they effect. Moorhead, Minn., and Fargo, N. D., are practically the same distance from St. Paul, Minneapolis, and Duluth, respectively. They have long received, and they ought to continue to receive, the same fares and rates in and out. This is also true of Duluth, Minn., and Superior, Wis.; Breckenridge, Minn., and Wahpeton, N. D.; East Grand Forks, Minn., and Grand Forks, N. D. These acts and orders reduced the fares to and from the Minnesota towns of these pairs from and to other Minnesota points 33⅓ per cent., and the freight rates from 7 per cent. to 25 per cent., while the former interstate fares and rates from and to the other towns of the pairs remained in effect, as to commodity rates under the protection of the injunction of this court, and would have continued in effect in the matter of merchandise rates and the passenger fares had not the prohibition of discriminations between localities by the interstate commerce law and the laws of trade which have been considered compelled the companies to reduce their interstate rates to a parity with the local rates prescribed. The discrimination thus wrought by these acts and orders between the towns mentioned on the state lines is but illustrative of the undue preference and advantage the local reductions gave to Minnesota cities and towns, and the unreasonable prejudice and disadvantage to which they subjected the towns and the cities of other states similarly situated in their vicinity.

Congress by the "act to regulate commerce" (24 Stat. 379) forbade the companies to make or give any undue or unreasonable preference or advantage to any party or locality, or to subject any party or locality to any unreasonable prejudice or disadvantage in any respect whatsoever, and the prevention of the discrimination thus prohibited was one of the main purposes of this legislation. The first section of the act, however, contained this provision:

"Provided, however, that the provisions of this act shall not apply to transportation of passengers or property, or to the receiving, storage or handling of property wholly within one state, and not shipped to or from a foreign country from or to any state or territory aforesaid."

The result was that the act of Congress forbade, and the acts and orders of the officers of Minnesota compelled, this discrimination between localities under the penalty of the surrender by the companies of a substantial part of their interstate commerce or of the revenue therefrom. Counsel for the defendants argue, however, that this radical discrimination is not forbidden by the interstate commerce law because it is a discrimination wrought, not by an undue difference between intrastate rates of which they say the state has exclusive jurisdiction, nor by an undue difference between interstate rates of which they admit the nation has exclusive jurisdiction, but by an undue difference between intrastate rates and interstate rates, and they contend that over the discrimination thus wrought neither state nor nation has any power. The argument, however, again disregards the broad and fundamental difference between the power of the state over intrastate commerce and the power of the nation over interstate com-

merce. The state may regulate its intrastate commerce so far only as the exercise of its power does not substantially burden or regulate or discriminate against interstate commerce, but no farther. A state may not prohibit or regulate discrimination between interstate and intrastate rates in such a way as substantially to burden or regulate interstate commerce, as, for instance, by the prohibition of a higher charge or rate for a short haul wholly within the state than for a long haul that includes the short haul and extends into another state, because such action burdens and regulates interstate commerce. Louisville & Nashville R. R. Co. v. Eubank, 184 U. S. 27, 42, 43, 22 Sup. Ct. 277, 46 L. Ed. 416. By the same mark, because it is a direct regulation of interstate commerce, the nation may regulate and prohibit discriminations wrought by an undue difference between interstate and intrastate rates, although such regulation or prohibition may also to some extent affect and regulate intrastate commerce. For to the extent necessary completely and effectually to regulate interstate commerce the nation by the Congress and its courts may affect and regulate intrastate commerce. United States v. Colorado & N. W. R. Co., 157 Fed. 321, 331, 85 C. C. A. 27, 37, 15 L. R. A. (N. S.) 167; Brown v. Maryland, 12 Wheat. 419, 448;[1] Gibbons v. Ogden, 9 Wheat. 1, 209, 210, 6 L. Ed. 23; Gulf, Colorado, etc., Ry. Co. v. Hefley, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910; Interstate Commerce Commission v. Detroit, etc., Ry. Co., 167 U. S. 633, 642, 17 Sup. Ct. 986, 42 L. Ed. 306; State Freight Tax Case, 15 Wall. 232, 275, 280, 21 L. Ed. 146; Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 8, 24 L. Ed. 708; Chy Lung v. Freeman, 92 U. S. 275, 280, 23 L. Ed. 550; Railway Co. v. Husen, 95 U. S. 465, 471, 472, 473, 24 L. Ed. 527; Hall v. De Cuir, 95 U. S. 485, 488–490, 497, 498–513, 24 L. Ed. 547; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 736, 737, 5 Sup. Ct. 739, 28 L. Ed. 1137; Bowman v. Chicago, etc., Ry. Co., 125 U. S. 465, 479, 480, 481, 484, 485, 488, 489, 490, 491, 507, 508, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Welton v. Missouri, 91 U. S. 275, 280, 23 L. Ed. 347; Lyng v. Michigan, 135 U. S. 161, 166, 10 Sup. Ct. 725, 34 L. Ed. 150; Norfolk, etc., Ry. Co. v. Pennsylvania, 136 U. S. 114, 115, 118, 120, 10 Sup. Ct. 958, 34 L. Ed. 394; Crutcher v. Kentucky, 141 U. S. 47, 57, 58, 59, 11 Sup. Ct. 851, 35 L. Ed. 649; Osborne v. Florida, 164 U. S. 650, 655, 17 Sup. Ct. 214, 41 L. Ed. 586; Caldwell v. North Carolina, 187 U. S. 622, 623, 23 Sup. Ct. 229, 47 L. Ed. 336. "This power," said Chief Justice Marshall, "like all others vested in Congress, is complete in itself, may be exercised *to its utmost extent,* and acknowledges no limitations, other than are prescribed in the Constitution. * * * If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, *is vested in Congress as absolutely as it would be in a single government,* having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." Gibbons v. Ogden, 9 Wheat. 1, 189, 194, 197, 6 L. Ed. 23; Lottery Case, 188 U. S. 321, 346, 347, 359, 23 Sup. Ct. 321, 47 L. Ed. 492.

[1] 6 L. Ed. 678.

The power therefore to prohibit the railroad companies from making or permitting any undue discrimination between localities and parties by unreasonable differences between intrastate and interstate rates was vested in Congress, and no acts or orders of the state or its officers could justify such a discrimination. If, as the Supreme Court held in the Eubank Case, a state has no authority to suppress such a discrimination, much less has it the power to create and maintain it.

But counsel insist that, if Congress had the power to forbid this discrimination, it did not exercise it because it declared in the proviso to section 1 that the provisions of the interstate commerce act should not apply to transportation wholly within one state. But the main object of the act was to prevent every undue discrimination between parties and between localities. When it was enacted there was a crying evil in such discriminations, an insistent public demand for the remedy thereof, and a determined effort by the legislators to make the prohibitions of such discriminations as broad, searching, and effective as the Congress had the power to make them. It had, as we have seen, ample authority to forbid discriminations wrought by differences between intrastate and interstate rates, but none to prohibit discriminations caused by differences in rates for transportations wholly within a state. The act prohibits any undue discrimination in any respect whatever between localities under similar circumstances and conditions by any common carrier subject to its provisions. In the light of these facts, the natural and reasonable construction of the proviso in section 1 is that it was inserted out of abundance of caution to make sure that the broad terms of the act did not go beyond the constitutional power of the Congress and directly regulate intrastate commerce more than was necessary completely to regulate interstate commerce, and that it has no farther effect upon the subject of discrimination now under discussion. The evil the act was passed to remedy, the main purposes of its passage, the public demand for a prevention of all discriminations, the patent effort of the legislators to meet this demand, and the broad terms of the prohibitions themselves compel the conclusion that the Congress intended to exercise, and that by this act it did exercise, its constitutional power to prevent discriminations of the character here in question to its utmost extent, and that the companies were and are prohibited thereby from making or maintaining the unjust discriminations between localities which the maintenance of their former lawful interstate fares and rates and the intrastate rates prescribed by the acts and orders of the officers of the state would necessarily effect. Reliance Textile & Dye Works v. Southern Ry. Co., 13 Interst. Com. R. 48, 54.

The next suggestion is that, if the prohibition of the interstate commerce act applies to discriminations between intrastate and interstate rates, it applies only when the transportation is under substantially similar circumstances and conditions and the acts and orders in question render the circumstances and conditions under which the intrastate rates are charged dissimilar from those which condition the interstate rates. But state laws and orders effecting discriminations forbidden by acts of Congress cannot be held by themselves to

create such dissimilar conditions as to warrant the maintenance of such discriminations.

Finally, counsel cite, to overcome the proof of the substantial burden and the direct regulation of interstate commerce effected by the acts and orders in this case, with which this record teems, these words from the opinion of Mr. Justice Brewer in Ames v. Union Pacific Ry. Co. (C. C.) 64 Fed. 172:

"Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true that the companies may, for their own convenience, to secure business, or for any other reason, rearrange their interstate rates, and make them conform to the local rates prescribed by the statute; but surely there is no legal compulsion. The statute of the state does not work a change in interstate rates, any more than an act of Congress prescribing interstate rates would legally work a change in local rates. Railroads cannot plead their own convenience, or the effect of competition between themselves and other companies, in restraint of the otherwise undeniable power of the state."

The reduction of local rates does not interfere with interstate rates "as a matter of law," yet it may do so as a matter of fact. Whether or not the general and sweeping reductions in local rates in Minnesota necessarily interfere with interstate rates and interstate commerce is in this case, as it must be in every case, a question of fact. The facts which determine that question in this case have been set forth in this opinion at great length, because it is upon them, and not upon legal inferences, that the answer to the question, whether or not the effect of the necessary operation of the acts and orders challenged is substantially to burden interstate commerce, now rests. Those facts are that it was not for "their own convenience," but at great inconvenience and loss, not on account of the "effect of competition between themselves and other companies," but because these acts and orders, the prohibition of discrimination between localities by the interstate commerce act and the laws of trade, forced them to do so, that the defendants reduced their interstate commerce rates to a parity with the local rates and submitted to the loss of interstate revenue this action entailed. The opinion of Mr. Justice Brewer in the Ames Case is inapplicable to the cases in hand because no such array of condemnatory facts was ever submitted to him in that case, and it is perhaps not too much to say that no case has been found in the books in which any such proof of the unavoidable effect of general reductions of intrastate rates to substantially burden and directly regulate interstate commerce has ever been presented.

Minnesota, North Dakota, South Dakota, and Wisconsin embrace a vast region 1,000 miles in extent, traversed by the railroads of the defendant companies, which produces the same things shipped to the same markets and consumes the same things bought in the same markets. The conditions of the transportation of passengers and freight in interstate traffic and also in intrastate traffic have been and are identical, and a relative, fair, and equable relation between fares and rates in interstate commerce and fares and rates in intrastate commerce had been maintained before the acts and orders here challenged were made. The railroad companies had established and were collect-

ing their interstate fares and rates pursuant to the act to regulate commerce enacted by the Congress of the United States. Those fares and rates were lawful, hence presumptively reasonable, and neither the officers of the state of Minnesota nor any court, state or federal, could legally adjudge them unreasonable until they had been denounced by the Interstate Commerce Commission. Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553. The fares and rates and the traffic in intrastate commerce were so inextricably interwoven with the fares and rates and the traffic in interstate commerce that a general and substantial reduction of the fares and rates in either by its necessary operation compelled a similar reduction in the other, because the interstate commerce act forbids the discrimination that would otherwise result and because traffic will move only at the lowest available rates. The subject of the fares and rates in interstate commerce through this region is national in its character and capable of regulation by uniform rates, and the railroad companies are therefore free to make and regulate them subject only to the orders of the Interstate Commerce Commission. The officers of the state of Minnesota by the acts and orders challenged made a general and sweeping reduction of 33⅓ per cent. in passenger rates within that state, of 20 per cent. to 25 per cent. in rates on general merchandise, of 7.37 per cent. on grain, coal, live stock, and lumber, and of 13.58 per cent. on in-rates to distributing points.

The effect of the necessary operation of these acts and orders was substantially to burden and directly to regulate the interstate commerce of the companies by causing the transformation of that part of their transportation upon which their former interstate rates were higher than the sums of the locals over the border towns in Minnesota into local commerce at those sums, or by causing the companies to reduce their interstate fares and rates affected by the reduced local fares and rates to a parity therewith. This effect was unavoidable because the interstate commerce law prohibited the companies from giving to Minnesota towns and cities the undue and unreasonable advantage and from subjecting the cities and towns of other states in the vicinity to the undue and unreasonable disadvantages which a maintenance of their former interstate fares and rates and the prescribed local fares and rates would have wrought, and because passengers and freight will move at the lowest available rates.

This effect was not like that of the directions concerning the movements of particular trains, the inspection of animals to guard against disease, the reduction of intrastate rates on one or a few articles of commerce, and similar regulations which were sustained in the cases in the earlier part of this opinion and in others of like character, because their effect upon interstate commerce was so incidental and remote as to be negligible. The effect of these acts and orders was substantial, direct, controlling, and compelling. They are general and sweeping in their terms, they reduce the fares and rates on the great body of intrastate commerce in the state of Minnesota from 7 to 33⅓ per cent., and their inevitable effect is directly and unavoidably

to regulate much of the interstate commerce of the defendant companies and unavoidably to cause each of them great loss of revenue therefrom.

No case has been found in the books in which the facts disclose a more substantial burden imposed upon interstate commerce by the acts or orders of the officers of any state than that which the effect of the necessary operation of these acts and orders entails upon the interstate commerce of these companies. If in the early proceedings in the Northern Pacific Case the Supreme Court was moved to say, of the issue whether the necessary effect of these acts and orders was to interfere with and to regulate interstate commerce, "the question is not, at any rate, frivolous," how, now, that their necessary effect upon that commerce has been indisputably proved to be not only general and substantial, but controlling and compelling, may they escape the ban of the Constitution? If one state might by such radical reductions of its local fares and rates below legal interstate fares and rates constitutionally use the laws of trade and the prohibition of discriminations in the interstate commerce law to force like reductions of interstate rates, all states might do so, and the power of the states to regulate fares and rates in interstate commerce would be supreme and that of Congress and the Interstate Commerce Commission inferior and futile. Such does not seem to be the law.

Each of the acts and orders challenged has the natural and necessary effect substantially to burden and directly to regulate interstate commerce, to create undue and unjust discriminations between localities in Minnesota and those in adjoining states, and it is unconstitutional and void.

The master also found that the maximum state rates prescribed by these acts and orders produced incomes insufficient to pay the cost of earning them, taxes and just returns upon the real values of the Minnesota properties of the defendants respectively used to carry on their intrastate commerce in that state. The actual earnings, taxes, and cost of conducting transportation during the year ending June 30, 1908, the year when the fares and all the rates, except the commodity rates, were in actual operation, were proved, and the master found that the net freight income for that year of the Northern Pacific Company from its Minnesota intrastate freight business yielded an annual return of only 1.941 per cent. on the value of its property used to produce that income, and that if the commodity rates had been in operation this percentage would have been still smaller, that its net income from its intrastate passenger business was sufficient to yield an annual return of only 4.2 per cent., and its net income from all its intrastate business in Minnesota an annual return of only 2.909 per cent. of the values of its property assignable thereto respectively. He reported that the net income of the Great Northern Railway Company from its Minnesota intrastate freight business was sufficient to yield an annual return of only 5.468 per cent. of the value of its property assignable to that business, and if the commodity rates had been in force the return would have been less than 5 per cent., that its net income from its Minnesota passenger business yielded a return of

only .925 per cent. on the value of its property assignable to that business, and that the net income from all its Minnesota intrastate business was sufficient to yield an income of only 3.359 per cent. on the value of its property assignable thereto. His report is that, if the acts and orders of which complaint is made had been in force during the fiscal year 1907, the year to which the proof is especially addressed in the case of the Minneapolis & St. Louis Company, the net income derived from that company's Minnesota intrastate business would have been sufficient to pay an annual return of only 2.93 per cent. on the value of its property assignable to that business, that the net income derived from its Minnesota passenger business would have yielded an annual income of only 1.79 per cent. on the value of its property assignable to that business, and that its Minnesota net income from intrastate freight and passenger business would have been sufficient to earn an annual return of only 2.47 per cent. on the value of its property assignable to all its Minnesota intrastate business.

All the Minnesota property of each of these companies devoted to transportation had always been and is used at the same time to conduct both intrastate commerce and interstate commerce. In determining whether or not the fares and rates challenged are confiscatory, the Minnesota intrastate commerce of these companies must be considered by itself. That commerce may receive the benefit of none of the revenue and must bear the burden of none of the cost of interstate commerce. The portion of the value of all Minnesota property of each of these companies which is chargeable with the economic duty to produce a just return by means of the intrastate commerce of that company must therefore first be ascertained, for that is the basic measure of the reasonableness of the return produced by the Minnesota fares and rates and the criterion for the trial of the issue confiscation vel non. In the ascertainment of the necessary facts and in the determination of this issue the master pursued this approved method in the case of each company. Take the Northern Pacific Company for example. He first found the real value of that portion of its Minnesota property devoted to transportation in Minnesota during the year ending June 30, 1908, to be $90,204,545, he apportioned this value between its freight business and its passenger business in that state that was conducted by the use of the property thus valued on the gross earnings basis, and in that way found $66,445,570 thereof assignable to its freight business and $23,758,975 assignable to its passenger business. On the same basis he divided the values thus respectively assigned to freight business and passenger business between the interstate business and the intrastate business of the company conducted by the use of the property so valued, and in that way apportioned $10,867,837 thereof to the company's intrastate freight business, and $8,159,782 thereof to its intrastate passenger business. From the evidence produced he found that the total freight revenue earned by the use, during the year ending June 30, 1908, of the company's Minnesota property valued, was $9,823,508.35, and that the total passenger revenue was $3,512,538.52. These earnings he divided between intrastate commerce and interstate commerce and found

that the intrastate freight earnings were $1,606,771.26, and the intrastate passenger earnings were $1,206,333.09. He found from the evidence that the cost of the freight business conducted by the use of the property valued was $5,343,718.25, and the cost of the passenger business was $2,311,631.95. He divided the freight and passenger cost respectively between the interstate commerce and the intrastate commerce and found that the cost of the intrastate freight business was $1,355,273.82, and the cost of the intrastate passenger business was $863,325. He deducted the annual intrastate freight cost from the annual intrastate freight earnings, and thus found the annual net intrastate freight income which, divided by the value assigned to the intrastate freight business, produced the 1.941 per cent. which he found to be the annual return which the rates challenged yielded upon the value of the Minnesota property of the Northern Pacific Company used to conduct it. In the same way the annual return upon the value assigned to the intrastate passenger business of this company was found, and the same method was pursued in ascertaining the returns yielded to each of the companies by the assailed fares and rates. His findings upon all these matters are terse, clear, and complete. They set forth the values found, the values assigned, the gross earnings, the net earnings, the cost found, the cost assigned, and where they are not drawn directly from the testimony of witnesses they carefully detail the methods and the computations by which they were reached. These findings are drawn from evidence which the master has reported to the court and which fills 19 printed volumes. Exceptions to them and to the report have been taken, and counsel for the defendants by brief and argument seem to have presented every contention and suggestion in opposition to them that learning, ingenuity, and ability enable man to conceive.

Fortunately it is unnecessary to enter upon any review of the authorities, or any discussion of the rules of law, by which the validity, under the fourteenth amendment to the Constitution of the United States, of the acts and orders which prescribed the fares and rates in question must be tried. They are presumed to be reasonable and valid because the Legislature and the Commission have the power to prescribe fares and rates of this nature on condition that they do not have the effect to deprive the owners of any property whose use is subjected to them, and the legal presumption is that the officers of the state have faithfully discharged their duties and acted within the constitutional limits of their power. Proof that they have not done so or that their acts and orders are violative of the federal Constitution must be clear.

It is, however, beyond the power of a state or of its officers to establish or maintain fares and rates the effect of the enforcement of which is equivalent to the taking of the property of public service corporations for public use without compensation, unless justice to the public requires such a confiscation. Fares and rates must be just, both to the people and to the carrier. In the case in hand justice to the people does not demand that the property of the defendant companies shall be taken for their benefit without just compensation, and fares

and rates which do not yield a reasonable return upon the real value of the property of the railroad companies subjected to them are confiscatory in their nature, and the acts and orders which establish or maintain them are unconstitutional and void. "What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public." Smyth v. Ames, 169 U. S. 466, 547, 18 Sup. Ct. 418, 42 L. Ed. 819; San Diego Land Co. v. National City, 174 U. S. 739, 757, 19 Sup. Ct. 804, 43 L. Ed. 1154; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 442, 23 Sup. Ct. 571, 47 L. Ed. 892; Willcox v. Consolidated Gas Co., 212 U. S. 19, 41, 29 Sup. Ct. 192, 53 L. Ed. 382; Missouri, Kansas & Texas Ry. Co. v. Love (C. C.) 177 Fed. 493, 495.

Numerous exceptions are leveled at the master's findings of the values of the Minnesota properties of the companies used to conduct their intrastate transportation on the ground that they are too high. Speaking generally the same classes of evidence were introduced by the respective parties in the case of each of the companies and what will be said of the proof and the finding in the case of the Northern Pacific Company is applicable to the proof and the finding in the cases of the two other companies. Evidence of the cost of reproduction of the Minnesota property of each of the companies, of the original cost of acquisition and construction thereof, and of the average market value of the stocks and bonds of each of the companies for a reasonable period of time prior to June 30, 1908, was introduced before and considered by the master. He found the value of the Minnesota property of the Northern Pacific Company devoted to public use to be $90,204,545. He found the average market value of the stocks and bonds of the company for a period of five years was $509,824,723. The track mileage of the company in Minnesota was 21 per cent. of the track mileage of the Northern Pacific system, and hence the value of the Minnesota property of the company upon this basis was $107,630,191, nearly $17,000,000 more than the value found by the master. In the absence of competent evidence segregating the property of a railroad company devoted to transportation from its other property, all its property represented by the market value of its stocks and bonds is presumed to be devoted to public use. Atchison, Topeka & Santa Fé Ry. Co. v. Sullivan, 173 Fed. 456, 466, 97 C. C. A. 1, and the cases there cited. There was evidence in this case, however, that a considerable portion of the property of the Northern Pacific Company represented by the value of its stocks and bonds was not devoted to transportation; but there was no reliable evidence of the value of this property or of its relative value to the value of all the property of the company. For this reason the master rightly and unavoidably concluded that the market value of the stocks and bonds was not a sound premise from which to deduce the value of the Minnesota property of the company devoted to public use. Counsel for the defendants assail this conclusion and found an argument for a lower valuation upon this market value of the stocks and bonds and a statement in a monthly balance sheet of the company which

they introduced in evidence and which contained a statement of certain accounts of the company and of the book value of certain securities that appear from that statement not to be devoted to public use and to be held by the company. But this balance sheet was not an admission of the company against interest, the record contains no competent evidence of the value of these securities or of the accounts, and therefore the contention of counsel here is without foundation. For similar reasons the market values of the stocks and bonds of the other two companies present no credible evidence that the values found by the master were excessive.

The master found the original cost of the acquisition and construction of the entire railroad systems of each of the companies and the proportion thereof assignable on a track mileage basis to Minnesota. The amounts thus found prove to be much less than the values ultimately found by the master, and for this very good reason: These railroads were pioneers; they were built in large part over the prairies of Minnesota before they were settled and before many of the existing towns, villages, and cities along their lines came into existence. A large part of the right of way of the Northern Pacific Company was granted to it by the nation. The cost of rights of way from 5 to 40 years ago through wild lands, and through towns and villages whose population and the value of the property in which have since been multiplied by from 2 to 10, is obviously no criterion of the value of those rights of way in 1908, when they were used under these fares and rates and when agricultural lands in Minnesota were worth from $35 to $100 an acre, and rights of way and lands for yards and sites for stations in cities like St. Paul and Duluth have wonderfully increased in value. It is a fair return upon the reasonable value of their Minnesota property in 1908 to which these companies were entitled, and the cost of that property at times varying from 5 to 40 years ago may be some evidence; but it is certainly no criterion of its value in that year. In view of these facts the master rightly decided that the cost of reproducing this property new was a more rational and reliable measure of its real value than the original cost of its acquisition and construction or the market values of the stocks and bonds of the companies, and upon that basis he made his findings.

The Railroad Commission seems to have reached the same conclusion at an earlier date, for in the first part of the year 1906, before these suits were commenced, they had employed Mr. Dwight C. Morgan as their engineer, and had instructed him and had requested the railroad companies to find the respective values of their railway properties in Minnesota on the basis of the cost of their reproduction new. This basis is described in the instructions of the Commission to the companies under date of March 12, 1906, in these words:

"In estimating the value of the physical, real and personal property of the railway companies in the state of Minnesota, an estimate of the cost of reproducing them new is deemed essential as the prime factor. In respect to real estate and construction, this prime estimate is to be made as though the existing railways were not constructed and the regions through which they now extend were occupied as now, by the settlements, improvements, and varied industries. * * * The present value of the physical properties of

the railways will be obtained by deducting from the cost of reproduction of deteriorations by time and use, on the date corresponding to that of the estimated cost of reproduction."

A schedule of about 40 items originally suggested by the Commission, and perhaps subsequently somewhat modified, was used by both parties in these cases, and their evidence was directed to the values of these items on the basis of the cost of their reproduction new.

The first and largest item on the schedule was "lands for right of way, yards and terminals." In the case of the Northern Pacific Company the evidence on behalf of the complainant tended to show that the cost of reproducing this item was about $25,000,000. The claim of counsel for the Commission now is that the value of this item does not exceed $9,498,099.27, and the master found that the cost of its reproduction and its value were $21,240,562. In the testimony the item is divided into lands for rights of way, yards, and terminals in St. Paul, Minneapolis, and Duluth, which for brevity will be called "terminals," and other lands for rights of way, yards, and sites for stations through the other cities, towns, and villages and through the country, which will be termed "lands outside of terminals." The evidence for the defendants regarding this item consists of an estimate made and verified by Mr. Morgan and corroborating purchases and sales. Mr. Morgan had never bought and sold any real estate, except his homestead, nor was he acquainted with the value of real estate in general. To ascertain the value of the terminals in each of the three cities he took from the county records the considerations recited in the records of deeds of a large number of lots and lands in each of the cities, compared them with the assessed values of those lots and lands, and found the per cent. that on the average the assessed values were of the considerations recited in these records. In St. Paul this was about 60 per cent. He then laid out strips of lands of varying widths along each side of the railway lands he desired to value, divided these strips into such sections as he thought were of about uniform value, found the values of the land in these sections from their assessed values on the theory that the assessed values were, in St. Paul, 60 per cent. of their real values. From these values of the sections of his strips he deduced the values of the railway lands between the strips by a comparison of areas. To the values of the railway lands thus ascertained he added 75 per cent. because in his opinion it costs railroad companies 75 per cent. more than the normal market value of lots and lands in these three cities to obtain such irregular tracts as they need and now own. To ascertain the value of the lands outside of terminals, he searched out himself and by means of employés the prices at which many lots and lands throughout the region traversed by the railroads had been sold, and from these prices he estimated the value of the lands of the railway companies, and then multiplied these values by three, because, as he testified, it costs railway companies three times the normal value of lands to procure the irregular tracts necessary for their rights of way and station grounds through agricultural lands and the smaller towns, cities, and villages. By these means Mr. Morgan found and testi-

fied that the cost of reproduction, and hence the present value of the land for right of way, yards, and terminals, of the Northern Pacific Company, was $15,385,078.47. At the request of counsel for the defendants he made another estimate in which he omitted to use the multiples 75 per cent. of the normal terminal values and three times the normal values of lands outside the terminals, and disclosed therein the fact that if these multiples were not used his estimate would become $9,498,099.27, the value for which counsel for the defendants argue. But neither Mr. Morgan nor any other witness came to say that the latter was the true cost of reproduction or the real value of this item of the schedule. The defendants also introduced evidence of purchases and sales that tend to sustain Mr. Morgan's estimate of the value of this item.

On the other hand, the evidence for the complainants was, as to the terminals in the three cities, the testimony of three residents of each of those cities engaged in the real estate business, of long experience and accurate knowledge of the values of real estate in their respective cities, as to the values of the terminals of each of these companies, the testimony in the Northern Pacific Case of Mr. Cooper, the land commissioner of that company, who was in charge of its rights of way and had purchased for it since 1903 property for which there had been paid $6,139,542.35, and who had a general knowledge of the property in question and its value, the testimony in the cases of the other companies of officers thereof similarly qualified, and evidence of purchases and sales which tend to sustain the evidence of these witnesses. As to the lands outside of the terminals, the Northern Pacific Company produced the testimony of Mr. Cooper and proof of purchases and sales for railway purposes which tend to prove that his testimony of the cost of reproduction and the value of the property was not substantially above prices that had actually been paid for like property. He testified that he had much knowledge from his experience and observation of the cost and value of these lands outside the terminals, that he verified his knowledge by investigating the purchases and sales of property in the vicinities of these various rights of way, that the necessary cost of obtaining such rights of way by a railroad company was three times as much as the normal value of the land, and that his testimony of the value of these tracts was based upon that fact. The evidence in the other two cases was of the same character. In each of the three cases the master added to the values of the terminals in St. Paul and Minneapolis, established by the testimony of the real estate dealers and Mr. Cooper, 5 per cent. for the cost of acquisition and consequential damages and to the values of the lands for terminals in Duluth, verified by the witnesses for the companies, 25 per cent. for railroad value and the cost of acquisition and consequential damages, and from the values of lands outside terminals, established by the evidence for the companies, he deducted 25 per cent. The result was that his ultimate finding of the value of the first item on the schedule was about $4,000,000 below the value which the testimony of all the witnesses, except Mr. Morgan, sustained, about $6,000,000 above that which Mr. Morgan's tes-

timony supports, and about $11,000,000 above the amount which counsel for the defendant now urge the court to adopt. This finding of the master is assailed because he allowed 5 per cent. of the value of the terminals for cost of acquisition and consequential damages, because he increased the values of the terminals at Duluth, established by the testimony of the real estate dealers, 20 per cent. for the reason that they failed to give due weight to the value of these terminals for railway purposes, because the companies' estimates of the value of this item included an addition to the values of the St. Paul and Minneapolis terminals fixed by the real estate dealers of 25 per cent. thereof for railroad value, and because he failed to follow the theory of Mr. Morgan and to adopt the value which Mr. Morgan would have found if he had discarded his multiples.

But the evidence in this case is conclusive, nay, we may say it is without conflict, that every railroad company is compelled to pay more than the normal market value of property in sales between private parties for the irregular tracts it needs and acquires for rights of way, yards, and station grounds. The defendants' witness, Mr. Morgan, testified that in his opinion the companies necessarily paid three times the normal value for the lands outside of the terminals in the three cities and 75 per cent. more than the normal value for their terminals within those cities. The master in effect found that the cost of reproduction and the present value of the lands for the terminals in the three great cities, including therein all cost of acquisition, consequential damages, and value for railroad use which he allowed, was only about 30 per cent. more than the normal value of the lands in sales between private parties. He found the value of the lands outside the terminals to be only twice their normal value. Findings of lower values would have been contrary to the great weight of the evidence and without substantial support therein.

The measure of the value of real estate is its market value for its most available use. There was uncontradicted evidence that the most available use of the terminal lands in Duluth, the use for which they were of the greatest value, was their use for railroad purposes, that they were indispensable for those purposes, that the real estate dealers who testified to their values had fixed them originally in 1906, without regard to their value for railroad uses, and that since that time they had advanced in value from 15 to 25 per cent. Thus the proof is ample to sustain the addition to this 1906 estimate of the value of these lands of 25 per cent. thereof for railroad value, cost of acquisition, and consequential damages which the master allowed.

But counsel argue that this court should disregard Mr. Morgan's multiples and fix the value of this entire item at the amount that his estimate would produce if his multiples were not used, $9,498,099.27, because the original presumption was that the fares and rates fixed by the Legislature and the commission were just and reasonable, clear proof was requisite to overcome that presumption, if there is any substantial evidence to the contrary the proof is not clear, and the master's findings must be presumed to be wrong, and Mr. Morgan's evidence is sufficient to enable one fairly, in the exercise of an honest

judgment, to disregard the findings of the master and the evidence which supports it, and to adopt the lowest value claimed. This contention is urged with such force and frequent repetition in brief and argument, and is applied so persistently to the various specific findings of the master, that it deserves consideration.

Rate making, the determination of what shall be the railroad rates in the future, is a legislative function. But rate judging, the determination whether rates already made yield a fair return upon the reasonable value of the property used to earn them, or take that property without just compensation in violation of the Constitution, is a judicial function. Prentis v. Atlantic Coast Line, 211 U. S. 210, 226, 228, 29 Sup. Ct. 67, 53 L. Ed. 150; Missouri, Kansas & Texas R. R. Co. v. Interstate Commerce Commission (C. C.) 164 Fed. 645, 648. Why should the presumption that the judicial officer, on whom the duty to perform the latter function is imposed by the law, rightly discharges that duty and reaches just conclusions, be less persuasive than the presumption that legislative officers faithfully discharge theirs? When a rate is made under legislative authority, the legal presumption is that it is fair and reasonable, and proof to the contrary must be clear, especially in cases in which the rates challenged have never been in operation and injunctions are sought while their effect is yet speculative.

But the question whether fares and rates which have been put in operation confiscate the property of the companies in violation of the Constitution of the United States is a judicial, and not a legislative, question. And when that issue is presented the rules of law, of equity, and of practice applicable to the determination of judicial questions have effect. When, therefore, rates have been tried by actual use for many months, and their effect has become known and is proved, when the issue whether or not they take the property of the railroad company without just compensation has been made in a competent court, and all parties have introduced, in the presence, and subject to the cross-examination and rebuttal, of each other, all the evidence they desire, when that issue and the numerous subordinate issues it involves have been heard and decided, as they have been in the case in hand, by a master, who has personally heard the testimony of every witness, received and examined all the evidence, and made specific findings of every material issue of fact in the case, the judicial presumption arises that his findings are right. This is a presumption of reason as well as of law, a presumption that forces itself upon and compels the reflective mind. Take the general issue. The Legislature and the Commission decided it upon the information they had acquired as to the probable effect of the rates they were making before those rates were tried. The master decided it after the fares and all the rates, except the commodity rates, had been tried for many months and their actual effect was known and proved. The former decision was based on the conjectural effect of the rates; the latter, on their actual effect. The master decided this issue upon a full trial, in which all parties produced all their evidence, subject to the cross-examination and rebuttal of each of the other parties, in the manner which the wisdom and experience of centuries has taught is most conducive to the dis-

covery of the truth and the administration of justice. The Legislature and the Commission decided it without such trial or such proof. Doubtless, if the fares and rates had been tested by the actual operation of the railroads under them, and the plenary proof of their effect and of the other facts presented to the master had been introduced before the Legislature and the Commission, they would have reached the same conclusions which the evidence forced upon the master's mind. They decided the issue upon evidence more conjectural or speculative; he, upon proof more certain and conclusive. And the presumption that a master learned in the law, accustomed by long experience at the bar and on the bench to hear and analyze evidence and draw just conclusions therefrom, has faithfully discharged his judicial duty and reached right results, is not less strong than the presumption that the Legislature and the Commission rightly discharged their official duties. The result is that when, after fares and rates have been in effect for months, plenary proof of that effect and of other facts pertinent to the issue of confiscation vel non is made before a master who finds the facts, the legal or judicial presumption that his findings are just and right, while not conclusive, is superior to the original presumption that they were just and reasonable, which arose before they were or could be tried, and it prevails over it. The question, therefore, upon the exceptions to the master's report, is not, is there any evidence upon which one might fairly, in the exercise of an honest judgment, reverse his findings? But it is, are the findings which are presumptively right sustained by clear proof? If they are, they should be affirmed, and the exceptions to them should be overruled.

Returning now to the finding of the value of the first item of the schedule, it is sustained by the testimony of nine real estate dealers familiar with the values of the properties in their respective cities, by the testimony of the officers of the companies who were well acquainted with the properties and their values, who had purchased rights of way that cost many millions of dollars, and by the corroborative evidence of purchases and sales at prices approximating the values found. It is met by the theoretic value of Mr. Morgan, based on his assessment sales method of proof, and by evidence of purchases and sales corroborating it. But the foundation of this value is what copying clerks wrote that grantors in deeds wrote were the considerations of their conveyances of certain properties, and all of these parties were strangers to the parties to this suit. It is conditioned by Mr. Morgan's opinion of the number of such considerations it was necessary to use to discover the true relation of considerations of deeds or presumptive values of properties described therein to their assessment values, by his opinion as to the width of the strips on each side of the rights of way and as to the number and the lengths of the sections of the strips requisite to ascertain just measures of the values of the rights of way between them. He concedes, and counsel for the defendants do not deny, that his method would not reliably indicate the value of any specific lot or tract of land of moderate dimensions, and it is difficult to understand how it can escape the maxim, "falsus in uno, falsus in omnibus." A careful consideration and analysis of Mr. Morgan's testimony and of the other evidence introduced to sup-

port it has convinced that they are too indirect, uncertain, and inconsequential to overcome the direct and convincing proof of the values of these properties which the complainants have made, and the exceptions to the master's findings of these values must be overruled.

Exceptions were taken to the allowance of interest at 4 per cent. per annum on the cost of the reproduction of the railroad properties during one-half of the estimated times of their construction. But the evidence is conclusive that moneys invested for the purchase of rights of way for, and in the construction of, railroads, ordinarily produce no net income during the period of construction, that the amount of capital thus losing returns is ordinarily equal to one-half of the cost of reproduction during the entire period of construction, or to the entire cost during one-half of that period. There is no doubt that interest at a fair rate on the capital invested in materials and labor that remain idle during construction is as much a part of the cost of constructing or reproducing a railroad as is the money paid for those materials or that labor. Brunswick Water District v. Maine Water Company, 99 Me. 371, 59 Atl. 537, 542. Mr. Morgan, the engineer and witness for the defendants, allowed in his report to the Commission, and verifies the justice of an allowance, of 4 per cent. per annum during one-half of the period of construction; but the amounts he allowed were less than those found by the master, because his estimates of the cost of reproduction and of the times requisite for construction were less. The weight of the testimony on this subject, however, sustains larger amounts than those fixed by Mr. Morgan or the master, and there was no error against the defendants in the latter's finding and allowance of the item here under consideration in either of the cases in hand.

The Minnesota Transfer Railway Company is a corporation and the joint agent of the owners of ten different lines of railway for the interchange of their freight traffic in St. Paul and Minneapolis. Each of the ten owners owns one-tenth of the property of the Transfer Company by virtue of an ownership of stock. The St. Paul Union Depot Company is a like corporation and joint agent of the owners of nine lines of railroad for the exchange of their passenger traffic, and it is owned by nine constituents in the same way. Each of the three defendant companies owns one share in each of these terminal companies, and the latter corporations and their properties are operated and used as tools of the railroad companies that own them, to conduct transportation for their exclusive use and benefit. The defendants complain because the master allowed to each of these three companies $1,186,191 as the cost of reproduction and the value of their respective interests in the property of these subsidiary companies, and because he allowed to the Northern Pacific Company $1,180,151 for the cost of reproducing and the value of its interest in a similar corporation and its property used by the Northern Pacific Company for a like purpose at Duluth. It is not claimed that these interests are not worth, or that their cost of reproduction would not be, the amounts allowed; but it is contended that these values are not allowable at all, because they are represented by the stocks and bonds of the subsidiary companies. But these interests in these terminal

corporations and their property are the most indispensable parts of the Minnesota properties of the defendant companies used to earn the fares and rates here in question, and any estimate of the value or of the cost of reproduction thereof which omitted the value or the cost of reproduction of these interests would have been incomplete and deceptive. The master rightly considered and allowed their value.

There are exceptions because the master allowed to the Northern Pacific Company $1,613,612.76, to the Great Northern Company $3,219,642, and to the Minneapolis & St. Louis Railroad Company $608,896.43, for the solidification and adaptation of their respective railroads, and deducted nothing from the cost of reproduction for depreciation. But these amounts are those allowed by the defendants' engineer and witness Morgan in his original estimates of the cost of reproduction which he reported to the Commission, and there is much other evidence in the record to sustain them. It is clear that a new railroad may appreciate or depreciate as it grows older. It may be renewed, repaired, and improved day by day and year by year as it is operated, until its embankments become more solid, its culverts and bridges firmer and more reliable, its ties and rails more steadfast and secure, and its rolling stock more seasoned and better adapted to its service and to the railroad it traverses, and until the whole property becomes more valuable than it was when it was first constructed. On the other hand, its embankments and its roadbed may be neglected and permitted to deteriorate by the action of rain, snow, and frost, its ties may be allowed to become partially decayed, its bolts and rails loose, and its rolling stock worn, without adequate repairs, until the entire property suffers great depreciation. Whether at a given time a railroad property is more or less valuable than it would be if it had just been constructed is a question of fact, that in a suit of this nature must be answered by the evidence. That evidence in this case is that the railroads, rolling stock, and appurtenances which constitute the great transportation machines of these companies in Minnesota are in better condition for use, more efficient, more steadfast, better adapted to each other, than if their construction was just completed, that all depreciation has been offset by appreciation, and that values to the amounts here allowed by the master have been added to the values of these properties new, by their age, their repairs, their renewals, their adaptation, and the assured efficiency that comes from constant careful maintenance and operation. There was no error in these allowances.

Many other exceptions were taken to items which constitute parts of the values found by the master. Each one of them has been examined in the light of the evidence, the arguments, and the briefs. They challenge matters less important than those that have been reviewed, and no good purpose would be served by stating and discussing them in detail. Suffice it to say that none of these exceptions is sustained by the record, and the result is that the findings of the values of the Minnesota properties of the three companies by the master must be confirmed.

The master divided the values of the Minnesota properties between freight business and passenger business and between interstate business

and intrastate business on the basis of the respective gross earnings of these classes of business. Counsel for the defendants challenge this basis of division, and contend that the apportionment should have been made on the basis of the use made of the property by each of these classes of business, measured either (1) by the aggregate number of the ton miles and passenger miles of the respective classes, or (2) by the aggregate number of the car miles and engine miles of these classes. They say that if that proportion of the value of the property of a company which the number of ton miles hauled by it in Minnesota bears to the aggregate of its ton miles and passenger miles in Minnesota be assigned to its freight business, and that proportion which its number of passenger miles bears to the same aggregate be assigned to the passenger business, and if that proportion of the value thus assigned to the freight business which the aggregate of the car miles and engine miles appertaining to the intrastate freight business bears to the car miles and engine miles used in the freight business be assigned to the intrastate freight business, and the same method be pursued in apportioning value to the intrastate passenger business the apportionment will be more equitable and just. The issue is between apportionment by use without regard to the worth or value of the use and apportionment according to the value of the use. The latter basis seems to be more logical and rational. Capitalization is founded on the worth of use, not on mere use. The value of property and of investment in every form is measured by the value of its use, not by its use divorced from the value thereof. The Minnesota Railroad Commission, the railroad companies, all rate makers, base their rates primarily on the worth of the use of the railroad machines by the various classes of freight and by the passengers, and not on the amount of that use. The rate for hauling a ton of merchandise of the first class a mile is not five times the rate for hauling a ton of merchandise of class E a mile, because the former ton mile uses the railroad property five times as much as the latter, but because the use by the former is worth more than the use by the latter. Moreover, there is no unit of measurement of ton miles and passenger miles, of freight car miles and freight engine miles, or of passenger car miles and passenger engine miles, divorced from the values of the uses they make of the railroad property, from the classes of loads they carry and the distances these loads are hauled. Indeed, there is no proportioning or measuring relation between such varying uses of property, when no regard is given to the values of these uses.

On the other hand, the values of the uses, the earnings of the property, unavoidably condition the value of the property used, and present a natural and equitable basis of apportioning that value to these uses. Cases may indeed be imagined in which this basis does not produce persuasive results. One of them was suggested by Mr. Justice Brewer in Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins, 176 U. S. 167, 176, 20 Sup. Ct. 336, 44 L. Ed. 417, and others of like character have been presented in argument by counsel. But no basis has been suggested and none has been discovered which seems to be more equitable or more accurate. It may be that there is no basis or method that brings perfect or ideal results. But because the ton mile and

passenger mile basis has no common unit of measurement, because that basis and the car mile and engine mile and the passenger car mile and passenger engine mile bases exclude the effect of the values of the uses made of the railroad property by the various classes of freight and by the passengers carried, because there is really no proportioning relation between uses divorced from their values and the value of the property used, because these bases ignore the differences in the classes of freight carried and in the distances they are hauled, because the apportionment of the value of railroad property on the basis of the gross earnings of the classes of business, which disclose approximately the values of their uses of it, gives effect to these material differences, appeals more persuasively to the reason and produces results more equitable than any other basis suggested and because this basis has commended itself to the judgment of, and has been adopted by, the courts upon whom duties of apportionment of this nature have been imposed in like cases, the master was justified in following their decisions and his action and report in this regard is confirmed. Ames v. Union Pacific R. R. Co. (C. C.) 64 Fed. 165, 179; Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins (C. C.) 90 Fed. 363, 370; St. Louis & S. F. Ry. Co. v. Hadley (C. C.) 168 Fed. 317, 348–352; Northern Pacific Ry. Co. v. Keyes (C. C.) 91 Fed. 47, 56, 57; In re Arkansas Railroad Rates (C. C.) 163 Fed. 141, 142; Missouri, Kansas & Texas Ry. Co. v. Love (C. C.) 177 Fed. 493, 497.

In the cases of the Northern Pacific Company and the Great Northern Company exceptions are urged to the master's division of common cost between freight business and passenger business, to his finding that the cost of doing intrastate freight business was 2½ times the cost of doing interstate freight business, and to his finding that the cost of doing intrastate passenger business was 15 per cent. more than the cost of doing interstate passenger business. About 60 per cent. of the cost of doing the passenger and freight business in Minnesota consisted of items which in themselves disclosed the fact that they were incurred either in doing the passenger or in doing the freight business. All parties conceded that these items were properly assigned to the freight business and the passenger business, respectively, by the railroad companies, and these are termed "allocated items." The remaining 40 per cent. of the cost consisted of items incurred for the common benefit of the passenger business and the freight business, and there was no method of assigning these items that was certain to be mathematically and absolutely correct. Two methods were advocated by the respective parties to this controversy. The defendants introduced in evidence an allocation of these items made by Mr. Conway W. Hillman, an expert railway accountant, without extended experience as a railroad operator, whereby, in the Northern Pacific case, about $400,000 more common cost, and in the Great Northern case, about $900,000 more common cost, was assigned to the passenger business, and a correspondingly less amount to the freight business, than was assigned by the companies and confirmed by the master. This division was supported by the testimony of Mr. Hillman that in his opinion it was right and reasonable and by his statement of his reasons for this belief. But no other witness came to support his

view. On the other hand, a large number of witnesses, who had long been familiar with the details of the expense of operating railroads, who had enjoyed a long experience in their actual operation, and who had considered in the light of their knowledge and experience and formed opinions concerning a just division of this common cost, testified that the allocation made by the companies and finally adopted by the master was fair and just. This testimony was buttressed by evidence that this basis of division had been used by these and other railroad companies for their own information and convenience for some time before the questions here at issue had arisen, and that it had at one time received the approval of the Interstate Commerce Commission. So it is that whether the knowledge, experience, and opportunities of the witnesses to form correct judgments upon this issue or their numbers be considered, the great preponderance of the evidence sustains the division made by the master, and it must stand.

All admit that the cost of doing intrastate business exceeds the cost of doing interstate business, and the issue is, how much does the cost of doing the former exceed the cost of doing the latter? Upon that issue many hundreds of printed pages, a mass of evidence too vast for recital or review, has been examined and considered by the master and the court. The evidence for the state consists of the testimony of Mr. Hillman, and the evidence for the complainants is the testimony of six men who have long been engaged in and are familiar with the actual operation of railroads and the expenses thereof. Many criticisms of the testimony of each of these witnesses, of their opinions, and of the reasons they give for them, have been made by counsel for the respective parties, and have been the subjects of study and reflection in the light of the evidence and the arguments. Mr. Hillman's conclusion in the Northern Pacific case, and it was similar in the other cases, was that the cost per ton per mile of doing intrastate business was about 44 per cent. more than the cost of doing interstate business. Starting with the cost of doing business which was entirely local upon certain branch lines of the company, a cost which he extracted from its records, and with the assumption that the cost per ton per mile of doing the local business on the main lines of the company was the same as it was on the branch lines, he derived this result from these premises, from other records and reports of the company, and from a long and intricate series of computations, assumptions, and deductions. No chain, however, is stronger than its weakest link, and an examination of the method he pursued and the bases upon which he founded his conclusion has convinced that the result he deduced is conditioned by so many of his own opinions and assumptions, unsupported by other persuasive proof, that his conclusion is entitled to no more weight than his opinion that it and the means by which he reached it are correct.

Many witnesses, however, whose evidence disclosed the facts that they had long been engaged in the actual operation of railroads, that they had learned and knew from actual observation and experience the conditions which increased and diminished the cost of the transportation of freight, and the relative effect of these conditions upon the cost of interstate and intrastate transportation, that they were

familiar with the details of the relative expenses of doing intrastate and interstate freight business, witnesses whose opinions are certainly as likely to be sound as that of Mr. Hillman, came and testified that, while they had no means of accurately and mathematically determining the fact, they were confident in the opinion that the cost per ton per mile of doing intrastate freight business was from three to six times the cost per ton per mile of doing interstate business. Counsel for the defendants say that a portion of local business is interstate business and takes a short haul, and a portion of through business is intrastate business and takes a long haul, and that the effect of the testimony of these witnesses is not that the cost per ton per mile of intrastate freight business is from three to six times the cost of intertate freight business, but merely that the cost of local and short-haul business bears that relation to the cost of through and long-haul business. The testimony of these witnesses has been considered in view of this criticism, but the record does not seem to sustain the contention of counsel. For example, Mr. Elliott says that the average haul of intrastate freight in Minnesota on the Northern Pacific Railroad was about 104 miles, that the average haul of interstate freight touching Minnesota on that railroad was about 485 miles, that the expense of short hauls is much greater than that of long hauls, and after enumerating various other reasons he testified that these reasons "all lead me to the conclusion that the so-called short-haul intrastate business costs anywhere from three to six or seven times as much as the so-called long-haul, through interstate business." On his redirect examination he was asked if by the statement which has just been quoted he meant "to compare the average cost of the state business with the average cost of the interstate business," and his answer was, "That was my intention in making that statement in my direct examination, last week." Mr. Doddridge testified in the Great Northern case that his judgment was that upon the basis of ten miles, excluding the Missabe ore traffic, the ratio of extra cost per ton per mile of intrastate Minnesota freight was at least three times, and maybe four times, as great as that of interstate freight. True, much was said in the testimony of these and other witnesses of the extra cost of short hauls over long hauls, and of local business over through business, for the witnesses had in mind that a larger proportion of the interstate freight than of the intrastate freight was through business and took the long hauls; hence the terms "local freight" and "local business" appear to have been frequently used in this case and in other cases of this character to mean intrastate freight and intrastate business. But, when all the testimony of each of the six witnesses for the complainants upon this issue is considered together, it is persuasive that their testimony clearly discloses their opinions that the cost per ton per mile of the intrastate freight business of the two companies in Minnesota was from three to six times the cost of their interstate freight business in that state. The testimony of Mr. Hillman on behalf of the defendants falls far short of prevailing over this evidence, and the exceptions to the finding of the master that the cost of the Minnesota intrastate freight business of the companies per ton per mile was at least 2½ times that of the interstate freight business must be overruled.

For similar reasons the master's finding that the cost of intrastate passenger business per passenger mile was 15 per cent. more than that of interstate passenger business is confirmed. Missouri, Kansas & Texas Ry. Co. v. Love (C. C.) 177 Fed. 493, 499; In re Arkansas R. R. Rates (C. C.) 163 Fed. 141, 142; Chicago, Mil. & St. P. Ry. Co. v. Tompkins, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417; Minneapolis & St. L. R. R. Co. v. Minnesota, 186 U. S. 257, 262, 22 Sup. Ct. 900, 46 L. Ed. 1151; Ames v. Union Pacific R. R. Co. (C. C.) 64 Fed. 165, 184; Northern Pac. R. R. Co. v. Keyes (C. C.) 91 Fed. 47, 54; St. Louis & S. F. R. R. Co. v. Hadley (C. C.) 168 Fed. 317, 348. The master did not rest his final conclusions on this relatively greater cost of intrastate business per ton per mile without a careful consideration and credit to the intrastate business of the relatively greater revenue per ton per mile derived from that business, thus reducing the percentage for the freight business in the Northern Pacific case, for instance, from 250 per cent. to 173+ per cent., and for passenger business from 115 per cent. to 113+ per cent.

Complaint is made that the master finds that the companies are entitled to a net return of 7 per cent. per annum upon the respective values of their properties devoted to this public use. The character of the business in which an investment is made, the locality in which it is placed, the returns secured in that locality from other investments of a similar nature, the uniformity and certainty of the return, and the risks to which the principal and the income from it are subjected condition the measure of a fair return upon capital invested. An investment in a bank, in a factory, in a mercantile, manufacturing, or agricultural business, is substantially free from regulation by the government and exempt from any duty to the public, except that of paying taxes. If the business in which such an investment is made is unprofitable, its owners may promptly discontinue its operation until more prosperous days come and then return to their undertaking. An investment in a railroad which operates in many states is subject to the regulation of its business by many governments. Its owners owe the duty to the governments and to the public to operate their railroad continually in days when its operation is unprofitable as well as when it is remunerative, a duty they must discharge under the penalty of the forfeiture of their property if they fail. In view of these facts, they ought to be permitted to receive a return large enough to enable them to accumulate in prosperous days a surplus sufficient to enable them to protect their property in days of disaster and to make their average return through days of prosperity and of adversity fair and just. The lands in Minnesota through which these railroads extend are fertile and productive. The cities, villages, and towns they reach are rapidly increasing in population and wealth, and the people they serve are thriving and successful. The evidence satisfies that the railroads are maintained in excellent condition, that they are efficiently and on the whole economically managed and operated, and are rendering commendable service. Justice to the thriving people they serve does not require that the owners of these railroad properties should be deprived of a fair return upon their values.

To deprive them of such a return would prevent advances and tend to compel reductions in the wages and salaries of their employés, would tend to prevent the extension of their lines into portions of the state where the development and accommodation that railroad service assures would be welcome and may be needed, to deteriorate the character of the service they render, and to retard the general prosperity. The legal rate of interest on a debt in Minnesota, in the absence of contract, is 6 per cent., and by contract it may be 10 per cent. per annum. Rev. Laws Minn. 1905, § 2733. Rational investments in agricultural, manufacturing, mercantile, and other industrial pursuits, and even well-secured loans, yield returns in Minnesota corresponding with these lawful rates. Investments in railroads and the returns thereon are at the risk of failures and partial failures of crops, of the disasters, delays, and expenses of unusual storms, snow, and cold, of the great financial disasters which occasionally prevent or delay the movement of traffic, and of the burden of continuous operation whether profitable or unremunerative. It is an axiom in economics that the greater the risk the greater must the return be upon invested capital, and the conclusion is irresistible that a net return of 7 per cent. per annum upon the respective values of the properties of these companies in Minnesota devoted to transportation is not more than the fair return to which they are entitled under the Constitution of the United States.

Other exceptions were taken by the defendants, but they must be overruled, because they are not of the controlling character of those that have been discussed, and they are not sustained by the record. For the same reasons, the exceptions of the complainants must share a like fate.

The findings of the master must be confirmed. The fares and rates prescribed by the acts of the Legislature and the orders of the Railroad and Warehouse Commission which have been considered, have been, are, and will be, as to each of these railroad companies, unreasonably low, unjust, and confiscatory. Each of those acts and orders is violative of the fourteenth amendment to the Constitution, and void, and a decree for the complainant must be rendered in each of the cases.

It is so ordered.

SIMPSON v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 16, 1911.)

No. 3,393.

1. PUBLIC LANDS (§ 19*)—UNLAWFUL INCLOSURE—INDICTMENT.
Where an indictment charged that defendant unlawfully, etc., maintained and controlled an inclosure of the public lands of the United States situated, etc., and that such inclosure consisted of posts and wire fences, it sufficiently alleged that the lands described were surrounded by posts and wire fences, and was not demurrable for failure to charge that the fences were connected with natural barriers, so as to surround the land, etc.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 19.*]

2. INDICTMENT AND INFORMATION (§ 121*)—INCLOSING PUBLIC LANDS—BILL OF PARTICULARS.
An indictment charged defendant with unlawfully inclosing certain public lands, and alleged that the inclosure consisted of posts and wire fences, that defendant in maintaining and controlling the fences and inclosure had no claim or color of title to any of the lands made or acquired in good faith, or any asserted right thereto by or under claim made in good faith with a view to entry thereon, etc. *Held*, that the court did not err in refusing to require the government to furnish a bill of particulars alleging whether the alleged posts and wire fences completely surrounded the lands described, and, if not, where and what were the particular fences to which the allegation related, and who owned the same, and also stating the acts or relations of the defendant contemplated and deemed offensive by the allegation that he maintained and controlled the alleged inclosure of public lands.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 316–320; Dec. Dig. § 121;* Criminal Law, Cent. Dig. § 1378.]

3. CRIMINAL LAW (§ 1166½*)—WRIT OF ERROR—PREJUDICE.
Where the record failed to show that any objectionable juror was selected over defendant's challenge for cause, or that he exhausted his peremptory challenges, error, if any, in excusing two jurors on the government's challenge for cause was not prejudicial to accused, under the federal rule that it is only when the record discloses that an impartial jury may not have been selected; either by the exhaustion of the parties' peremptory challenges and the selection of a juror over his legal objection, or by some other equally cogent evidence that a fatal error in the selection of the jury is presented to an appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114–3125; Dec. Dig. § 1166½.*]

4. CRIMINAL LAW (§ 901*)—WAIVER AND CORRECTION OF ERROR—MOTION FOR VERDICT.
Introduction of evidence by accused in his own behalf is a waiver of previous motions for an instructed verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2124; Dec. Dig. § 901.*]

5. CRIMINAL LAW (§ 1044*)—SUFFICIENCY OF EVIDENCE—REVIEW—MOTION FOR DIRECTED VERDICT—NECESSITY.
A request for a directed verdict at the close of all the evidence is essential to authorize a review of the sufficiency of the evidence to sustain a conviction on a writ of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2672–2675; Dec. Dig. § 1044.*]

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

6. PUBLIC LANDS (§ 19*)—UNLAWFUL INCLOSURE—OFFENSES—EVIDENCE.
In a prosecution for wrongfully inclosing public lands, in violation of Act Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), evidence that it had been the custom of the Land Department, before commencing prosecution for such offense, to notify the parties to remove their inclosures, but that no notice had been given to accused before the prosecution was commenced, was properly excluded; the failure of the Land Department to give such notice constituting no defense.
[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 19.*]

7. CRIMINAL LAW (§ 379*)—EVIDENCE—CHARACTER.
Where a witness had testified that he was acquainted with the reputation of accused as a law-abiding, law-obeying, and law-observing man, and that his reputation as such was good, a further question as to whether, if anything derogatory had been said of defendant, the witness would likely have heard of it, was immaterial.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 843, 844; Dec. Dig. § 379.*]

8. PUBLIC LANDS (§ 19*)—UNLAWFUL INCLOSURE—JOINING TO LAWFUL FENCES.
The maintaining of an inclosure of public lands by joining defendant's fences with lawful fences belonging to other parties, thereby intentionally effecting an inclosure of public lands, constitutes a violation of Act Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), prohibiting the illegal inclosure of such lands.
[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 19.*]

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

Frank Simpson was convicted of unlawful occupancy of public lands, and he brings error. Affirmed.

Charles M. Thacker (H. M. Thacker, on the brief), for plaintiff in error.

George F. Zimmerman, Asst. U. S. Atty. (John Embry, U. S. Atty. and Isaac D. Taylor, Asst. U. S. Atty., on the brief), for the United States.

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

WM. H. MUNGER, District Judge. The plaintiff in error was indicted, tried, convicted, and sentenced upon the first count in the indictment, in the United States District Court for the Western District of the state of Oklahoma, for violating the provisions of Act Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), being an act to prevent unlawful occupancy of the public lands.

The first count in the indictment charged that the defendant did wrongfully, unlawfully, willfully, and knowingly maintain and control an inclosure of the public lands of the United States, situate in the counties of Beckham and Greer, in said district. Said lands were described in the said count of the indictment by governmental subdivisions. The count further alleged that said inclosure so maintained and controlled consisted of posts and wire fences; that the said defendant, in maintaining and controlling said fences and inclosure, had no claim or color of title to any of said lands made or acquired in good

faith, or asserted right thereto by or under claim made in good faith with a view to entry thereon at the proper land office of the United States in said district under the general laws of the United States.

As defendant was not convicted upon the second count, it does not require consideration.

A demurrer to the first count was overruled, which ruling is assigned as error. It is insisted that the demurrer should have been sustained—

"because it is not alleged in the indictment that posts and wire fences surrounded the lands, nor that they connected with natural barriers so as to thereby surround the lands, nor that there were any openings which plaintiff in error rendered, or attempted to render, ineffectual as ways of ingress or egress, so that his acts in this regard, in connection with the posts and wire fences and other barriers, if any, surrounded the lands with effective obstacles to ingress and egress."

The demurrer was properly overruled. The count in the indictment charged the defendant with maintaining and controlling an inclosure of the public lands therein described; said inclosure so maintained and controlled by him consisting and being composed of posts and wire fences. We think the charge that it was an inclosure was a sufficient allegation that the lands therein described were surrounded by posts and wire fences.

Defendant, after the overruling of the demurrer, filed a motion for a bill of particulars in the following respects:

"So that he may know and be informed: (a) Whether the alleged posts and wire fences completely surrounded the lands therein described; and, if not, where and what are the particular fences to which said allegation relates, and who owns same? (b) What are the acts or relations of the defendant contemplated and deemed offensive by the allegation that he did maintain and control the alleged inclosure of public lands?"

We think the defendant was sufficiently advised in these respects by the charge in the indictment against him, and the court did not err in overruling the motion for a bill of particulars.

During the selection of the jurors, after they had been examined by counsel, two jurors voluntarily informed the court that they themselves had inclosed public lands; that they had not been interrogated on that subject, and they thought they should advise the court of the fact before their selection. They were thereupon more fully interrogated by the parties and by the court; each juror, however, stating that he did not think such fact would in any respect influence his verdict. They were each, however, challenged by the prosecution for cause, and the challenge sustained, to which the defendant excepted. The record discloses the fact that the jury was subsequently selected and sworn that tried the case; but it fails to show that any objectionable juror was selected over the defendant's challenge for cause, or that he exhausted his peremptory challenges. Under the practice in the federal courts it is only when the record discloses the fact that an impartial jury may not have been selected, either by the exhaustion of a party's peremptory challenges and the selection of a juror over his legal objection, or by some other equally cogent evidence, that a fatal error in the selection of the jury is presented to an appellate court. Northern Pac. R. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed.

755; Marande v. T. & P. Ry. Co., 59 C. C. A. 562, 124 Fed. 42; Thompson on Trials, § 120.

At the close of the opening statement of the case to the jury by counsel for the government, and again at the close of the introduction of evidence by the government, defendant requested the court to direct a verdict for the defendant, each of which motions were overruled. Such rulings are assigned as error. The record shows that subsequently the defendant proceeded with the trial and introduced evidence in his own behalf. This was a waiver of the previous motions for an instructed verdict. Chicago & St. P. & K. C. Ry. Co. v. Chambers, 15 C. C. A. 327, 68 Fed. 148; Ins. Co. v. Frederick, 7 C. C. A. 122, 58 Fed. 144; Hughes County v. Livingston, 43 C. C. A. 541, 104 Fed. 306; Barnard v. Randle, 49 C. C. A. 177, 110 Fed. 906.

The principal error relied upon and chiefly discussed is the insufficiency of the evidence to support the verdict of the jury. We cannot review the sufficiency of the evidence, for the reason that this court can only review errors of law committed by the trial court, and no request for an instructed verdict was made after all of the evidence had been introduced. To enable this court to review the sufficiency of the evidence in an action at law, the complaining party must, after all the evidence has been introduced, request the trial court to direct a verdict. The refusal of the trial court to grant such request presents a ruling the correctness of which may be reviewed in the appellate court. In the absence of such request, no action of the trial court in that respect is presented. Drexel v. True, 20 C. C. A. 265, 74 Fed. 12; Pac. Mut. Life Ins. Co. v. Snowden, 7 C. C. A. 264, 58 Fed. 342; Hansen v. Boyd, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746.

Complaint is made that the court excluded evidence, sought to be elicited on cross-examination of witnesses for the government, to the effect that there had been a custom in the Land Department, before commencing prosecution, to notify parties who had inclosed government lands to remove the inclosure, and that, in this case, the defendant had not been notified. Such custom, if one existed, was no defense. The statute creating the offense of inclosing the public lands makes no provision for notice to the accused before the offense becomes completed, and the defendant was not entitled to receive any such notice.

The defendant called a witness in his own behalf, who testified that he had been personally acquainted with the defendant for some 10 years; that he knew the defendant's general reputation in the community in which he had resided as to being a law-abiding, law-obeying, and law-observing man; and that his reputation in those respects was good. The witness was further asked this question:

"In the position in which you have been, and with the acquaintance and association which you have had, if there had ever been any derogatory statement or accusation against him, any acts of violating any law, or being disposed to violate any law, do you think you would have most likely heard of it?"

This question was objected to, and the objection sustained. The witness having previously testified positively that he was acquainted with the defendant's reputation in those respects, and that it was good, that was all the defendant was entitled to. The opinion of the witness as

to whether or not, if anything derogatory had been said of the defendant, he would likely have heard of it, was immaterial.

Exceptions were taken to certain portions of the instructions of the court relative to defendant being guilty if he maintained an inclosure, although a portion of the fences surrounding such inclosure did not belong to and were not under the control of defendant. The court instructed the jury in substance that, if the defendant maintained an inclosure of the public lands by joining his fences with lawful fences belonging to other parties, and thereby intentionally effected the inclosure of public lands, such inclosure would nevertheless be unlawful. The instructions were in harmony with the law as announced in Thomas v. United States, 69 C. C. A. 157, 136 Fed. 159, wherein the Court of Appeals said:

"But if it were true that any portion of the fence forming the inclosure were the fence of another, the appellant could not justify himself, nor avoid the penalty of the statute, if, by joining his fences to said fence so constructed, he availed himself of it to make a complete inclosure. Whether he took advantage of a portion of an existing fence, or a natural barrier impassable for cattle, if he constructed his surrounding fence with reference thereto, he is undoubtedly guilty of making and maintaining an inclosure in violation of the law."

Such we think is a correct statement of the law, and the instructions of the trial court were proper.

We have examined each of the 25 assignments of error, and find in them nothing showing that the defendant did not have a fair and impartial trial; and the judgment is affirmed.

HAYES, U. S. Commissioner, v. CANADA, A. & P. S. S. CO., Limited.

(Circuit Court of Appeals, First Circuit. February 10, 1911.)

No. 912.

UNITED STATES COMMISSIONERS (§ 5*)—POWERS—ARREST OF MESNE PROCESS—JURISDICTION.

Rev. St. § 627, providing for the appointment of commissioners of Circuit Courts, was superseded by Act Cong. May 28, 1896, c. 252, § 19, 29 Stat. 184 (U. S. Comp. St. 1901, p. 499), which, as amended, provides for the appointment of United States commissioners by the District Court of each judicial district, to have the same powers and perform the same duties as had been imposed on commissioners of Circuit Courts. Section 990 (U. S. Comp. St. 1901, p. 709) provides that no person shall be imprisoned for debt in any state on process issued from a court of the United States, where by the laws of such state imprisonment for debt has been or shall be abolished, and that all modifications, conditions, or restrictions on imprisonment for debt provided by the laws of any state shall be applicable to the process issuing from the courts of the United States to be executed therein, and the same course of proceedings shall be adopted therein as may be adopted in courts of such state. Section 991 (page 709) declares that, when a person is arrested or imprisoned in any state on mesne process or execution isued from any court of the United States in a civil action, he shall be entitled to his discharge in the same manner as if he were so arrested and imprisoned on like process from courts of the state; "but all such proceedings shall be had

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

before one of the commissioners of the Circuit Court for the district where the defendant is so held." *Held*, that a United States commissioner had jurisdiction, not only of proceedings for the discharge of a person arrested on mesne process issued out of a federal court, but also of proceedings to obtain the arrest of a judgment debtor on an execution issued by a federal court, and hence was bound to entertain and determine an application for such arrest.

[Ed. Note.—For other cases, see United States Commissioners, Cent. Dig. § 3; Dec. Dig. § 5.*]

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

Petition by the Canada, Atlantic & Plant Steamship Company, Limited, for a writ of mandamus against William A. Hayes, 2d, United States Commissioner, to compel defendant to entertain an application for a certificate for the arrest of a judgment debtor on mesne process. From a judgment granting the writ, the defendant brings error. Affimed.

Warren O. Kyle, for plaintiff in error
William M. Richardson, for defendant in error.

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

ALDRICH, District Judge. This case involves a petition for a writ of mandamus to be directed to a United States commissioner who declined to entertain an application for a certificate for the arrest of a judgment debtor upon an execution issued by the Circuit Court.

The application is based upon a supposed right under section 990 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 709), and the certificate was asked for upon the ground that the judgment debtor had property which he did not intend to apply in payment of the execution. The commissioner declined to entertain the application and dismissed it upon the idea that he had no jurisdiction. Mandamus was granted by the Circuit Court, and the commissioner asks for a review of the question of jurisdiction upon writ of error.

It is quite apparent that Congress, for reasons deemed sufficient, undertook to make the right of arrest upon execution issued by the United States courts in civil proceedings conform to the right existing under the laws of the state where the arrest is sought. The statutes on the subject were not designed to create new rights of arrest, but to limit and modify the old right, and make it correspond to the right as exercised under state laws.

The statute of February 28, 1839 (5 Stat. 321, c. 35), abolished the right of arrest for debt on process issuing from the federal courts in states where, by the laws of the state, imprisonment for debt had been abolished. It also provided for arrest under certain conditions and restrictions, where, by the law of the state, imprisonment for debt was allowed, and it conformed United States court proceedings to the proceedings adopted in the state courts.

The act of March 2, 1867 (14 Stat. 543, c. 180), recognizing the qualified right of arrest of a party upon mesne process or execution

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

issuing from the United States courts, provided for a discharge from arrest in the same manner as if he was arrested on like process issued from the state courts, and it also provided that all the proceedings should be before some one of the commissioners appointed by the Circuit Court.

In the revision of 1873 the foregoing statutes without any very substantial change, became sections 990 and 991 of the Revised Statutes, with some features of the statute of 1867 carried to section 990.

It is true United States commissioners were not expressly designated by the statute of 1839 as tribunals of first instance to entertain applications in respect to arrest for debt; but we should entertain no serious doubt, if it were a question here, that when Congress, in 1839, conformed the proceedings to those of state courts, it intended that the rights were to be ascertained and established by judicial procedure in the federal courts, or before some of their authorized appointees who have authority in respect to affidavits, process, and bail. But, however that may be, it is apparent that Congress at a later period sought to cover the whole subject of arrest and discharge in civil proceedings by incorporating into the revision of 1873 the two earlier statutes of 1839 and 1867, which, as said, without substantial change, became sections 990 and 991.

If there was any doubt about it before it was made clear by the act of 1867 that Congress intended that the proceedings, which were to be like proceedings in the state courts, should not be had before a state official, something which, of course, might have been enacted (Holmgren v. United States, 217 U. S. 509, 517, 30 Sup. Ct. 588, 54 L. Ed. 861), but, on the contrary, before a United States commissioner, because it was then expressly and imperatively declared that all such proceedings shall be had before some one of the commissioners of the Circuit Court. It is possible that the closing words, "so held," not in the act of 1867, but which appeared in section 991 of the Revised Statutes, though apparently inadvertently inserted, tend somewhat to confuse the meaning; and if we were to disregard the unmistakable general and comprehensive purpose, and construe the jurisdictional provision under technical rules, we might, perhaps, under the closing words of section 991, limit a commissioner's authority to proceedings for discharge from arrest. But looking at the question historically, and having in view the manifest purpose of Congress of conforming the practice to that existing under state laws, and of designating a suitable tribunal of first instance, we have no doubt that Congress intended that all proceedings both in respect to arrest under section 990 and of discharge under section 991 were to be before a United States commissioner. Indeed, Judge John Lowell, in Low v. Durfee (C. C.) 5 Fed. 256, 259, a Massachusetts case, referring to the sections in question, aptly stated the intent and purpose of Congress by saying that "the two sections reached all cases provided for by the laws of the state."

The report of the commissioners (1872) on the revision of the United States Statutes (volume 1, §§ 454 and 455, and note on pages 230–232) sustain the view that no substantial change was proposed

by the revision, as well as the idea that the act of 1867, supplementing the earlier statutes on the subject in respect to the right of arrest by remitting the discharge of prisoners to the rules of the several states, was intended as a complete disposition of the whole matter. It is understood that italics were adopted by the commissioners on revision as a means of indicating what was new, and it is true the words "so held" appear at the end of section 455 of the commissioner's report, yet these words were not italicized as were the words "in any civil action," and looking to the origin and purpose of the legislation upon the general subject of arrest upon civil action process and release therefrom, we find nothing in the words "so held," in section 991 of the Revised Statutes of 1873, of sufficient potency to warrant the conclusion that Congress intended them as words of radical limitation upon the jurisdictional provisions of the act of 1867, to the end that there should be state officers for preliminary purposes in respect to arrest and United States commissioners for preliminary purposes in respect to a dischage from arrest.

We think it clear enough that Congress, in adopting state procedure as a device for working out the rights and the remedies, recognized and intended jurisdiction in the commissioner as a tribunal of first instance to do the things that are done by the primary tribunals under state procedure in the state where the rights and remedies are involved, and to do them in the same way; and, as this case arises in the state of Massachusetts, the practice would conform itself to the practice which holds in respect to arrest and discharge upon civil process before the police, district, or municipal court, or a trial justice of that state, as the primary tribunal to which the application for a certificate of arrest is to be made.

We think the reasonable meaning of the two sections, read together, is that Congress understood that preliminary questions in respect to arrest, as well as those in respect to discharge, should first be dealt with by a United States commissioner as a tribunal corresponding to such subordinate tribunals as may be designated by the laws of the particular state where remedy is sought.

The point is taken that, in matters which concern liberty and imprisonment, jurisdiction should be certain. That is quite true; but it must be borne in mind that these statutes were not creating new rights of arrest, but were limiting them and putting them under restriction, and in the way of amelioration in the interests of the debtor, and that Congress, in limiting and abridging the old right of arrest, undertook to shield the debtor until a fact should be found which, according to the law of the state, would entitle one party in a civil suit to have his adversary arrested.

If the material fact should be found against the party who applies for the certificate of arrest, process, of course, would not issue; but if, on the contrary, the concealment contemplated by the state law should be found by the preliminary tribunal, various remedies would be open to the aggrieved party for review by the court whose process is being used as a foundation for the arrest, and thus the law suitably safeguards the liberty of aggrieved parties.

The limitation upon the powers of United States commissioners is found in section 627 of the Revised Statutes, which declares that they "shall exercise the powers which are or may be expressly conferred by law," and under the construction which we put upon sections 990 and 991 express power is found in the closing sentence of section 991, which declares that all such proceedings shall be had before one of the commissioners of the Circuit Court.

By Act May 28, 1896, c. 252, § 19, 29 Stat. 184 (U. S. Comp. St. 1901, p. 499), the office of Circuit Court commissioner was abolished, and the power to appoint commissioners was conferred upon District Courts; but it is declared by the same statute that commissioners so appointed shall have the same powers and perform the same duties as theretofore imposed upon commissioners of the Circuit Court. So it still remains, we think, that a United States commissioner is a proper tribunal to entertain the proceedings contemplated by sections 990 and 991 under consideration.

The order of the Circuit Court is affirmed, without costs.

KENYON v. MULERT.

(Circuit Court of Appeals, Third Circuit. February 1, 1911.)

No. 61.

1. VENDOR AND PURCHASER (§§ 54, 85*)—RESCISSION OF EXECUTORY CONTRACT —RECONVEYANCE OF PURCHASER'S EQUITY.

Under the law of Pennsylvania, an executory contract for the sale of real estate on which the purchaser has made a payment vests him with an equitable estate in the land to the extent of the payment made, but a conveyance of such equity to the vendor, who still retains the legal title, and his acceptance of the same, operates as a rescission of the contract, and the vendor cannot recover the remainder of the purchase money from the vendee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 85, 141–143; Dec. Dig. §§ 54, 85.*]

2. BANKRUPTCY (§ 318*)—PROVABLE DEBTS—PURCHASE MONEY OF LAND—RESCISSION OF CONTRACT.

Claimant contracted to sell bankrupt certain real estate in Pennsylvania, and received a payment thereon, and, on default of payment of the remaining purchase money, obtained a decree for specific performance in a state court. After the bankruptcy, the decree not having been carried out, he applied to the court of bankruptcy to have the trustee required to accept or refuse the property, and, in conformity to the action of the creditors, the court directed the trustee to execute a quitclaim deed to claimant, which was done, and the deed was accepted by him. *Held*, that such action was within the powers of the court and effected a rescission of the contract, and that claimant could not thereafter prove a claim for purchase money due thereunder against the estate.

[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.

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

In the matter of Harry Davis, bankrupt. Appeal by Thomas Kenyon from an order disallowing his claim. Affirmed.

Marron & McGirr, for appellant.

Maurice L. Avner and Samuel S. Robertson, for appellee.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. This is an appeal by Thomas Kenyon from an order made by the District Court affirming the action of the referee in refusing a claim of said Kenyon against the bankrupt estate of Harry Davis. On April 2, 1908, the latter was adjudged bankrupt, and on May 28, 1908, Kenyon filed proof of the claim here in question for $52,174.41, alleged to be the purchase money, costs, and taxes of land sold on an executory agreement by Kenyon to Davis prior to bankruptcy, less $70,000, the value of the land, which land Kenyon retains and has never conveyed to Davis.

The facts of the case are as follows: By article of agreement Kenyon in February, 1906, agreed to sell for $200,000, and on settlement of the purchase money convey to Davis this real estate. Davis paid some $15,000 and defaulted on the balance, whereupon Kenyon tendered him a deed and demanded performance. Davis having failed to perform, Kenyon began a proceeding in the state court for specific performance. Such performance was decreed, the decree providing for the payment by Davis of $85,000, the execution of a bond and mortgage for $100,000, and, on payment of and securing such sums, Kenyon was ordered to convey. On February 15, 1907, the building on the land was burned, and subsequently Kenyon received the insurance, $86,237.50, of which sum the state court applied $39,622.63 to the money decree of $85,000, and the balance of $46,614.87 to the reduction of the mortgage decree of $100,000. Davis had not paid the money decree or given the mortgage, and Kenyon had not conveyed the legal title when Davis went into bankruptcy. Subsequent to the bankruptcy Kenyon took no steps to enforce his decree in the state court, but on August 19, 1908, presented his petition to the referee, setting forth, inter alia, that Davis's trustee "has never elected to take or refuse said property which petitioner sold to said Davis by said article of agreement, and petitioner is desirous of having the title of said property settled or to recover the amount due him under the said articles of sale, which is considerable over $100,000." To this petition the trustee answered, alleging "that there is no provision of law requiring the trustee in bankruptcy to elect to take or to reject real estate of the bankrupt under circumstances such as are set forth in the said petition"; that Kenyon had himself rescinded the contract after the bankruptcy by advertising and trying to sell the property, without leave of the District Court; that the trustee had acquiesced in such rescission, and averred the trustee's right to sue for and recover from Kenyon the $15,000 of purchase money Davis had paid. Thereupon Kenyon replied, denying rescission, and stating:

"Said Thomas Kenyon says that the attorney of said trustee, on various occasions, had informed said Thomas Kenyon and his attorney that said trustee would not accept said real estate, but, in order to clear the title to said

real estate, it is necessary that said trustee should put his declination on record, and that is the whole object of the present proceedings."

On hearing the rule on the trustee to take or refuse, the referee made an order that:

"Said rule having come on for hearing before me at a meeting of the creditors held November 10, 1908, and having been fully argued by counsel, and no creditor desiring that the trustee should accept said property under the terms and conditions on which it was sold to the bankrupt, it is ordered that the trustee be, and he is hereby, authorized and directed to make, execute, and deliver to said Thomas Kenyon a quitclaim deed for the interest of the bankrupt, Harry Davis, in said real estate."

In pursuance of this order, the trustee executed and delivered such deed to Kenyon, and it was of this the court in its opinion later said:

"It was admitted at the argument by counsel for Kenyon that the quitclaim deed which the trustee was ordered to execute and deliver was executed and delivered and accepted by Kenyon."

Such being the case, the contract having been rescinded, the equitable interest of Davis in the premises surrendered, and Kenyon being the absolute owner of the land, is he entitled to prove his unpaid purchase money as a claim against the estate? The referee and court below held he was not, and in that holding we find no error.

Now, the fact is that the creditors of this estate at a meeting held before the referee declined to carry out this contract and the trustee by direction of the referee has executed and delivered to the owner of the property, who has accepted the same, a formal release of any interest of the bankrupt estate in the land. This was a rescission in fact and in law of the contract. The owner of the land cannot have at the same time both his land and the price thereof, and, having accepted the rescission, the contract no longer exists. His claim therefore has no contract to support it. This conclusion follows from the decisions of the Pennsylvania courts. In that state, where land is sold by executory contract, the vendee has an equity to the extent of the purchase money he pays, and the vendor who holds the legal title until the purchase money is all paid is a trustee meanwhile for the vendee pro tanto to the extent of the purchase money paid. Purviance v. Lemmon, 16 Serg. & R. 294; Bear v. Whisler, 7 Watts, 144; Bayler v. Commonwealth, 40 Pa. 37, 80 Am. Dec. 551; Phillips v. Swank, 120 Pa. 76, 13 Atl. 712, 6 Am. St. Rep. 691. When, however, the equitable interest of the vendee becomes united to the legal title of the vendor, the executory contract is rescinded, and there can be no recovery by the vendor of the purchase money from the vendee. Purviance v. Lemmon, supra, and Bradley v. O'Donnell, 32 Pa. 280, where it is said:

"Executory articles of agreement for the sale of land establish the relation of trustee and cestui que trust between the vendor and vendee, and a reunion of the equitable with the legal estate is virtually a rescission of the contract."

In Wolfe's Appeal, 110 Pa. 129, 20 Atl. 410, the Supreme Court of that state, referring to an executory contract for the sale of land, say:

"The vendee acquires merely an equitable interest in the land, a right to a conveyance of the legal title upon paying or securing, as may be agreed

upon, the residue of purchase money. In the meantime the vendor retains the legal title as security for the unpaid purchase money; and, if on a lien therefor he sells and purchases the equitable interest of his vendee, the contract is thereby rescinded, and he is precluded from recourse to the vendee personally for the balance of purchase money that may not be paid by the proceeds of sale."

The principle of this and numerous other cases of that state that might be cited is that a reuniting of the equitable estate under an executory contract to the vendee's legal estate extinguishes such contract. That principle is conclusive of this case, and precludes Kenyon, who has never conveyed the legal title and has reunited thereto Davis's equitable interest, from collecting the purchase money also. It is said, however, that the referee had no authority to direct the trustee to execute the quitclaim deed, and that a cloud may remain on the title. We cannot agree to that proposition. Davis never had, and his estate has not now, title to Kenyon's property. By the contract relation between them, he had an equitable interest commensurate with the amount of purchase money he had paid and a right to demand a conveyance of title when he had paid it all. He has never paid it all. His creditors have elected that his trustee should not fulfill the contract; and the trustee, in pursuance of an order of the court, has evidenced such action on the part of the creditors by a formal release and surrender of the bankrupt's right to performance. The only source from which any cloud upon this title could arise was from the bankrupt's estate and the trustee has surrendered such claim at the instance of the creditors. And, if authority on the court's part is needed to order the trustee, at the instance of creditors, to do what he has done, we think it exists under Act July 1, 1898, c. 541, § 58, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), which authorizes action on "the proposed compromise of any controversy," section 55, which provides, "The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate," and section 2, which authorizes courts to "cause the estates of bankrupts to be collected * * * and determine controversies in relation thereto." We are clear that this vendor having received from Davis before bankruptcy $15,000 in cash and $86,000 more in insurance, and having the absolute title to the property and a surrender of Davis's equity, has no standing to enforce the payment of purchase money, or any part thereof, at the expense of the bankrupt's creditors.

The decree of the court is therefore affirmed.

NORFOLK & W. R. CO. v. HAZELRIGG.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1911.)

No. 2,070.

1. MASTER AND SERVANT (§ 278*)—ACTION FOR INJURY TO SERVANT—DEFECTIVE CAR COUPLER—EVIDENCE.

In an action by an employé against a railroad company to recover for an injury alleged to have been caused by the use by defendant in interstate commerce of cars not equipped with automatic couplers, as required

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

by the Safety Appliance Act March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), evidence of the use of such cars with couplers so defective that they could not be coupled without going between them, and that in doing so plaintiff was injured, is sufficient to make a prima facie case, although it does not show the precise nature of the defect.

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

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

2. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

An inexperienced brakeman doing switching work in railroad yards in weighing cars which were required to be uncoupled as they were weighed, who, when the lever on a car on the side of the train where he was working would not uncouple two cars because of a defect, went between the cars as he had seen others do, and was injured, cannot be held chargeable with contributory negligence as matter of law because he did not go around the train and try the lever on the other side.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089–1132; Dec. Dig. § 289.*]

3. MASTER AND SERVANT (§ 230*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

In determining whether or not a brakeman was chargeable with contributory negligence in going between two cars to uncouple the same, whereby he was injured, his knowledge and experience in the work are proper elements to be considered.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 687–700; Dec. Dig. § 230.*]

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

At Law. Action by John T. Hazelrigg against the Norfolk & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. H. Holt and J. F. Hager, for plaintiff in error.

B. G. Williams, for defendant in error.

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

KNAPPEN, Circuit Judge. This is the second appearance of this cause in this court. The defendant in error (plaintiff below) brought suit for the loss of an arm, occasioned by its being caught between the bumpers of two coal cars, through the alleged negligence of plaintiff in error in using, upon a car employed in interstate traffic, a coupling device which would not operate without the necessity of going between the cars for the purpose of coupling and uncoupling; the plaintiff being at the time of his injury a brakeman doing switching work in defendant's yard, in connection with the weighing of cars. On a former trial plaintiff recovered judgment, which was reversed by this court on account of certain instructions and refusals to instruct upon the subject of contributory negligence. Norfolk & Western Railroad Co. v. Hazelrigg, 170 Fed. 551, 95 C. C. A. 637. On a new trial plaintiff has again recovered; the judgment thereon being the subject of this review.

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

At the close of the evidence, defendant asked a peremptory instruction for verdict in its favor, the denial of which is assigned as error. On the former review a similar request was held properly denied. On this review the alleged failure of proof to sustain a verdict for the plaintiff is put upon the ground that the plaintiff relied in the alternative upon one of two distinct grounds of negligence, one that the chain designed to lift the locking dog or pin was broken, the other that the chain was too long, and without any showing as to which was the actual defect. There was testimony tending to show that the action of the lever indicated the existence of one or the other of the two defects. The argument presented is that for the second cause referred to, as being a defect in original construction, the defendant would be absolutely liable, but that for the first, being a defect subsequently arising, defendant would not be responsible except for a negligent failure to keep the coupling device in repair, according to the decision of this court in St. Louis & San Francisco R. Co. v. Delk, 158 Fed. 931, 86 C. C. A. 95; that it is incumbent upon the plaintiff to prove actionable negligence; and that in this state of the proof he has not done so, and that the jury was thus left wholly to conjecture as to the cause of the accident. This state of the evidence appeared on the former trial, and is mentioned in the opinion of this court on the former review, although it does not appear that the point we are now considering was raised or passed upon. Whatever might otherwise be the case, it is clear there is no merit in the objection raised, in view of the holding of this court in United States v. Illinois Central R. Co., 170 Fed. 542, 548, 95 C. C. A. 628, that, where it is apparent that a car with a defective coupling device has been hauled upon defendant's track, the burden is upon defendant to prove that it has used all reasonably possible endeavor to discern and correct the fault. The plaintiff had made his prima facie showing of negligence when he showed a defective condition of the coupling device, and the fact that the plaintiff did not show which of the two defects mentioned was the one actually existing did not make his proofs conjectural. The court submitted to the jury the question of defendant's negligence, upon each of the two grounds alleged, in a charge fully as favorable on that subject as defendant was entitled to.

The evidence showed that the plaintiff was stationed on the left or fireman's side of the train, the yard conductor being on the right or engineer's side, and from that position directing the placing of the cars on the scales and the movement of the engine in switching the cars. After a car was weighed, and as it was about to be pushed, moving backward, off the scales, or while it was passing over the scales, it was plaintiff's duty to uncouple the weighed car from the car next forward which was to be placed on the scales. The plaintiff had been engaged in coupling and uncoupling cars but from two to five days. He testified that, as the car in question was ready to be pushed from the scales, he tried three times to work the lever from his side as the car moved along, but that it would not work; that the car came to a stop; that it was impossible for him to uncouple the cars without going between; and that accordingly he called to the conductor to "wait a minute," and stepped in between the cars,

when his arm was caught between the bumpers by an unexpected movement of the train, which seems to have been made under signal to the engineer given by the conductor. Plaintiff testified that he knew there was a lever on the other side of the connecting car, but did not know at the time whether or not it was operative. He also testified that he did not know at the time whether there was room for him to pass between the car he was trying to uncouple and the last one pushed off the scales, from the fact that sometimes the cars so kicked go "just barely off the scales," and that the reason he did not go around the end of the car to the other side of the train was that, if he had done so, "they might have backed in and caught me when they were kicking these cars off," and that, moreover, he was authorized to do as he did, having learned the yard from observation by way of watching others, and that he had no rules or book of instructions to the contrary of the course he took, but that, on the other hand, his instructions from the conductor were to "stay on that side and cut the cars." There was evidence that between the car which was being kicked from the scales and the tender of the engine there were but about three cars yet unweighed. The defendant contends that it was the plaintiff's absolute duty as matter of law, on finding that the lever on his side would not work, to go around the train, either behind the car in question or in front of the engine, and requested an instruction to the jury that:

If "they believed from the evidence in this case that there was a safe way and an unsafe way by which plaintiff Hazelrigg could have uncoupled the cars between which he was injured * * * and he, the said Hazelrigg, voluntarily and without necessity chose the unsafe way instead of the safe way and was injured in consequence, he cannot recover and your verdict must be for the defendant."

This request was refused, the jury being instructed as follows:

"The question, then, is whether or not a brakeman of ordinary care and prudence, with such experience as plaintiff in this case had, and with such knowledge of railroading as he had, and under existing conditions—i. e., under like circumstances—would or not have appreciated the danger of going in between those cars, and have refrained from going in between them, and, instead of doing so, would have called over to the conductor to operate the lever on his side, or himself have gone around and operated that lever or otherwise acted. If you believe from the evidence that a brakeman of ordinary care and prudence, under like circumstances, would have appreciated that danger, and would not have gone in between these cars, but would have called across to the conductor, or would have gone around and pulled the other lever himself, or acted otherwise than going between the cars, there can be no recovery in this case."

In support of the requested instruction defendant cites four decisions of the Circuit Court of Appeals for the Eighth Circuit, namely, Morris v. Duluth, S. S. & A. Ry. Co., 108 Fed. 747, 47 C. C. A. 661, Gilbert v. Burlington C. R. & N. R. Co., 128 Fed. 529, 63 C. C. A. 27, Suttle v. Choctaw, O. & G. R. Co., 144 Fed. 668, 75 C. C. A. 470, and Union Pacific Ry. Co. v. Brady, 161 Fed. 719, 88 C. C. A. 579, each of which cases involved an injury to one engaged in switching by stepping between the cars upon the failure of the lever to work, and without attempting to use the lever on the other side of the train; the rule being laid down that, where there is a compara-

tively safe and less dangerous way known to a servant by means of which he may discharge his duty, it is negligent in him to select the more dangerous method. In the Morris, Gilbert, and Suttle Cases it was held that the act of the brakeman in going between the cars instead of using the lever on the opposite side was negligence as matter of law. The Brady Case is in harmony with the other three cases. We think the case before us is readily distinguishable upon its facts from each of the four cases cited. In the Morris Case the injured employé was the head brakeman of a crew of employés. He stepped between moving cars in the dark. The lever on the opposite side was in working order. In the Gilbert Case the plaintiff was head brakeman of the switching crew, and was directing the movements of the train. He likewise stepped between moving cars. The couplers on both sides were in good working order, but the one on his side could not be pulled because the "slack was tight." In the Suttle Case the lever on the brakeman's side was temporarily disconnected, but the one on the other side was all right, and the brakeman could have reached and drawn the pin in safety by going on the platform of the caboose. Instead of doing so, he went between moving cars in the nighttime. In the Brady Case plaintiff was foreman of the switching crew, and had had 12 years' experience as brakeman, switchman, and yardmaster. He knew it was not uncommon for a coupling appliance to require several jerks of the lever to uncouple. While he was between the cars after dark, the cars were moved through the negligence of a fellow servant.

It will be noticed that the requested instruction in the case before us omitted the element of plaintiff's knowledge that there was a comparatively safe and less dangerous way than the one employed by him, and the making of a choice by him with such knowledge, including the extent to which plaintiff's experience or inexperience, his appreciation or nonappreciation of the dangers, would affect the question of his negligence. Under the circumstances testified to by the plaintiff, his action in stepping between the cars could not be held negligence as matter of law. In view of the instruction actually given, we think there was no error in refusing the requested instruction, unless the qualification now to be mentioned was unwarranted.

The use of the words "with such experience as plaintiff in this case had, and with such knowledge of railroading as he had," is criticised as an unwarranted limitation upon the rule governing contributory negligence; the defendant contending that the plaintiff's negligence must be determined by the standard of a brakeman of ordinary care and prudence, and not by the standard of a brakeman of ordinary care and prudence with like knowledge and experience. It cannot be controverted that plaintiff's knowledge and experience are proper elements for consideration in determining the question of assumption of risk. That subject, however, is not before us, as under the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) the defense of assumption of risk is not open. In our opinion the plaintiff's experience is equally to be taken into account in cases of contributory negligence. Blumenthal v. Craig (3d Circuit) 81 Fed. 320, 26 C. C. A. 427; George v. Clark (8th

Circuit) 85 Fed. 608, 610, 29 C. C. A. 374; Wheeler v. Oak Harbor Head Lining & Hoop Co. (6th Circuit) 126 Fed. 348, 351, 61 C. C. A. 250; Michigan Headlining & Hoop Co. v. Wheeler (6th Circuit), 141 Fed. 61, 63, 72 C. C. A. 71. In the Blumenthal Case it was held that in considering the question of contributory negligence the youth and inexperience of the plaintiff are to be taken into account. In George v. Clark, in discussing the evidence of the alleged contributory negligence of a switchman killed in coupling cars, the court said, "Besides, the deceased had only had a limited experience as a switchman in coupling cars." In Wheeler v. Oak Head Lining & Hoop Co., which involved not only assumption of risk, but the contributory negligence of the plaintiff, who had received an injury by the catching of her clothing by a rapidly revolving shaft, Judge Severens, after discussing the assumption of risk, said:

"She (plaintiff) says she was unacquainted with the danger. * * * It might have been negligence for one familiar with the effect of a rapidly revolving shaft in gathering in articles of wearing apparel like the loose skirts of a woman's dress when brought in contact with it, while it might not be for one who had neither experience nor instruction in regard to the subject."

Upon a second review (Michigan Headlining & Hoop Co. v. Wheeler, supra) criticism was made of the submission to the jury of the question of plaintiff's age and experience. This court, speaking through Judge Richards, said:

"The defendant below insists that in place of the words 'an ordinarily prudent person of her age and experience, in the exercise of ordinary observation,' the court should have inserted either 'a person of ordinary intelligence' or 'a person of ordinary common sense in the exercise of ordinary observation.' We can perceive no difference in the meaning of these words which would warrant a reversal of the judgment and the sending back of this case for a new trial."

In our opinion the propriety of the instruction in question is ruled by the decisions we have cited, and the court did not err in this respect.

The court, speaking of the safety appliance act, said in his charge:

"As I construe that law—or at any rate the railway companies have so interpreted it; or, to put it more strictly, this railway company has so determined it—such cars must be provided with apparatus on each side of the coupler, so that on either side it can be uncoupled, without the necessity of the brakeman going in between the cars."

Defendant contends that there is nothing in the act of Congress to warrant such construction of it. We do not feel called upon to interpret the act in this respect, for it is clear that defendant could not have been harmed by the statement of the court referred to, as not only was there no evidence that the equipment on the other car was out of order, but the only ground of defendant's negligence submitted to the jury related to the device on plaintiff's side of the car.

We have considered all the alleged errors discussed in defendant's brief. In our opinion no error has been committed to the prejudice of the defendant. The judgment of the Circuit Court is accordingly affirmed.

CINCINNATI EQUIPMENT CO. v. DEGNAN.

(Circuit Court of Appeals, Sixth Circuit. December 31, 1910.)

No. 2,043.

1. PLEADING (§ 9*)—SUFFICIENCY OF BILL AGAINST CORPORATION—ALLEGATION OF INSOLVENCY.

A bill against a corporation sufficiently alleges insolvency, when it alleges facts from which such condition may be naturally and reasonably deduced.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. § 9.*]

2. CORPORATIONS (§ 557*)—SUFFICIENCY OF BILL AGAINST CORPORATION—ALLEGATION OF INSOLVENCY.

Averments, in a creditor's bill against a manufacturing corporation, asking the appointment of a receiver, which alleges the issuance of an execution by complainant against defendant and its return nulla bona; the issuance of a second execution to another county, which for want of goods and chattels whereon to levy was levied on real estate subject to large mortgages thereon securing bonds; that defendant was unable to continue its business and was indebted to laborers whose claims had accumulated during nearly four months and until they amounted to more than $18,000; that, unless its property was conserved by the appointment of a receiver to continue its business and collect its accounts receivable until its property could be disposed of to advantage, such property would be insufficient to pay its debts—sufficiently allege insolvency.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2228; Dec. Dig. § 557.*]

3. CORPORATIONS (§ 553*)—WHAT CONSTITUTES INSOLVENCY.

The inability of a corporation to pay its current obligations as they mature in the ordinary course of its business constitutes insolvency in a general sense, which will authorize the appointment of a receiver by a court of equity in a creditor's suit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201–2216; Dec. Dig. § 553.*]

4. RECEIVERS (§ 56*)—JURISDICTION TO APPOINT—SUIT AGAINST CORPORATION.

Where, in a creditor's suit against a corporation asking the appointment of a receiver, the defendant appeared and admitted the averments of the bill, which sufficiently alleged insolvency, and no collusion is charged, an intervener coming into the case after the appointment of a receiver cannot challenge the jurisdiction of the court to make such appointment.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 95; Dec. Dig. § 56.*]

5. COURTS (§ 37*)—OBJECTIONS TO JURISDICTION—TIME FOR MAKING.

Objection to jurisdiction in equity must be taken before the case has been entered upon on the merits, and an intervener who in his petition did not question the jurisdiction cannot do so after an answer has been filed to his petition and property has been surrendered to him under a stipulation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 147–151; Dec. Dig. § 37.*]

6. SALES (§ 474*)—CONDITIONAL SALES—FAILURE TO FILE CONTRACT—OHIO STATUTE—VALIDITY AS AGAINST RECEIVER.

Under Rev. St. Ohio, § 4155—2, which provides that conditional sale contracts shall be void as to all creditors unless the conditions shall be

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

evidenced by writing signed by the purchaser, and also having a statement thereon under oath made by the seller of the amount of the claim, or by a true copy thereof, with an affidavit that the same is a copy, deposited with the county recorder, etc., a conditional sale of property to a corporation, where such requirements have not been complied with, is void as against a receiver for the corporation appointed by a federal court in a suit to administer the assets of the corporation for the benefit of all creditors, and, under the rule of decision in Ohio as to the rights of receivers in such suits, the right of the receiver to contest the validity of the sale does not depend on the degree of insolvency of the corporation as shown by the bill, but is the same whether it is alleged that the corporation has not sufficient assets to pay its debts, or is unable to meet its obligations as they mature in the ordinary course of its business.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1391–1402; Dec. Dig. § 474.*]

7. SALES (§ 474*)—CONDITIONAL SALES—VALIDITY UNDER OHIO STATUTE.

The effect of the failure to comply with Rev. St. Ohio, § 4155—2, declaring conditional sale contracts void as to creditors unless evidenced by a writing filed with the county recorder, etc., is not avoided by placing a plate on the article sold, stating that it is the property of the vendor.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1391–1402; Dec. Dig. § 474.*

What constitutes a contract of conditional sale, see note to Dunlop v. Mercer, 86 C. C. A. 448.]

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

Suit in equity by the Merchants' & Manufacturers' National Bank of Sharon, Pa., against the Logan Brick Manufacturing Company and the Security Savings Bank & Trust Company. On the hearing of a petition of intervention by the Cincinnati Equipment Company, a decree was entered against such company in favor of Joseph P. Degnan, receiver, and intervener appeals. Affirmed.

This is an appeal from a decree in favor of defendant below (appellee), against intervener (appellant), for $6,000 and interest from its date. Appellant was allowed to intervene in a suit theretofore brought on the equity side in the court below by the Merchants' & Manufacturers' National Bank of Sharon, Pa., against the Logan Brick Manufacturing Company and the Security Savings Bank & Trust Company, wherein the appellee had been appointed a receiver prior to such intervention. The appellant sought by its intervening petition to obtain an order directing the receiver, Degnan, to deliver to it a certain steam shovel and dipper which it had prior to the receivership delivered to the brick company under a contract in writing, whereby the intervener leased and demised the shovel and dipper to the brick company for a term of eight months, subject, however, to a covenant that the brick company should pay to intervener $1,000 in cash and at the same time deliver to intervener its promissory notes for different sums and terms, aggregating $10,500. The contract further provided that, on payment of these notes as they fell due, the intervener would on demand sell the shovel and dipper to the brick company for the sum of $5 in cash; but that, upon failure so to pay the notes or upon any breach of the contract, the intervener might take possession of the equipment; and further that in the event the purchase should not be completed the brick company should return the equipment. It was alleged, in substance, also, that the equipment was delivered to the brick company in Hocking county, Ohio, where it had since been in use; that intervener duly filed a copy of the contract of lease with the recorder of that county; and that the same was by him recorded in the

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

Hocking county record of leases; but that the brick company had not paid the notes, and a balance of something over $7,000 remained due.

The receiver filed an answer to the intervening petition in substance admitting its allegations, but stating that there was not attached to the contract or made a part of it a statement under oath of the seller showing the amount of the claim; and that there was no affidavit to the contract when filed that the same was a copy of the original; and further that the instrument was not filed by the equipment company and recorded by the recorder of Hocking county, Ohio, "in accordance with the provisions of section 4152 of the Revised Statutes of Ohio"; and further that after the delivery of the equipment many persons became creditors of the brick company, among whom were common laborers whose claims, amounting to $18,986.58, had been assigned by the brick company to another company named the Logan Supply Brick Company; that the latter company claimed to have a lien upon all the property of the Logan Brick Manufacturing Company, lessee and conditional purchaser of the equipment, under the Revised Statutes of Ohio. After describing the nature and object of the original suit in which the receiver was appointed, the receiver prays that the intervening petition be dismissed. Under a supplemental intervening petition stating that the equipment was deteriorating in value, a consent order was made finding the value of the equipment to be $6,000, and directing that the equipment company should have title to and possession of the equipment upon executing bond providing for paying that sum in the event the receiver should be adjudged to be the owner of the shovel. It was afterwards stipulated that the intervening petition should be amended by inserting a provision of the contract requiring that there be attached to the equipment prior to delivery a name plate bearing the words "property of the Cincinnati Equipment Company," and further that the plate was so attached, and that it so remained until after the appointment of the receiver. The cause was submitted to the court upon the intervening petition as so amended, the amended answer of the receiver, and the bill and answer filed in the original suit; whereupon the court below held, as before indicated, in favor of the receiver.

A. L. Smith and J. B. Kelley, for appellant.

E. J. Marshall, for appellee.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). It is not contended that the equipment company placed on the conditional contract of lease and sale the sworn statement of the amount of its claim, as required by section 4155—2 of the Ohio Statutes, or that it caused the instrument to be indorsed and an entry thereof to be made in the recorder's office, as provided by section 4152; nor is it denied that the effect of such failure under the first section mentioned was in terms to render the instrument "void as to all subsequent mortgagees and creditors." It is insisted, however, that the conditional instrument was good as between the parties to it, and that the receiver is in no better position than that of the conditional lessee and purchaser. One theory of this contention, as we understand it, is that the bill under which the receiver was appointed did not state facts sufficient to warrant the appointment of the receiver; and that, although the brick company by its answer admitted the averments of the bill and consented to the appointment of the receiver, the appointment was not justifiable.

It is to be observed that the intervener stated nothing in the form of pleading in the court below to challenge either the sufficiency of the

bill or the appointment of the receiver; nor is anything touching the sufficiency of the bill stated in specific terms in any of the assignments of error. Yet it is true that among the matters submitted at the trial below were the bill and answer in the original suit, and the learned trial judge regarded the bill as sufficient to warrant the receivership. We shall therefore assume for the purposes of the case that it is open to appellant, except so far as the right has been waived, to test the sufficiency of the bill in the main suit.

Jurisdiction of the parties was acquired through diversity of citizenship. The introductory portion of the bill contains an averment that complainant "on its own behalf and on behalf of such other creditors of the defendant, the Logan Brick Manufacturing Company, as shall elect to join in the prosecution of this suit, brings this its bill of complaint," etc. The bill contains averments to the effect that complainant had theretofore recovered judgment in the common pleas court of Lucas county against the defendant for the sum of $3,235.69 with interest; that a writ of execution was issued to the sheriff of that county and returned unsatisfied "for want of goods, chattels, and real estate whereon to levy"; that a writ of execution was also issued to the sheriff of Hocking county, Ohio, who levied upon certain real estate described in the bill, "there being no goods and chattels whereon to levy"; that in August, 1900, the brick company had delivered to the Security Trust Company of Toledo its deed of trust conveying a portion of the property described and covering the personal property of the defendant to secure $50,000 of its bonds; that the Security Savings Bank & Trust Company, one of the defendants, had succeeded to the rights of the Security Trust Company; that in December, 1906, the brick company delivered its deed of trust to its codefendant conveying all the real property described in the bill and covering the personal property of the defendant to secure payment of $225,000 of its bonds. Both mortgages are alleged to have been duly recorded, at times stated, in Hocking county, where the real estate is situated. It is averred that the principal place of business of the brick company, as well as that of the trustee under the mortgages, was in Toledo, and that such trustee by virtue of the deeds of trust claimed to have a first lien upon all the property of the defendant "to secure the payment of the bonds" before referred to. It is then averred, in substance, that defendant had on hand contracts and orders for a large amount of brick, which could be manufactured and sold at a profit, and, unless a receiver was appointed, the defendant would be "obliged to close down its plant, discharge its employés, and will be unable to fill said contracts and orders, and said plant and property can be sold at a much larger amount if kept operated and sold as a going concern than if it is closed and sold under execution at law; that its good will is valuable and can only be preserved by keeping said plant in operation"; and further that defendant owned a large number of accounts receivable for merchandise sold, and a larger percentage of them could be collected if the plant were kept in operation than if it were closed; that excepting the real estate and accounts receivable described the property of the company was insufficient "to satisfy the claim of plaintiff or the other creditors"; that the assets of the company were situated

in Toledo, Lucas county, and the city of Logan, Hocking county; and that, unless they were "marshaled and protected by a receiver or receivers to be appointed," they would be subject to vexatious and costly litigation in both jurisdictions and would bring much less than their fair and reasonable value, to the detriment of the complainant and stockholders and creditors.

The prayer includes a request for an accounting to ascertain the amount due the trustee and bondholders under the mortgages and other creditors, also the number of bonds issued and outstanding, and the number used as collateral with the claims for which the bonds were so held; that a receiver be appointed to take over all books, papers, assets, and property of every kind wherever situated and belonging to the brick company; that the receiver be empowered and directed to prosecute all actions necessary to secure possession of the property, and to operate the plant, factory, and business of the brick company, to purchase necessary materials, to borrow money, and to issue receiver's certificates, etc., also to sell the whole or such parts of the property as might be necessary to pay and discharge the claim of plaintiff and the claims of other creditors; that the court ascertain all the respective liens and priorities, if any exist, in favor of creditors, and upon sale that the sale's proceeds be applied in payment of the claim of plaintiff and the other claims as they might be ascertained by the court; that all creditors be required to intervene and assert their claims and rights and be enjoined from instituting or prosecuting suits against the property of defendant without first obtaining an order of the court. By its answer the defendant admitted the averments of the bill and consented to the appointment of a receiver.

The order of the court recites the appearance of complainant and the brick company, the filing of the answer, and a motion in accordance with the prayer of the bill for an order of injunction and the appointment of a receiver. By the order Degnan was appointed receiver of the brick company and of all its property, real, personal, and mixed, including all stocks, bonds, credits, things in action, etc., and clothing him with all rights usually conferred upon receivers in chancery; directing him at once to take possession of all such property wherever found so that it might be safely and advantageously used and sold; and enjoining all persons from interfering with his possession, use, and operation of the property, vesting in him extensive power and control respecting the property and business. It was further ordered that the receiver give immediate notice by publication of his appointment and of the order.

Two of the objections urged against the bill are, first, that it is not a creditors' bill, and, second, that it does not contain an express averment of insolvency; the idea being to show a failure to secure the lien of an ordinary creditors' bill, and particularly a failure to state a financial condition of the debtor corporation that would impress upon its property a trust for the benefit of its creditors. Plainly the ultimate purpose of the objections is to test the sufficiency of the proceeding to fasten the claims of creditors on the corporate property. Whatever might be said of a bare averment of insolvency, it is certain that such a condition may be deduced from facts averred; and, if there be aver-

ments of facts sufficient, a court cannot escape giving to them their natural and reasonable effect. As stated by Judge Gilbert in Pacific Northwest Packing Co. v. Allen (Ninth Circuit) 109 Fed. 515, 518, 48 C. C. A. 521, 524, in passing upon an appeal involving an order confirming the appointment of a receiver:

"We think it may be inferred from the allegations of the bill that the defendant corporation was at the time of the filing of the bill insolvent, and that the complainant's security, without the intervention of the court by a receiver, would have been insufficient."

The order appointing the receiver does not state any specific ground upon which it was based. The learned trial judge thought that "the bill should be construed as charging insolvency," saying further:

"It is true that it does not allege insolvency in so many words. But it alleges facts from which insolvency is the reasonable inference, to wit, that a judgment has been obtained and execution thereon returned unsatisfied, and that the plant cannot and will not be operated unless a receiver is appointed, thus indicating an inability to obtain means to operate it."

Citing, among other decisions, Terry v. Tubman, 92 U. S. 156, 160, 23 L. Ed. 537, where Justice Hunt said:

"A judgment and execution unsatisfied are evidence of insolvency, or inability to collect. They are, however, evidence only; and the fact may be established as well by other evidence, among other modes, by an assignment and continued suspension of business, or other notorious indications."

The intervener cannot at most be in a better position than that of a general demurrant. The averment that the company would be "obliged to close down its plant, discharge its employés," etc., signified a financial condition preventing the company from prosecuting the objects for which it was created. The averment that aside from the real estate and accounts receivable the property of the company was, as claimed, "wholly insufficient to satisfy the claim of plaintiff or other creditors," cannot be interpreted with respect alone to complainant's unsatisfied judgment and the agreed value of the shovel. The averment must be construed as an entirety and as relating at least to the judgment and also the labor claims. These claims were earned before the original suit was begun and were set up by answer before the value of the shovel was agreed upon. Then there was the alleged financial inability to fill orders, carry out contracts, or to continue business at all; even wages, as before shown (and this is no stronger than the averment covering the fact), had accumulated during nearly four months to the amount of over $18,000 and were being carried through another company. It is true that there is no averment that the real estate upon which the mortgages had been given was not worth more than the outstanding bonds; indeed, the number of bonds outstanding, whether through sales or pledges, was not stated, nor was it stated that the conditions of the mortgages had been broken. But if, in spite of other averments tending strongly to show inability of the debtor to meet its obligations, it be assumed that the interest on the mortgage bonds was paid as it accrued, still we do not see how it can be inferred that the bonded indebtedness was not in some form outstanding; for if the bonds were worth anything and were not out-

standing, or even if the business was yielding any material profit, it is hardly conceivable that the wages account would have been suffered to accumulate for the long time and to the amount stated, not to speak of the failure to pay the judgment. Hence, unless the learned trial judge meant by his finding of insolvency to use the term in the sense in which it is defined by section 1, cl. 15, of the present bankruptcy act,[1] we approve of the conclusion. But we understand counsel's insistence to be that insolvency within the meaning of that definition should be averred. We do not regard that as the true meaning of the conclusion, nor do we think such a conclusion is either necessary or sustainable in this case.

"Insolvency," as counsel urge it, is statutory, and in administering the bankruptcy act must be strictly adhered to. Duncan v. Landis (Third Circuit) 106 Fed. 839, 858, 45 C. C. A. 666. Insolvency has, however, another and different meaning. To illustrate, we may refer to the definition given by the Supreme Court when considering the term "insolvency" under the bankruptcy act of 1867, which did not define the term. As stated by Justice Clifford in Dutcher v. Wright, 94 U. S. 553, 557, 24 L. Ed. 130:

"'Insolvency,' in the sense of the bankrupt act, means that the party whose business affairs are in question is unable to pay his debts as they become due, in the ordinary course of his daily transactions." Wager v. Hall, 16 Wall. 584, 599, 21 L. Ed. 504; Toof v. Martin, 13 Wall. 40, 47, 20 L. Ed. 481.

Insolvency was many years ago defined in Ohio to be (Mitchell v. Gazzam, 12 Ohio, 315, 336):

"In the mercantile sense, it means a person unable to pay his debts according to the usages of trade. But, in the broad sense used by the statute, it means a person whose affairs have become so deranged that he is unable to pay his debts as they fall due; and if from such a deranged state of his affairs, and the sense of inability to meet his moneyed engagements, he should transfer his property to a person to pay his debts, we should regard such assignment as made in contemplation of insolvency, and within the meaning of the statute."

This definition has been followed in Ohio circuit and common pleas courts. Am. Hosiery Co. v. Baker, Assignee, 18 Ohio Cir. Ct. R. 604, 605; Perkins v. Scott, 9 Ohio Cir. Ct. R. 207, 215; Remington & Son v. Central Press Ass'n Co., 3 Ohio N. P. 258, 263; Baker v. Fraternal Mystic Circle, 32 Wkly. Law Bul. 84, 85.

In American Can Co. v. Erie Preserving Co. (C. C.) 171 Fed. 540, 542, it is said:

"The allegations in the bill that the defendant could not pay its current obligations as they matured, and that it was unable in the ordinary course of its business to pay its existing and enforceable liabilities, was a proper and sufficient allegation of insolvency. Brouwer v. Harbeck, 9 N. Y. 593; 16 Am. & Eng. Ency. of Law, 636; Buchannon v. Smith, 16 Wall. 277 [21 L. Ed. 280]; Herrick v. Borst, 4 Hill (N. Y.) 652. 'Insolvency,' as the term is used in equity, is clearly differentiated from the meaning which is given it by the bankruptcy act."

See, also, Citizens' Bank & Trust Co. v. Gold Co. (C. C.) 106 Fed. 97, 100; In re Douglas Coal & Coke Co. (D. C.) 131 Fed. 769, 774, 779; In re Edward Ellsworth Co. (D. C.) 173 Fed. 699, 700.

Now, still further averments are to be considered in connection with

[1] U. S. Comp. St. 1901, p. 3419.

this interpretation of the financial condition of the company. The assets of the company were held in two counties separated by considerable distance. They were subject to hostile litigation on the part of creditors. Complainant, having failed to recover by execution on its judgment, initiated proceedings on behalf of itself and all such creditors as might elect to join in the prosecution of the suit to marshal and conserve the assets including the good will, and ultimately to bring them to sale and apply the proceeds in payment of the claims of all the creditors. It is said that this was not necessary because the complainant might have levied its execution at law upon the shovel now in controversy. This is but challenging the jurisdiction on the ground that complainant had an adequate remedy at law.

It is to be remembered, however, that the defendant in the original suit admitted the averments of the bill and consented to the appointment of the receiver. Since the intervener has failed to aver or to prove collusion between the parties to the original suit or anything tending to show a design to impose upon the court, we must conclude that the act of the defendant in the original suit was a rightful submission to the jurisdiction of the court. The intervener therefore cannot be heard to reopen the case on any such ground. The principle to which allusion is made is a general one and was sustained by a full citation of the authorities by the present Mr. Justice Lurton in Horn v. Pere Marquette R. Co. (C. C.) 151 Fed. 626, 634. Among the objections passed upon was one that the bill under which the receiver was appointed in that case was filed by a single unsecured creditor who had no judgment and who claimed no lien. In the course of the opinion it was said:

"A most absurd result would ensue if, when the corporation has submitted to the jurisdiction of the court, either as a court of equity or to the local jurisdiction, a creditor could come in, or, when brought in, might reopen the matter of jurisdiction over the debtor corporation. If such an objection is not waived once for all, so as to close the question as to stockholders and creditors, what number of creditors would conclude the rest?"

Also, Re Metropolitan Railway Receivership, 208 U. S. 90, 109, 110, 28 Sup. Ct. 219, 52 L. Ed. 403.

Moreover, whatever might have been done by prompt and direct procedure, we do not think objection to the jurisdiction in equity was taken here in proper time. As stated by Justice Brewer in Brown v. Lake Superior Iron Co., 134 U. S. 530, 536, 10 Sup. Ct. 604, 606, 33 L. Ed. 1021, adopting the language of the court in an earlier case:

"* * * If the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court, having the general jurisdiction, will exercise it; and in a note [in 1 Dan. Ch. Prac. (4th Am. Ed.) p. 550] many cases are cited to establish that, 'if a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff had a plain and adequate remedy at law. This objection should be taken at the earliest opportunity.'"

We call attention also to the language of the same learned justice in Hollins v. Brierfield Coal & Coke Co., 150 U. S. 371, 380, 381, 14 Sup. Ct. 127, 37 L. Ed. 1113.

True, as stated in Brown v. Lake Superior Iron Co., the subject-matter must be within the jurisdiction of the court. But the claim of lack of jurisdiction in equity which is under consideration at this moment is that complainant could have caused his execution at law to be levied on the shovel. As before pointed out, it filed its intervening petition without suggestion of defect in jurisdiction. Thereafter the receiver filed his answer setting up, among other things, claims of laborers; still later the intervener and the receiver entered into a stipulation concerning the shovel, and then the intervener took possession and gave the indemnity bond before the trial.

We are therefore constrained to hold, for the purposes of this case, that the court below through diversity of citizenship obtained jurisdiction not only of the parties to the original suit, but also of a subject-matter equitable in its nature and embracing admitted facts sufficient to justify the appointment of the receiver.

What then is the right of the intervener to the shovel equipment? The question of the effect of the intervener's delinquency under the Ohio statute respecting the absence of a sworn statement of the amount of its claim and the filing of the instrument is not an open one in this court. This results from the decision of this court in Dolle v. Cassell, 135 Fed. 52, 56, 67 C. C. A. 526, construing the Ohio statute as placing unfiled conditional contracts of sale upon the same basis as unfiled chattel mortgages respecting their invalidity as against creditors. The Supreme Court sustained this proposition in York Mfg. Co. v. Cassell, 201 U. S. 345, 351, 26 Sup. Ct. 481, 50 L. Ed. 782, although it reversed the decision of this court on other grounds. Attention is directed also to the very clear decision recently announced by Judge Sater in Hamilton v. David C. Beggs Co. (D. C.) 179 Fed. 949.

Now, it is admitted, as of course it must be, that in Ohio a chattel mortgage unfiled and so void as to creditors is void also as to the mortgagor's assignee in insolvency (Hanes v. Tiffany, 25 Ohio St. 549); that this is likewise true as to the personal representative of a deceased insolvent (Kilbourne v. Fay, 29 Ohio St. 264, 23 Am. Rep. 741); and also as to a receiver of an insolvent corporation, where there has been a failure to record its real estate mortgage (Cheney v. Maumee Cycle Co., 64 Ohio St. 205, 60 N. E. 207). But it is sought to distinguish these Ohio decisions from the present case on the ground that insolvency was shown in each of the Ohio cases. While this is true, and apparently true in the sense that the liabilities exceeded the assets, yet the absence here of that degree of insolvency does not seem to us to be decisive of the case in hand.

This case is to be determined not merely by the degree of insolvency deducible from the original bill, but also by its nature and object, together with the effect of the seizure made of the property of the debtor. It is to be recalled that the suit is representative; it is maintained for the benefit of all creditors who join in its prosecution. Intervener's counsel claims, and so admits, that by the levy made on the judgment complainant obtained a lien on the realty, subject to the mortgages, citing Martin v. Alter, 42 Ohio St. 94. Whatever estimate complainant's officers may have placed on the lien, it seems

voluntarily to have opened its suit to all the creditors, whether lienors or not. It is therefore not necessary to consider the bill either as a creditors' bill or as one in the nature of a creditors' bill. Bispham's Eq. § 527, and citations; 4 Pom. Eq. § 1415, note; Freedman's Savings & Trust Co. v. Earle, 110 U. S. 710, 4 Sup. Ct. 226, 28 L. Ed. 301. It is sufficient that on its face it was brought in the interest of all the creditors. Upon Degnan's appointment as receiver of the company and its property, all persons were enjoined from interfering with his possession or control, and from instituting or prosecuting any suits against the debtor company or any of its property, and all were required to intervene in the cause and assert their claims there. And it must still be kept in mind that the end in view was a sale for the benefit of the creditors.

Hence, in considering the question of relation between the receivership and the creditors, it will not do to say either that the creditors were not represented, or that their rights were not involved, simply because insolvency in the sense urged by counsel does not appear. If insolvency in that sense had been specifically alleged and admitted, it is difficult to see how the order could have been more sweeping, or how the property could have become "a trust fund for the benefit of corporate creditors" (Rouse v. Merchants' National Bank, 46 Ohio St. 493, 504, 22 N. E. 293, 298, 5 L. R. A. 378, 15 Am. St. Rep. 644), any more certainly or effectually than it has here. The contention, then, that the receiver in the present case is in no better position than that accorded to a trustee in bankruptcy is not tenable, because the feature of the decision in York Mfg. Co. v. Cassell, 201 U. S. at page 353, 26 Sup. Ct. 481, 50 L. Ed. 782, which holds that bankruptcy does not operate as an attachment or lien in favor of creditors, has not either in terms or principle any relation to the rule prevailing in Ohio as to the effect of a receivership upon the rights of creditors. It ought to follow that the present case is ruled by Cheney v. Maumee Cycle Co. and the principle of Dolle v. Cassell which was affirmed by the Supreme Court. In our judgment this is but applying a settled rule in Ohio touching the effect of the appointment of a receiver and a seizure made through him.

It is true that in Cheney v. Maumee Cycle Co. the court, in answer to an objection made to the pleadings, cited Rouse v. Bank in support of the proposition that the property of an insolvent corporation which has ceased to do business and carry on the objects of its creation "constitutes a trust fund for the equal benefit of its creditors"; but it is equally true that, in speaking of the receiver and his right to contest an unrecorded real estate mortgage, it was said (64 Ohio St. 214, 60 N. E. 209):

"His appointment is an equitable remedy, bearing the same relation to courts of equity that proceedings in attachment bear to courts of law; the appointment being treated as an equitable execution. The purpose is to secure the means for satisfying the final order and judgment of the court in the action, and the effect of the seizure is to place the property seized in the custody of the court. Railroad Co. v. Sloan, 31 Ohio St. 1."

After speaking of section 5590, vesting power in receivers under control of the court to take possession of property "and generally to

do such acts respecting the property as the court may authorize," which seems to us to be only declaratory, the court proceeded (64 Ohio St. 215, 60 N. E. 209, 210):

"It follows from this that the effect of the appointment, and the seizure of the property by the receiver, was to fasten the claims of creditors upon it and to give that officer control over it for the benefit of creditors, and in this respect his relation to it was, for all practical purposes, the same as that which an assignee would have had. The property thus sequestered was held by the receiver as effectually as an assignee could have held it, or as creditors could have held it by attachment or levy. In no other way than through him could the rights of creditors be worked out, and, in this aspect of the case, he represented the creditors rather than the debtor."

It is to be observed of that case that neither in the syllabi, in which all the judges concurred, nor in the opinion, was the right of the receiver in the interest of the general creditors to the proceeds of sale in dispute made to depend upon the question or degree of insolvency, but rather upon the appointment and seizure.

As stated by Judge Cochran in his decision of the case at bar:

"By the appointment of the receiver, if not before, the assets of the debtor defendant have been judicially seized, and such seizure is the equivalent of the levy of an attachment or execution. The receiver, it is true, has simply the custody of the assets and no more. But such is the case where an attachment or execution has been levied. The levying officer has custody and no more."

He cited the case of H. K. Porter v. Boyd (Third Circuit) 171 Fed. 305, 312, 96 C. C. A. 197, 204, 205, where, in speaking of a seizure made through a receivership, it was said:

"It is of no importance what term may with most propriety be used to designate the taking and holding possession of the property of the Construction Company by the ancillary receiver. Whether it be called an equitable execution, an equitable attachment, a sequestration, or an impounding, is a matter of indifference. It does not affect the essential nature of the thing done. The receiver entered into and held possession by virtue of his appointment and the mandate of the court. A sheriff enters into and holds possession of property under an execution or attachment by virtue of his election or appointment and the order or writ of the court. In either case, the property is compulsorily taken by judicial authority for the purpose of being applied to the payment of claims, theretofore or thereafter to be ascertained in nature or amount."

See, also, Farmers' L. & T. Co. v. Minneapolis E. & M. Works, 35 Minn. 543, 546, 29 N. W. 349; Harrison v. Warren Co., 183 Mass. 123, 124, 66 N. E. 589; Hamilton v. David C. Beggs Co., supra, 179 Fed. at page 952.

We therefore hold that the degree of insolvency of a debtor is not the test, certainly not the only test, of the power of a court through its receiver to enforce the rights of creditors respecting an instrument that is declared by the statute to be void as to creditors; and that the effect of the appointment of the receiver and the seizure of the property in the present case operated "to fasten the claims of creditors upon it and gave that officer control over it for the benefit of creditors." We are not unmindful of the claim that placing and keeping the name of the conditional lessor on the shovel as owner preserved the vendor's rights. The name-plate did not even state the true re-

lation of the parties. The claim really means that the will of the lessor may be substituted for that expressed by the lawmaking power itself. No decision is cited in support of the claim. It is admitted that, if execution had been levied upon the shovel, the right of the execution creditor would have prevailed. Since the seizure actually made was the equivalent of such a levy, we are unable to see why it should not have the same effect.

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

TYGART VALLEY BREWING CO. v. VILTER MFG. CO.

(Circuit Court of Appeals, Fourth Circuit. November 10, 1910.)

No. 927.

1. COURTS (§ 366*)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

A decision of the highest court of a state, construing the recordation acts of the state as respects what is necessary to be done to secure liens thereunder, will be followed by the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. § 366.*

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

2. MECHANICS' LIENS (§ 154*)—WEST VIRGINIA STATUTE—VERIFICATION BEFORE FOREIGN NOTARY—NECESSITY OF CERTIFICATE OF AUTHENTICATION.

Under the mechanic's lien law of West Virginia (Code W. Va. 1906, c. 75), which requires a sworn statement giving a true account of the amount due with a description of the property to be filed with the clerk of the county court, and Code W. Va. 1906, c. 130, § 31, which provides that an affidavit may be made before any officer of another state or country and authenticated by the certificate of the clerk or other officer of a court of record of such state or country, under an official seal, verifying the signature of the first-mentioned officer and his authority to administer oaths, as such statutes have been construed by the Supreme Court of Appeals of the state, the certificate authenticating the signature and official capacity of a foreign officer before whom a lien claim is verified, attached to the claim when filed, is essential to the validity of the lien, and its omission cannot be cured by amendment after the time allowed by the statute for filing the lien has expired.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 154.*]

3. MECHANICS' LIENS (§ 246*)—FAILURE TO PERFECT—POWER OF COURT TO ENFORCE.

A mechanic's lien is purely statutory, and, where the complainant in a suit to enforce such a lien has failed to perfect it in the manner required by the statute, the court cannot establish a lien on equitable considerations, however meritorious the claim may be.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 246.*]

4. MECHANICS' LIENS (§ 154*)—"VERIFICATION."

The verification contemplated by Code W. Va. 1906, c. 130, § 31, relating to the verifying of mechanics' liens, is an oath or affirmation taken and administered by and before an officer having authority by law to administer and certify oaths and affirmations.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 154.*

For other definitions, see Words and Phrases, vol. 8, pp. 7295, 7296.]

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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 Northern District of West Virginia, at Clarksburg.

Suit in equity by the Vilter Manufacturing Company against the Tygart Valley Brewing Company. Decree for complainant (168 Fed. 1002), and defendant appeals. Reversed.

The appellee, by agreement, dated February 1, 1906, contracted with the appellant to furnish and erect, in the latter's brewery, at Grafton, Taylor county, West Virginia, two large refrigerating machines and an ice plant, at the price of $21,500. After the completion of the work, the appellee, pursuant to the laws of the state of West Virginia, on the 22d day of April, 1907, filed in the clerk's office of said county its mechanic's lien, namely, an account purporting to show, among other things, a just and true account of the amount due, after allowing all credits, together with a description of the property to be covered therein, the name of its owner, against the plant and premises, and the land used in connection therewith, duly described in said lien. This account was sworn to before a notary public of the state of Wisconsin, and filed within the time prescribed by the statute, that is, within 60 days from the cessation of the labor on and furnishing material in connection with such machinery and ice plant; and the appellee, within the period allowed by the same statute, namely, 6 months from the date of the filing of said lien in the clerk's office, filed the bill in this case in the Circuit Court of the United States for the Northern District of West Virginia, for the purpose of enforcing the lien for the balance claimed to be due under the contract. The defendant in the lower court, the appellant here, appeared and demurred to the bill, assigning, among other grounds, that the account or lien, which was executed and subscribed to before a notary public of the state of Wisconsin, was not accompanied with the certificate of the clerk, or other officer of a court of record, in said last-named state, under his official seal, verifying the genuineness of the signature of said notary, and showing his authority to administer oaths, as required by the laws of the state of West Virginia. After the filing of the demurrer, the complainant was allowed to file an amended and supplemental bill, setting up the fact, among others, that the notary before whom the account referred to had been verified and filed as a mechanic's lien was authorized to administer oaths, and that his signature was genuine, and duly exhibited with said amended and supplemental bill a formal certificate dated the 12th day of August, 1907, from Fred. W. Cords, clerk of the circuit court of the county of Milwaukee and state of Wisconsin, under the seal of said court, showing these facts. This certificate was not annexed to and made a part of said account, nor did it purport to have been issued in relation thereto, but merely certified that the notary in question, whose name appeared at the top of the certificate, was duly commissioned and qualified, and that he was familiar with and verily believed his signature to be genuine. This certificate was not filed in the office of the clerk of the county court of Taylor county, W. Va., before or at the time of the filing of the amended and supplemental bill, or within 60 days from the completion of the work for which the lien is claimed. To this amended and supplemental bill a demurrer was also filed, assigning the insufficiency of the certificate dated 12th of August, 1907, unannexed to the claim for lien, and unrecorded therewith, to cure the defect in the claim for lien as originally filed. This demurrer was overruled, and thereupon appellant, the defendant below, answered the original and amended and supplemental bills, setting up the defects aforesaid in the complainant's lien, denying that a legal lien had been perfected, and made claim for alleged damages caused by delay in the erection of the machinery and plant. Subsequently, upon the motion of the complainant, leave was granted it to withdraw from the files the certificate of the clerk of the circuit court of Milwaukee county aforesaid, in order that the same might be filed in the office of the clerk of the county court of Taylor county, W. Va., and the same was withdrawn and recorded in said court in its record book of mechanics' liens; and thereupon, by leave of court, a second amended and supplemental bill was filed, setting up the withdrawal and recordation of such certificate and the contention that said lien was

thereby validated, to which a demurrer was interposed, again assailing the validity of the lien, and the same was overruled by the court. The defendant then answered the second amended and supplemental bill. Proofs were duly taken, and the cause submitted upon its merits; and the court, on the 3d day of April, 1909, filed its written opinion, reaffirmed its ruling on the demurrers, rejected the defendant's counterclaim, and found that the complainant on such lien was entitled to recover a balance of $8,294.39, for which a decree was, on the 20th day of April, 1909, duly entered, and the plant and premises ordered to be sold, from which decree this appeal was taken.

John Bassel (Fred. T. Martin, on the brief), for appellant.
C. F. Fawsett, for appellee.

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

WADDILL, District Judge (after stating the facts as above). The assignments of error raise but two questions: First, the validity of the lien, because of the defective authentication thereof; and, second, the propriety of the rejection of the counterclaim for liquidated damages.

Considering the sufficiency of the certificate to the mechanic's lien under the West Virginia statute, the provisions of the same, so far as material, will be found in Code W. Va. c. 75, § 2 et seq., especially sections 4, 5, 10, and 11. Section 2 gives the lien. Section 4 provides how it shall be claimed, and is as follows:

"Sec. 4. Every lien provided for in the second and third sections shall be discharged unless the person desiring to avail himself thereof shall, within sixty days after he ceases to labor on, or furnish material or machinery for such building or other structure, file with the clerk of the county court of the county, in which the same is situated, a just and true account of the amount due him, after allowing all credits, together with a description of the property intended to be covered by the lien, sufficiently accurate for identification, with the name of the owner or owners of the property, if known, which account shall be sworn to by the person claiming the lien, or some person in his behalf."

Section 5 provides how, when, and where the lien must be recorded; section 10, within what time the bill must be filed for its enforcement, and the method of procedure thereunder; and section 11, the time within which such suit shall be instituted, and the effect of failure so to do. Code W. Va. 1906, c. 130, § 31, provides how affidavits before officials of another state, or nonresident officials, must be authenticated, viz.:

"An affidavit may also be made before any officer of another state or country authorized by its laws to administer an oath, and shall be deemed duly authenticated if it be subscribed by such officer, and there be annexed to it a certificate of the clerk or other officer of a court of record of such state or country, under an official seal, verifying the genuineness of the signature of the first mentioned officer, and his authority to administer an oath."

The question here presented involves the true interpretation to be given to the statutes of the state of West Virginia, and this court, where those statutes have been interpreted by the court of last resort of the state, will follow that construction, certainly as respects

the meaning of its recordation acts and what is necessary to be done to secure liens thereunder. According to our view of those decisions, the precise question here involved has already been passed upon, and we have heretofore, in another case before us, followed that decision. Lockhead v. Berkeley Springs W. & Imp. Co., 40 W. Va. 553, 21 S. E. 1031, was, as here, a suit filed for the enforcement of an alleged mechanic's lien, which was assailed because of the lack of due authentication of the certificate of the officer before whom the account was sworn to, and the court, among other things, said:

"Here the statute prescribes a method of giving notice to all whom it may concern, by requiring it to be in writing, and made matter of record, so that the lien created may not be secret, and the inherent nature of the transaction necessarily implies that such method is intended to be exclusive. Where a statute declares that the notice to create a lien shall be verified before filing, it is essential to the creation of the lien that it should be sworn to in the manner prescribed. The want of verification, or of a sufficient verification, is a defect which goes to the whole claim and cannot be amended. 'A claim for a mechanic's lien, when filed, should have been verified; and it should appear upon its face to have been verified, before it can be made the basis of a proceeding to enforce the claim based upon it. If any special form of verification is prescribed, it must be followed.' See Phil. Mech. Liens (3d Ed.) §§ 366, 366a, citing Hallagan v. Herbert, 2 Daly [N. Y.] 253; Lindsay v. Huth, 74 Mich. 712, 42 N. W. 358. In the latter case the notice of lien filed had no verification of any kind. The verification of the demand contemplated by the statute is an oath or affirmation taken and administered by and before an officer having authority by law to administer and certify oaths and affirmations. 2 Jones, Liens, § 1451. A verification of the claim substantially as required by statute is essential to its validity. Id. * * * Our opinion is that in such case what is essential to create the lien, and give notice thereof to the world at large of its being filed for record as such lien, does not exist, efficiently to that end, unless it appears on the face of the paper that the verification of the genuineness of the signature of the foreign officer before whom the affidavit was made, and his authority to administer an oath, does not in this case so appear by such certificate of the clerk or other officer of a court of record in such state or country, as section 31 of chapter 130 of the Code requires; that the decree sustaining the demurrer was therefore right. And the plaintiff declined to amend, and, electing to stand by his bill as he made it, there was nothing the court could do but dismiss it as on final hearing." Lockhead v. Berkeley Springs Waterworks & Improvement Co., 40 W. Va. 553, 563, 564, 21 S. E. 1031, 1034.

In passing upon the validity of a mechanic's lien, because of the absence of the very certificate of authentication lacking here, this court, in Morgan v. First National Bank, said:

"Regarding the claim of the Pittsburg Gage & Supply Company for $2,193.15, the mechanic's lien in that case does not appear to conform to the laws of the state of West Virginia as construed by the Supreme Court of Appeals of that state, by which decision we feel bound in determining upon the validity of the statutory lien enforceable in bankruptcy. The precise question raised as to this lien—namely, whether the affidavit supporting this lien, taken before a notary public in the state of Pennsylvania, was properly authenticated—was decided in the case of Lockhead v. Berkeley Springs W. & I. Co., 40 W. Va. 553, 21 S. E. 1031, and such an authentication as we have in this case was therein declared to be insufficient under the laws of West Virginia, and the mechanic's lien declared on that account invalid. The claim of the Pittsburg Gage & Supply Company will therefore be treated only as an unsecured claim in the future conduct of this case." Morgan et al. v. First Nat. Bank of Mannington et al., 145 Fed. 466, 472, 76 C. C. A. 236, 242.

The views thus announced by the Supreme Court of Appeals of West Virginia, and followed by this court, are in accordance with the decisions of courts of last recort of many states, having similar statutes, and adopted by the leading text-writers of the country.

"Where a statute declares that the notice to create a lien shall be verified, before filing, it is essential to the creation of the lien that it should be sworn to in the manner prescribed. The want of verification, or a sufficient verification, is a defect which goes to the whole claim, and cannot be amended. Phillips, Mech. Liens [3d Ed.] § 366.

"A verification of the claim substantially as required by the statute is essential to its validity. The verification of the demand contemplated by statute is an oath or affirmation taken and administered by and before an officer having authority by law to administer and certify oaths and affirmations." Jones, Liens, § 1451.

Cream City Furniture Co. v. Squier, 2 Misc. Rep. 438, 21 N. Y. Supp. 972; Colman v. Goodnow, 36 Minn. 9, 29 N. W. 338, 1 Am. St. Rep. 632; Hickey v. Collom, 47 Minn. 568, 50 N. W. 918; Stetson Co. v. McDonald, 5 Wash. 496, 32 Pac. 108; Hill v. Alliance Building Co., 6 S. D. 160, 60 N. W. 752, 55 Am. St. Rep. 819; McDonald v. Rosengarten, 134 Ill. 126, 25 N. E. 429; McGillivray v. District Tp. of Barton, 96 Iowa, 629, 65 N. W. 974; Lindsay v. Huth, 74 Mich. 716, 42 N. W. 358.

The learned judge of the court below was not unmindful of the decision of Lockhead v. Berkeley Springs, etc., supra, but was of opinion that that case had been modified, and in effect overruled, by subsequent decisions of the Supreme Court of Appeals, citing in support of his view West Virginia Building Co. v. Saucer, 45 W. Va. 483, 31 S. E. 965, 72 Am. St. Rep. 822, and that a less rigorous rule now prevails in perfecting liens of the character in question, on account of the equitable nature of the claim, and, moreover, that the defect under the circumstances in this case had been cured by amendment. We are unable to concur in any of these contentions; we do not think that the case relied on modifies the former ruling. On the contrary, the case of Lockhead v. Berkeley Springs, etc., Co., supra, has for its support the decisions of that court theretofore, as well as since rendered, all adhering to the doctrine of the necessity for strict compliance with the statute, in order to secure a mechanic's lien. Mayes v. Ruffner, 8 W. Va. 384; Stout v. Golden, 9 W. Va. 231; McGugin v. Ohio River R. R. Co., 33 W. Va., 63, 10 S. E. 36; U. S. Blowpipe Co. v. Spencer, 40 W. Va. 698, 21 S. E. 769; Niswander v. Black, 50 W. Va. 188, 40 S. E. 431; Mertens v. Cassini Mosaic & T. Co., 53 W. Va. 192, 44 S. E. 241.

Under our view, the lien must be claimed strictly in accordance with the statute, and within the time therein prescribed; and that whatever right of amendment, if any, exists, the same must be exercised during the time the lien is required to be filed; and the lien in all respects perfected before the statutory period allowed for claiming the same expires. The necessity for strict compliance with the act under which liens of this character are claimed was emphasized by this court in Liberty T. B. & L. Co. v. Furbish Sons Mfg. Co., 80 Fed. 631, 26 C. C. A. 38, a supply lien case under the Virginia statute; Judge Goff, speaking for the court, saying:

"If such a lien exists on said property in favor of the appellant, it is one unknown to the common law, as well as to courts of equity, and can be sus-

tained only under the provisions of the Virginia Code before mentioned. Being dependent entirely on the statute, * * * it can only be successfully asserted after the terms and conditions prescribed by the Code have been complied with. This legislation, while commendable in character, is far reaching in its results, and those claiming its benefits will be required to show that they have strictly complied with the obligations imposed upon them by its provisions. * * * The Legislature evidently intended that all these provisions should be respected by those desiring to avail themselves of the benefits provided for in the legislation now under consideration. The intention was that the mere inspection of a record, to be found at a particular place, should disclose all the information necessary in order to enable those interested therein to determine as to the existence of liens on the property of certain companies. * * * The Legislature, for reasons plainly evident, has wisely limited the time within which liens can be perfected, and has required that the record shall show that the party claiming has asserted them within 90 days from the time that his demand was due. The appellant is unable from the record to do this, and it must suffer the consequences." Withrow Lumber Co. v. Glasgow Investment Co., 101 Fed. 863, 42 C. C. A. 61.

The right to amend a lien improperly claimed, after the period of time in which it is required by law to be filed has expired, is clearly negatived by the last-mentioned decision of this court, and was expressly passed upon in the Lockhead Case, supra, 40 W. Va. 553, 21 S. E. 1031; the court saying:

"The want of verification, or of a sufficient verification, is a defect which goes to the whole claim, and cannot be amended."

The reason why amendments of the character here asked for cannot be made is apparent. It is not the amendment of a pleading in the cause that is desired, but an effort to change, add to, or supplement a paper that is sought to be enforced as a lien in the cause; in other words, to perfect a lien upon its face imperfect. The statute alone can be looked to to determine when and how this can be done, and, if its requirements have not been conformed to within the period specified therein, necessarily amendments cannot be made after the period specified for claiming its benefits have passed. To do so would destroy the very benefits that the recordation acts of the state are intended to secure and preserve, and make those laws a mere pitfall. Colman v. Goodnow, 36 Minn. 9, 29 N. W. 338, 1 Am. St. Rep. 632; Conklin v. Wood, 3 E. D. Smith (N. Y.) 662; Drake v. Green, 48 Kan. 534, 29 Pac. 584; McDonald v. Rosengarten, 134 Ill. 126, 25 N. E. 429; Dearie v. Martin, 78 Pa. 55; 27 Cyc. of Law & Pro. 206.

The suggestion that this court can be influenced by equitable considerations, based upon, perhaps, a meritorious claim, is untenable. The object of the bill is to enforce a lien, and the court has at once presented to it for determination by the demurrer whether one exists; if not, this court sitting in equity has no jurisdiction of the subject-matter—it matters not how meritorious the complainant's demand may be, from the standpoint of the defendant's indebtedness. This view was presented to this court in the case of Withrow Lumber Co., supra, and a rehearing granted to afford an opportunity to consider the same, and, after full argument of the cause, the court there said:

"The weakness of the contention made by the petitioner, in the application for rehearing, is that the existence of a lien is presupposed. If a lien existed, much that is said would be true; but under the Virginia mechanic's lien law, as has been repeatedly decided by the court of last resort in the state, a lien can only be acquired in the manner prescribed by the statute. The petitioner attempted to perfect its lien as required by the statute, but failed properly to do so; and, the lien not having been thus secured, it is impossible otherwise to set it up. The court cannot, upon the theory of keeping alive the right to secure an inchoate or incipient lien, create one." Withrow Lumber Co. v. Glasgow Investment Co., 106 Fed. 363, 45 C. C. A. 321.

The conclusion reached by the court on the first assignment of error, that the appellee's lien is invalid, makes it unnecessary to pass upon the question presented by the second assignment, relating to the appellant's defense of set-off.

The decision of the lower court will therefore be reversed, and the case remanded thereto, with directions to dismiss the bill, but without prejudice to the complainant to take such steps as it may be advised to establish its claim and recover the same from the defendant.

Reversed.

REDWINE v. CONTINENTAL REALTY CO., INC.

(Circuit Court of Appeals, Sixth Circuit. January 3, 1911.)

No. 2,046.

1. CORPORATIONS (§ 432*)—CONTRACTS—AUTHORITY OF MANAGING AGENT.
The general manager of a corporation who on its behalf made a contract, the validity and binding effect of which is not denied, is presumed to have authority to accept performance of such contract, and the other party thereto is justified in acting on such presumption.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1727; Dec. Dig. § 432.*]

2. PRINCIPAL AND AGENT (§ 81*)—COMPENSATION OF AGENT.
Plaintiff contracted with defendant to procure contracts for the sale to it of 300,000 trees of specified kinds and dimensions at not to exceed a stated price per tree, for which he was to be paid a commission. The contract was to continue for one year after which it was terminable by either party, and provided that plaintiff should use his energy and best ability to procure the contracts at as low a price as possible, but should not be held responsible for the deficiency if he failed to procure contracts for the full number of trees, in which case he should be paid a proportionate part of the commission. Plaintiff procured a single contract from other parties to furnish the full number of trees which was accepted by defendant with an express indorsement thereon that it was in fulfillment of plaintiff's contract. Defendant subsequently brought an action for breach of such second contract. *Held*, that plaintiff's contract was not one for a year's services, but was performed when he procured contracts for the required number of trees which were acceptable to defendant, and that, in the absence of fraud, he was entitled to recover the stipulated commission.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 81.*]

8. PRINCIPAL AND AGENT (§ 89*)—ACTION—QUESTIONS FOR JURY.
In an action for compensation, the question whether plaintiff was precluded from recovery by fraud *held* under the evidence one for the jury.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 89.*]

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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 Eastern District of Kentucky.

Action at law by D. B. Redwine against the Continental Realty Company, Incorporated. Judgment for defendant, and plaintiff brings error. Reversed.

Harmon, Colston, Goldsmith & Hoadly, for plaintiff in error.

Worthington & Cochran and Edward W. Hines (Charles C. McChord, of counsel), for defendant in error.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

SEVERENS, Circuit Judge. This is an action brought by the plaintiff, Redwine, to recover compensation for services performed by him for the defendant in procuring contracts for standing trees in several counties in the state of Kentucky. The agreement under which the plaintiff undertook to procure such contracts for the defendant reads as follows:

"This agreement, made and entered into, this the 24th day of July, 1903, by and between D. B. Redwine, of the town of Jackson, Breathitt county, Ky., party of the first part, and the Continental Realty Company, incorporated under and by virtue of the laws of Delaware, with offices at Baltimore, Md., and Jackson, Ky., party of the second part, witnesseth:

"First. That for and in consideration of the sum of one ($1.00) dollar cash in hand paid, the receipt of which is hereby acknowledged, and for the further consideration to be paid as hereinafter set out, the said first party agrees to procure contracts for (300,000) three hundred thousand standing trees, on the waters of the North fork of Kentucky river in the counties of Breathitt, Perry, Knott and Letcher, state of Kentucky, said contracts to be taken in the name of Continental Realty Company, Incorporated, in the form and manner of a blank contract hereto attached and made a part hereof, the same to be duly acknowledged by the grantors, and recorded in the proper county clerk's office, the expense of which to be defrayed by the party of the second part.

"Second. The said three hundred thousand (300,000) trees shall be made up of the following dimensions, and kinds of timber, to wit:

"White oak, twenty, 20 inches up diameter, 3 ft. from ground.

"Hickory, twenty, 20 inches up diameter, 3 ft. from ground.

"Red oak, twenty, 20 inches up diameter, 3 ft. from ground.

"Chestnut oak, twenty inches up diameter, 3 ft. from ground.

"Lynn, twenty, 20 inches up diameter, 3 ft. from ground.

"Ash, twenty, 20 inches up diameter, 3 ft. from ground.

"Cucumber, eighteen 18-inch up diameter, 3 ft. from ground.

"Poplar, 18-inch up diameter, 3 ft. from ground.

"Said timber to be measured with the proper deductions for bark thereon, and said trees shall be measured at least twenty-four (24) feet of body, three feet from the ground on the upper side, clear of limbs, knots and other defects.

"Third. The said party of the second part for and in consideration of the work to be done and the contracts secured as above mentioned agrees and binds itself to pay unto the said party of the first part the sum of five thousand ($5,000) dollars if said party of the first part secure said three hundred thousand (300,000) trees of the kinds, sizes and dimensions mentioned in clause 2nd of this agreement.

"Fourth. It is expressly understood between the parties hereto that should the party of the first part fail to secure three hundred thousand (300,000) trees he shall be paid, on the number of trees secured on the ratio of five thousand ($5,000) dollars for three hundred thousand (300,000) trees, that is

one hundred ($100.00) dollars for each six thousand (6,000) trees secured, and shall not be held responsible for the deficiency.

"Fifth. The party of the first part agrees and binds himself to secure said contracts in trees, for a sum not to exceed ($1.00) dollar per tree, and said party of the first part further agrees to use his energy and best ability to secure contracts on said timber at as low a figure as within him lies; and second party agrees that first party shall take or secure said contracts at any price not exceeding one dollar per tree.

"Sixth. Said party of the second part agrees and binds itself to pay unto the party of the first part, the seventy-five (75) per cent. of the amount of commission, upon the turning over to said second party the contracts for any number of trees, the remainder, twenty-five (25) per cent. shall be due and payable to said party of the first part, upon the abstract of title being made, and found satisfactory, the trees counted and branded by the attorneys, representatives and agents of the said second party and the number of trees determined, but should said second party fail to complete the abstracting, counting and branding of the timber inside of twelve months from the date of the contracts on the same then the said remainder of twenty-five (25) per cent. shall immediately be due, and payable.

"Seventh. The said party of the second part further agrees, and binds itself to pay all the legitimate expenses of the party of the first part while actually engaged in the business of buying trees mentioned herein; and said second party further agrees to advance such sums of money as may be necessary to secure said contracts, not to exceed ten cents per tree, money thus advanced to go as payment on the purchase price of said timber. * * *

"Ninth. It is expressly agreed between the parties hereto that the commission of first party shall be either paid in cash or in stock of Continental Realty Company, at the election of said first party. This contract shall continue for at least twelve months from the date hereof, and the same can be terminated at any time, thereafter, by either party on notice in writing duly directed and mailed to the address of the other party, in the way and manner all United States mail of the same class is mailed or posted.

"Given under our hands the day and date first above written.

"D. B. Redwine,
"Continental Realty Co.,
"By C. J. Little, Gen. Mgr."

Eight days after the date of this agreement, and on August 1, 1903, the following contract procured by the plaintiff was submitted by him to the defendant and was accepted and executed in its behalf by its general manager:

"This agreement, made and entered into this the first day of August, 1903, by and between J. B. McLin, of Jackson, Ky., and Kiah Kilbourn, of Whitesburg, Ky., doing business under the firm name of McLin & Kilbourn, party of the first part, and the Continental Realty Company, incorporated under and by virtue of the laws of Delaware, with offices at Baltimore, Md., and Jackson, Kentucky, party of the second part, witnesseth:

"That for and in consideration of the sum of one ($1.00) dollar, cash in hand paid, the receipt of which is hereby acknowledged, and for the further consideration to be paid as hereinafter set out, the said first party has sold and binds themselves to convey by deed of general warranty to second party, or order, 300,000 merchantable white oak, red oak, chestnut oak, hickory, lynn, ash, cucumber, and poplar trees, and the said first party has the privilege, if they so desire, to furnish any number they desire, not exceeding 500,000 trees, in like number, to second party, all of said trees to be located on the waters of the North fork of Kentucky river and in the counties of Breathitt, Perry, Knott, and Letcher, or in one or more of said counties and the said trees are to be of the following dimensions, viz.:

"White oak, 20 in. and up in diameter, 3 ft. from ground on upper side.

"Chestnut oak, 20 in. and up in diameter, 3 ft. from ground on upper side.

"Red oak, 20 in. and up in diameter, 3 ft. from ground on upper side.

"Hickory, 20 in. and up in diameter, 3 ft. from ground on upper side.

"Lynn, 20 in. and up in diameter, 3 ft. from ground on upper side.
"Ash, 20 in. to 24 in diameter, 3 ft. from ground on upper side.
"Poplar, 18 in. to 24 in diameter, 3 ft. from ground on upper side.
"Cucumber, 18 in. to 24 in diameter, 3 ft. from ground on upper side.
"Poplar, 24 in. and up in diameter, 3 ft. from ground on upper side.
"Cucumber, 24 in and up in diameter, 3 ft. from ground on upper side.
"Ash, 24 in. and up in diameter, 3 ft. from ground on upper side.

"All measurements to be made 3 feet from the ground on the upper side, inside of bark, or proper deductions made for bark, and to have a body at least 24 feet in length, 3 feet above the ground, to be clear of limbs, knots and other defects.

"First parties agreed and binds themselves to furnish second party with plat and certificate showing the number of acres contained in the tracts of land on which said trees are located, together with an abstract of title satisfactory to second party, or such as will show a good title and upon the acceptance of title to said land, or trees the second party agrees and binds themselves to pay to first party two dollars and fifty cents ($2.50) per tree for poplar, ash, cucumber, 24 inches and up in diameter and seventy-five cents (.75) per tree, in cash, for all other trees furnished, branded and accepted by second party as contemplated herein. Second party further agrees to advance to first party a sufficiency of money to secure said contracts for said trees not to exceed 10 cents per tree, and any and all money so advanced by second party shall be a credit on the purchase price of said trees and treated as part of same.

"All the contracts for said trees shall be taken in the name of J. R. McLin, trustee for the Continental Realty Company, and to be acknowledged according to law and recorded in the proper county clerk's office, the expense of same to be paid by the second party.

"The contracts shall be taken upon the blank form hereto attached, which is made a part of this contract, to include the right of way over the lands on which said trees are located, together with right of way for tram-road, railroads, commissaries and splash-dams, shanties, and all things necessary for the manufacturing and transportation of timber to market or otherwise. Second party shall have the right to enter upon the lands at any and all times in the protection of said trees or for the purpose of removing or manufacturing same into lumber or otherwise, but not to interfere with growing crops. This contract shall continue in force for one year from this date, at which time either party may terminate same by giving the opposite party notice in writing, but all contracts, deeds or other instruments of writing taken in the name of J. B. McLin, trustee for second party under this contract, shall be perpetual.

"The said J. B. McLin, trustee, binds himself to convey said trees by deed of special warranty, upon demand of second party and on the payment of the purchase price as herein stipulated. It is further agreed that the advancement referred to in this contract in cash shall be furnished upon demand of said J. B. McLin.

"Second party is to commence taking up and branding said timber as soon as the abstracts, plat and certificate herein provided had been furnished to second party and title found to be perfect, and continue to take up same as rapidly as practicable.

"Given under our hands, August 1st, 1903.

"McLin & Kilbourn,
"By J. B. McLin.
"Continental Realty Co.,
"By C. J. Little, Gen. Mgr."

To this contract there was appended the following acknowledgment:

"The foregoing contract was this day procured to be entered into and executed by McLin and Kilbourn to the Continental Realty Co., by D. B. Redwine, in contemplation of and for the fulfillment of his contract with the Continental Realty Co. of date July the 24th, 1903.

"This Aug. the 1st, 1903. Continental Realty Co.,
"By C. J. Little, Gen. Mgr."

Attached to the foregoing contract was a blank form of contract which McLin was to use in taking contracts with others, as specified in the above-mentioned contract between McLin & Kilbourn and the realty company. The plaintiff thereupon elected to take his compensation in money.

To a petition of the plaintiff brought to recover his compensation which stated the particular terms of the written agreement between the plaintiff and defendant and making an exhibit of the same, and further alleging his performance thereof, the defendant interposed a demurrer which failed to state the grounds thereof. Thereupon the plaintiff tendered an amended petition which, against the defendant's objection, the court allowed to be filed. This amended petition seems to differ from the original mainly in stating the substance of the contract, and did not attach the exhibit. To this also there was a general demurrer. This was overruled. Then the defendant answered the petition. The substance of the answer was that the McLin & Kilbourn contract was never accepted by the defendant as a performance of the plaintiff's contract, and, further, that no part of the compensation agreed to be paid to the plaintiff had ever become due and payable. After some further proceedings not necessary to mention, the plaintiff again, by leave of the court, amended his "reformed" petition by striking out a nonessential part of it, and adding to it a count for quantum meruit. But the plaintiff at no time deserted his claim to compensation under his contract. Enough was left of the petition after it was amended by striking out the matter referred to, to constitute a special count upon the contract. It was so understood by the defendant when it moved for an election on which count the plaintiff would elect to proceed as next stated.

The defendant thereupon moved that the plaintiff be required to elect on which cause of action he would seek to recover. This was denied. Thereupon the defendant amended its answer by denying that the plaintiff procured the McLin & Kilbourn contract, denying that his services were rendered to the defendant or at its request, and denying that his services were of any value. The case came on for trial before a jury, and on the conclusion of the evidence the court, on the request of the defendant's counsel, directed a verdict for the defendant. On what ground the request was made, or the instruction given was rested, does not appear. The plaintiff excepted to the charge of the court, and thereon founds an assignment of error. Certain rulings were made excluding evidence offered by the plaintiff to which the plaintiff excepted. It seems to us that, upon the evidence given and tendered, the jury might not unreasonably have found a verdict for the plaintiff. Indeed, as the case stood upon the pleadings, the cause of action stood confessed, and nothing was stated by the answer which constituted any defense, providing the written terms of the transaction are to be construed as we think they should be. The contract between the parties is not denied, the procuration by the plaintiff of the McLin & Kilbourn contract is acknowledged by the general manager, and its acceptance as a performance of the plaintiff's contract by the same manager of the defendant is also ad-

mitted, or, if his indorsement upon the McLin & Kilbourn contract is not such an acceptance, the manager's testimony at the trial proved it. He was the same agent who made and signed for the defendant the contract with the plaintiff, and, no fact appearing to the contrary, the law will presume that he was qualified to attend to and accept the manner of its performance in behalf of the defendant, and will hold the plaintiff justified in assuming that the manager was competent to bind his company in that regard. Mechem on Agency, § 365; Johnson v. Christian, 128 U. S. 374, 9 Sup. Ct. 87, 32 L. Ed. 412. The main stress of the argument of counsel for the defendant is rested on a construction of the contract which we think is erroneous. They contend that the plaintiff agreed to serve the defendant in procuring contracts for a year, and that he was "to use his energy and best ability" during that time in securing contracts for the defendant, and that he assumed a responsibility for the performance, and the value, of the contracts which he was to procure, to the defendant. The contract, as we understand it, does not cast any of these obligations upon the plaintiff.

The plaintiff agreed to procure for the defendant contracts for 300,000 trees. He did not agree to procure contracts for more than that; but it was agreed that, if he failed to get contracts for that number, he was to be paid the proportion of the commission he was promised, which those he procured would bear to the whole amount of his commission. And he further agreed to use his energy and best ability to procure the contracts at as low a price as he could. The $5,000 was to be paid for getting contracts for the 300,000 trees, and was no consideration for anything else. Of course, if the contracts he was to procure did not conform to the specifications, or if there should be fair doubt of the ability of the contractors to perform the contracts, the defendant might refuse to take them. And it would be entitled to a reasonable time to inform itself. In the present case, however, the defendant accepted the McLin & Kilbourn contract, pursued it, and at length, after it had found that the contract was not going to be performed, made claim to recover damages upon it in a suit with the contractors. The plaintiff did not guarantee the responsibility of parties who would make the contracts. He was bound to exercise good faith in procuring them, and if he knew, or had good reason to believe, that the contracts would not be performed and it turned out so, he would not be allowed to recover the agreed compensation. But if the defendant, with knowledge that the contract had been procured, did not repudiate it, but, on the contrary, sought to enforce it, and get damages for its breach, it would thereafter be precluded from denying its obligation to the plaintiff, unless it should be developed that the plaintiff had acted in bad faith.

As the record does not give any sure information of the reasons for taking the case from the jury, we are left to conjecture what they were. If they rested upon the construction of the contract, which counsel here contended for, we should have no hesitation in holding that the court erred in its direction. But from some of the evidence which was admitted we infer that the court may have thought that

the plaintiff was guilty of a fraud, in that he was himself interested in the contract of sale by McLin & Kilbourn to the defendant, and so in the price at which the trees were agreed to be sold, and that the defendant did not know of this, in which case the defendant contends the plaintiff could not recover. If the facts were as suggested, a grave question would arise whether, after all that had happened, the conditions were such as to justify the conclusion. There was no such defense made by the answer. We are inclined to think, however, and so hold, that, if the plaintiff had an interest in the price which the defendant was to pay for the McLin & Kilbourn trees which they contracted to sell, and that this was not known to the defendant until it ceased to prosecute its claim for damages against McLin & Kilbourn, he cannot maintain his action. There was some testimony which pointed to the existence of such facts, and, if the court was contemplating this as something decisive of the case, it should have admitted evidence tendered by the plaintiff but excluded by the court. Thus the plaintiff, who testified, was asked:

"Whether, after the execution of this contract between you and the Continental Realty Company, did you have any interest whatever in the trees, belonging to McLin & Kilbourn?"

Counsel for defendant objected, but assigned no reason for the objection. The court sustained it and rejected the evidence. This was error, if that question were to be a factor in the case.

Mr. Little, the general manager, was a witness in the case, and gave testimony from which a jury might reasonably infer that he knew of the relations of the plaintiff with McLin & Kilbourn, and that he understood that the trees they were concerned with might be furnished under this contract with the plaintiff. The plaintiff's claim was that he withdrew from his relations with McLin & Kilbourn prior to this contract with defendant and had no further interest in the trees. Enough has been said to show that it was a question of fact whether the plaintiff procured the McLin contract, intending thereby to cover up an interest of his own and make profit thereby. The court could not, as we think, properly withdraw this question from the jury.

There are no other questions which seem to require separate consideration. Some minor points are raised, but they are not likely to be presented on a new trial. Leave should be granted to the parties to reform their pleadings before the new trial shall be had.

The judgment must be reversed, with costs, with direction to award a new trial.

MIDDLESWORTH et al. v. HOUSTON OIL CO. OF TEXAS et al.†

(Circuit Court of Appeals, Fifth Circuit. January 24, 1911. Rehearing Denied February 28, 1911.)

No. 1,970.

1. EXECUTION (§ 320*)—SHERIFF'S DEED—VALIDITY AND PRESUMPTIONS.
Under the law of Texas, a sheriff's deed to convey title must be supported by a valid judgment by a court of competent jurisdiction and a valid execution thereunder which are ordinarily proved by duly certified

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

† Rehearing denied February 28, 1911.

copies from the court records; but, where such records have been destroyed, proof may be made by other legal evidence, and, where 30 years have elapsed, the existence of the judgment and execution recited in the deed may be presumed, but not a judgment or execution varying from that described.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 940–945; Dec. Dig. § 320.*]

2. EXECUTION (§ 320*)—SHERIFF'S DEED—RECITALS.

As a general rule, a claimant under a deed is estopped from denying the material recitals in such deed, and recitals of the power to convey asserted by the grantor are material; but the rule of decision in Texas is that a misrecital of the judgment in a sheriff's deed, such recital not being required by statute, is not material if it is shown that the sale was under a valid and subsisting judgment and execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 940–945; Dec. Dig. § 320.*]

3. EXECUTION (§ 256*) — QUESTION FOR JURY — EVIDENCE — CONTRADICTING WRITING.

An action was brought in a court of Texas against the unknown heirs of a decedent to recover land which had been patented to such heirs by the state. The court appointed attorneys to defend the suit, which they did successfully. In 1878, after the entry of judgment by the trial court, but before the case was heard on writ of error by the Supreme Court, which affirmed the judgment, the land was sold by the sheriff; his deed reciting that the sale was made under an execution issued on a judgment against the unknown heirs of the decedent in favor of the attorneys so appointed by the court for a stated sum of money. The execution and court records of the time had been destroyed by fire prior to 1906, when plaintiffs, who were the heirs of such decedent, brought action to recover the land from defendant which claimed through the sheriff's deed. A personal judgment against unknown heirs such as recited in the deed would have been void as without due process of law; but there was parol testimony tending to show that there was no such judgment, and that the sale was made under an order entered in the original action against such heirs, fixing the compensation of the attorneys who defended the action and making the same a lien on the land. *Held*, that such testimony, contradictory as it was of the recitals in the deed, was not sufficiently conclusive to establish the validity of the sale as matter of law, and that the question was one for the jury.

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

4. ATTORNEY AND CLIENT (§ 192*)—LIEN OF ATTORNEY APPOINTED BY COURT FOR UNKNOWN DEFENDANT—FORECLOSURE—TEXAS STATUTE.

Act Tex. Nov. 9, 1866 (5 Gammell's Laws, 125), gave a right of action to recover land against unknown owners on service by publication and authorized the court to appoint an attorney to represent such owners, to allow him a reasonable compensation, and to enter a judgment therefor which should be a lien on the land. *Held*, that the statute did not authorize the issuance of an execution on such judgment in favor of the attorneys, who were not parties to the cause, and the sale of the land thereunder without further notice to the owners, but that, in the absence of provision otherwise, the lien could only be foreclosed by an equitable suit and on due notice to the owners.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 425–427; Dec. Dig. § 192.*]

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

Action at law by Caroline C. Middlesworth and others against the Houston Oil Company of Texas and others. Judgment for defendants, and plaintiffs bring error. Reversed.

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

This action was brought by plaintiffs in error March 9, 1906, in the ordinary form of trespass to try title against the Houston Oil Company of Texas, and various other defendants, for the recovery of a league and labor of land in Hardin county patented by the Governor of Texas to the heirs of George Brown on September 7, 1860. On the trial before court and jury November 24, 1908, the plaintiffs showed themselves to be heirs of George Brown and the death of George Brown, and their right to recover such title as is now vested in the heirs of said George Brown is undisputed.

The defendant the Houston Oil Company of Texas pleaded not guilty as to all but 50 acres which it disclaimed, the three, five, and ten years' statutes of limitation, while the other defendants, Richmond Orton, Henry and Louisa Fugia, Jack Tonchett, J. K. P. Holland, each pleaded "not guilty" and the ten years' statute of limitation to 160 acres each, while Jack Noland pleaded "not guilty." Plaintiffs pleaded in answer to the pleas of limitation coverture since 1875. John L. Little claimed through assignments from the defendant settlers and pleaded limitation under the ten years' statute. The Houston Oil Company claimed limitation through some of the settler defendants, as tenants, while said defendants denied tenancy and claimed 160 acres each in their own right, and an issue of fact was squarely drawn as to the question of their tenancy; their occupancy for the requisite time being undisputed.

The trial court peremptorily instructed the jury to bring in a verdict in favor of the Houston Oil Company of Texas against the plaintiffs, and submitted to the jury the issues of limitation between the Houston Oil Company and its codefendants. The verdict of the jury was against the Houston Oil Company's contention of tenancy and was in favor of the squatters, and motion of said company for a new trial was overruled, and judgment was accordingly entered. It therefore appears that the Houston Oil Company has no title by limitation, and such title as it has is a record title. The only issue in this court is the correctness of the charge of the trial court giving peremptory instruction against the plaintiffs in error and in favor of the Houston Oil Company.

It is shown by the evidence that on September 1, 1856, a special act was passed by the Legislature authorizing the issuance of a land certificate to the heirs of George Brown, deceased. Pursuant to this act, certificate No. 5,017/5,018, was issued, under which a patent issued in favor of said heirs, and the title to the lands in controversy is now vested in them unless it has passed out by the sheriff's sale hereinafter referred to.

The Houston Oil Company, to take the title out of said heirs, introduced a sheriff's deed from the sheriff of Hardin county to John P. Work in words and figures as follows:

"The State of Texas, County of Hardin.

"Whereas by virtue of an execution to me directed and issued from the district court of Hardin county, Texas, on the 10th day of August, A. D. 1878, upon a judgment obtained in said court on the 19th day of July, A. D., 1878, by P. A. Work and N. A. Cravens, Jr., against the unknown heirs of George Brown for the sum of six hundred and fifty dollars, I levied upon on the 10th day of August, A. D. 1878, and advertised for sale all the right, title and interest that said unknown heirs of George Brown had in and to a league and labor of land patented to the heirs of George Brown by the state, on the 7th day of September, A. D. 1860, and situated in said Hardin county (here follows field notes of land which are omitted) containing within the above set out metes and bounds one league and one labor, or four thousand six hundred and five acres of land, and whereas on Tuesday, the 3d day of September, A. D., 1878, the same being the first Tuesday in said month of September, and having previously advertised said sale and the time and place thereof for the length of time and in the manner required by law, I proceeded to sell at the courthouse door in the town of Hardin in said Hardin county, between the hours prescribed by law, to the highest bidder, at public auction, all the right, title and interest that the said unknown heirs of George Brown had in and to the above mentioned and described league and labor of land, and whereas at such sale John P. Work having bid therefor the sum of one hundred and seventy-five dollars, and this being the

highest and best bid made, became the purchaser thereof. Wherefore, know all men by these presents that I, W. W. Lyon, sheriff of Hardin county, Texas, in view of the premises and in pursuance of the authority in me vested by law, have sold and conveyed unto John P. Work of the county of Hardin and state of Texas, for and in consideration of said sum of one hundred and seventy dollars, all the right, title and interest that the said unknown heirs of George Brown has or had, in and to the above mentioned and described one league and labor of land, together with all and singular the rights, privileges or immunities thereunto belonging or in any wise incident or appertaining, to have and to hold and to possess the same unto him, the said John Work, his heirs or assigns forever as against the claim of the said unknown heirs of George Brown and any and all persons claiming by, through or under the unknown heirs of George Brown, subsequent to the said levy on the 10th day of August, A. D. 1878, by virtue of the execution hereinbefore mentioned.

"Given under my hand September 4, A. D. 1878.

"W. W. Lyon, Sheriff of Hardin County.

"The State of Texas, County of Hardin.

"Personally appeared before me on the 7th day of September, A. D. 1878, W. W. Lyon, sheriff of Hardin county, aforesaid, and who is personally well unknown (known) to me, who acknowledged that he had executed the above and foregoing deed of conveyance for the purpose and consideration therein specified.

"Witness my hand and official seal in Hardin county, September 7, 1878.

"[Seal] W. G. Brackin, C. D. C. H. C., By O. H. Butler, Deputy."

No judgment nor execution was produced in support of the judgment, but it was agreed by counsel for both sides that the judgment and execution records of Hardin county for this date were destroyed by fire.

N. A. Cravens, one of the plaintiffs in execution, and in the recited judgment, testified that he never had knowledge of any suit in Hardin county in which he was plaintiff, that he was never coplaintiff with P. A. Work in any such suit, never authorized such a suit, nor obtained such a judgment as that recited in the sheriff's deed, and never asked for nor had execution issue against the unknown heirs of George Brown, and never authorized the issuance of same, nor authorized nor obtained a levy upon the land in question.

Upon testimony of Mr. Cravens, taken by defendant the Houston Oil Company of Texas, he testified that he and Col. P. A. Work together represented the unknown heirs of George Brown, under appointment of the court, in case instituted in Hardin county by McKinney et al., in 1877 or 1878; same being the case reported in 51 Tex. 94. He further testified as to the nature of the plaintiffs' cause of action, and said that a copy of the petition in said suit was attached to his answers.

This petition, omitting description of land, is as follows:

"Plaintiff further alleges that she is the owner of said land by and through mesne conveyance from said George Brown, but that the before recited transfer from George Brown to Josiah H. Bell has never been recorded nor proven for record, nor acknowledged as the law requires, owing to the death of the grantor and each of the subscribing witnesses thereto, and by plaintiff being unable to find the requisite witnesses who are acquainted with the handwriting of said George Brown, and that the failure to have said transfer proven or acknowledged for record, and the possible claim of defendants in and to said land, is a cloud upon the plaintiff's title thereto, whereby a right of action has accrued to plaintiff against defendant. Plaintiff further alleges that the mesne transfer is, first, a deed from Thaddeus C. Bell and James H. Bell, sole heirs at law of Josiah H. Bell, deceased, to James W. Coffee, dated 9th of March, 1858. The will of said Jas. W. Coffee, deceased, whereby plaintiff is made sole legatee of said Jas. W. Coffee, duly recorded in Brazoria county, Tex. Wherefore plaintiff alleges that she is the owner of said land, and she sues and prays that the said defendants may be cited in the terms of the law to appear and answer this petition. That upon a hearing hereof the plaintiff may have a judgment establishing the said trans-

fer from the said George Brown to the said Josiah H. Bell, as aforesaid, and a decree for the title to said land as against the defendants, and have such other and further judgment and decrees to justice and equity shall appear and including costs and general and special relief as in duty bound, etc.

"Winch & Schaffer, For Plaintiff."

He further stated: That in said case a fee of $650 was allowed himself and Col. P. A. Work for services as attorneys for the unknown heirs, and that his recollection is that said amount of money was declared a lien on said land to secure the payment of said amount. That he and Col. Work made a division of the fee, he getting $260 and Col. Work $390 thereof, and that he transferred his interest in said fee to John P. Work, a son of Col. P. A. Work, his associate in the case.

The agreement dividing the fee and assignment thereof to John P. Work is as follows:

"The State of Texas, County of Hardin.

"Be it known that on this, the 19th day of July, A. D. 1878, the sum of six hundred and fifty dollars was allowed P. A. Work and N. A. Cravens as reasonable compensation for legal services rendered by them as attorneys at law, under appointment of the court to defend in behalf of the defendants in a certain suit, No. 140, in the district court of said Hardin county, wherein E. L. McKinney and her husband, Samuel McKinney, were plaintiffs and the unknown heirs of George Brown were defendants, and whereas judgment has been entered in favor of the said Work and the said Cravens for said sum of $650.00, and the same decreed to be a lien upon said land, therefore, be it known that said Work and Cravens agree between themselves, to wit:

"First. That said P. A. Work's interest in said sum of $650.00 is three-fifths or $390.00.

"Second. The said N. A. Cravens' interest in said sum of $650.00 is $260.00, or two-fifths.

"Given under our hands in duplicate July 18, 1878.

"P. A. Work.
"N. A. Cravens, Jr.

"My within named interest to the judgment of Work and Cravens v. Heirs of George Brown is this day for value received transferred and conveyed to John P. Work of Hardin county, Texas, who is hereby entitled to the same.

"N. A. Cravens, Jr."

Mr. Cravens testified further that he had no knowledge with reference to any sale made of said land. He testified that the result of the trial in the district court was a judgment sustaining a demurrer to plaintiff's petition. This judgment was affirmed by the Supreme Court upon writ of error.

Col. P. A. Work testified that he is familiar with all the proceedings in the case of McKinney v. Brown Heirs, and testified, among other things, as follows: That affidavit was made that the heirs were unknown, and service by publication was had for the requisite period in the Jasper Newsboy, which was the official paper at that time. That the case was continued at the July term in 1877, stood for trial in 1878, when an agreed judgment was sought to be taken but was refused by the court, and Col. Work appointed to defend in lieu of Cravens, and the case was continued until the July term, 1878, when plaintiffs' counsel and Mr. Cravens were present, and Work and Cravens both defended, and the court sustained demurrers to plaintiffs' petition and rendered judgment in favor of the defendants.

Col. Work further testified:

"The court, in order to determine what would be proper compensation (of attorneys for absent owners), heard evidence. I remember there were some attorneys testified that in a stated land case, where the fee was wholly contingent and consisted of a part of the recovery, some insisting on one-quarter and some one-third and some half of the recovery, and the court announced that it had no authority to award a part of the land in controversy, and further testimony was introduced to show the value of the league and labor of land, and that testimony varied from 60 cents an acre to 75 cents an acre, I disremember; that was 30 years ago and lands were not valuable then, and I don't know how he arrived at that percentage or anything of the sort. In

his conclusions, after hearing these values, he announced that his allowance of a fee of $650 to be governed, of course, by the testimony of the value of the land. As I have stated, I drew up the judgment. Whether I entered it in the minutes or not, I am not sure, but the clerk at that time, Wm. G. Brackin, could scarcely write, and for that reason I probably entered it on the minutes. It was entered, and an order of sale and execution was issued for the league and labor of land. That was in July, 1878. Mr. Shafer gave notice of appeal to the Supreme Court of Texas. He might have made a motion for a new trial. At all events, he gave notice of appeal, and the memorandum of it was made on the docket. I told Mr. Cravens that I intended to see Mr. L. Shafer, and if he appealed and perfected the appeal for plaintiffs within the time required by law, which, I believe, was 20 days at that time. At any rate, he did not appeal in the time, and the time for the forwarding—or rather, I should say, the time of filing—the bond expired, and on the very next day after the expiration of that time I, myself, drew up the writ of sale for the property and handed it to the clerk, and he put his jurat and seal on it, and on the same day I handed that order of sale to the sheriff, W. W. Lyon, of Hardin county, Tex. I am satisfied that that was some time in August that the writ of sale issued, and I remember that the reason I wanted the notice posted that day was that the land might be advertised fully 20 days exclusive of the day of posting the notice and the day of sale. Anyhow, it was advertised and sold out in September some time, in the early part of the month, I forget the exact day of the month, on the first week, first Tuesday I guess, the land was sold under that order of sale. I believe I have already stated about the issuance of the order of sale. I was not present at the sale. I was not in town. My son, John P. Work, was present at the sale. Now, after the judgment had been entered making the allowance of $650 as compensation to the attorneys, Mr. Cravens and myself, by an agreement between ourselves before the sale by the sheriff, partitioned the fee."

Witness further testified that the agreement for division and the transfer of Cravens' interest to his son were executed on the day judgment was entered, and that John P. Work attended to the sale of the property, and having bought the whole league for $175 and became the purchaser with his father in the deal, and afterwards, having taken title in his own name, he deeded one-half thereof to witness, and that he did not know his son had taken deed in his own name for six months and then demanded deed for his part. He says his son handled the sale and subsequent proceedings of return of execution, etc., and probably wrote the return.

With reference to the return upon the order of sale, he further testified:

"Now, you asked me about the return or indorsements upon the order of sale. I notice the sheriff's deed says under execution. I drew up the order of sale in conformity with the judgment with the statute before me and handed it to the sheriff, and I wrote on that the levy. I wrote the levy on the writ because the sheriff usually did not seem to be well up in his duties, and I wrote that. After the sale I wrote no return. I had nothing to do with it after that. There was an order from the court authorizing a forced sale of the property."

Witness testified that he took no evidence in the case, did not attempt to find or locate the defendants, his clients, and did not know that they were living or had an actual existence; that, after defeating plaintiffs' suit, he made no effort to find the unknown heirs, nor did he make any inquiry to ascertain where they were.

With reference to the judgment for attorney's fees, he testified as follows:

"I could not state that language. The substance was, naming the attorneys, Work and Cravens, appointed by the court to defend in behalf of the unknown heirs of George Brown, are allowed compensation to the amount of $650, and let judgment be entered and made a lien upon the land or property in controversy, and let an order of sale issue. I prepared the judgment in accordance with that. There was no order that Work and Cravens take a judgment against the unknown heirs of George Brown, but that Work and Cravens be allowed compensation in the sum of $650 and judgment be entered therefor and made a lien upon the property in controversy, and I fol-

lowed that order. I would not attempt to quote the language. Compensation to the amount of $650 is hereby allowed by the court, or is allowed Work and Cravens, giving their full names, as compensation for their services for defending under the appointment of the court, for which let a judgment be entered operating as a lien upon the property in controversy. Of course, I could not undertake after the lapse of 30 years to state that every 't' was crossed and every 'i' dotted; that was the pith and substance of it."

Witness also testified:

"I employed the law firm of Willie & Cleveland of Galveston, and furnished them with a law brief, a memorandum of authorities, and also with my equitable brief upon which I made the argument before the court in support of my demurrers. I was not 15 minutes in making the argument, and it was sustained, and I referred to the court many equity authorities. I sent that to Willie & Cleveland."

He testified that he paid Willie & Cleveland $200 for the services; that he had a personal interest in addition to the interest of his clients. He further testified that his son represented him in making the sale; that his son paid Cravens $75 for his $260 interest in the fee; that he did not get a cent from the sale; that his son was instructed to buy in the land under the judgment; that the 4,605 acres bought in by him for $175 was actually worth from 50 cents to 75 cents per acre; that, if the George Brown heirs had appeared on the scene, he would have deeded them back their land for the fee and interest; that he believed the heirs of George Brown were mythical; that he sold the land purchased for $175 in 1878, and warranted the title in February, 1882, for $5,000, half cash. Witness said the judgment was as recited in the Cravens' contract above set out; that he did not know whether he rendered or paid taxes on the land, but supposes he did; that he first went on the land about the middle of September, 1878. It was a very few days after the sheriff's sale, I think less than a week, and before the case had been taken up by writ of error.

Witness was asked: "Now, during all the time you were representing the unknown heirs of George Brown in the case in the higher court and in the lower court, you were cutting the timber off that land?" To which he answered as follows:

"The facts are as have been stated. You can make what deductions you please. The notice of appeal was given and the appeal not perfected, and the writ of sale was issued and the land sold. I believe I remarked to you that the case went up by writ of error and not appeal. I had no doubt myself, of course, it was a matter of opinion, from my knowledge of the law of the country that there was no error of law that could possibly warrant the Supreme Court in reversing the judgment."

Witness was asked the following questions:

"There was no suit, as I understand your testimony, styled P. A. Work and N. A. Cravens, Jr., against the unknown heirs of George Brown?"

To this he answered:

"No, sir; and there was no judgment against the unknown heirs of George Brown in favor of Work and Cravens, but simply a judgment against the land in the nature of a condemnation proceeding under the statute just as you condemn land in any other suit."

Witness further testified that he received from $1,000 to $2,000 from timber taken off the land prior to his sale of the land, and remaining timber for $5,000 in 1882.

The bill of exceptions contains all the evidence, most of which is upon the question of limitation, but the above is all the material evidence relating to the propriety of the court's peremptory instruction against plaintiffs. This part of the charge is as follows:

"In the suit of the plaintiffs against the Houston Oil Company of Texas, you are instructed that the judgment rendered in Hardin county, and the sale thereunder, passed such title as the unknown heirs of George Brown had, and vested the title in the Works, and the defendant the Houston Oil Company of Texas holds the title to the league and labor of land by its duly registered and mesne conveyances, and, as against the plaintiffs, are entitled to a verdict for the land in controversy."

Plaintiffs excepted to the action of the court in instructing the jury as above, and before the retirement of the jury from the bar requested other special instructions which were refused.

John Hamman and Oliver J. Todd, for plaintiffs in error.
Oswald S. Parker and A. D. Lipscomb, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). The plaintiffs in error, plaintiffs below, were entitled to recover the land in controversy as against the Houston Oil Company, unless said company established its title; and the question before us is whether on the trial the Houston Oil Company proved by undisputed evidence its title to the land in controversy through mesne conveyances from the heirs of George Brown.

The basis of the claimed title is a sheriff's deed dated September 4, 1878, in support of which no record evidence of judgment and execution thereon were produced; but, the court records having been admittedly destroyed, evidence was offered and admitted tending to prove a judgment and execution.

It is undisputed in Texas that, for a sheriff's deed to convey title, it must be supported by a valid judgment of a court of competent jurisdiction and a valid execution thereunder. Ordinarily, this proof is made by duly certified copies from the records of the courts wherein the judgment was rendered. Where, as in this case, such records have been so lost or destroyed that certified copies of the proceedings cannot be produced, the proof may be made by other legal evidence. Where the records are destroyed and considerable time has elapsed, the decisions in Texas are that, where possession is shown under the sheriff's deed, a judgment such as recited in the execution produced may be found by the jury (Walker v. Emerson, 20 Tex. 707, 73 Am. Dec. 207) and, where 30 years have elapsed, the existence of the judgment and execution recited in the sheriff's deed ought to be presumed (Giddings v. Day, 84 Tex. 605, 19 S. W. 682).

In Tucker v. Murphy, 66 Tex. 355, 359, 1 S. W. 76, 78, Mr. Justice Stayton, for the Supreme Court, says:

"It is true that, ordinarily, after the lapse of 30 years, the power of a person who assumes to have executed a deed under power of another or in a fiduciary capacity will be presumed. This, however, is but a presumption of fact, which is indulged upon the idea that time has made it impracticable to make such proof of the actual existence of the power, as may be made in regard to matters recently transpiring. Whether such a presumption will or may be indulged in a given case must depend on the facts presented. In one case the facts in relation to a deed, purporting to have been executed under a power, may be such as to preclude the idea that there still exists means, other than such as the deed itself affords, and the acts of the parties claiming under or adversely to it long continued present, whereby to prove the actual existence of the power, and in such a case the power will be often presumed. In another case the deed may be shown by itself to have been executed under a power, but under such circumstances that the primary proof of the existence of the power must be presumed to exist. In such case the failure to produce such primary proof, or to show that it cannot be produced, would seem to require the holding that the evidence of the existence of the power, which arises from the ancient character of the instrument, and

the action of those interested under or adversely to it, is not sufficient proof. In the case before us the deed which it is claimed is sufficient evidence of the power of the persons who executed it to pass the title which it purports to convey shows, if it speaks the truth, that the probate court for Goliad county granted letters of administration on the estate of Jacob Aaron, that by an order entered on its minutes it directed the administrator of that estate to sell the land certificate in question, and that by an order subsequently entered, in a similar manner, the sale, after being properly reported, was confirmed."

The above-cited and other Texas cases we have examined do not provide for the presumption of any other judgment or execution than according to the recitals or descriptions thereof found in the sheriff's deed, and we know of no reason supported by the text-books or adjudged cases holding that, where a sheriff's deed is produced, any judgment can be presumed that varies from the execution if that is produced, or from the recitals in the sheriff's deed if neither the judgment nor execution can be produced.

In French v. Edwards, 13 Wall. 515, 20 L. Ed. 702, Mr. Justice Field, for the Supreme Court, says:

"It is also contended that the recitals in the deed were not required, and therefore do not vitiate the deed; but the cases cited fail to support the position as broadly as here stated. They only show that a defective or erroneous recital of the execution, under which a sheriff has acted, will not vitiate his deed if the execution be sufficiently identified. Every deed executed under a power must refer to the power. As an independent instrument of the holder of the power, it would not convey the interest intended. The deed of a sheriff forms no exception to the rule. But it is not essential that the execution, or judgment under which he acted, should be set out in full, or that his proceedings on the sale should be detailed at length. It is sufficient if they be referred to with convenient certainty, and any misdescription not actually misleading the grantee would undoubtedly be considered immaterial. But if the manner in which the power is exercised is recited, it being a proper matter for recital, then the recital is evidence, not against strangers, but against the grantee and parties claiming under him. Thus, if a sheriff should refer in his deed to an execution issued to him, and recite that, in obedience to it and the statute in such case provided, he had sold the property to the highest bidder, it would be presumed that he had done his duty in the premises, given the proper advertisement, and made the sale at public auction in the proper manner. But if he should go farther and recite that he had sold the property, not at public auction, but at a private sale, the deed would be void on its face; the sale by auction being essential to a valid execution of the authority of the sheriff. The vendee, by accepting the conveyance with this solemn declaration of the officer as to the manner in which his power was exercised, would be estopped from denying that the fact was as recited."

In the present case, taking it that 30 years had elapsed since the sheriff's deed, it was permissible for the court to have presumed the judgment and execution thereunder of the description given thereof in the deed; but it was not permissible to presume any judgment substantially varying therefrom.

This would dispose of the case were it not for the fact that the judgment recited in the sheriff's deed would be void on its face because the judgment recited is a personal judgment, and a personal judgment rendered against unknown heirs for a specific sum of money and costs is void on its face as not in accordance with due process of law.

It therefore appears that, to sustain the court below in directing a verdict, we must find that the oil company was not estopped by the sheriff's deed, although it offered the same in evidence and claimed title thereunder from showing a valid judgment and execution under which the sheriff had power to and did sell; and, further, that the evidence establishing such other judgment and execution was undisputed and conclusive.

As a general proposition based on reason and authority, a claimant under a deed is estopped from denying the material recitals contained in such deed, and recitals of the power to convey asserted by the grantor are material. Bigelow on Estoppel (4th Ed.) 354; French v. Edwards, supra; Den v. Morse, 12 N. J. Law, 331; Jackson v. Roberts, Ex'rs, 11 Wend. (N. Y.) 422; Eustis v. City of Henrietta, 91 Tex. 325, 43 S. W. 259.

The rule in Texas, however, as declared in Howard v. North, 5 Tex. 290, 311, 51 Am. Dec. 769 (apparently followed and not since questioned), is different, and to the effect that the misrecital of the judgment in the sheriff's deed is not material, if it in fact appear that the sale was under a subsisting judgment and execution, the main reason given being that a recital of the judgment and execution in a sheriff's deed is not prescribed by the statutes of the state.

Howard v. North controls as to the law of Texas and in the present case; but the question remains as to the sufficiency and conclusiveness of the evidence offered to show a valid judgment and execution to support the sheriff's deed. This evidence has been substantially given in the statement herein, and consists of the recitals in the sheriff's deed which to establish fact are admissible, although not conclusive, the testimony of Col. Work, an appointed attorney by the court to represent the unknown Brown heirs, and of Mr. N. C. Cravens, also an appointed attorney, and some documentary evidence, and need not be recapitulated nor analyzed. An inspection of it shows that while it may have tended to prove a valid judgment and execution under which the sheriff's sale of the lands of the unknown heirs of George Brown to John Work, September 4, 1878, could have been made, it does not conclusively, as a matter of law, prove such judgment and execution; and, further, that, from the interest of the witnesses, the long time elapsing, and the indefinite, confused, and conflicting nature of the evidence itself, taken as a whole, the facts involved were for the jury, and not for the court, to determine.

As this conclusion leads to a reversal and new trial, it is proper to consider the contention that the statute of Texas, approved November 9, 1866 (5 Gammell's Laws of Texas, 125), warranted a judgment and execution thereunder in the case of McKinney et al. v. Unknown Heirs of George Brown, theretofore pending in the district court of Hardin county, Tex., which would support the sheriff's sale and deed of the land in controversy.

This act should be construed to warrant in a proper case a judgment affecting the ownership and title of the land in controversy, with costs as in other cases (for which see Paschal's Dig. art. 1483), and that, in such cases, the court had power to allow the attorney appointed to

represent the absent owners a reasonable compensation, and enter judgment therefor; the amount thereof to be taxed as the costs.

For such judgment the statute gives a lien on the lands in controversy. As a statutory lien for the foreclosure of which no special proceedings are provided by law, it would seem that, if the costs are not paid nor collected in due course, the lien may be foreclosed by suit, and, on due notice to the owners, the land affected ordered sold to pay the lien. At the same time, we are clear that the said statute does not warrant a personal judgment against absent parties for money or costs, nor such a foreclosing of the statutory lien which only comes into existence on rendition of the judgment as would permit the sale of the absent owners' property without giving said owners some notice and opportunity to protect themselves.

A lien confers no power of sale without judicial process (Ency. Pl. & Pr. vol. 13, 123), and it is elementary that judicial proceedings involve notice. The foreclosure of a lien is either a statutory or an equitable proceeding. See Mr. Justice Brewer's opinion in Howe Machine Co. v. Miner, 28 Kan. 441. If a proceeding at law or in equity, the owner of the property to be affected must have notice either actual or constructive.

In Dunlap v. Southerlin, 63 Tex. 42, the court said:

"A judgment rendered against a person not before the court would be void, and it is not perceived that a judgment against a defendant in court at the suit of named plaintiffs, upon a cause of action accruing to them alone, in favor of a person in no manner a party to the action, can stand upon any higher ground. Courts have no more power, until their action is called into exercise by some kind of pleading, to render a judgment in favor of any person than they have to render judgment against a person until he has been brought within the jurisdiction of the court in some method recognized by law as sufficient; and it never will be presumed, in the face of a record which shows that certain named plaintiffs were seeking and entitled to a judgment, that the court rendered a judgment in favor of some person not shown to be before it seeking relief.

See, also, Stephenson v. Bassett, 51 Tex. 544, 545, in which the court said:

"Possibly no injustice in fact may have been done the defendant, but, under the rules of pleading and practice, we cannot sanction such a departure from long-established principles of legal procedure, as to authorize a judgment upon a case not made by the pleadings, and as to which the defendant has not had his day in court."

That notice by publication of a suit claiming title to land can be taken to be also notice of a proceeding to foreclose a possible lien not then existing nor coming into existence until after judgment rendered ought not to be held. Such notice calls the absent owner to defend his property against an adverse claimant of title, and not against the possible incidental and subsequent demands of other persons. To hold that the statute in question authorized, on publication, the rendition of a judgment which shall be a lien on property of the absent owner within the jurisdiction of the court is correct; but therefrom it does not follow that such lien may be eo instanti and without further notice foreclosed, and the absent owner's property sold.

Such proceeding would be tantamount to the rendition of a personal judgment without service.

An absent owner would have little protection for his landed property if, upon a notice in a local newspaper, he stands to lose his land, not only to an adverse claimant, but, failing that, to satisfy the demands of an attorney appointed to represent him. Such "due process of law" would be a farce, encouraging fraud, particularly if, as in this case, the appointed attorney should think that the absent owner was "mythical."

We find nothing in Taliaferro v. Butler, 77 Tex. 578, 14 S. W. 191, nor in other cases cited inconsistent with these views.

The judgment of the circuit court is reversed, and the cause is remanded, with instructions to award a new trial.

STEEL CAR FORGE CO. v. CHEC.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1911.)

No. 1,694.

1. NEGLIGENCE (§ 56*)—VIOLATION OF PENAL STATUTE—ACTIONABLE NEGLIGENCE—PROXIMATE CAUSE.

While a violation of penal statutes may constitute negligence per se, actionable negligence will not arise therefrom, unless the violation of the statute is the proximate cause of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.*]

2. MASTER AND SERVANT (§ 291*)—EMPLOYMENT OF MINOR—STATE STATUTES—NEGLIGENCE PER SE—PROXIMATE CAUSE—INSTRUCTION.

Burns' Ann. St. Ind. 1908, § 8022, prohibits the employment of children under 14 years in any manufacturing establishment, and declares that no person under 16 who is not blind shall be so employed who cannot read and write simple sentences in the English language, except during the vacation of the public schools in the city or town in which the minor lives. *Held*, that where plaintiff, a minor between the ages of 14 and 16, was employed in defendant's factory during the time when schools were in session in the town where plaintiff resided, and he was unable to read and write simple English sentences, and while so employed was injured, an instruction that if the jury found such facts, and that plaintiff was not blind, the charge of negligence was sustained, was erroneous, as authorizing a recovery on such facts without proof of any causal connection between defendant's violation of the statute in employing plaintiff and the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1145; Dec. Dig. § 291.*]

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

Action by Andrew Chec, a minor, by Adam Marszewski, his guardian, against the Steel Car Forge Company. Judgment for plaintiff, and defendant brings error. Reversed.

The defendant in error, Andrew Chec, brought an action for personal injuries, which resulted, in the trial court, in a verdict and judgment against the Steel Car Forge Company for $12,000. This

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

writ of error is sued out to reverse that judgment. The facts, so far as they are regarded as material, and the errors assigned, are reviewed in the opinion.

Francis Lackner and Otto Butz (Amos C. Miller and C. E. Heckler, of counsel), for plaintiff in error.

Frank A. Rockhold and Francis X. Busch, for defendant in error.

Before SEAMAN and KOHLSAAT, Circuit Judges, and CARPENTER, District Judge.

CARPENTER, District Judge. The first count in the declaration filed in the Circuit Court charged that the defendant, the Steel Car Forge Company, managed and operated in the city of Hammond and state of Indiana, a factory with various machines and machinery for the purpose of manufacturing steel cars and other steel and iron products; that the plaintiff was a minor of the age of 15 years, and was employed, negligently and carelessly, by the defendant to work upon a drill press in its factory; that the press was a large machine composed of drills, cogwheels, shafting, and other parts, and was operated rapidly by means of electricity; that at the time of the injury and negligence complained of there was in full force and effect a statute of the state of Indiana, as follows:

"8022. (7087b.) Children employés—Affidavit of Age—Register.—2. No child under fourteen years of age shall be employed in any manufacturing or mercantile establishment, mine, quarry, laundry, renovating works, bakery or printing office within this state. It shall be the duty of every person employing young persons under the age of sixteen years to keep a register, in which shall be recorded the name, birth-place, age, and place of residence of every person employed by him under the age of sixteen years; and it shall be unlawful for any proprietor, agent, foreman, or other person connected with a manufacturing or mercantile establishment, mine, quarry, laundry, renovating works, bakery or printing office to hire or employ any young person to work therein without there is first provided and placed on file in the office an affidavit made by the parent or guardian, stating the age, date and place of birth of said young person; if such young person have no parent or guardian, then such affidavit shall be made by the young person, which affidavit shall be kept on file by the employer, and said register and affidavit shall be produced for inspection on demand made by the inspector, appointed under this act. There shall be posted conspicuously in every room where young persons are employed, a list of their names, with their ages respectively. No young person under the age of sixteen years, who is not blind, shall be employed in any establishment aforesaid, who cannot read and write simple sentences in the English language, except during the vacation of the public schools in the city or town where such minor lives. The chief inspector of the department of inspection shall have the power to demand a certificate of physical fitness from some regular physician in the case of young persons who may seem physically unable to perform the labor at which they may be employed, and shall have the power to prohibit the employment of any minor that cannot obtain such certificate." Burns' Ann. St. 1908.

The first count also contained an averment that the plaintiff was not blind; that he could not read or write in the English language, and that at the time when the accident occurred the public schools were open, and that it was not then the vacation period of the public schools at the place where the plaintiff lived; that as a direct result of the illegal employment of the plaintiff, contrary to the provisions

of the statute, the plaintiff, while exercising ordinary care for his own safety, was injured.

The evidence showed that the plaintiff was not blind at the time of the accident; that the public schools of Hammond, where the plaintiff lived, were then in session; that it was not the vacation period; and that the plaintiff could not read and write simple sentences in the English language. It also appeared that, while the plaintiff was over the age of 14 years, there was some controversy as to whether he was over or under 16 years of age at the time he was hurt.

The trial judge in charging the jury said:

"Coming back to the first theory of the plaintiff, the law which I referred to, prohibiting the employment of a person under 16 years of age in the occupation named, which list of occupations includes one in which this plaintiff was engaged at the time of this accident, that law provides that a person shall not be employed under 16 years of age during vacation if he cannot read and write simple sentences in the English language, and is not blind.

"If you find in this case that this plaintiff was under 16 years of age at the time of this injury, that he could not read and write simple sentences in the English language at that time, and was not blind, then the charge of negligence against the defendant on this first theory—under this first theory is sustained."

Under this instruction the jury were authorized, if not directed, to find the defendant guilty upon the mere showing of a violation of the statute, without any proof of actual negligence; that the violation of the statute was in itself negligence, and sufficient to form the basis of a recovery.

Causal connection between the negligence charged and the injury complained of always must be shown, and, while a violation of certain penal statutes constitutes negligence per se, nevertheless to make such negligence actionable it must be the proximate cause of the injury for which the action is brought. The violation of the statute which imposes a duty may support a cause of action for damages to one who is affected by its observance, provided it is shown that the injury was the direct or necessary result of the breach.

That portion of the Indiana statute which forbids the employment in any manufacturing establishment of a child under 14 years of age was a wise provision of the law for the protection of children. Years of hard experience have taught us that in mind and body the child is not able to cope with the adult in ordinary employments. The measure of responsibility governing the conduct of adults cannot be cast upon a child.

Wherever the policy of the law is that a child cannot assume certain responsibilities and perform certain labor with safety, it is the permitting the child to accept those responsibilities and to do such work in violation of the law which is regarded as the proximate cause of any injury which may happen to the child during the course and within the scope of his employment. It is the unlawful employment, resulting in an illegal overtaxing of the infant, which constitutes the actionable negligence. The law declares that children within the prohibited age are not possessed of the strength, judgment, and care necessary for their own safety while engaged in a dangerous pursuit. A person employing a child within the prohibited age is presumed to

know what, if any, legal disability exists, and must ascertain under all circumstances whether the employed child is of the proper age to perform the work required. The employment of children under 14 years of age was prohibited because in the minds of the legislators the natural consequence of such employment would be an accident to the child. It is therefore the doing of a thing prohibited by law, which might result in injury, that is the negligence chargeable to the employer, and the causal connection between the negligence and the injury consists in the presumption of law that the employment of itself will result in accident or injury to the minor.

If, however, a causal connection between the unlawful employment and the injury complained of is not shown, the master cannot be held liable.

With respect to that portion of the statute which has regard for children between the ages of 14 and 16 years, the situation is very different from that part which prohibits the employment of children under the age of 14 years. It is apparent that it was the policy of the state of Indiana to prohibit the employment of children under the age of 14 years, and it is equally apparent that the prohibition did not run against the employment of children between the ages of 14 and 16 years. We must determine, therefore, why the Legislature prohibited children under 14 from working under any circumstances and permitted children between the ages of 14 and 16 to work under some circumstances. To interpret this statute properly we must look to the evil aimed against.

It is clear from the wording of the statute that children between the ages of 14 and 16 years could work, provided they were able to read and write simple English sentences, and provided, further, that the public schools in the place where the child lived were not in session during the employment. The language is clear and simple, and indicates that the Legislature intended to force attendance in the public schools of all children under the age of 16 years. The mental advancement, and not the physical protection of the child, is the undoubted purpose of this provision. That this is true follows necessarily from the fact that during the vacation period in the public schools children between the ages of 14 and 16 years might work, and during that time no discrimination is made between children of advanced mental capacity and those more ignorant. Certainly a minor over 14 years of age who cannot read and write simple sentences in the English language is just as likely to be injured during the vacation period of the public schools as he would be if the schools were in session. The fact of the schools being open would in no measure increase the liability to accident, and the fact that it was vacation would not protect children from injury. In addition to this, a minor who is blind is exempt from the prohibition of the statute.

It would seem that the Legislature intended to force minors to acquire a rudimentary education in the English language by barring them from employment until they acquired it, and the question of their safety or ability to guard against injury was not under consideration. A blind child certainly would need more protection than one who could see. Education generally, however, is not required;

only the ability to read and write simple sentences in the English language. Education consists not so much in the communication of knowledge as in the discipline of the intellect. It does not depend upon the medium one uses to do his thinking or to express his ideas. If the minor were a Pole, and highly educated, he would be just as capable of guarding against injury as if his medium of communication were English. It is not at all uncommon to find boys of foreign birth of unusual intelligence and training, who are unable to read and write simple sentences in the English language. Such a boy would be barred under this statute from taking employment between the ages of 14 and 16 years, and yet another boy, even American born, of far less intelligence and training, and far less able to protect himself from injury, is permitted to work simply because of his ability to read and write simple English sentences. There can be no doubt but that it was the policy of the state of Indiana to force its children to acquire some knowledge of the English language, and that such was the purpose of this statute so far as it relates to children between the ages of 14 and 16.

Inasmuch as children between the ages of 14 and 16 years are permitted to work, providing school is not in session, it is difficult to see what causal connection exists between the unlawful employment and the accident, where the child is employed during school time. There was no relation of cause and effect between the omission on the part of the plaintiff in error to observe the provisions of this statute, and infliction of the injury upon the defendant in error in this case. In no way can it be said that the failure to observe the statutory requirements had a tendency to bring about the accident complained of. The trial judge therefore erred in instructing the jury that the charge of negligence against the defendant was sustained, provided the jury found that the plaintiff was under 16 years of age at the time of the injury; that the schools were in session; and that he could not read and write simple sentences in the English language.

Being of the opinion that in this respect there is substantial error in the record, it will be unnecessary for us to pass upon the other errors assigned. The judgment of the trial court is reversed, and the cause remanded, with directions to grant a new trial.

SELDEN et al. v. ILLINOIS TRUST & SAVINGS BANK et al.

(Circuit Court of Appeals, Seventh Circuit. January 10, 1911.)

No. 1,698.

1. COURTS (§ 366*)—FEDERAL COURTS—CONSTRUCTION OF STATE STATUTES—STATE DECISIONS—CONCLUSIVENESS—"PERSON INTERESTED."

Illinois Statute of Wills (Hurd's Rev. St. 1901, c. 148) § 7, as amended by Act July 1, 1903 (Laws 1903, p. 355), provides that if any person interested, within one year after the probate of any will, shall appear and by bill in chancery contest the validity of the same, an issue of law shall be made up as to whether the writing produced be the will of testator. *Held*, that decisions of the Supreme Court of Illinois that the phrase

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

"any person interested" does not include persons having a mere expectancy, but only includes those having an interest already attached in case the ancestor is held to have died intestate, is conclusive on the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 960; Dec. Dig. § 366.*

For other definitions, see Words and Phrases, vol. 4, pp. 3692–3709; vol. 8, p. 7691.

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

2. WILLS (§ 417*)—PROBATE—VALIDITY.

Illinois Statute of Wills (Hurd's Rev. St. 1901, c. 148) § 7, as amended by Act July 1, 1903 (Laws 1903, p. 355), provides that, when any will is exhibited to the court having jurisdiction of probate, it shall be probated without delay, provided that if any person interested, within a year after probate, shall appear and by bill in chancery contest the validity of the same, an issue of law shall be made up as to whether the writing produced be testator's will or not. *Held* that, where a will has been admitted to probate, it is a valid one, unless and until it has been successfully contested and set aside, either in accordance with the special procedure provided by the state for that purpose, or in some other court of competent jurisdiction other than provided in such special procedure, if such jurisdiction exists.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 895; Dec. Dig. § 417.*]

3. WILLS (§ 284*)—PROBATE—CONTEST—DEMURRER—ADMISSIONS.

Illinois Statute of Wills (Hurd's Rev. St. 1901, c. 148) § 7, as amended by Laws 1903, p. 355, provides that when any will is exhibited for probate it shall be admitted without delay, provided that if any person interested shall, within a year after probate, appear and by bill in chancery contest the validity of the same, an issue of law shall be made to determine its validity. *Held*, that where, after a will had been admitted to probate, an heir at law filed a bill under such act to contest the will, alleging that at the time of making the same testator was not of sound mind, and that the will was procured by undue influence and fraud, a demurrer to the bill did not admit that testator was of unsound mind, or that the will was procured by fraud or undue influence, but simply put forward that the probate was an adjudication that he was of sound mind and that the will was his free act and deed, unless the same was set aside in the way pointed out, and that the same had not been so vacated.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 643; Dec. Dig. § 284.*]

4. WILLS (§ 229*)—CONTEST—PERSONS ENTITLED TO CONTEST.

Where, after the probate of a will, a bill to set aside the same was filed by the testator's sole heir at law, and pending such proceedings the heir died and the proceeding was continued by her executor, the complainant's heirs, who at the time the bill was filed had a mere expectancy under the statute of descent, had no sufficient interest to entitle them to maintain a suit in equity, on the theory that the special procedure provided by Hurd's Rev. St. 1901, c. 148, § 7, as amended by Laws 1903, p. 355, was inadequate to the vindication or protection of their rights.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 550; Dec. Dig. § 229.*]

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

Bill by Richard L. Selden, as executor of the will of Olive J. Cone, and others, against the Illinois Trust & Savings Bank and others.

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

From a decree sustaining a general demurrer to the amended bill, and dismissing the same for want of equity, complainants appeal. Affirmed.

The appeal is from a decree sustaining a general demurrer to the amended bill of complaint, and thereupon dismissing the bill for want of equity.

The complainant Richard L. Selden is a citizen of Connecticut, Phebe R. Mason a citizen of Massachusetts, and Lura A. Champlain a citizen of New Jersey. The defendant, The Illinois Trust & Savings Bank, executor of the will of Daniel B. Shipman, is a corporation, organized and existing under the laws of Illinois, and Daniel B. Shipman, during his life time, and at the time of his death, was a citizen of Illinois. The other defendants are beneficiaries under the will of Shipman.

The bill was to set aside, as null and void, the probate of the will of Shipman, upon the ground that Shipman was not, at the time of making such will, of sound and disposing mind, and that the will was procured by undue influence and fraud.

The equity jurisdiction of the federal courts is invoked upon the following facts:

Shipman died November 22, 1906, leaving Olive J. Cone his sole heir at law. His estate was over $1,500,000. On January 11, 1907, his will, granting nearly the whole of his estate to the Illinois Trust & Savings Bank, as trustee for the benefit of the beneficiaries therein named, was filed and duly proven by the attesting witnesses, whereupon it was probated. On February 15, 1907, Olive J. Cone filed her bill in chancery in the Circuit Court of Cook County, under the seventh section of the Illinois statute of wills, contesting the will upon the ground that Shipman was of unsound mind and that the will had been procured by fraud and undue influence. On January 8, 1908, while this bill in chancery was pending, Olive J. Cone died; whereupon complainants in the present suit filed a petition in the then pending chancery suit, suggesting the death of Olive J. Cone on the record, and praying that her executor might be made complainant in said cause, which was so ordered. On January 13, 1908, the Illinois Trust & Savings Bank, and the beneficiaries under the Shipman will, entered a motion to vacate said order; and thereupon Phebe R. Mason and Lura A. Champlain, heirs at law of Olive J. Cone, applied to the Circuit Court to be joined as parties with Selden in the then pending chancery cause. On July 18, 1908, the Circuit Court of Cook County ruled that the petitioners (the appellants here) had no right to intervene in said cause, whereupon the appellants here asked leave to file a bill of revivor, which was also overruled. Upon appeal to the Supreme Court of Illinois, these orders were sustained.

M. Henry Guerin, M. F. Gallagher, and Oliver R. Barrett, for appellants.

John P. Wilson, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, after stating the facts as above, delivered the opinion.

Section 7 of the Illinois statute of wills (Hurd's Rev. St. 1901, c. 148), as amended July 1, 1903 (Laws 1903, p. 355), provides that when any will, testament or codicil is exhibited to the Court having jurisdiction of probate, it shall be the duty of the Court to probate the same without delay, provided, however, "that if any person interested shall, within one year after the probate of any such will, testament or codicil, * * * appear and by his or her bill in chancery contest the validity of the same, an issue at law shall be made up whether

the writing produced be the will of the testator or testatrix or not. * * *"

Construing this section, the Supreme Court of Illinois has held that "any person interested" does not include the appellants—that it does not mean persons who have merely an expected interest, but only persons who have an interest that has already attached in case the ancestor is held to have died intestate—and this construction of the statute we are bound to follow.

It has also frequently been ruled by the Supreme Court of Illinois that the probate of a will is an adjudication of its validity; a ruling followed by us in Palmer v. Bradley (C. C.) 142 Fed. 193. The will of Shipman, therefore, is a valid will unless and until it has been successfully contested and set aside; either in accordance with the special procedure provided by the State for that purpose, or in some Court of competent jurisdiction other than as provided in such special procedure, if such jurisdiction to so contest and set aside wills exists.

The argument of appellants is that a will is invalid, under the laws of Illinois, unless made by a sane person and without undue influence and fraud; that admittedly (the demurrer admitting the averments of the bill) this will has been made by an insane person and under undue influence and fraud; that in the absence of a valid will, appellants have an interest in the property involved as heirs at law through Olive J. Cone; that the seventh section of the Illinois statute of wills, as construed by the Supreme Court of the State, is inadequate to protect their interest; from which it follows that there must be, in Courts of general chancery jurisdiction having jurisdiction over the parties, power to protect this interest.

The difficulty with this argument lies in some of the premises assumed. It is not true, for instance, that the demurrer admits that Shipman was of unsound mind, or that the will was procured by fraud or undue influence. What the demurrer puts forward is that the probate of the will is an adjudication that Shipman was of sound mind, and that the will was his free act and deed, unless and until the same was set aside in the way pointed out, and that the same has not been set aside in the way pointed out. To make the admission wider than that, is to construct a false premise upon which to build the argument.

Nor was it true that, at the time the will was probated, the appellants were heirs at law or had any interest, which had already attached, in Shipman's property. The right to succeed to property of an ancestor is not an inherent natural right; it is a mere expectation that clothes the expectant with no legal right whatever. Not until the event happens, upon which the expectation is founded, does the expectant acquire any present interest in the property. Whatever rights the appellants have is under the statute of descent of the State of Illinois. But the statute of wills, to be read in pari passu, as construed by the Illinois Supreme Court, contemplates that the interest by descent shall have already attached to the person claiming it when the will is probated, otherwise there is no interest by descent. In other words, under the Illinois law, the heirs of an heir have nothing

in the way of a property interest in their ancestor's estate as long as their immediate ancestor is alive. There is, therefore, no property interest or right in this case to go to a court of general chancery jurisdiction for vindication or protection, because of the special procedure provided by the State being inadequate to their vindication or protection.

The decree of the Circuit Court is affirmed.

COLUMBIA CHEMICAL CO. v. DUFF.

(Circuit Court of Appeals, Third Circuit. January 24, 1911.)

No. 33.

APPEAL AND ERROR (§§ 1099, 1195*)—DECISION AS LAW OF THE CASE—CONSTRUCTION OF CONTRACT.

Where an appellate court has placed a construction on a written contract sued on, it becomes the law of the case, both for the trial court on a retrial and the same court on a second review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4373, 4661; Dec. Dig. §§ 1099, 1195.*]

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

Action at law by Edward James Duff against the Columbia Chemical Company. Judgment for plaintiff, and defendant brings error. Reversed.

See, also, 168 Fed. 57.

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

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

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

BUFFINGTON, Circuit Judge. In the court below Edward J. Duff, a citizen of Great Britain, recovered a verdict against the Columbia Chemical Company for license fees for the use of four gas producers, alleged to be due him by a contract between them, dated November 28, 1903, which provided:

"The remainder of said amount, to wit, the sum of fifteen thousand five hundred dollars ($15,500.00), shall be paid to said grantor [Duff] by said licensees [the Columbia Chemical Company] in full as soon as the said four producers shall be completed and shall operate in the manner and with the results hereby guaranteed by said grantor, as follows, to wit: From each ton of 2,240 pounds of coal treated in said producers, or any of them, there shall be in addition to the gas a yield of seventy (70) pounds of sulphate of ammonia, provided that the coal contains not less than one and three-tenths (1.3) per cent. of nitrogen; and the gas produced shall be free from soot, tar, or other residuum, which, if present, could or would clog the flues and require them to be burned."

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

Upon entry of judgment thereon the Chemical Company sued out this writ, and assigned for error, inter alia, that the court below failed to follow and give effect to the construction theretofore placed upon the contract by this court. The case was here on a previous writ of error, sued out on the entry of judgment in Duff's favor. The judgment was reversed in an opinion reported at 168 Fed. 57. As the case had been submitted to the court below on the theory that there was a waiver of the contract guaranty, we awarded, as a matter of precaution, a new trial, feeling that the pleadings might be amended, showing a waiver, if such was the fact, and evidence of such waiver might be produced. No such amendment was made or evidence given. The present case involves the same question before us on the other writ, namely, the proper construction of the contract. In that regard we said in our previous opinion:

> The suit "is brought to recover license fees for use of a patented device which this defendant [the Columbia Chemical Company] built at its own cost and on which it agreed to pay license fees in case it fulfilled certain guaranteed requirements."

Of those guaranteed requirements we said:

> "Under the contract, the plaintiff was bound to produce 70 pounds of sulphate of ammonia per 2,240 pounds of coal, and to do this he had a right to call upon the defendant[1] to use coal containing 1.3 per cent. of nitrogen. If he chose to use coal of a less per cent. of nitrogen, that was his right; but he did not thereby lessen his guaranteed output of 70 pounds of sulphate of ammonia. He chose to make the test with coal of less nitrogen; and the issue was whether he did or did not produce 70 pounds of sulphate of ammonia. He alleged he had; the defendant alleged he had not. That was the issue involved."

We accordingly held the court erred in introducing the question of waiver into the case, saying:

> "It follows, therefore, that in bringing the question of waiver into the case as an act of the chemical company, and in embodying in the defendant's points the factor of a waiver by defendant, the court fell into an error which did the defendant injustice."

As to the contention of Duff's counsel that there could be a proportionate or partial performance of the guaranty, viz., that if the coal used, on testing, contained less than 1.3 per cent. of nitrogen, there was a correspondingly proportionate reduction in the 70 pounds requirement of sulphate of ammonia, we said:

> "It is clear, however, the alleged waiver was based on an erroneous assumption by the court that the contract meant that 1.3 per cent. nitrogen in the coal was a requirement the defendant [the Columbia Chemical Company] could insist upon, and which, therefore, it waived by using a coal of less nitrogen. Had this assumption been correct, there might have been some ground for holding that there should be, as contended by the plaintiff, a proportionate reduction in the guaranteed 70 pounds of sulphate of ammonia from each ton. But the presence of 1.3 per cent. of nitrogen in the coal was a requirement that plaintiff, not the chemical company, had a right to insist on, and which, therefore, was not a subject of waiver by the company."

From this it will be seen the court held there could be no proportionate fulfillment of the guaranty. Such being the construction of

[1] Misprinted "plaintiff" in 163 Fed. 57, 93 C. C. A. 479.

the contract by this court, it follows that the charge of the court below on the retrial, viz.:

"As you will see, there was inserted in this guarantee a proviso: Provided that the coal—that is, the producer coal—contains not less than 1.3 per cent. of nitrogen. That percentage was placed in that contract for some purpose. And it contemplated, I instruct you, that there could be a proportionate yield of sulphate of ammonia, if the coal contained less than 1.3 per cent. of nitrogen,"

—was error, for it overlooked the scope of this court's former decision that:

"Under the contract the plaintiff was bound to produce 70 pounds of sulphate of ammonia per 2,240 pounds of coal, and to do this he had a right to call upon the defendant[2] to use coal containing 1.3 per cent. of nitrogen. If he chose to use coal with a less per cent. of nitrogen, that was his right; but he did not thereby lessen his guaranteed output of 70 pounds of sulphate of ammonia."

The construction of this contract was a question which this court was required to pass upon when the case was here before. That question it decided, and, as said in National Surety Company v. Kansas Company (C. C. A.) 182 Fed. 54:

"All questions of law determined on a first writ of error become, if the facts remain substantially the same, the law of the case both for the trial court and for this court on a second writ of error."

To this we may add Roberts v. Cooper, 20 How. 467, 15 L. Ed. 969, wherein Justice Grier said:

"To allow a second writ of error or appeal in a court of last resort on the same questions which were open to discussion on the first would lead to endless litigation. * * * There would be no end to a suit, if every obstinate litigant would by repeated appeals compel a court to listen to criticisms on their opinions or speculate on chances from changes in its members."

In accordance with these firmly established and salutary principles, the judgment entered below must be reversed.

RICE et al. v. H. L. DOHERTY & CO. (two cases).

(Circuit Court of Appeals, Fifth Circuit. January 31, 1911.)

Nos. 2,138, 2,139.

SPECIFIC PERFORMANCE (§ 108*)—PROCEEDINGS IN SUIT—PRELIMINARY INJUNCTION.

In a suit in equity to enforce specific performance of a contract for the sale of a majority of the stock in an electric light and power company, preliminary injunctions *held* properly granted for the purpose of preserving the property involved in such condition as to enable the court on final hearing to render effective its decree in case it should be in favor of the complainant.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 353; Dec. Dig. § 108.*]

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

[2] Misprinted "plaintiff" in 168 Fed. 57, 93 C. C. A. 479.

Appeals from Circuit Court of the United States for the Middle District of Alabama.

Suit in equity by H. L. Doherty & Co. against Alex Rice and others. Defendants appeal from orders granting injunctions. Affirmed.

John M. Chilton, Harace Stringfellow, Ray Rushton, Fred S. Ball, and Wm. H. Samford, for appellants.

B. P. Crum, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

PARDEE, Circuit Judge. These two appeals are in the same case, which is in equity for the specific performance of a contract for the sale of the majority of the stock of the Citizens' Light & Power Company, and may be disposed of together.

In 2,139 the order appealed from is one maintaining the status quo, and was proper and necessary to preserve the property sold in such condition as to enable the court to pass on the issues involved, and render effective judgment in the premises. None of the assignments of error in relation to this order are well taken.

In 2,138 the order appealed from, while on the same line and for the same purpose, was granted on amended and supplemental bills bringing in new parties and disclosing a state of facts amounting to a concerted scheme to so involve the stock claimed in the suit and the affairs of the Citizens' Light & Power Company and of the subsidiary and dependent Citizens' Light, Power & Heat Company to such an extent as to render nugatory, if not valueless, any decree the complainants might obtain in the line of specific performance of their contract, and therefore said order is properly much more comprehensive in preventive relief.

From the standpoint of the parties defendant, who are all either charged with notice or volunteers, we find no objection sufficient to warrant a reversal or modification of the order, and only two contentions that merit any discussion. The more serious one is that the case made by the bills and affidavits is one where one corporation engaged in furnishing light and heat to the city of Montgomery and the inhabitants thereof is seeking by means of this suit to obtain possession and control of a rival and competing corporation with the intention of controlling and monopolizing the entire business, and that a court of equity on grounds of public policy will not lend its aid to carry out such purpose. See American Biscuit Co. v. Klotz (C. C.) 44 Fed. 720. We have given the contention, which was very ably and exhaustively presented by counsel orally and in briefs, very careful examination and full consideration, with the resulting conclusion that on the showing made in this record it is not well founded. Judge Jones, presiding in the Circuit Court, disposed of this contention in his exhaustive opinion which is well supported by reason and authority, and we substantially concur with his argument and conclusion.

If on full proof the purposes of the parties and the necessary or even probable effect of a decree for the specific performance of the contract sued on shall so appear as to show that a monopoly in public

utilities injurious to the inhabitants of the city of Montgomery will result, and that the same is not authorized nor permitted by the laws or public policy of the state of Alabama, the court will undoubtedly follow reason and established authority in so moulding the decree rendered as to prevent the evil suggested.

Another contention is that by the injunction the hands of the directors of the Citizens' Light, Power & Heat Company are tied in their legitimate corporate management, and that said corporation is thereby hindered and prevented from making immediate necessary improvements to and enlargements of its plant and machinery, and thus improve its business and increase its profits. An inspection of the bills of complainant and the affidavits offered on the hearing shows that the Citizens' Light, Power & Heat Corporation at the time this suit was instituted was a dummy appending to and dependent on the Citizens' Light & Power Company, and, if other stockholders now have an interest in the "Heat" Company, it is an interest acquired lis pendens with actual notice. Notwithstanding this volunteer-acquired interest, we have sought for a permissible modification consistent with complainant's rights, but found none.

The decrees in No. 2,138 and No. 2,139 are affirmed.

In re DWYER.

ROBERTSON et al. v. DWYER.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1911.)

No. 1,705.

BANKRUPTCY (§ 68*)—ADJUDICATION—PERSONS LIABLE—"FARMING."

Defendant, during the two years preceding the filing of a bankruptcy petition against him, owned a farm, on which he fed a large number of cattle and hogs for market. He had 46 acres cultivated in corn and oats on equal shares, and the balance of his land, about 110 acres, was in grass and feeding lots. He rented 15 acres, on which he raised corn. He received about 2,000 bushels a year from his own and the rented land, and in addition bought about 8,400 bushels to feed. A large proportion of the cattle were purchased and brought to the farm, while almost all of the hogs were born and raised there. His fat cattle and hogs he would sometimes sell to drovers, and sometimes ship in car load lots to market; but he never bought cattle as a drover or stock dealer, with the expectation of making a profit out of his ability to bargain or his knowledge of market conditions. *Held*, that defendant was engaged chiefly in farming or the tillage of the soil, and was, therefore, not subject to adjudication as a bankrupt; the word "tillage," as used in the expression "chiefly engaged in farming or the tillage of the soil," not being a statutory definition of "farming," tillage being a part of "farming," but not being coextensive with the whole thereof.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 68.*

For other definitions, see Words and Phrases, vol. 3, p. 2700; vol. 8, p. 7661.]

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

Appeal from the District Court of the United States for the Southern District of Illinois.

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

In the matter of bankruptcy proceedings against Timothy C. Dwyer. An involuntary petition having been filed by W. W. Robertson and others, and a master's report in favor of an adjudication having been disallowed, as contrary to the evidence, and the petition dismissed, petitioners appeal. Affirmed.

W. N. Hairgrove (J. J. Neiger, of counsel), for appellants.

John A. Bellatti and Albert Salzenstein, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Appellants filed a petition to have appellee adjudged a bankrupt as a person "engaged in the business of dealing in stock." He filed a plea that he was not within the act because he was and for more than 20 years last past had been "a farmer and engaged chiefly in farming and the tillage of the soil." The issue was referred to a special master "to take the testimony and report the same with his conclusions thereon to the court." The master's conclusion was that appellee was not chiefly engaged in farming or the tillage of the soil. The court found that the master's conclusion was "contrary to the law and the evidence," and dismissed the petition.

In the expression "chiefly engaged in farming or the tillage of the soil," tillage of the soil does not stand as a statutory definition of farming. Tillage is a part of farming, but is not coextensive with the whole of farming.

The facts respecting appellee's occupation were these: He was born and brought up on a farm. Up to the last two or three years before the filing of the petition, the evidence shows him nothing more than a tiller of the soil. For about seven years preceding the filing of the petition he owned and dwelt upon 160 acres of land in Morgan county, Ill. Besides this he owned 120 acres of land in Wayne county until June, 1907, when he sold it, and bought 360 acres in Missouri, which he sold about six months before the petition was filed. His relation to the Wayne county and Missouri lands was unobjectionable to appellants. Of the Morgan county land, during the last two years, he had 46 acres cultivated in corn and oats on equal shares. The balance was in grass and feeding lots, about 110 acres being in grass. During this time he rented from a neighbor 15 acres, on which he raised corn. He received about 2,000 bushels a year from his own and the rented land, and in addition bought about 8,400 bushels a year to feed to cattle and hogs on his farm. A very high proportion of the cattle were purchased and brought to the farm. Almost all of the hogs were born and raised on the farm. When he had fat cattle or hogs, he would sometimes sell them to drovers and sometimes ship them in car load lots to Chicago. The fact that he bought four times as much grain as he raised for feeding stock seems to have led the master to the conclusion that appellee was chiefly engaged as a dealer in live stock. But he never bought cattle as the drover or ordinary stock dealer buys them, with the expectation of making something out of his ability to bargain and his knowledge of market conditions, with the expectation of selling at an advanced price the very thing he bought. "Every steer I ever bought I brought home and fed from

three months to six months on my place." Instead of being a "dealer," appellee was something like a manufacturer, who takes raw materials ("feeders") and converts them into finished product ("fat beef cattle"). As a rule appellee had not more than 60 head of cattle on his farm at a time. In addition to corn, they had grass and hay. In addition to feed, they had prolonged care and attention. Because the grain land was of less extent than the pasture and grass land, it seems to be urged that his farm was "a mere feeding station." Bank v. Matney (D. C.) 132 Fed. 75. But at a mere feeding station one would not need to care whether the footing was sand, or plank, or good rich soil. During the first three years that appellee lived on this farm, and while he was taking grain out of the land and putting nothing back in, the soil was thin and worn, and he did not raise crops enough to pay the interest on the mortgage. In putting "feeders" on the land, one of his purposes (born of the necessity of getting enough from the use of the land to pay the interest) was to rest the soil and restore its fertility. If he could properly buy tons of fertilizers to mix with worn-out soil, we think he could properly buy corn to supplement the pasture and grass (about two acres to each head of cattle) and the corn raised on the tilled land.

We deem it unnecessary to review the facts further. We have read the evidence and examined the cases cited; and we rest our decision on the conclusion that conducting a "stock farm," as well as conducting a "grain farm," is farming, and that appellee was chiefly (if not solely) engaged in farming.

The decree is affirmed.

COMMONWEALTH STEEL CO. v. McCASH.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1911.)

No. 1,706.

MASTER AND SERVANT (§ 125*)—DEATH OF SERVANT—NEGLIGENCE.

Decedent, a marker in defendant's steel foundry, was killed by being struck by a heavy piece of steel broken from the body of a steel car body in process of manufacture. After the cars were molded in the process of manufacture, a mass of steel called a "gate" was attached to the body of the car, which was required to be removed by cutting or breaking. It was usual to break off this "gate" by means of a drop working somewhat like a pile driver; the appliances being so adjusted that, when the gate was broken off, it dropped in the soft sand below. Decedent, at the time he was killed, was at work some 25 or 30 feet from the drop, with his back toward the car body from which the gate was about to be broken, and while so engaged the gate, after being struck by the drop, was whirled through the air and struck deceased at the back of the head and neck, causing injuries from which he died. No such accident had ever happened before in the course of many years, and though nine witnesses testified, who had worked in the same business for years, none of them were able to tell how the accident occurred. *Held* insufficient to show actionable negligence, under the rule that there must be proved a danger, either known, or which by reasonable diligence could have been ascertained by defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243–251; Dec. Dig. § 125.*]

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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 Illinois.

Action by William McCash, as administrator of Harry McCash, deceased, against the Commonwealth Steel Company. Judgment for plaintiff, and defendant brings error. Reversed, with directions.

This is an action brought by the administrator of a young man who lost his life in the employ of the Commonwealth Steel Company, plaintiff in error. The question is whether the injury was negligent or accidental. The company has been for many years engaged in manufacturing car bodies for passenger cars, made of steel. They are molded, and then taken to the finishing department, in which the accident occurred. In molding these bodies the melted steel is conducted into the mold by means of so-called runs. These runs are somewhat in the shape of an elongated three-pronged pitchfork with the tines coming together where the molten steel is poured. The mold of the car body is filled up with this steel, and also the runs, so that, when the mass is cooled, there is firmly attached to one end of the car body the steel which was left in the run, and which is called a gate, which must be detached either by cutting or breaking. The gate is about 42 inches long and 2½ inches wide, weighing 180 pounds. The double body, with the gate attached, is taken up by a crane, in a large building, 125 feet by 300 feet, carried down the center of the building, and finally deposited on one side upon large blocks of iron or steel, so that, when the body is at rest, it is about 18 inches from the floor, and so adjusted that the end of the double body slightly projects beyond the edge of one of the steel blocks; the floor at this point being covered with sand. Over the gate there is employed what is called a "drop," working somewhat like a pile driver. A steel block, measuring 18 inches square at the base and about the same at the top, and 3 feet in length, is hung by a rope over the gate, so that it can be raised about 30 feet above the gate. The drop is worked by machinery.

The process of breaking off the gate is as follows: The steel block is suspended above it, and let down over it to obtain the proper position. Before this is done, however, the point of connection between the gate and steel body is weakened by chiseling, so that the gate may be broken squarely off from the body. When the drop block is properly adjusted, it is suddenly released and falls upon the gate, thus breaking it off from the body. Sometimes it cannot be detached at a single blow of the drop, and the operation must be repeated sometimes twice or three times. When the gate is broken off, it drops in the soft sand below.

On the day of the accident one of these double bodies had been placed as above described, for the purpose of breaking off the gate. The plaintiff's intestate, Harry McCash, was a young man working in the finishing department, marking and numbering car bodies and other iron products, at certain points where holes were to be drilled in them. He carried with him a blue print, from which he would find the places where marks were to be put. His work was in various parts of the finishing department, and at the time of the accident he was working from 25 to 30 feet away from the drop, with his back toward the car body. While so engaged, the gate, after being struck by the drop, was in some unexplained manner whirled through the air, passing over the head of another workman, who was within 15 or 20 feet from the gate, striking the deceased in the back of his head and neck, causing injuries from which he died.

Charles P. Wise, W. E. Wheeler, and David E. Keefe, for plaintiff in error.

S. A. Burgess and Robert H. Patton, for defendant in error.

Before BAKER and SEAMAN, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge (after stating the facts as above). No reasonable theory of the cause of the accident is disclosed in the tes-

timony. No witness assumes to account for the erratic course of the heavy gate through the air for the distance of 25 feet, although it is suggested that there may have been something in the sand on which it fell which would cause it to take such an unusual and unexpected course. No one appears to have anticipated any danger. Such a thing had never happened before. The only conjecture which seems at all plausible is that, when the car body was let down on the steel block, it was allowed to come to rest with the inner end of the gate slightly extending over the block, so that, when the former was struck with the weight, it would naturally be whirled off away from the car body. This is mere surmise, however; there being no proof explaining just how this particular body was placed on the block, and no charge of negligence in this respect. At the close of all the testimony defendant moved for a directed verdict, which was denied, and defendant duly excepted.

The four counts of the declaration allege failure to provide a safe working place, omission to warn the deceased of the danger, failure to inclose the working place with a railing or fence, and negligently allowing the weight to drop on the side of the gate, instead of the center. The last count is not sustained by the evidence, and the third, relating to the railing, was withdrawn from the consideration of court and jury. The court submitted to the jury the question whether an ordinarily prudent person would have regarded it reasonably safe to put the deceased to work near the drop—would have anticipated the danger. As to the second count, alleging failure to warn, the court charged that if the company knew the place was dangerous, and the young man did not, and was not warned, there might be a recovery.

The motion to direct a verdict for defendant should have been granted. No one could reasonably anticipate such an unexpected and extraordinary event. No such thing had ever happened before, in the course of many years. It is not possible even now to arrive at more than a guess as to why the thing happened. If there is no way now, with the testimony of nine witnesses before us, men who have worked at the same business for years, to tell why or how the accident occurred, how can it be said that the company, in the exercise of reasonable and ordinary care, should have anticipated any danger? It must either have known there was danger, or by reasonable diligence could have known it. Parrott v. Wells, 15 Wall. 524, 21 L. Ed. 211; Washington, etc., Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; St. Louis, K. & C. R. Co. v. Conway, 156 Fed. 234, 86 C. C. A. 1; Chicago, etc., Co. v. Elliott, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582. Neither of these requisites is shown by the evidence to have existed. They are not even suggested by it. On the other hand, all the evidence, and all reasonable inference from it, show plainly an utter lack of any ground, reasonable or speculative, of anticipated danger.

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

Reversed.

TOLEDO, ST. L. & W. R. CO. v. SELLERS.

(Circuit Court of Appeals, Seventh Circuit. January 10, 1911.)

No. 1,723.

APPEAL AND ERROR (§ 1195*)—REVERSAL—LAW OF THE CASE.

Where a judgment for plaintiff is reversed on appeal for error in denying defendant's motion for a peremptory instruction at the close of the evidence, such decision, though not concurred in by the whole court, is the law of the case on retrial, requiring the granting of a similar motion, unless the evidence is such as to change the state of facts to which the law in the previous case was applied, until the decision of the Circuit Court of Appeals is reversed by the Supreme Court, either on certiorari or certified questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

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

Action by Ambrose Sellers, as administrator of the estate of Edwin J. Hair, deceased, against the Toledo, St. Louis & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Charles A. Schmettau and H. M. Steely (Clarence Brown, of counsel), for plaintiff in error.

Henry A. Neal, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion:

This case was in this Court, before, 177 Fed. 152, 100 C. C. A. 572, where the facts are fully stated. The principal assignment of error is that plaintiff in error's motion for a peremptory instruction, made at the close of the evidence, was overruled. Unquestionably, this instruction should have been given, unless there was evidence at this hearing not in the previous case, tending to change the state of facts to which the law in the previous case was applied by this Court.

After stating the facts in detail, the opinion, in the previous hearing, proceeds:

"As appears from the above statement of facts, after signalling the engineer to slack forward and backward several times in an attempt to effect a coupling, the decedent, while the drawbars were eighteen inches or two feet apart, gave a quick signal to back which the engineer instantly obeyed, but not before decedent had placed himself between the drawbars. We can conceive of but three possible explanations for decedent's conduct; first, he may have deliberately placed himself in the position in which he was killed. This would be suicide and is not to be presumed. The presumptions are against it. Second: He may have attempted to pass to the other side of the drawbars after giving the signal to back, and thus got caught. The closeness of the drawbars together when the signal was given and his position when found might indicate an effort to pass through sidewise. Or, third: he may have given the wrong signal; that is, he may have intended to give the signal to pull forward, may have thought he had done so and then gone in to examine the coupling further. If the accident happened in any one of these ways, there can be no recovery. Indeed, upon any possible view of the case made

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

by the evidence the decedent was guilty of negligence which contributed to his own injury and death."

From this there was a dissent (the writer of this opinion), the gist of which was as follows:

"The decedent's experience in railroading had not extended beyond thirty days. He was only twenty-one years of age. Now, accepting the immediate cause of the decedent's going between the cars as the third supposition stated— that his signal to the engineer, interpreted by the engineer to go back was in fact meant by him to go forward—we have a case, not of contributory negligence, but of confusion of signals, due to the inexperience or ignorance of the decedent as a railway brakeman. Does the mistake of the decedent, due to inexperience or ignorance, exempt the railroad company from the consequences of having failed in its absolute duty of equipping the cars with safety devices, in a case where, had there been compliance with the law, the confusion and mistake would not have occurred?

I think not. In my judgment, the conclusion arrived at in the majority opinion is contrary to what Congress, in the Safety Appliance Act, intended should be a comprehensive safety precaution for all the operatives of the road—the inexperienced as well as the experienced—and contrary to what the Supreme Court intended to lay down in the Taylor Case, above quoted."

Upon this division of the Court, the judgment of the Circuit Court, under review at the previous hearing, was reversed, for the reason that the then plaintiff in error's motion for a directed verdict should have been sustained and the cause remanded for a new trial. It will thus be seen that, on the previous hearing, the case turned, in this Court, upon a question of law. Confessedly, there was no evidence offered, at the second trial, changing the facts to which this Court had applied the law.

The case must be reversed for failing to follow the instructions of this Court. What this Court said in its majority opinion, not its minority opinion, is the law of the case; and whatever the trial Court may have thought, respecting its soundness, it had no right to disregard the law as thus laid down. This Court might have certified the question of law to the Supreme Court; but this was not done. Defendant in error's remedy, under these circumstances, should she wish to question the judgment of this Court, is by application for writ of certiorari to the Supreme Court. That remedy still exists, but unless and until the Supreme Court issues its writ, what this Court has said, through its majority opinion, is the law of the case. The instruction asked for, by plaintiff in error, should have been given.

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

In re CHANDLER.

COMMERCIAL GERMAN NAT. BANK OF PEORIA COUNTY, ILL., v. BROOKS.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1911.)

No. 1,734.

1. BANKRUPTCY (§ 439*)—REVIEW—PETITION TO REVIEW AND REVISE.
Denial of an application by an individual creditor of a bankrupt member of a firm for an allowance of interest out of the individual estate subsequent to the allowance of his claim was reviewable on original petition to review and revise.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 439.*

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

2. BANKRUPTCY (§ 351*) — PARTNERSHIP — INDIVIDUAL DEBTS — INTEREST — "DEBT."
Bankr. Act July 1, 1898, c. 541, § 5f, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), provides that the net proceeds of the partnership property shall be appropriated to the payment of partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts; that if any surplus remains of property of any partner, it shall be added to the partnership assets and be applied to the payment of partnership debts, and vice versa; section 1, par. 11, declares that the term "debt" means any debt, demand, or claim provable in bankruptcy; section 63a (1) declares that debts of the bankrupt may be proved and allowed against his estate which are a fixed liability, as evidenced by a judgment or an instrument in writing absolutely owing at 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; and section 63a (5) authorizes the allowance of provable debts reduced to judgment after the filing of the petition in bankruptcy, "less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments." *Held*, that where the estate of an individual bankrupt partner was more than enough to pay his individual debts, but the individual estates of both partners and the partnership property was insufficient to pay partnership debts, the claim of an individual creditor for interest accruing after the filing of the bankruptcy petition was not a "debt" which the creditor was entitled to have paid out of the partner's individual assets as against partnership creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 351.*

For other definitions, see Words and Phrases, vol. 2, pp. 1864–1886; vol. 8, p. 7628.]

Petition to Review and to Revise an Order of the District Court of the United States for the Southern District of Illinois.

In the matter of the bankruptcy proceedings of Charles V. Chandler. From an order denying the petition of the Commercial German National Bank of Peoria County, Ill., for an allowance of interest out of the individual estate of Charles V. Chandler, on objections by Frank W. Brooks, trustee in bankruptcy of the individual estate of Chandler, the petitioner files a petition to review and revise. Dismissed.

On June 7, 1907, an involuntary petition in bankruptcy was filed against Charles V. Chandler and Clara A. Chandler as partners and as individuals.

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

Adjudication followed accordingly, and Brooks was duly elected trustee of each of the three estates. The bank, petitioner herein, owner of a $10,000 note executed in September, 1906, by Charles V. Chandler alone, filed its claim against the individual estate of the maker for the principal and for $137.50 interest due on June 7, 1907. The claim was allowed as filed, and by November, 1909, the trustee had paid the bank $10,137.50.

In the individual estate of Charles V. Chandler, after 100 per cent. had been paid on all claims, including interest down to June 7, 1907, a considerable sum remained; but the assets of the partnership estate were inadequate to meet the partnership debts, and the addition of the unconsumed assets of the individual estates will not suffice to pay the partnership creditors in full.

The bank, in December, 1909, filed a petition in the District Court, setting out the foregoing facts, and asking payment from the individual estate of Charles V. Chandler of interest on the $10,000 note at 6 per cent., the contract rate, or at 5 per cent., the Illinois statutory rate in the absence of contract, from June 7, 1907, until payment should be made. This petition the District Court adjudged to be wanting in equity, and the ruling is assailed here by an original petition to review and revise. Respondent interposed a motion to dismiss for want of jurisdiction, which was presented in connection with the argument on the merits, and was denied on reference to Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, In re Friend, 134 Fed. 778, 67 C. C. A. 500, In re Janes, 133 Fed. 912, 67 C. C. A. 216, and Euclid Nat. Bank v. Union Trust Co., 149 Fed. 975, 79 C. C. A. 485.

Pinkney & McRoberts, for petitioner.

George T. Page, S. D. Wead, Jay T. Hunter, and John C. Scully, for respondent.

Before DAY, Circuit Justice, and GROSSCUP and BAKER, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). Shall a surplus in the individual estate of a bankrupt partner be used to pay interest on the claims of individual general creditors accruing after the filing of the petition in bankruptcy, or shall that surplus be added to the partnership fund, the estates as a whole being insolvent?

Section 5f of the bankruptcy act provides that:

"The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership." Act July 1, 1898, c. 541, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424).

The contention of the bank is that interest, by the terms of the note, is as much a part of the "individual debt" as is the principal, and that "payment of individual debts" cannot be made by slighting the interest any more than it could by slighting the principal.

But the bankruptcy act furnishes its own terminology. "Debt," according to section 1, par. 11, means any "debt, demand, or claim provable in bankruptcy." Section 63a enumerates what debts, and section 63b what claims, may be proved and allowed. Proof and allowance of the note in question were governed by section 63a (1), which reads:

"Debts of the bankrupt 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."

As a provable debt—that is, as a debt within the scope of the bankruptcy act—the note was limited to the principal and the interest thereon that would have been recoverable at the time of the filing of the petition in bankruptcy. The only other reference to interest is in section 63a (5), wherein authority is given for the allowance of provable debts reduced to judgments after the filing of the petition in bankruptcy, "less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments." This requirement, like the stopping of interest and the rebating of unearned interest under section 63a (1), shows the legislative intent that all creditors having the right to share in the distribution of the bankrupt's property should be placed on an equal footing as of the date of the filing of the petition. Reverting now to section 5f, the conclusions seem clear that partnership creditors have a recognized right to look to the assets of the individual estates, that individual "debts" are satisfied under the bankrutpcy act by the payment thereof to the extent "proved and allowed," that this statutory limitation becomes by operation of law a part of the "instrument in writing" that evidences the debt, and that, therefore, any surplus that remains in an individual estate, after payment of individual debts as allowed, should be added to the partnership assets and be applied to the payment of the partnership debts. These conclusions should be read, of course, as applicable only to contests between individual and partnership creditors where, as here, the total net proceeds are inadequate to meet all the claims as allowed. What the equitable rights between the bank and Charles V. Chandler would be, if there were a surplus after payment of the partnership debts as allowed, is a question not involved.

No precedents under the present act have been adduced by counsel or found by us. But our holding accords with interpretations of similar provisions of the act of 1867 and of the English acts. In re Orne, Fed. Cas. No. 10,581; In re Haake, Fed. Cas. No. 5,883; Thomas v. Minot, 77 Mass. (10 Gray) 263; Ex parte Reeve, 9 Ves. Jr. 588.

The ruling of the District Court was right, and the petition to review and revise is therefore dismissed.

WILLIS et al. v. DAVIS.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1911.)

No. 2,072.

1. APPEAL AND ERROR (§ 113*)—APPEALABLE ORDERS—ORDER DENYING MOTION TO VACATE DISMISSAL.

An appeal does not lie from an order denying a motion to set aside a prior order of dismissal as to certain defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 777; Dec. Dig. § 113.*]

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

2. APPEAL AND ERROR (§ 257*)—EXCEPTIONS—NECESSITY OF EXCEPTIONS TO ORDER IN EQUITY.

No exception is necessary to give a right of appeal from an order of dismissal.

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

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

Suit in equity by Charles Henry Davis, trustee of Naomi Lawton Davis, against Elizabeth Willis and others. Defendants Frederick A. Hull, Mary A. Hull, W. L. Millar, and Edward Willis appeal from an order denying a motion to vacate an order of dismissal as to them. On motion to dismiss appeal. Motion granted.

Mordecai & Gadsden, Rutledge & Hagood, and Brown & Nuckols, for appellants.

Frank Chinn, for appellee.

Before KNAPPEN, Circuit Judge, and SATER and HOLLISTER, District Judges.

PER CURIAM. On September 27, 1909, an order was made upon the ex parte application of the complainant, dismissing the cause without prejudice as to the defendants Frederick A. Hull, Mary A. Hull, W. L. Millar, and Edward Willis. On October 6th following the defendants named moved the court to set aside the last-named order of dismissal on the grounds that they had no notice of the order and that they had asked for affirmative relief in their answer. On March 12, 1910, a motion to set aside the order of dismissal was denied. No appeal was taken from the order of dismissal. The appeal before us is from the order denying the motion to set aside the order of dismissal. When this appeal was taken the time for appealing from the original order had not expired. Complainant moves to dismiss this appeal on the ground that the order in question is not appealable.

The motion to dismiss must be granted. An appeal will not lie from a refusal to open a prior decree and grant a rehearing. Brockett v. Brockett, 2 How. 228, 11 L. Ed. 251; Wylie v. Coxe, 14 How. 1, 14 L. Ed. 301; McMicken v. Perin, 18 How. 507, 15 L. Ed. 504; Roemer v. Bernheim, 132 U. S. 103, 106, 10 Sup. Ct. 12, 33 L. Ed. 277. Nor from a refusal to open a judgment. Connor v. Peugh, 18 How. 394, 15 L. Ed. 432; Cambuston v. United States, 95 U. S. 285, 24 L. Ed. 448. Nor from a refusal to reinstate a case after nonsuit. United States v. Evans, 5 Cranch, 280, 3 L. Ed. 101; Dexter v. Kellas (2d Circuit) 113 Fed. 48, 51 C. C. A. 35. There is nothing in the record to sustain the contention that the court reopened the case and reheard the motion to dismiss, and that the order appealed from was accordingly an order of dismissal. The language both of the opinion and of the order thereon is distinctly to the contrary of this contention. Nor is there anything in the fact that the original order of dismissal was made without notice to the appellants, and thus without opportunity to be heard thereon or to reserve exception thereto, which precluded remedy by appeal from the original order, and so made it necessary

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

(as contended) to have a motion to set aside acted upon before there was anything to appeal from. No exception was necessary to give the right of appeal from the original order.

ST. LOUIS & S. F. R. CO. v. CUNDIEFF.

(Circuit Court of Appeals. Eighth Circuit. February 10, 1911.)

No. 3,431.

APPEAL AND ERROR (§ 1097*)—DECISION ON FORMER APPEAL—LAW OF THE CASE.

Where a judgment for plaintiff is reversed on a former appeal for error in refusing to direct a verdict for defendant, because plaintiff was negligent, as a matter of law, such determination is the law of the case on a retrial, unless the evidence then introduced is so different from that previously considered by the appellate court as to justify a different conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

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

Action by George Cundieff against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. T. Miller (W. F. Evans, R. A. Kleinschmidt, and J. H. Grant, on the brief), for plaintiff in error.

Charles B. Rogers, for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and W. H. MUNGER, District Judge.

ADAMS, Circuit Judge. This writ of error challenges a judgment rendered in favor of Cundieff against the railroad company for injuries claimed to have been occasioned by negligent acts of its agents and servants.

When the case was here before (96 C. C. A. 211, 171 Fed. 319) we held on the evidence then before us that the plaintiff appeared to be guilty of contributory negligence as a matter of law, reversed the judgment in his favor, and remanded the cause for a new trial. Another trial has been had, resulting in a second judgment in his favor. The only assignment of error presented for our consideration is whether the trial court erred in refusing to instruct a verdict in favor of the railroad company because of contributory negligence on the part of the plaintiff.

If the evidence was substantially the same on this issue as at the first trial, the law of the case would preclude any reconsideration of it now. If, on the other hand, new and material evidence was introduced at the second trial on this issue, we must again consider it. Beiseker v. Moore, 98 C. C. A. 272, 174 Fed. 368; National Surety Co. v. Kansas City H. P. Brick Co. (C. C. A.) 182 Fed. 54.

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

No practical good can come from an analysis of the evidence, or a comparison of it with what was before us on the former appeal. Suffice it to say it is considerably different in material respects from what it then was, enough so to warrant a new consideration by us. This has been given, and we conclude that there was substantial evidence to warrant a submission of the issue in question to the jury.

The judgment is affirmed.

SMYTHE v. NEW ORLEANS LAND CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 7, 1911.)

No. 2,117.

APPEAL AND ERROR (§ 395*)—PROCEEDINGS FOR TRANSFER OF CAUSE—EFFECT OF INFORMALITY IN BOND.

Where a writ of error is allowed, and citation duly issued and served, an informality in the bond, or in its approval, will not affect the appellate jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3127; Dec. Dig. § 395.*]

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

Action at law by Andrew W. Smythe against the New Orleans Land Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Gustave Lemle and F. Rivers Richardson, for plaintiff in error.

Chas. Louque, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Where a writ of error is allowed, and citation duly issued and served, an informality in the bond, or in its approval, will not affect the appellate jurisdiction. See O'Reilly v. Edrington, 96 U. S. 724, 24 L. Ed. 659; Hudson v. Parker, 156 U. S. 287, 15 Sup. Ct. 450, 39 L. Ed. 424.

The assignments of error herein complain, first, of a refusal to direct a verdict for the plaintiff; and, second and third, of excerpts from the judge's charge. From a consideration of the evidence and the judge's full charge to the jury, given in the transcript, we conclude that the evidence made a case for the jury, and that the charge, taken as a whole and in the light of the evidence, was not incorrect or misleading, so as to constitute reversible error.

The judgment of the Circuit Court is affirmed.

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

COLUMBIA MOTOR CAR CO. et al. v. C. A. DUERR & CO. et al.

(Circuit Court of Appeals, Second Circuit. January 9, 1911. On Taxation of Costs, February 8, 1911.)

Nos. 168-170, 173, 174.

1. PATENTS (§ 117*)—CONSTRUCTION AND OPERATION — EFFECT OF DELAY IN PATENT OFFICE.

Where an applicant for a patent followed strictly the statutes and rules of procedure of the Patent Office, the courts cannot exact a greater measure of diligence from him, and the fact that he took advantage of the delays which the law permitted him cannot affect the consideration to which his patent is entitled when granted.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 117.*]

2. PATENTS (§ 101*)—VALIDITY—COMBINATION CONTAINING UNDESCRIBED ELEMENT.

A patent is granted for solving a problem, not for stating one, and a claim for a combination which embraces an element only in case it is made capable of being employed in the combination and without disclosing means of adapting it is invalid as disclosing nothing definite.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 101.*]

3. PATENTS (§ 245*)—INFRINGEMENT—EQUIVALENTS.

A constant volume gas engine is not the equivalent of a constant pressure engine under a patent entitled to a fair and reasonable, but not a broad, range of equivalents.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 245.*]

4. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—GASOLINE AUTOMOBILE.

The Selden patent, No. 549,160, for an improved road engine, granted in 1895 on an application filed in 1879, claim 1, covers, broadly speaking, a combination of three elements—the carriage, the drive mechanism, and the engine. The first two elements were concededly old, and no novelty is disclosed in them. The engine, described as a "liquid hydrocarbon gas engine of the compression type," was also old; there being at the time of the application two forms of such engine in extensive use—the Brayton, or constant pressure, engine with slow combustion and constant flame ignition, operating without explosion, and the Otto, or constant volume, explosion engine. The combination itself was not new in an inventive sense, as the Brayton engine had been applied to motor boats and to some extent to vehicles. As thus broadly stated in the language of the claim, it is void for lack of invention in view of the prior art, but as limited by the specification and drawings, which show an engine of the Brayton type, with certain improvements and adaptations resulting in a decrease in weight and bulk in proportion to the power produced and in increase in speed, the claim discloses invention and is valid as covering a combination embracing as a novel element an improved liquid hydrocarbon engine of the Brayton type. As so limited, the claim is not infringed by the modern gasoline automobile in which the engine is of the Otto constant volume or explosion type with electric ignition.

5. WORDS AND PHRASES—"CONSTANT PRESSURE ENGINE"—"SLOW COMBUSTION"—"NONEXPLOSION."

A "constant pressure engine" is one in which the cylinder pressure remains the same during the outward travel of the piston while the volume of flame increases. The pressure is applied continuously. This mode of operation is also called "slow combustion" and "nonexplosion."

6. WORDS AND PHRASES—"CONSTANT VOLUME ENGINE."

A "constant volume engine" operates in a different manner from a constant pressure engine. The volume during ignition theoretically re-

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

mains constant; the pressure increases. The action is spasmodic and is kept in motion by a series of explosions.

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

Suits in equity by the Columbia Motor Car Company and George B. Selden against C. A. Duerr & Co. and the Ford Motor Company, against the O. J. Gude Company, against John Wanamaker and others, against Société Anonyme Des Anciens Établissements, Panhard & Levassor, and Andre Mossenat, and against Henry & A. C. Neubauer. Decrees for complainants, and defendants appeal. Reversed.

The decrees of the Circuit Court sustained the validity, and found infringement of letters patent No. 549,160 granted November 5, 1895, to the complainant George B. Selden for an improved road engine. The corporation complainant is the exclusive licensee under the patent. The opinion of the Circuit Court is reported in 172 Fed. 923.

Livingston Gifford, Frederic R. Coudert, and Edmund Wetmore (W. Benton Crisp, R. A. Parker, John P. Murray, and Charles K. Offield, on the briefs), for appellants.

Samuel R. Betts, William A. Redding, and Frederick P. Fish (Edward Rector and John W. Peters, on the briefs), for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. Although the title of the alleged invention as stated in the preamble of the patent is an "improved road engine," it is claimed to embrace the essential elements of the modern automobile and has been sustained as being "so fundamental and far reaching as to cover every modern car driven in any way by petroleum vapor and as yet commercially successful."

The subject is most important; the interests involved, of great magnitude; the record, phenomenally long; and the questions presented, complex. In examining these questions we have been greatly aided by the work of the judge of the Circuit Court in blazing the way through the mass of testimony and defining the issues to be decided. While we may be unable to adopt the conclusions stated in his very able opinion, we must at the outset acknowledge our indebtedness to it.

Ordinarily the first thing to be looked at in a patent suit is the patent. That is the source and measure of the patentee's rights. But in this case it seems desirable before we examine the patent to take up some preliminary considerations, the disposition of which may serve to indicate the standpoints from which the patent should be regarded in the examination to follow.

This patent was applied for in 1879 and granted in 1895. For over 16 years the application lay in the Patent Office and the applicant took full advantage of the periods of inactivity permitted by the rules and statutes. It is apparent that he delayed just as long as possible the issue of the patent to him. During this long time the automobile art made marked advances along different lines, and when, in 1895, the patent was granted, it disclosed nothing new. Others had then made the patentee's discovery and had reduced it to practice

in ignorance of what he had done. While he withheld his patent, the public learned from independent inventors all that it could teach. For the monopoly granted by his patent he had nothing to offer in return. The public gained absolutely nothing from his invention, whatever it was. From the point of view of public interest it were even better that the patent had never been granted. Judge Hough was quite within bounds in saying:

"No litigation closely resembling these cases has been shown to the court, and no instance is known to me of an idea being buried in the Patent Office while the world caught up to and passed it, and then embodied in a patent only useful for tribute."

It is urged that we should regard unfavorably the patent on account of this delay in the Patent Office, should seek to avoid giving it a broad construction, and should permit the alleged abuse of the law to weigh against the standing of the complainants in a court of equity. But the patentee acted wholly within his rights. He merely took advantage of the delays which the law permitted him. He followed strictly the statutes and rules of procedure, and the courts cannot exact a greater measure of diligence from him. When the patent was granted under the authority of the law, it became entitled to the consideration accorded to any other patent. If the statutes and rules permit unnecessary delays, they should be changed; but we reject the view that this court owes any duty to relieve against their operation. This patent, even if it be useful only for tribute, must be viewed without prejudice and with absolute judicial impartiality.

But, while we should be careful to avoid viewing the patent with disfavor, we should be equally careful to avoid considering it with too much favor on account of its subject-matter. Fifteen years ago hardly any one had seen an automobile. Ten years ago they were rare. To-day they are in use by tens of thousands, and tens of millions of dollars are invested in them and in their manufacture. The development of the automobile has been nothing short of phenomenal, and every one is inevitably impressed with its importance. Consequently, when we see that 30 years ago an application for a patent was filed which even pointed the way to the modern automobile, we can hardly fail to receive the impression that an idea of great importance must have been embodied in it. But, as we shall later see, the development of the automobile was not so sudden as we have thought. It developed step by step at the beginning; the startling activity has come at the end. Moreover, a great idea may be embodied in a patent, and yet the patentee take nothing of value by it. That which he takes is that which he describes and claims. His discovery may be of importance, but he may limit it by his claim, and his claim may proceed in the wrong direction.

So, from any standpoint, we come in this as in other patent causes to the patent in suit in which at its commencement the patentee thus states the object of his invention:

"The object of my invention is the production of a safe, simple and cheap road locomotive, light in weight, easy to control, and possessed of sufficient power to overcome any ordinary inclination."

The patentee then states the difficulties encountered, his manner of overcoming them, and the advantages arising therefrom:

"The difficulties heretofore encountered in the application of steam to common roads are the great weight of the boiler, engine, water, and water tanks, the complicated apparatus necessary to adapt the machine to the roughness of the roads which it must traverse, the necessity of the attendance of a skilled engineer to prevent accidents, and the unsightly appearance of the locomotives built on this plan. I have succeeded in overcoming these difficulties by the construction of a road locomotive propelled by a liquid hydrocarbon engine of the compression type, of a design which permits it to be operated in connection with the running gear, so that the full carrying capacity of the body of the vehicle can be utilized for the transport of persons or goods, and which, by dispensing with skilled attendance and with steam boilers, water, water tanks, coal, and coal bunkers, very largely reduces the weight of the machine in proportion to the power produced and enables me, while employing the most condensed form of fuel, to produce a power road wagon which differs but little in appearance from and is not materially heavier than the carriages in common use, is capable of being managed by persons of ordinary skill at a minimum of trouble and expense, and which possesses sufficient power to overcome any usual inclination."

The patent then describes—as we shall later see with more particularity—the body, wheels, and connections of the vehicle and the engine furnishing the motive power.

The first claim of the patent is the broadest, and the questions of validity and infringement have been presented wholly with respect to it. It is the vital claim in the case and is as follows:

"The combination with a road locomotive, provided with suitable running gear including a propelling wheel and steering mechanism, of a liquid hydrocarbon gas engine of the compression type, comprising one or more power cylinders, a suitable liquid-fuel receptacle, a power shaft connected with and arranged to run faster than the propelling wheel, an intermediate clutch or disconnecting device, and a suitable carriage body adapted to the conveyance of persons or goods, substantially as described."

The defenses are:

(1) That if the patent be broadly construed it is invalid.

(2) That if it be construed less broadly, but according to legitimate rules of construction, the defendants do not infringe.

In considering the validity of the patent, we are met, at the outset, with contentions of some of the defendants that prior uses anticipate, and that that which it discloses is an aggregation rather than a combination. But the questions of novelty and invention often run together, and the inquiry whether a given association of elements is more than an aggregation is only a phase of the question of invention. We shall primarily test the question of the validity of the patent by the answer to the inquiry, whether it discloses the exercise of the inventive faculties in view of the prior art.

This requires an examination of the state of the art in 1879—the date of the application and, consequently, of the alleged invention.[1]

[1] The date of the filing of the application—May 8, 1879—is prima facie the date of the alleged invention. The complainants, however, seek to overcome the presumption that that is the date and to carry it back to December, 1877. But, while we have no doubt that the patentee conceived the general idea of the subject of the patent some time before he applied for it, there was no such reduction to practice or description of the whole structure as would

In tracing its development we shall find that the combination described in the claim developed, to some extent, along with its elements. But this was by no means entirely so, and we think that a correct appreciation of the subject can best be obtained by considering:

(a) The development of the elements of the combination;

(b) The development of the combination itself—the motor vehicle.

The claim is for a combination possessing six elements:

(1) "A road locomotive provided with suitable running gear, including a propelling wheel and steering mechanism."

(2) "A liquid hydrocarbon gas engine of the compression type, comprising one or more power cylinders."

(3) "A suitable liquid fluid receptacle."

(4) "A power shaft connected with and arranged to run faster than the propelling wheel."

(5) "An intermediate clutch or disconnecting device."

(6) "A suitable carrying body adapted to the conveyance of persons or goods."

Or, departing from the language of the claim, these are the elements:

(1) The carriage (including the running gear, the body, the propelling wheel and the steering mechanism).

(2) The drive (including the power shaft and connections and the intermediate clutch or disconnecting device).

(3) The engine (including the liquid fluid receptacle).

The claim contains no limitations with respect to the carriage element, and the specification states that the body of the road locomotive "may be of any ordinary or desired form with any number of seats and with or without a top."

Reading the claim by itself, any wheel vehicle for the conveyance of persons or goods would come within its language, and the only limitation the specification could possibly impose upon it would be that the carriage should be of such a type that the engine could be located upon it without obstructing the body or platform.

So, there are no limitations in the claim with respect to the running gear, propelling wheel, or steering mechanism. While the specification and drawings show particular structures, there is no suggestion that the claim is confined to any particular form. Manifestly there was nothing novel in the carriage element.

With respect to the drive element: The claim describes no particular form of power shaft except that it shall be so connected and arranged as to run faster than the propelling wheel. Thus any speed-reducing gear between the driving and the driven shaft would come within the language used. Gearing down to gain leverage under sim-

serve to antedate the date of the application. It is true that the patentee made one of the elements of the combination (the engine) some months before he applied for the patent, but he did not make the combination itself (the road locomotive) until many years afterwards, and that is what he claims a patent for. Moreover, we fail to find that any adequate description of the combination claimed was made any substantial time before the application. But, while it is well to fix a starting point, the question between the dates is of little practical importance, as we find no prior use materially affecting the patent between 1877 and 1879.

ilar conditions was, however, old in the art. Mr. Dugald Clerk—the distinguished and very competent witness for the complainants—says:

"It was old in the art for a motive power engine to run at a greater speed than the propelling axle."

The claim likewise imposes no limitation upon the intermediate clutch or disconnecting device, and such devices were old in the art in 1879. They were commonly interposed between stationary engines and the load and had been employed in steam engines; the purpose being the same as here—to permit the engine to run without driving the vehicle. The drive element of the claim was old.

The engine element in the claim is the one which requires the most extended consideration. It is the feature of the patent.

The engine is described in the claim as "a liquid hydrocarbon gas engine of the compression type." Being an engine of this kind, it must, in the first place, be an internal combustion engine, which (using the definitions in the complainants' brief) is an engine in which "the fuel is burned in the engine cylinder and the heat energy thereof utilized by the expanding gases acting on the piston." In the second place, it must be a gas engine, which is "an internal combustion engine wherein the fuel is burned in a gaseous or vaporous condition." In the third place, it must be a liquid hydrocarbon gas engine, which is a gas engine "wherein the gaseous form of fuel is derived from a hydrocarbon liquid, such as petroleum, alcohol, etc." In the fourth place, it must be a gas engine of the compression type, which is "a gas engine using a compressed charge of gaseous fuel," and in which, consequently, the charge-containing space back of the piston will, at the time of ignition, "receive a larger amount of fuel in relation to its size than if the fuel was admitted thereto under mere atmospheric pressure."

Now, gas engines were old at the time of the application for this patent and had been used for various purposes. We shall have occasion to examine their use for propelling vehicles when we come to trace the development of the motor carriage itself. So liquid hydrocarbon engines were in use, both of the compression and noncompression types. The phrase in the claim, "a liquid hydrocarbon engine of the compression type," is descriptive of the Brayton engine, which came into use about 1873, and of the Otto compression engine, which came into use a little later but still was in the antecedent art. The Brayton was undoubtedly the leading compression engine at the time of this application, but it was later superseded by the Otto.

These two engines—the Brayton and the Otto—play important parts in this case. We shall later have occasion to examine them at length and to compare them as belonging to two well-defined types of compression gas engines—the "constant pressure" type and the "constant volume" type. But it is unnecessary to describe them at this time nor to define the terms which we have just employed. It is sufficient now to state the fact that the engine element of the claim—considered as an engine and not necessarily as a part of a combination—was in existence at the date of the alleged invention.

To recapitulate, we have examined the prior art and have found the different elements of the combination, other than the engine, admittedly old. We have also found the engine element old and represented by two types. We must now examine the art with reference to the combination itself and ascertain what, prior to 1879, had been the development of motor vehicles, particularly those for the carrying of passengers and goods.

For some years subsequent to 1830 steam carriages for common roads were used to a considerable extent in England for transporting goods and passengers. But the rapid development of the railroad locomotive as well as the opposition to the use of steam vehicles upon highways soon drove them out of use, so that for many years before the application for this patent steam engines had been used upon highways in this country and in England only for traction purposes.

Gas motor vehicles came later. As we have seen, gas engines were old in the art. The first suggestion of their use to propel road carriages was in 1860 in connection with the Lenoir engine. The Lenoir patent embraced the use of liquid hydrocarbon in the form of vapor, and the engine was successful for stationary purposes. It was a noncompression engine. An illustration published in Paris in 1860 showed a vehicle propelled by this engine, and it was described in various publications. If such a motor vehicle were operated, it undoubtedly ran slowly, and the engine had great weight in proportion to power. But no reason is advanced why the Lenoir engine was not capable of propelling a vehicle.

The Mackenzie English patent of 1865, which the patent itself states was in the prior art, was for the use of steam or "compressed air or other motive power instead of steam" for driving an omnibus or carriage. The structure of this patent included the use of a geared down chain and clutch.

The Savelle French patent of 1867 described how the Lenoir engine could be applied to road vehicles. This patent referred to the difficulty of applying such engines to light carriages.

The Kirkwood English patent of 1874 was for an engine "worked by the explosive force of a mixture of gas and atmospheric air," and which, among other uses, might "be incorporated in the structure of an ordinary tramway car or other vehicle."

The Rosenwald French patent of 1877 was for a carriage propelled by a noncompression gas engine. This vehicle had reducing gears and a clutch or "disentangler." The engine described was of the free piston type and was poorly adapted for use in a road locomotive.

Other patents are shown in the prior art—to Menn, Wilson, and others. But, without examining them or further considering those which we have outlined, it is clear that, if there were nothing more in the case, invention would not be shown in the mere combination of (1) a carriage, (2) a drive, and (3) a gas engine, or even a hydrocarbon gas engine. The elements were old and the combination neither novel as producing any new result nor as showing any new co-operative action.

It follows, then, that, if we are to find invention and novelty in the broad combination of the patent, they must be in the use of a hydrocarbon gas engine of the compression type.

We have seen that hydrocarbon gas engines of the compression type were old in the art and were represented by the Brayton constant pressure engine and the Otto constant volume engine. The inquiry then is whether either of those engines was ever combined with the other elements for propulsion purposes before the application for this patent.

The testimony shows clearly that prior to 1878 Brayton had successfully applied his engine for propulsion purposes in boats. Several launches from 25 to 35 feet in length had been equipped with and operated by them. The evidence, including sketches, shows geared down transmission, the use of disconnecting clutches, and the presence of liquid fuel receptacles. Indeed, if the claim be given the broad construction of covering the use of all compression gas engines, it might be read on the Brayton boat construction—if the words "motor boat" and "boat" were substituted for "road locomotive" and "carriage." Still we appreciate the substantial difference between the problem of propelling a boat and the motor vehicle problem and are not inclined to hold that this use constituted an anticipation, although it may properly be considered in determining the question of invention.

It also appears that about 1874 Brayton used one of his engines to propel a street car upon a trial track near the city of Providence. The car was propelled back and forth over the half-mile track, and it also ran up a slight grade. Some passengers were carried. There were reversing and disconnecting devices. The engine was large and heavy in proportion to the power which it furnished and—an accident taking place—it was not long used. More power in proportion to weight was necessary for commercial street railway purposes, and the plan of installing these engines was given up; financial considerations entering into this determination. But, although the experiments did not develop a commercial success, they were successful from a mechanical standpoint. The engine ran the car considerable distances and carried passengers. This use was not an abandoned experiment but an abandoned attempt to induce the railway company to equip the cars with the Brayton engine. The perfected structure was capable of practical use, although there was much room for improvement. It was not embryotic or inchoate. The combination of the engine, the drive, and the carriage was used in public, and thereafter it required the use of the imitative, and not of the inventive, faculties to claim, without modification, the same combination. The use of the engine in one vehicle pointed directly to its use in another vehicle.

The Brayton engine was also used upon an omnibus in 1878. The weight of the testimony is that the omnibus was run by the engine a very short distance, but the experiment cannot be regarded as having been either mechanically or commercially successful. This use will not be considered as in the antecedent art.

In the state of the art thus disclosed the patentee filed his application for a patent. As we have seen, he claimed broadly the combination of a "liquid hydrocarbon gas engine of the compression type" with the other elements. It is true that in the specification and draw-

ings he described and showed a particular type of engine, but he also said:

"Any form of liquid hydrocarbon engine of the compression type may be employed in my improved locomotive."

Taking the patent according to its terms, the case apparently presented is the ordinary one in which a patentee claims a broad invention and describes what he considers to be the best mode of applying it, but is not confined to that method. And if the prior art permitted such a patent in this case it might well be that it would be valid. But the prior art did not permit such a patent. Every element in the claim was old, and the combination itself was not new. Combinations of noncompression gas engines with the other elements had been in use, and Brayton had employed a "liquid hydrocarbon engine of the compression type" in a vehicle.

Even if the Brayton uses were not precisely anticipatory, we can reach no other conclusion than that with them in the prior art the claim in question must be held invalid for want of invention if it be given the broad construction the language apparently calls for. Moreover, if we give it a slightly narrower construction and treat it as covering the selection of the Brayton type of compression engine, the same conclusion must be reached. Invention would not be involved in the mere choice of that type of engine, for Brayton had previously made the same selection for his street car and boats. And, even if the Brayton engine had been used only for stationary purposes, it is by no means certain that its mere selection for incorporation in a motor vehicle without adaptation would have involved invention.

In re Faure's Appeal, 52 Off. Gaz. 754 (Supreme Court, District of Columbia), is in point. In that case Faure claimed a patent for the combination of an electric motor with a vehicle. It appeared in that case, as in this, that boats had been propelled by the same kind of motor. The court said (page 756):

"It is made evident that the mechanical arrangements for applying the power are not new, being familiar to all experts; and that the result is not new, viz., the movement of vehicles by electrical storage batteries. It is admitted that Trouve had propelled boats in this way. The contention that such a use did not anticipate this application because that experiment was on water and this invention is designed for use on land seems untenable. The propulsion of vessels through water by such batteries is within the same principle as locomotion on land."

In Shaw Electric Co. v. Worthington (C. C.) 77 Fed. 992, 993, the patent was for an improvement in traveling cranes through the substitution of independent electric motors for the power previously furnished by steam power. Judge Acheson said:

"The facts, then, being as above stated, what element of invention is to be found in the patent here in suit? In view of the previous employment of electric motors in propelling street cars, driving machinery in mills, working elevators, etc., the mere application of electric motors to traveling cranes certainly did not involve invention, even had Shaw been the first to operate cranes electrically. The inventive faculty was no more exercised here than in a multitude of other instances in every branch of industry where the electric motor has been substituted for the steam engine or other source of power."

Indeed, Mr. Clerk, himself, says:

"I have already stated that if the Lenoir, Brayton, Otto, and Langen, and Otto Silent motors were all supposed to be in active existence and running, doing stationary work, that the mere selection of one of these motors without alteration and the application of any one of them without alteration of any kind would not involve an act of invention."

It must be distinctly borne in mind that we are not now considering the alteration of any engine for the purposes stated in the patent; the question of the superiority of a combination embracing a modified or reorganized engine, or the invention involved in making it. We are, for the time being, taking the claim as it reads in connection with the broad statement in the specification, and we conclude that, taken in that way, invention is not disclosed. It should also be observed that this conclusion is not inconsistent with a holding that the patent is valid upon its face. The antecedent art as shown by the testimony goes far beyond that disclosed by the patent or that of which the court could take judicial notice.

But we are reluctant to so construe the claim that it must be held invalid for want of invention. We are of the opinion that the patentee had ideas ahead of the times and appreciated many aspects of the problem to be solved in creating a practical motor vehicle. Reading his statement of the difficulties encountered, his manner of meeting them, and the advantages of his discovery, we think it evident that he understood that an engine suitable for a light vehicle could not be taken bodily from the prior art and used without change, but that modification and adaptation were required. In our opinion the statement in the patent that any form of compression engine may be employed is inconsistent with the intention disclosed by the patentee in the patent as a whole and should not have too much stress laid upon it. We also think that we should examine the specification, including the drawings and the model, to determine whether the patentee in addition to expressing the need of adapting an engine to the purposes of a motor vehicle shows that he actually adapted one. It may well be that the claim as limited by the specification should be held to be valid.

As already shown, the patentee states at the commencement of his patent that the object of his "invention is the production of (1) a safe, (2) simple and (3) cheap road locomotive, (4) light in weight, (5) easy to control, and (6) possessed of sufficient power to overcome any ordinary inclination."

He then, as shown in the extract from the patent quoted at the beginning of this opinion, points out the difficulties involved in the use of steam engines upon common roads, and states that he has overcome them by his road locomotive propelled by his liquid hydrocarbon engine of the compression type.

He next states that the advantages of his invention are:

(1) Dispensing with steam boilers, coal, and water, and the structures necessary to their use, and employing a condensed form of fuel, thereby reducing the weight of the machine in proportion to the power produced;

(2) Producing a power road wagon light in weight, capable of being managed by persons of ordinary skill, and having sufficient power for ordinary purposes.

The patentee also describes with reference to the drawings the body of the road locomotive, the driving wheels, the clutches, the gearing, the springs, the fifth wheel, the steering device, the brake, and other parts of the structure and also indicates the preferable location of various devices and preferable methods of connection.

The patentee describes with reference to the drawings the engine element, pointing out (1) the air reservoir, (2) the air pump, (3) the working cylinder, (4) the inlet valve, (5) the cam shaft, (6) the combustion chamber, and other details. He also briefly describes the operation of some of the different parts. The description, however, both of the construction and operation of the engine, is quite incomplete. This was appreciated by the patentee, for he concluded his description by saying:

"As the general construction and mode of operation of liquid hydrocarbon engines of this class are well known, it is considered unnecessary to further describe them here."

As the patentee thus refers to the existing art for a more complete description of his compression engine, and as we have ascertained that there were two different types of compression engines in the art represented respectively by the Brayton and Otto engines, we must now find what those types were in order to determine which the patentee selected.

The two types are called respectively the "constant pressure type" and the "constant volume type." Although these terms may have originated since the date of the invention, they correctly describe the types or classes of compression engines then in existence. No better explanation of them can be found than in Mr. Clerk's work entitled "The Gas Engine," which was published in 1887 and which has been offered in evidence. In this book he also shows the construction and working processes of the two types of engines and the differences between them, as stated in the footnote.[2]

[2] In his book (page 29) Mr. Clerk divides gas engines according to their work processes into three well-defined types:

"1. Engines igniting at constant volume, but without previous compression.

"2. Engines igniting at constant pressure with previous compression.

"3. Engines igniting at constant volume, with previous compression."

It is not necessary for the purposes of this case to examine the operation of the first type—the noncompression engine. With respect to the second type, the constant pressure compression engine, Mr. Clerk says (page 31):

"In it the engine is provided with two cylinders of unequal capacity. The smaller serves as a pump for receiving the charge and compressing it; the larger is the motor cylinder, in which the charge is expended during ignition and subsequent to it.

"The pump piston, in moving forward, takes in the charge at atmospheric pressure; in returning compresses it into an intermediate receiver, from which it passes into the motor cylinder in a compressed state. A contrivance similar to the wire gauze in a Davy lamp commands the passage between the receiver and the cylinder, and permits the mixture to be ignited

It is apparent from the descriptions in this work that a "constant pressure engine" is one in which the cylinder pressure remains the same during the outward travel of the piston while the volume of flame increases. The pressure is applied continuously and not spasmodically. This mode of operation is also called "slow combustion," and "nonexplosion."

A constant volume engine operates in a different manner from a constant pressure engine. The volume during ignition theoretically remains constant; the pressure increases. The action is spasmodic. The piston moves by explosive action and is kept in motion by a series of explosions.

The Brayton engine, to which we have referred, was a constant pressure compression engine. Mr. Clerk said in his book (page 32) that it was one of the most successful of that kind, and also said (page 154):

"The engine worked well and smoothly; the action of the flame in the cylinder could not be distinguished from that of steam; it was as much within control and produced diagrams quite similar to steam."

And in Prof. Thurston's contemporaneous report (1873) concerning the Brayton engine, quoted in Mr. Clerk's book (page 157), it is said:

"The operation of the engine is precisely similar in the action of the engine proper and in the distribution of pressure in its cylinder to that of the steam engine. The action of the impelling fluid is not explosive, as it is in every other form of gas engine of which I have knowledge."

The Otto engine, on the other hand, was a constant volume compression engine. Although the leading idea of compression and ignition at constant volume had been suggested before the time of this

on the cylinder side as it flows in without the flame passing back into the receiver.

"The motor cylinder thus receives its working fluid in the state of flame, at a pressure equal to, but never greater than, the pressure of compression. At the proper time, the valve between the motor and the receiver is shut, and the piston expands the ignited gases till it reaches the end of its stroke, when the exhaust valve is opened, and the return expels the burned gases.

"The ignition here does not increase the pressure, but increases the volume. The pump, say, puts one volume or cubic foot into the receiver; the flame causes it to expand while entering the cylinder to two cubic feet. It does the work of two cubic feet in the motor cylinder, so that, though there is no increase of pressure, there is nevertheless an excess of power over that spent in compressing."

With respect to the constant volume compression engine, Mr. Clerk says (page 33):

"The compression cylinder may be supposed to take in the charge of gas and air at atmospheric temperature and pressure; compress it into a receiver from which the motor cylinder is supplied; the motor piston to take in its charge from the reservoir in a compressed state; and then communication to be cut off and the compressed charge ignited.

"Here ignition is supposed to occur at constant volume, that is, the whole volume of mixture is first introduced and then fired; the pressure therefore increases. The power is obtained by igniting while the volume remains stationary and the pressure increases.

"Under the pressure so produced, the piston completes its stroke, and upon the return stroke the products of the combustion are expelled."

engine, Otto seems to have first successfully applied it, and his engine came into general use. This engine was operated by a series of timed explosions and, as we shall later see, was the prototype of the modern automobile engine.

It is clear from this examination that the statement heretofore made that the Brayton and Otto engines differed in being respectively constant pressure and constant volume engines is sustained by the record.[3] They also differed in another important particular. The Brayton was a two-cycle engine. The Otto was a four-cycle engine. Turning to the complainant's definitions, we ascertain that "a cycle is a series of movements composing one complete operation," and that the following is a definition of the term "two-cycle engine":

"An engine whose operation is completed by two strokes, viz., a power stroke and a scavenging or exhaust stroke. If of the compression type the power stroke simultaneously compresses the charge for the next power stroke, the charge thus compressed being admitted to the cylinder at the end of or during the scavenging or exhaust stroke."

The term "four-cycle engine" is thus defined:

"An engine whose operation is completed in four strokes. Always of the compression type. First stroke sucks in the gaseous charge at atmospheric pressure; second stroke compresses the charge; third stroke is the power stroke; fourth is the scavenging or exhaust stroke."

The compression stroke in the two-cycle engine of the earlier art usually compressed the charge into an intermediate receiver from which it was admitted in a compressed state to the cylinder. This was the construction of the Brayton engines which were provided with outside mechanism in which compression took place before the charge was let into the cylinder. The four-cycle engine, on the other hand, as represented by the Otto engine, had no such intermediate receiver. The single cylinder served alternately the purposes of motor and pump, and the charge was also compressed in it.

Now, as the patentee in effect referred to an existing compression engine to supply the deficiencies in his description, and as the two existing types are represented by the Brayton and Otto engines respectively, the question is: Which one did he refer to?

Comparing the engine drawings of the patent in suit with the Brayton patent drawings, we think it evident that the patentee adopted, and perhaps, adapted, the Brayton apparatus. Looking at the written specification, it will be seen that an external air reservoir and pump are provided, showing that the engine was of the Brayton two-cycle type. Reading further we observe that the patentee says:

"As it would be decidedly inconvenient to be under the necessity of extinguishing the flame in my improved traction engine whenever it was required to make a short stop, the clutch, Y (or the clutches, 'j j') is interposed between the engine and the driving wheels, so as to admit of the running of the engine while the carriage remains stationary."

This constantly burning flame (or other continuous ignition) was necessary to the operation of the Brayton constant pressure engine.

[3] We shall continue the examination of the differences between these engines when we consider the question of infringement.

It was the "living torch at the entrance of the cylinder" referred to in the Brayton patent. Its existence was not essential to the timed explosion operation of the Otto engine.

So without any expert opinion we should have no difficulty in determining that the engine of the patent is of the Brayton two-cylinder constant pressure type. And the testimony even of the complainants' expert is to the same effect. Mr. Clerk said in his testimony that the reference in the patent to existing well-known engines was to the Brayton constant pressure engines.

He also said in his report to complainants' counsel, after referring to the description in the patent:

"Stopping at this point it is necessary to recognize what type of engine is indicated. About this I have no difficulty whatever. I at once recognize it as an engine of the Brayton type operating on the constant pressure cycle. Although no description is given in the specifications, any one familiar with Brayton engines can see the air pump of smaller capacity than the motor cylinder; the air reservoir containing air compressed by the pump, and the inlet valve admitting air to the cylinder. * * * Altogether I have no difficulty in seeing that the intention of the inventor is to operate by the constant pressure method, although he does not say so specifically."

It cannot therefore be questioned that the engine which the patentee referred to in the patent for the completion of his description was the Brayton engine. The Brayton mode of operation was adopted by reference as the Selden mode of operation, and this method, as we have already seen, was the constant pressure, two-cycle method.

The next question is: What modifications does the patent show that Selden made in the Brayton engine?

The Brayton patents and the testimony concerning the actual Brayton engines show that they were heavy and cumbersome in proportion to the power furnished. While such an engine did run a street car, it occupied considerable space, and a still larger and heavier engine would have been necessary to furnish sufficient power for the practical needs of the railway. The engines were poorly adapted for use in a vehicle upon common roads. When capable of furnishing sufficient power they were too heavy, and the reciprocating parts occupied too much space.

The written description of the patent, read in connection with the drawings, shows fairly that Selden made material improvements upon the Brayton structure in order to adapt it to the purposes of a road vehicle.

1. The drawings show that the Selden engine has an inclosed crank chamber; it being a continuation of the working chamber. It is true that the only function of the inclosed crank case mentioned in the written specification is that of a cooling chamber. But it is referred to and it is clearly shown in the drawings, so that we think the patentee entitled to claim as a feature of his patent any benefits necessarily accruing from its use. We are also satisfied that the use of the inclosed crank case rendered unnecessary the heavy bed plates of the former Brayton construction and enabled the patentee to dispense with other heavy and cumbersome parts outside the casing of the cylinder.

2. We also think it is the better view that Selden by his alterations increased the speed capabilities of the Brayton engine. Higher speed was obviously necessary for the purposes of a light road vehicle, and it was such a vehicle that it was the object of the patent to produce. The elimination of cumbersome working parts by the use of an inclosed crank case necessarily increased, to some extent, the capacity for speed. The plurality of cylinders referred to, but not required by, the specification and shown in the drawings, produced, in the arrangement shown, continuous turning power and increased the speed possibilities over the old Brayton construction. The gearing ratio—the proportion of stroke to volume of cylinder—shown in the drawings, but not mentioned in the written specification, also gave increased speed.[4]

The improvements, then, which Selden made in the Brayton engine, had these results:

(a) Decrease in weight in proportion to power produced.
(b) Decrease in bulk in proportion to power produced.
(c) Increase in speed.

To make these improvements we think that something more than mere mechanical skill was required, and, in view of the superior efficiency of the engine for the purpose for which it was designed, we hold that invention was involved. The complainants are probably right in saying in their brief:

"He (Selden) was compelled to materially reorganize the Brayton engines of the prior art even to such an extent that a separate engine patent would have been fully justified by the degree of invention involved."

Selden did not, however, obtain a patent for his improvement upon the Brayton engine, but made the improved engine an element in his road locomotive combination. But no new co-ordinate action of the members of the combination is shown. The improved engine furnished the power, and the other elements co-operated with it in the same way that similar elements had co-operated with the older engines. The superior results would seem to have arisen from the superiority of the engine element alone. But it is not necessary to determine whether the associated action, as such, produced a new and useful result. It is sufficient to sustain the claim to hold that the combination embraced a novel element. The claim is held to be valid as covering a combination in a road locomotive of the different elements with a liquid hydrocarbon compression engine of the Brayton type;

[4] The rule is, of course, appreciated that while the drawings of a patent serve to make plain doubtful or ambiguous statements in the written description, they cannot go further and supply the entire absence of the written description required by the statute. A strict application of this rule would probably prevent us from considering what the drawings show concerning the gearing ratio or the working of the cylinders—these subjects not being mentioned in the description. But in view of the stated objects of the patent and in view of the fact that changes in the Brayton structure referred to in the description tend to increase speed capabilities, we have thought that the rule should not be strictly applied in this case and that some weight should be given to what the drawings disclose in that direction, as supplementing the written description and not altogether as supplying its absence.

the limitation to this type being read into the claim by the specification to save it from invalidity.

It must be understood, however, that we do not sustain the claim upon the theory that Selden invented a light engine, an engine of small bulk, or an engine of high speed, using those terms absolutely. We have made comparisons with, and have considered improvements upon, the Brayton engines only. Compared with them, we think the Selden engine lighter, less bulky, and of higher speed. But we are not at all convinced that the Selden engine operating according to the Brayton or constant pressure method would be a high speed engine as compared with one operating according to the explosive method. Constant pressure involving slow combustion seems consequently to involve slow operation.

The complainants urge that it places too narrow a construction upon the claim to limit it to a combination of which the engine is an improved Brayton engine. They say that the improvements upon the Brayton engine which Selden shows in his patent merely illustrate the alterations and changes required by compression engines generally to fit them for the purposes of a light road vehicle. They say, in effect, that the engine element of the claim is any compression engine which has been adapted to vehicular purposes by changes similar to those made in the Brayton engine.

But we have been able to find that Selden reorganized the Brayton engine only by making close comparisons with that particular construction. We have nearly broken established rules by looking at the drawings by themselves to ascertain the changes made in that engine. There is little enough to be found about the improvements to it and nothing at all about the alterations of other engines. The patent does not pretend or attempt to lay down any rule for reorganizing compression engines to fit them for vehicular purposes. It does not say that other kinds of engines than the Brayton type require changes. It does not say that the changes made in the Brayton engine could be made in other engines, or that, if made, they would fit them for use in motor vehicles. No one could learn from the patent whether the Otto engine could be constructed with an inclosed crank chamber, or whether the substitution of the gearing ratio shown in the drawing would increase or diminish its speed. With the patent before a person skilled in the art, experiments, certainly, and invention, not improbably, would have been necessary to determine the steps required to reorganize the Otto engine.

A patent is granted for solving a problem, not for stating one. Its description must explain the invention itself, the manner of making it, and the mode of putting it in practice. In the absence of knowledge upon these points, the invention is not available to the public without further experiments and further exercise of inventive skill. A claim for a combination which embraces an element only in case it is made capable of being employed in the combination and without disclosing means of adapting it discloses nothing definite. The questions remain: What engine is capable of being combined in a road vehicle? What changes are necessary to adapt it to the purpose? How are these changes to be made? If we were to construe the claim

as the complainants urge, we should be obliged to go further and hold it uncertain, indefinite, and consequently invalid.[5]

For these reasons, we must hold that the claim of the patent, limited by the specification in the manner shown, is valid unless, indeed, we are satisfied that the patented structure was inoperative and without utility. But, without discussion, it is sufficient to say that we have no doubt that an engine constructed according to the teachings of the patent with its references to the Brayton engine would, in combination with the other elements, run a road vehicle. We think that the patent discloses an operative structure, and that is sufficient. The defense of want of utility is not sustained. But any contention that a motor vehicle constructed by the patentee according to the teachings of the patent operated so successfully as to demonstrate that Selden had solved a great problem and is entitled to the status of a pioneer inventor is, we think, without foundation.[6]

We now come to the question of infringement, and as it is conceded that the defendants use a combination embracing all the elements of the claim other than the engine element, and as it is also conceded that they use an engine of some kind in connection with such other elements, the question of infringement resolves itself into the inquiry whether their engine is a modified Brayton engine or its equivalent.[7]

[5] Any force whatever in the complainants' contention must grow out of the presence in the patent of the statement to which attention has already been directed that "any form" of compression engine may be employed. But, just as we found that by giving those words their natural meaning, the patent would be made so broad and sweeping as to be invalid in view of the antecedent art, so, if we construe them as meaning "any adaptable engine" or "any engine which has been adapted," we make the patent indefinite and invalid. If the patent is to be sustained, the language in question must be given a limited application. Under all the conditions we think that it should be construed as meaning merely that the patentee does not confine himself to any particular form or detail of the Brayton type of engine.

[6] While the testimony with respect to the Selden vehicles constructed to illustrate the patent is sufficient to negative inoperativeness, it fails to show such practical success as to broaden the scope of the invention, and certainly does not disclose invention in and of itself. We should be unable to sustain the patent upon any such theory as that advanced by the complainants' experts that Selden's invention consisted in producing "a successfully operative vehicle" or "as a new result," "a practically unobstructed vehicle capable of great range of action." Of course, the vehicle had to be successfully operative in the sense of showing utility to make the patent valid, but that result did not show invention and novelty. Those essentials we were able to find only elsewhere. Moreover, the result of obtaining a practically unobstructed vehicle arose from the location of the engine upon the axle which the defendants have not adopted, and that feature is not put forward in the complainants' briefs as being essential to the invention. And, furthermore, we are not at all convinced by the testimony concerning the vehicles in question—even assuming that their construction followed the teachings of the patent and nothing besides—that they showed capability for commercial use or possessed great range of action.

[7] A distinction is made by the Judge of the Circuit Court in considering the question of infringement which, we think, is not well founded. He says in his opinion:

"Defendants seem continually to assume (without saying so) that Selden invented nothing more than a modified Brayton engine and then assert that

But before we enter directly upon this inquiry we should briefly examine the development of the modern automobile and ascertain from what source the engines of the defendants' type were obtained, and, especially, whether they were borrowed from Brayton and Selden.

We have already noticed the motor vehicles of the art prior to 1879. Much had been attempted and little accomplished. Indeed it was not until about 10 years later, at the time of the Paris Exposition of 1889, that the real automobile art may be said to have begun. At that exposition a Benz automobile was exhibited, and later the public interest was stirred by the Paris-Rouen race. In this country public attention was first called to the automobile by the Daimler Exhibit at the Columbian Exhibition in Chicago in 1893, and in 1895 the Times-Herald automobile race took place in Chicago. The pioneer inventors appear to have been Daimler and Benz abroad and Duryea, Olds and Ford (and perhaps one or two others) in this country.

These inventors selected for their automobiles the Otto compression engine. They did not select the Brayton engine and, indeed, as Mr. Clerk says, the Brayton engine had practically disappeared from the market in 1889. Thus in their original type of engine they borrowed nothing from Brayton, and, of course, they could have actually borrowed nothing from Selden because his patent was not issued until 1895.

In some of the first automobiles the engine was located on the axle as shown in the Selden patent. But this location below the springs caused too much jar to the machinery and was soon abandoned.

The Otto compression engine selected by these inventors has been modified and changed in its development into the modern automobile engine and adjuncts of importance have been added. But none of these changes was in fact taught by the patent in suit, nor could many of them have been taught by it had it been issued. And the possible changes which it did indicate were suggestive merely.

they do not infringe because they do not use that particular motor and do use a modified Otto. They admit that the claim is for a combination, but continually seek refuge in defenses that would be good against any patent on Selden's engine, but are worthless against the combination if it be patentable at all."

Undoubtedly a patent upon a combination may be broader than a patent upon any or all of its elements. The members may co-operate to produce a new and beneficial result or operate according to a novel method. But it is not clear that any novel co-operative action is shown in the present case and whatever new and beneficial result was produced by the combination seems clearly to have arisen from the superiority of the engine element alone. It has seemed well settled in the case that that which the patentee invented and used in his combination was a modified Brayton engine. There would have been no invention in combining an unmodified Brayton engine with the other elements.

But all this is beside the question of infringement. Even if it be conceded that the combination patent has a different scope than a patent for an improved Brayton engine would have had, it is none the less true that, if the defendants do not use the modified Brayton engine and do use the modified Otto engine, they escape infringement unless the latter is an equivalent of the former. It is well settled that to establish the infringement of a combination the use of every element of the combination must be shown.

The Otto compression engine did not at first employ electric ignition. A flame with a moving slide produced the timed explosions. Electric ignition was considered impracticable. But when the electric art had developed it was seen that the electric ignition could be made superior to flame ignition and would permit much higher speed. But the change was not indicated by the Selden patent, which refers only to flame ignition.

The inventors added a carburetter to the Otto engine in which the charge of gasoline and air was mixed in exact proportions before it was conducted to the cylinder for compression. In the engine of the patent the air vaporizes the gasoline in the passage leading to the cylinder, and the proportions necessarily vary. The patent in no way pointed in the direction of the carburetter.

When the inventors began to adapt the Otto engine to the purposes of a road engine, the desirability of lightness was apparent, and changes were made in the bed and castings so that the engine could be supported upon a steel frame instead of upon the heavy foundations used in stationary work. Other changes in the direction of decreasing weight and bulk and increasing speed were made. But these inventors were actually taught nothing in these matters by the Selden patent, and if it had been before them they would, as we have seen, have learned nothing definite from it.

We thus find that the defendants use an improved Otto engine which retains the principle of that type and is, in its essentials, a four-cycle constant volume (or explosion) compression gas engine. Obviously it is not identical with Selden's improved Brayton engine, which is a two-cycle constant pressure (or slow combustion) compression gas engine; and so the final question is whether they are, under the patent, equivalents.

It is, of course, clear that an inventor is not limited to the particular structure illustrated in his patent as the best form known to him provided his claim is broad enough to cover other or equivalent forms. If the claim in the present case could have been sustained as covering a combination of any hydrocarbon gas engine of the compression type with the other elements, the description in the specification of the modified Brayton engine would have been considered as a statement of the inventor's idea of the best form; but he would not have been confined to it, and the Otto improved engine would unquestionably have infringed. But we were unable to sustain the claim as so construed and could only hold it valid as being limited to a combination in which a Brayton modified or reorganized engine should be a member. The patent as so construed necessarily permits only a very limited range of equivalent forms. Being confined to an engine element of a particular class or type, an engine of another class seems almost barred by the interpretation itself. Still, classification might be based upon matters of form and not of substance. The elements of the combination are things and not names. In this as in other patents for combinations we think that the unity of the combination will not be affected by the substitution of elements which, however they may be classified or designated, perform the same function in substantially

the same way, while it will be destroyed by the substitution of elements which do not perform the same office in substantially the same manner.

We must then consider the materiality of the differences between the engines in question. We have already seen that broad differences exist and must now determine their nature and extent. In giving weight to dissimilarities—in saying what are substantial and what relate merely to form—we must consider the degree of invention shown in the patent, although we will be unable to disregard differences as in the case of a patent of a primary character. And we think this means in the present case that the patent is entitled to a fair and reasonable, but not broad, range of equivalents. What is a fair and reasonable range can better be determined in the concrete comparison rather than in the abstract definition.

A close comparison of the engines shows many differences. Some are obviously mere differences in shapes and designs and may be at once disregarded. The following are those which appear to be the most material:

(1) The Selden engine has external compression mechanism with a compressed air reservoir, while the defendants' engine has no such external mechanism but compacts the charge in the working cylinder. Were the compression of the charge the only object to be accomplished, undoubtedly the gas and air could as well be compressed to the requisite degree before entering the cylinder as by compression in the cylinder itself. And even if internal compression gave superior results it is probable that the one method would be the equivalent of the other. But if and in so far as outside compression is essential to a constant pressure engine, inside compression cannot be regarded as its equivalent unless we determine that the distinction between constant pressure and constant volume engines should be disregarded.

(2) The Selden is a two-cycle engine. The defendants' engines are four-cycle. The Selden engine compresses into an outside chamber simultaneously with its power stroke and with the next stroke drives out the burnt gases. Every second stroke is a power stroke. The defendants' engine draws in the charge with the first stroke and compresses with the second. The third stroke is the power stroke, and the fourth sweeps out the burnt gases. Every fourth stroke is a power stroke. But the first two strokes of the defendants' engine are merely pumping and compressing strokes, and, were the question here between a two-cycle explosion engine and a four-cycle explosion engine, we should have little difficulty in finding the one the equivalent of the other.

(3) The Selden engine burns the charge as mixed at the entrance to the cylinder, while the defendants' engine compresses and mixes the charge inside the cylinder. The result in the latter case is that by th compaction in the cylinder after admission the mixture is brought into a homogeneous state, while in the former case the gas and the air burn at the inlet to the cylinder in a more or less nonhomogeneous state with the pressure behind them. The materiality of this difference in operation, however, lies in the fact that the one form is that

of the constant volume engine; the other, of the constant pressure engine.

(4) The Selden engine has no distinctive external vaporizing device, while, as we have seen, the defendants' engine is equipped with a carburetter which determines the proportions of the mixture to be admitted to the cylinder and also increases its homogeneity. But by the construction shown in the patent the air vaporizes the hydrocarbon in the passage leading to the cylinder, and we think the carburetter, while undoubtedly an adjunct of great importance and advantage, should be held not beyond the range of equivalents.

(5) The Selden engine has constant flame ignition, while the defendants' engine has timed electric ignition. Probably continuous electric ignition would be the equivalent of constant flame ignition; but whether intermittent or timed ignition, which is an essential feature of the constant volume engine, is the equivalent of continuous ignition, depends altogether upon whether the constant volume engine is the equivalent of the constant pressure engine.

So, lastly, we reach the question: Is the constant volume engine the equivalent of the constant pressure engine, under a patent entitled to a fair and reasonable, but not broad, range of equivalents?

This is not a question of differences in terminologies or theories. It is a question of differences in principles and things. It is wholly immaterial whether the terms "constant pressure" and "constant volume" were in use when the patent was first applied for, or when or by whom they were first employed. It is equally immaterial whether we use those terms at all. We might just as well use the terms "explosion" and "combustion" to designate the two tpyes, and, indeed, have repeatedly used them in this opinion. But the terms "constant pressure" and "constant volume" are convenient phrases which in themselves indicate methods of operation and they are used in Mr. Clerk's book to which we have referred and shall refer. So, although laying no stress whatever upon the mere names, we shall continue to use them.

It is also immaterial that by omitting the bye-pass which furnishes a constant supply of gas, by changing the timing of valves, and by using timed ignition, a constant pressure engine might be converted into a constant volume engine. The required alterations are by no means trivial, and the actuality of differences in principles and methods is not changed by the readiness by which they may be eliminated.

There is another matter which is also without importance. It is immaterial that a constant volume engine, under extraordinary conditions and with unusual adjustments, may be made to approximate the action of a constant pressure engine, or that a constant pressure engine under like conditions and adjustments may be made to approximate the action of a constant volume engine. The question is whether in their regular methods of operation the two types of engine are so similar as to be substantial equivalents.

Turning again—with the risk of repetition—to Mr. Clerk's book, we find that, in addition to his classification of compression engines as

shown in the extract already quoted, he says, in speaking of the constant pressure type (page 152):

"In engines of this kind compression is used previous to ignition, but the ignition is so arranged that the pressure in the motor cylinder does not become greater than that in the compressing pump. The power is generated by increasing volume at a constant pressure. Engines of type 2 (constant pressure engines) are therefore:

"Engines using a mixture of inflammable gas and air compressed before ignition and ignited in such a manner that the pressure does not increase; the power being generated by increasing volume.

"These engines are truly slow combustion engines; in them there is no explosion.

"The most successful engines of the kind is an American invention; although proposed in 1860 by the late Sir William Siemens, it was never put into practicable workable shape till 1873, when the American, Brayton, of Philadelphia, produced his well-known machine."

And of his type 3, or constant volume type, Mr. Clerk further says (page 165):

"Engines of this kind resemble those just discussed in the use of compression previous to ignition, but differ from them in igniting at constant volume instead of constant pressure; that is, the whole volume of mixture used for one stroke is ignited in a mass instead of in successive portions.

"The whole body of mixture to be used is introduced before any portion of it is ignited; in the previous type (constant pressure type) the mixture is ignited as it enters the cylinder, no mixture being allowed to enter except as flame. In type 3 the ignition occurs while the volume is constant; the pressure therefore rises; it is an explosion engine, in fact, like the first type (noncompression) but with a more intense explosion due to the use of mixture at a pressure exceeding atmosphere. * * *

"In the third type are included all engines having the following characteristics, however widely the mechanical cycle may vary:

"Engines using a gaseous explosive mixture, compressed before ignition and ignited in a body, so that the pressure increases while the volume remains constant. The power is obtained by expansion after the increase of pressure."

Mr. Clerk considered these differences between constant pressure and constant volume so important that he made them the basis of classification in his book, and, notwithstanding his present testimony, we must regard them as substantial.[8]

It is true, as stated in the opinion of the judge at circuit, that in all internal combustion engines the result of expanding in any way the gaseous fuel is the driving of the piston; but the method of operation is not the same when it is driven by explosive action as when it is driven by slow expansion. So in all compression gas engines the charge is compressed before ignition; but the compression of the whole charge and its instantaneous firing at the moment of greatest compaction is a very different thing from the ignition of successive compressed portions—particle after particle—as they enter the cylinder. In the latter case the force upon the piston is progressive—"the action of the flame in the cylinder could not be distinguished from that of steam" (Mr. Clerk's book, page 154)—while in the former the

[8] Mr. Clerk uses the word "type" in his book in the sense of "kind" or "class." Thus he points out several different varieties of the different classes of engines. As we have quoted freely from the book, we have, to avoid confusion, used the same word in the same sense.

force is spasmodic and explosive. These are differences in principles and methods of operation. And these differences in principles and methods are substantial. We are satisfied that the slow combustion method necessarily involves slow operation; not only because of the time required for combustion between strokes, but on account of the comparatively nonhomogeneous character of the mixture. We are also satisfied that it gives less power in proportion to the size of the engine than the explosion method.[9]

It is our opinion, for these reasons, that in this road locomotive combination embracing as its engine element an engine of the constant pressure type, the substitution in place of such engine of an engine of the constant volume type destroys the unity of the combination, because the two engines do not perform the same functions in substantially the same way. Granting the patent as broad a range of equivalents as its interpretation will permit, and giving due consideration to the degree of invention involved, still we are not able to hold that the Otto improved engine is the equivalent of the Selden engine or that the defendants infringe by employing it as an element of their motor vehicle combination.

Let us briefly notice the consequences of an opposite conclusion. The Otto engine was in the prior art. Assuming that it was not adapted for propulsion purposes in a light vehicle, it would seem clear that the first person who showed invention in reorganizing and adapting it would have been entitled to a patent for the improvement, and, with Otto's permission, could have used the improved engine in a vehicle. Similarly it would seem, that he might have obtained a patent for a combination embracing the improved Otto engine as an element. But those things could not have been done if infringement is shown in this case. Selden, although selecting the Brayton engine which was designed to avoid the explosive type, yet pre-empted the field and prevented all improvements for propulsion purposes in that type.

While the conclusion of noninfringement which we have reached leaves the patentee empty handed with respect to his patent for the short time it has to run, it cannot be regarded as depriving him through any technicality of the just reward for his labors. He undoubtedly appreciated the possibilities of the motor vehicle at a time when his ideas were regarded as chimerical. Had he been able to see far enough, he might have taken out a patent as far reaching as the

[9] Explosive action was the very thing which Brayton, who invented the engine which Selden modified desired to avoid. In his foundation patent of 1872, in speaking of the long slow-burning operation of the combustible, he says:

"While in the state of expansion consequent upon ignition it (the flame) exerts, not a spasmodic or explosive force upon the piston at the very commencement of its stroke when the expanding gas begins to act upon it, and the quantity of gaseous mixture during its period of admission is in proportion to the extent of the movement of the piston and is put into the state of expansion upon passing the interceptors."

The statement concerning Brayton in "Engineering" for February, 1877, seems well founded:

"He turned his attention to the design of an engine in which an explosive mixture could be gradually consumed without the ordinary explosive action."

Circuit Court held this one was. But, like many another inventor, while he had a conception of the object to be accomplished, he went in the wrong direction. The Brayton engine was the leading engine at the time, and his attention was naturally drawn to its supposed advantages. He chose that type. In the light of events we can see that had he appreciated the superiority of the Otto engine and adapted that type for his combination his patent would cover the modern automobile. He did not do so. He made the wrong choice, and we cannot, by placing any forced construction upon the patent or by straining the doctrine of equivalents, make another choice for him at the expense of these defendants who neither legally nor morally owe him anything.

The decrees of the Circuit Court are reversed, with costs, and the causes remanded, with instructions to dismiss the bills, with costs.

On Taxation of Costs.

PER CURIAM. We think that the cost of the supersedeas bond was a necessary part of the expenses of appeal, caused by the erroneous decision of the court below. Although the bond was allowed as a favor and was not a matter of right, it was necessary to protect the appellant's interests pending the appeal. As it has not been customary to tax the premiums on supersedeas or appeal bonds in the Circuit Court of Appeals, the action of the clerk is affirmed, but the appellant should be allowed to tax these premiums in the Circuit Court.

The decision of the clerk on the other items is correct, and his taxation is affirmed.

ELECTRIC PROTECTION CO. v. AMERICAN BANK PROTECTION CO.

AMERICAN BANK PROTECTION CO. v. ELECTRIC PROTECTION CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 18, 1910. On Petition for Rehearing, January 30, 1911.)

Nos. 3,349, 3,370.

1. PATENTS (§ 328*)—INVENTION—BURGLAR ALARM.
The Coleman reissue patent, No. 11,626 (original No. 570,906), for an electric burglar alarm, claims 18 and 20, are void for lack of invention in view of the prior art.

2. PATENTS (§ 328*)—INFRINGEMENT—BURGLAR ALARM.
The Robinson & Green patent, No. 708,496, for improvements in electric burglar alarms, relating particularly to an alarm gong to be placed outside of the safe or vault to be protected in combination with a shield inclosing the same, which if removed or attempted to be removed from its position will cause an alarm to be sounded, is for a narrow invention, and entitled only to a correspondingly limited range of equivalents. Claims 1, 2, 3, 7, 8, and 10 construed in connection with the drawings and specification, and *held* not infringed.

3. PATENTS (§ 177*)—COMBINATION PATENTS—CONSTRUCTION.
In patents for a combination if the patentee specifies any element as entering into the combination, either directly by the language of the

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

claim or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 253, 254; Dec. Dig. § 177.*]

4. PATENTS (§ 243*)—INFRINGEMENT—PATENTS FOR COMBINATION.

In determining the question of infringement of a patent for a combination it is necessary to look at the mode of operation or the way the device works, as well as at the result, and the means by which that result is attained.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 243.*

Patentability of combinations of old elements as dependent on results obtained, see note to National Tune Co. v. Vaiken, 91 C. C. A. 123.]

5. PATENTS (§ 324*)—INFRINGEMENT—APPEAL—INTERLOCUTORY DECREE.

In a suit in equity for infringement of different patents for the same or kindred inventions, such as may be joined in one suit, where the bill is sustained as to some of the patents, but dismissed as to others by an interlocutory decree, no appeal lies from that part of the decree which dismisses the bill as to some of the patents until after the final decree.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 324.*]

6. PATENTS (§ 324*)—SUITS FOR INFRINGEMENT—APPEAL—DECISIONS REVIEWABLE.

Where defendants are jointly sued for infringement, and the bill is dismissed as to some by an interlocutory decree which retains it as to others for a final decree and accounting, such decree is not final, and no appeal lies from that part dismissing the bill as to some of the defendants.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 602; Dec. Dig. § 324.*]

Sanborn, Circuit Judge, dissenting.

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

Suit in equity by the American Bank Protection Company against the Electric Protection Company and others. From an interlocutory decree granting an injunction and ordering an accounting as to some of the patents involved and dismissing the bill as to others and as to the individual defendants (181 Fed. 350), defendant corporation and complainant both appeal. Reversed on defendant's appeal. Complainant's appeal dismissed.

John E. Stryker, for appellant in No. 3,349, and for appellees in No. 3,370.

Paul & Paul (A. C. Paul, of counsel), for appellee in No. 3,349, and for appellant in No. 3,370.

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

REED, District Judge. The first of these cases is an appeal by the Electric Protection Company, a Minnesota corporation, from an interlocutory decree granting an injunction and an order for an accounting in a suit of the American Bank Protection Company, also a Minnesota corporation, against it and certain of its stockholders and directors for an alleged infringement of claims 18 and 20 of reissued let-

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

ters patent No. 11,626, to Clyde Coleman and others August 17, 1897, and claims 1, 2, 3, 7, 8, and 10 of patent No. 708,496, issued to Robinson & Green September 2, 1902. The second is an appeal by the complainant, the American Bank Protection Company, from so much of the decree as dismissed the bill as to the individual defendants, stockholders and directors of the Electric Protection Company, and three of the patents sued upon, viz., Nos. 626,670, 771,749, and 880,020.

The appeal of the defendant the Electric Protection Company may be first considered. Its defenses are invalidity of the patents and noninfringement. The reissued letters patent No. 11,626 is for certain improvements in electrical burglar alarms, the original patent for which was issued November 10, 1896. Briefly stated the alleged invention is for improvements in an electrical alarm system whereby bank vaults and similar structures are surrounded and protected by electrical conductors and devices which, in combination with a time mechanism, are intended to give alarm if attempt is made to enter the vault or protected structure at other than predetermined hours, or to injure or cripple the system at any time so as to render it inoperative. The claims involved in this appeal are:

"18. The combination with a structure or district inclosed and surrounded by electrical conductors, of an electric protective circuit or circuits including said conductors, an alarm device controlled thereby at a distance from the protected structure and time mechanism inclosed within the electrical barrier at the protected district for throwing off the alarm to permit access to the guarded structure, substantially as described."

"20. The combination with a structure to be guarded and a housing, of an electrical alarm system having its parts so disposed as to protect both the structure to be guarded and the housing and cause an alarm to be sounded if either of them is entered, the alarm proper being arranged within the protected housing, and all other parts of the system that may be manipulated or injured so as to cripple the system being arranged within either the structure to be guarded or the protected housing, and time mechanism inclosed within the guarded structure for throwing off the alarm to permit access to the guarded structure, substantially as described."

The invention secured by these and other claims of the patent includes within the combination, time mechanisms for controlling the opening and closing of the main and alarm circuits at predetermined hours. The prior patents in evidence disclose that safes, vaults, and other structures were protected by electric alarm systems long prior to the application for this patent; also that clocks or other time mechanisms for automatically permitting the opening and closing of the doors of the protected structures at fixed hours, without causing an alarm, are a distinct feature of a number of such patents. The Walters patent of May, 1873, No. 138,965, discloses an electrical device in combination with clock mechanism for giving an alarm when the electrical circuit is broken; also a device operated by a time piece that prevents an alarm being given after a certain hour, thus preventing an alarm when the house or other protected structure is rightly open for use. The specifications also disclose that the system may be used in connection with safes, bank vaults and other similar structures. The Yeakle & Steuart patent, No. 370,439 (1887), is for an

electric alarm system, which includes a time mechanism for automatically opening and closing the electrical alarm circuits at predetermined hours. The patents to Pierce, No. 287,775 (1883) and No. 322,317 (1885), are for improvements in electric time locks, whereby the doors of safes or like structures may be automatically locked and the safe or other protected structure closed against entry until a fixed time. The specifications and drawings show the clock mechanism to be placed upon the inner side of the safe door and beyond the reach of manipulation while the door is closed. The Stern patent, No. 315,408 (1886), is for an electric burglar alarm in which the premises or structure to be guarded or protected is in electrical connection by means of insulated braided wires with an alarm station separate and distinct from the protected premises in which an alarm will be immediately sounded at the alarm station if the connecting wires are broken or cut. The Smith patent, No. 251,071 (1881), is for an electric alarm system to prevent cabinets or other places where money or other valuables are kept from being burglarized without sounding an alarm. The Shivler patent, No. 197,416 (1887), is for improvements in electric burglar alarms for protecting safes, vaults, and like structures, and includes clockwork and mechanism driven by such clockwork for automatically opening and closing the alarm circuit at predetermined times. The Holmes patent, No. 63,158 (1867), is for electro-magnetic circuit breaking clocks, whereby the electrical circuits may be opened or closed at predetermined times. Other patents disclose similar devices. Mr. Coleman is conclusively presumed to have known of all of these prior patents at the time of his alleged invention and when he applied for a patent therefor. Mast-Foos & Co. v. Stover Manfg. Co., 177 U. S. 485, 493, 494, 20 Sup. Ct. 708, 44 L. Ed. 856. They clearly show the use of electric alarms for the protection of bank safes, vaults, and similar structures with time mechanisms in combination therewith for automatically operating the system and opening and closing the alarm circuit whereby an alarm may or may not be sounded during predetermined hours or periods of time. It may be that Mr. Coleman's invention, other than as shown in claims 18 and 20 of this patent, differs substantially from those of the prior patents. If so, he has presumably secured his invention therefor by such other claims, which are not involved in this appeal. The feature of claims 18 and 20, which distinguishes each from the other claims, is the location of the time mechanism "within the electrical barrier at the protected district" which, under the specifications, means the "guarded housing" at the alarm station, or "within the guarded structure" itself. Claim 2 of the patent includes, "suitable time mechanism" for operating a switch common to the main and alarm circuits but does not limit the location of such mechanism to any particular place within the system. Claims 5, 6, and 16 also include time mechanism for operating a switch common to the main and alarm circuits and each limits the location of such time mechanism "within the guarded structure." These claims are not involved in this appeal, and no opinion need be, or is, expressed as to their validity. The exact location of the time mechanism within his system

is apparently not regarded by Coleman as an essential element of his invention, for, in the specification referring to the switch which operates the alarm and main electrical circuits, he says:

"It may be operated manually, but I prefer to operate it automatically by means of some suitable mechanism."

To this end he shows a time piece so arranged with the electrical mechanism that it will break and re-establish the main and alarm circuits at a predetermined time, and says:

"It would not be desirable to place within the guarded housing the clock or other mechanism for automatically operating the switch, for the reason that it would be inconvenient to get at it to wind it; for this reason I prefer to place the time mechanism within the guarded structure and to connect it with the switch operating mechanism by means of wires with the wires of the main circuit."

It is entirely plain that the clock or other time mechanism could be connected by wires with the main circuit wires if it is conveniently located at any place within the system, and its location in any particular system is a matter of convenience only to be determined in constructing the particular system. Claim 3 of the Yeakle & Steuart patent is as follows:

"In an electric burglar-alarm, a local battery circuit used for the lacing, or an equivalent of the lacing, of a place to be guarded, in which is included a circuit breaker connected with and operated by a time mechanism which acts to break the local circuit automatically at predetermined intervals, in combination with a time mechanism and a main line by the devices in the local battery circuit."

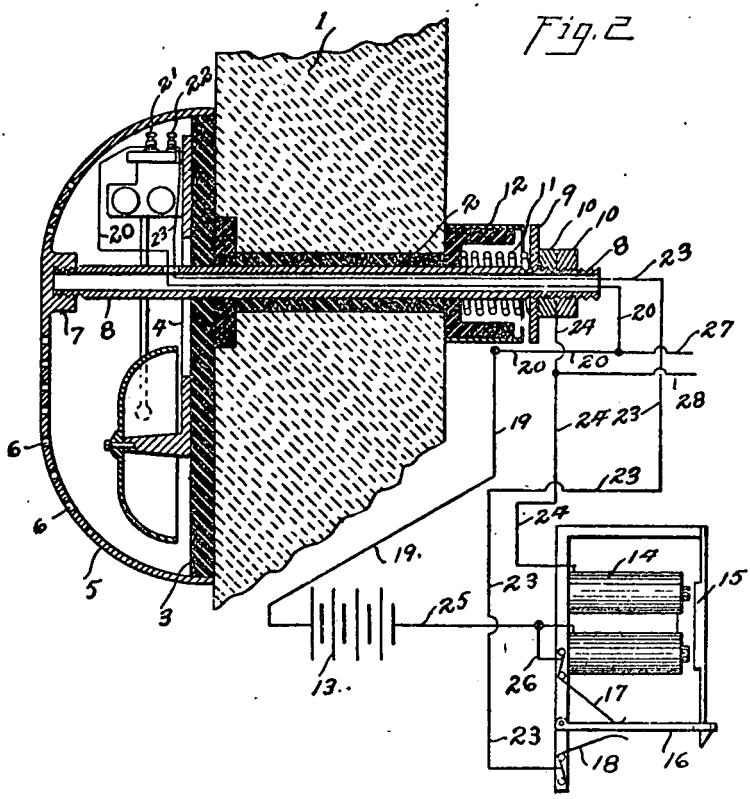
The attention of Mr. Carter, complainant's expert, was called to this claim and he was asked if it did not suggest that the clock mechanism is to be placed within the guarded structure. He answered:

"I would not be able to conclude from this claim alone whether the clock mechanism was intended to be included within the guarded structure or not, but from an examination of the drawings of the patent, I think the patentee leaves it open to place the clock mechanism within the guarded structure if desired."

It would of course be desirable that the time mechanism which controls the opening and closing of the alarm circuits should be protected from unauthorized interference as well as any other part of the system. This would readily suggest itself to any one skilled, or unskilled for that matter, in the art of constructing these systems, and is in fact suggested inferentially at least by the claim of the Yeakle & Steuart patent above quoted. The location of the clock or other time mechanism within the vault or guarded structure does not, therefore, in our opinion, arise to the dignity of invention, and claims 18 and 20 of this patent which so locate the same are void.

The Circuit Court sustained claims 1, 2, 3, 7, 8, and 10 of the Robinson & Green patent No. 708,496, and held that they were infringed by the corporate defendant. This patent is for improvements in burglar-alarms and relates particularly to an alarm-gong to be placed outside of the safe or vault to be protected, in combination with a shield inclosing the same, which if removed, or attempted to be, from

its position, will cause an alarm to be sounded. Figure 2 of the drawings illustrates the system, and is as follows:



The claims involved in this appeal are:

"1. The combination in a burglar-alarm, with a suitable gong located outside of the vault, safe or other receptacle or apartment to be protected, of a shield inclosing said gong and means for closing an electric circuit that causes said gong to be sounded upon the moving of said shield, substantially as described.

"2. The combination in a burglar-alarm, with a suitable gong, of a shield inclosing said gong, a tube supporting said shield and means connected with said tube for closing an electric circuit upon the moving of said shield, substantially as described.

"3. The combination with the wall of the vault, safe or other receptacle, of an alarm-gong located on the outside thereof, a shield inclosing said gong, a tube supporting said shield and extending through said wall and means connected with said tube for closing an electric circuit upon the movement of said shield and tube, substantially as described."

"7. The combination in a burglar-alarm, with a suitable gong located outside of the vault, safe or other receptacle or apartment to be protected, of a shield inclosing said gong, an electric circuit in which said gong is located and means for causing said gong to be operated through said circuit upon the moving of said shield, substantially as described.

"8. The combination, with the wall of the vault, safe or other receptacle, of a suitable gong or alarm located on the outside of said wall, an electric circuit in which said gong is located, a shield inclosing said gong and means for closing said electric circuit, and thereby operating the said gong or alarm, upon the moving of said shield, substantially as described."

"10. The combination with a vault, safe or other receptacle of a suitable gong or alarm located outside of said receptacle, a shield inclosing said gong and means located within said vault, safe or receptacle for operating said gong upon the moving of said shield."

Each of these claims is for a combination, but claims 1, 2, 7, and 10 do not include the wall of the vault as a part thereof. Claims 3 and 8 each includes such wall. Under claims 1, 2, 7, and 10 the location of the gong and its protecting shield might as well be upon the wall of the building in which the vault is located as upon the wall of the vault. Each of the claims contains the words, "substantially as described," and the drawings and specifications show that the gong, 4, and its protecting shield, 5, are to be placed upon the outer wall, 1, of the vault. A fair interpretation of the claims, in connection with the drawings and specifications, requires that they be so located. The drawings also show that the shield is held in position by the tube, 8, set into the lug, 7, upon its inner or concave surface, extending thence through an insulated sleeve or bushing, 2, in an opening in the wall to the interior of the vault, and that the means for sounding the gong, if attempt be made to remove the shield, are located within the vault. The patent comes late in the art, is for specified improvements that show a slight advance, if any, over the prior patents, in particular those to Duncan & Rowell, No. 109,193 (1870), and No. 129,913 (1872); to Haseltine, British patent, No. 1,108 (1871); to Freed, No. 626,684 (1899) and No. 667,123 (1901), and perhaps others. The invention, conceding it to be such, is therefore within a narrow compass, and its range of equivalents should be correspondingly limited. Boyd v. Janesville Hay Tool Co., 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973; Knapp v. Morss, 150 U. S. 221–228, 14 Sup. Ct. 81, 37 L. Ed. 1059; National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693–710, 45 C. C. A. 544. When an invention is a primary one, and the inventor a pioneer in the art to which it relates, he is justly entitled to a wide range of equivalents; but when it is for a slight improvement upon prior efforts which have met with more or less success, its range of equivalents should be correspondingly limited; and when the patent is for described means or mechanism to accomplish a specified improvement, it will be limited to the particular means described in the specification, or their clear mechanical equivalents. Union Match Co. v. Diamond Match Co., 162 Fed. 148–155, 89 C. C. A. 172. In patents for a combination, if the patentee specifies any element as entering into the combination, either directly by the language of the claim or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination and the court cannot declare it to be immaterial. Fay v. Cordesman, 109 U. S. 408–420, 3 Sup. Ct. 236, 27 L. Ed. 979. Each of the claims 1, 2, 3, 7, and 8 of this patent should therefore be read in connection

with the drawings and specifications, and as so read each limits the means for actuating the gong to a position within the interior of the vault; and claim 10 by its terms expressly so limits such means.

The question remains, Does the defendant infringe either of these claims? To sustain the charge of infringement the infringing device must be substantially identical with the one alleged to be infringed in (1) the result attained; (2) the means of attaining that result; and (3) the manner in which its different parts operate and co-operate to produce that result. If the devices are substantially different in either of these respects the charge of infringement is not sustained. Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935; Eames v. Godfrey, 1 Wall. 78, 17 L. Ed. 547; National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693, 45 C. C. A. 544; Adams Electric Railway Co. v. Lindell Ry. Co., 77 Fed. 432, 23 C. C. A. 223. In determining the question of infringement of a patent for a combination, it is therefore necessary to look at the mode of operation or the way the device works, as well as at the result and the means by which that result is attained. Machine Co. v. Murphy, above. As the end in view is to be accomplished by the union of all of the parts arranged and combined together in the manner described, the use of any two of these parts only, or of two combined with a third, which is substantially different in form or in the manner of its arrangement with the others, is, therefore, not the thing patented. It is not the same combination if it substantially differs from it in any of its parts. Eames v. Godfrey, 1 Wall. 78, 79, 17 L. Ed. 547. The specifications and Figure 2 of the drawings of the patent show that the tube, 8, which supports the shield, 5, upon the outer wall of the vault, is insulated by the sleeve or bushing, 2, through which it extends to the interior of the vault where the means for actuating the gong are located, and there arranged to contact with the end of the tube and sound the alarm if the shield and connecting tube be disturbed. In this combination the insulating sleeve or bushing, 2, and plate, 3, are essential elements. In the defendant's system the gong and all the means for actuating the same are located upon the outer wall of the vault, and are protected only by the shields which cover them, the whole being mounted upon a baseboard attached to the exterior of the wall, where they may be much more easily interfered with or crippled than if located within the vault. It omits entirely the insulating sleeve of the patent, and substitutes nothing therefor; in fact such a sleeve is not an essential element of its system, for it locates the battery and all other means for actuating the gong upon the outer wall of the vault. True the defendant shows a hollow metallic tube in some of its physical exhibits, extending through the walls of the vault, and through which it passes an iron rod by means of which the shields and baseboard are supported upon the exterior of the wall; but this hollow tube is not insulated, and is not therefore the equivalent of the insulating sleeve or bushing of the patent in suit, is not designed to, and does not in fact operate as such. The insulating device of the defendant is a collar or ring upon that portion of the iron rod exterior to the wall and under the protection of the

shields; but the method of insulating that rod and of contacting the flat spring with it are entirely different from the methods of insulating the tube, 8, and actuating the alarm bell or gong as shown in the patent in suit and does not infringe the same. The conclusion, therefore, is that the defendant does not infringe either of the claims 1, 2, 3, 7, 8, or 10 of the patent in suit.

The complainant's appeal challenges the correctness of the decree dismissing the bill as to the individual defendants, stockholders and directors of the corporate defendant, and as to patents Nos. 626,670, 771,749, and 880,020. A motion is made by the defendants to dismiss this appeal upon the ground that the decree from which it is taken is interlocutory only and not final. In Ex parte Enameling Co., 201 U. S. 156, 26 Sup. Ct. 404, 50 L. Ed. 707, it is held by the Supreme Court that where in a suit for the infringement of several claims of a single patent, the bill is sustained as to some of the claims and an interlocutory injunction is granted and an accounting ordered as to them, but is dismissed as to the others, that such decree is interlocutory only, and no appeal lies from that part of the decree which dismisses the bill as to such other claims until after the final decree. This decision in principle covers the case of a suit for the infringement of different patents for the same or kindred inventions, which may be joined in one suit, and when in such a suit the bill is sustained as to some of the patents but dismissed as to others by an interlocutory decree, no appeal lies from that part of the decree which dismisses the bill as to some of the patents until after the final decree.

As to the individual defendants, the rule is that, where defendants are jointly sued with others, and the bill is dismissed as to some but is retained as to others for a final decree and accounting, the decree is not final and no appeal lies from the part dismissing the bill as to some of the defendants so jointly charged. Hohorst v. Hamburg American Packet Co., 148 U. S. 262, 13 Sup. Ct. 590, 37 L. Ed. 443; Standley v. Roberts, 59 Fed. 836–839, 8 C. C. A. 305. The bill in this case fairly construed charges the individual defendants and the corporate defendant jointly with the infringement of all of the patents in suit. The conclusion, therefore, is that the complainant's appeal should be dismissed as to the three patents above mentioned, and the individual defendants. The decree of the Circuit Court is therefore reversed in No. 3,349, the appeal of the Electric Protection Company, and the cause remanded to that court, with directions to dismiss the bill as to claims 18 and 20 of the reissued patent No. 11,626, and claims 1, 2, 3, 7, 8, and 10 of the Robinson & Green patent No. 708,496. In No. 3,370, the appeal of the American Bank Protection Company is dismissed. It is ordered accordingly.

SANBORN, Circuit Judge (dissenting). I am unable to come to the view of the majority of the court that claims 18 and 20 of reissued letters patent No. 11,626 to Clyde Coleman and others are void. These claims are for new combinations of old devices. They are of course not anticipated by the fact that a part of the old devices may be found in one and another part of them in another prior patent.

The claim for such a combination is no more anticipated than it is infringed by a combination which lacks any one of its mechanical elements. The best study of the prior patents and the evidence that I am able to give fails to satisfy my mind that any of the prior patents discloses a combination of all the essential elements of either of the combinations disclosed by these claims. From each of the combinations described in the prior patents some element, and from most of them many elements, of the combinations of the claims are lacking. As I understand these prior combinations, none of them has the combination of (1) a vault or structure to be guarded, (2) a distant housing inclosing the alarm, (3) the electric connecting wires between them forming both an open and a closed circuit, (4) a perfect electrical protection of the foregoing elements so that they may not be tampered with from the outside without giving the alarm, unless the electrical protection is suspended by the action of the clock, and (5) a clock within the electrical protection adapted to open the protection at a predetermined time. Because there seems to me to be no prior combination of all these elements capable of performing the functions of these claims in any of the prior patents, I am of the opinion that the Circuit Court was right in sustaining these claims.

It also seems to me that the defendant's device is the mechanical equivalent and an infringement of the combination described in claims 1, 2, 3, 5, 7, 8, and 10 of patent No. 708,496 to Robinson & Green. The defendant's combination appears to me to perform the same function by the same or equivalent mechanical elements as does the combination of Robinson & Green. It would serve no useful purpose to set forth in detail the reasons for this conclusion for they would consist of a comparison of the details of these combinations which would present no precedent for subsequent decisions. Hence I limit this memorandum to a statement of my inability to assent to the views of the majority upon the two subjects which have been mentioned.

On Petition for Rehearing.

REED, District Judge. The complainant (appellee) has filed a petition for rehearing in which it is alleged, among other things, that in the opinion upon the question of the infringement of the Robinson & Green patent, No. 708,496, the court has wholly misapprehended the defendant's structure, which it is claimed infringes that of the patent, and states as a fact that "the battery and all other means for actuating the gong (in the defendant's system) are located upon the outer wall of the vault," and that the ultimate conclusion of the opinion upon the question of infringement rests wholly upon this alleged mistake of fact. The statement of the opinion of which complaint is made, standing alone, may be misleading as to the construction of the defendant's system in respect to the location of some of the devices therein referred to. But this does not affect in the least the conclusion reached upon the question of infringement, for it was only the location of the immediate mechanism for closing the electric circuit, viz., the circuit-closing devices, the manner of their construction, their mode of operation, and the omission from defendant's system

of the insulating sleeve, 2, of the patent, that it was held relieved defendant's system from infringing that of the complainant. The location of the battery, and of the mechanisms other than the "circuit-closers," is, therefore, quite immaterial, and the statement that they are upon the outer wall of the vault and under the protection of the shield only may be eliminated from the opinion without disturbing in the least the conclusion upon the question of infringement. This will appear upon a moment's consideration of the patent, and the conclusion of the opinion respecting the infringement. In the specification forming a part of the patent in suit it is said, after describing the mechanisms, that:

"A circuit may be closed through the automatic circuit-closer in any one of three ways: First, by any suitable circuit-closing devices placed between conductors 27 and 28, such, for instance, as a circuit-closing device arranged upon the vault or safe door, and adapted to be closed by the opening of said door or the withdrawal of the bolts on the door; second, by any outward movement of the shield and tube, 8, thus bringing the washer, 9, into contact with the sleeve or collar, 12; third, by any metallic instrument inserted through an opening in the shield, 5, and brought in contact with the metallic gong-frame."

The claims of the patent involved in this appeal are only those which relate to the second method of closing the circuit, viz., by bringing into contact the washer, 9, and the collar, 12, both of which are arranged upon the end of the tube, 8, within the vault; and the only question for determination, admitting these claims to be patentable, is: Are they infringed by the defendant's "circuit-closing" devices? That the position within the vault of the circuit-closers of the complainant's system is considered by it and its counsel an essential element of its combination appears from the brief of the latter. It is there said:

"An essential feature of this gong-protected device is the shield which incloses the gong and is itself supported by a bolt extended through the wall of the vault and provided upon *its end within the vault* with circuit-closing devices (the washer, 9, and sleeve, 12). * * * It [the Robinson & Green patent] is not perhaps to be considered as a strictly pioneer patent, * * * in the sense that it is the first to provide an electric burglar alarm. * * * It is, however, a strictly pioneer patent providing a gong upon the outer wall of the vault connected to circuit-closers *within the vault*, and with a shield arranged over and inclosing the gong and adapted to operate the circuit-closers *within the vault*, if attempt be made to move the shield. * * *"

The obvious purpose of placing the circuit-closers within the vault is to put them under its shelter, and such location is a material element in the combination of the patent; and circuit-closers not so protected, and constructed to operate in substantially the same manner as those of the patent, are in our opinion a material departure from the combination of the complainant's system. In the defendant's system the circuit-closers are on the outer wall of the vault under the protection of its shield only; but the battery and some of the mechanisms, *other* than the circuit-closers are, or may be, within the vault, and it was inadvertently stated in the opinion that *they were all* upon the outer wall of the vault. This statement, though quite immaterial, as it relates to the location of the devices *other* than

the "circuit-closers," may be misleading as to the construction of those parts of the defendant's system. The opinion as it relates to the question of infringement will therefore be modified by striking therefrom the part near its center beginning with the words, "In this combination," and extending to the word "True," and substituting therefor the following:

"In this combination the insulating-sleeve or bushing, 2, the plate, 3, and the location within the vault of the circuit-closers of the patent (the washer, 9, and collar, 12) are essential elements. In the defendant's system the 'circuit-closers' are located upon the outer wall of the vault, and protected by the shields which cover them, but where they may be more easily interfered with and the system crippled than if they were located within the vault. It omits entirely the insulating-sleeve, 2, of the patent, and substitutes nothing therefor; in fact such a sleeve is not an essential element of its system."

It is not denied that the insulating-sleeve or bushing, 2, of the patent, is wholly omitted from the defendant's system, but the petition for rehearing says:

"That the insulated wires from the battery and drop to the gong are shown in this sketch (a sketch of defendant's system) for convenience, as running directly through the wall of the vault, but they do, as a matter of fact, run through the tubular bolt; the insulation of the wires being exactly the electrical equivalent of the insulation of the sleeve, 2, of the patent."

We are unable to agree with this contention of counsel. In Fay v. Cordesman, 109 U. S. 408, 420, 3 Sup. Ct. 236, 244, 27 L. Ed. 979, the Supreme Court states the rule as to infringements of patents for a combination as follows:

"In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality."

And in Eames v. Godfrey, 1 Wall. 78–79, 17 L. Ed. 547, that court also said:

"The end in view is proposed to be accomplished by the union of all, arranged and combined together in the manner described. The use of any two of these parts only, or of two combined with a third, which is substantially different in form or in the manner of its arrangement and connection with the others, is therefore not the thing patented. It is not the same combination, if it substantially differs from it in any of its parts."

In the Robinson & Green patent the insulating-sleeve or bushing, 2, the plate, 3, and the location *within the vault* of its "circuit-closers" (the washer, 9, and the collar, 12) are specified as material elements of the combination in that patent. We are not at liberty, therefore, to declare them to be immaterial, and are of the opinion that the insulation of the wires of the defendant's system is not the mechanical equivalent of the insulating-sleeve or bushing, 2, of the patent.

Upon the other points urged in the petition for rehearing we are content with the opinion as it is.

The opinion upon the question of infringement of the Robinson & Green patent is modified as hereinbefore indicated, and the petition for rehearing denied.

SANBORN, Circuit Judge (dissenting). The opinion upon the motion for rehearing emphasizes one of the reasons for my dissent. As I understand the letters patent to Robinson and Green, they do not claim or attempt to secure a novelty of the means of forming an electric circuit or a circuit-closer. Means adapted to form such a circuit and such a circuit-loser, including those used by both complainant and defendant, were in fact, and were conceded by the patentees to be, old and familiar mechanical equivalents. While the patentees show an electric circuit and a circuit-closing device, they show it, not as their novel invention, but merely as a method by which they prefer to form certain elements of their combination. Thus they say in their specifications:

"The conductors, 27 and 28, extend to any circuit-closing devices arranged to be operated when an attempt is made to open the safe or vault or apartment to which the device is applied."

And their claim 8, for example, is not for the novelty or invention of these elements, but it is for—

"the combination (1) with the wall of a vault safe or other receptacle, (2) of a suitable gong or alarm located on the outside of said wall, (3) an electric circuit in which said gong is located, (4) a shield inclosing said gong, and (5) means for closing said electric circuit and thereby operating the said gong or alarm upon the moving of said shield, substantially as described."

A combination of old elements which accomplishes a new and beneficial result, or attains an old result in a more facile, economical, or efficient way, may be protected by patent as securely as a new machine or composition of matter. Seymour v. Osborne, 11 Wall. 516, 542, 548, 20 L. Ed. 33; Gould v. Rees, 15 Wall. 187, 189, 21 L. Ed. 39; Thomson v. Bank, 53 Fed. 250, 253, 3 C. C. A. 518, 520, 521. And the doctrine of mechanical equivalents is governed by the same rules and has the same application when the infringement of a patent for a combination is in question as when the issue is over the infringement of a patent for any other invention. Imhaeuser v. Buerk, 101 U. S. 647, 653, 25 L. Ed. 945; Griswold v. Harker, 10 C. C. A. 435, 437, 62 Fed. 389, 391; Fay v. Cordesman, 109 U. S. 408, 420, 3 Sup. Ct. 236, 27 L. Ed. 979; Water-Meter Co. v. Desper, 101 U. S. 332, 25 L. Ed. 1024.

To my mind the defendant uses a combination of equivalent mechanical elements by which it accomplishes the same end by substantially the same means attained by these patentees. It certainly has "an electric circuit in which said gong is located" and "means for closing said electric circuit and thereby operating said gong or alarm upon the moving of said shield." The specific details of wires, tubes, springs, and bolts which constitute the circuit in which the gong is located and the particular means for closing the circuit and operating the gong thereby when the shield is moved are not essential, and are not claimed as such, in this claim 8 of the patent. They were not

material, and there were many other well-known details and devices, including, as I believe, those used by the defendant, which were available to the skilled mechanic to form such circuits and circuit-closers, and were the clear mechanical equivalents of the details and devices described in the patent as one method of forming these elements of the combination. After a careful reconsideration of this case I have been unable to bring my mind to assent to the conclusion that where the claim of a patent is for the combination with other elements of an electric circuit in which the gong is located and means for closing the circuit and operating the gong upon the movement of the shield, and the specific means described in the specification for forming the circuit and the circuit-closer are not claimed as essential, but are clearly shown by both specification and claim to be a mere preferred method of forming the circuit and the circuit-closer, a defendant who uses the combination of the very elements described and claimed, and thereby accomplishes the very result sought by the patentee, escapes infringement, either because it places its circuit-closer on the outside of the vault protected by the gong and shield when the patentees expressly declare in the specification that they "preferably" placed it within the vault, or because it uses insulated wires extending through the wall of the vault in a hollow tube, instead of wires extending through the wall of the vault in a hollow tube surrounded by insulated bushing, or because by a different arrangement of well-known means of forming an electric circuit and a circuit-closer an insulating plate on the wall of the vault, which is not claimed as essential, is made unnecessary and omitted. These were not, in my opinion, the essentials of this claim, or of this patent. They were but the immaterial details of well-known means to form some of the claimed elements of the combination patented. The defendant is using that combination and every element of it: (1) The wall of the vault; (2) the gong on the outside of the vault; (3) "an electric circuit in which said gong is located;" (4) a shield inclosing said gong; and (5) "means for closing said electric circuit and thereby operating the said gong or alarm upon the moving of said shield, substantially as described." By the use of this combination it is accomplishing the end which the patentees secured by their combination. It has adopted the principle of the invention, and it should not be permitted to escape an accounting for its misappropriation.

The description in a specification or drawing of details which are not, and are not claimed as, essential elements of a combination, is the mere pointing out of the better method of using the invention. City of Boston v. Allen, 91 Fed. 248, 249, 33 C. C. A. 485; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 45 C. C. A. 544, 566, 106 Fed. 693, 715; J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 266, 93 C. C. A. 561, 568; Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 418, 28 Sup. Ct. 748, 52 L. Ed. 1122.

Mere changes of the form of some of the mechanical elements of a combination secured by patent will not avoid infringement, where the principle of the patented invention is adopted, unless the form of

the elements changed is the distinguishing characteristic of the invention. Watch Co. v. Robbins, 64 Fed. 384, 396, 12 C. C. A. 174, 187; New Departure Bell Co. v. Bevin Bros. Mfg. Co. (C. C.) 64 Fed. 859; Kinloch Telephone Co. v. Western Electric Co., 113 Fed. 652, 655, 51 C. C. A. 362, 365; Anderson v. Collins, 122 Fed. 451, 455, 58 C. C. A. 669, 673; Lourie Implement Co. v. Lenhart, 130 Fed. 122, 128, 64 C. C. A. 456, 462.

SIEBER & TRUSSELL MFG. CO. v. CHICAGO BINDER & FILE CO.

(Circuit Court of Appeals, Seventh Circuit. January 10, 1911.)

No. 1,732.

PATENTS (§ 328*)—INVENTION—LOOSE-LEAF BINDERS.

The Nelson, Dawson & Trussell patent, No. 806,702, for a loose-leaf binder, discloses nothing new, except the substitution, for the lock previously in use in such binders, of a locking device adopted from the related art of automatically locking boxes, and is void for lack of patentable invention.

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

Suit in equity by the Sieber & Trussell Manufacturing Company against the Chicago Binder & File Company. Decree (177 Fed. 439) for defendant, and complainant appeals. Affirmed.

The appeal is from a decree dismissing the bill for want of equity. 177 Fed. 439. The bill was to restrain the infringement of letters patent No. 806,702, issued December 5th, 1905, for a new and useful improvement in Loose-Leaf Binders. The claims sued upon are as follows:

"1. In a binder, in combination, a pair of side plates having end flanges and being pivotally united; a spring-stud carried by a flange of one of the plates and adapted to enter a T-slot in the adjacent flange of the other plate, such stud having its body enlarged at its base to a greater diameter than the throat of the slot.

"2. In a binder, in combination, a pair of angle-plates hinged together and having end flanges of such width that they overlap when the binder is closed, one of such end flanges having a T-slot entering from its front end; and a spring-stud having its body enlarged at its base to a greater diameter than the throat of the slot, such enlargement being beveled."

Other patents cited are the following:

No. 226,174, A. Kaufman, Apr. 6, 1880.
No. 335,822, G. B. Lehy, Feb. 9, 1886.
No. 638,726, F. Korsmeier, Dec. 12, 1899.
No. 652,439, F. X. Mudd, June 26, 1900.
No. 736,338, E. T. A. Akass, Aug. 18, 1903.
No. 746,052, J. J. Duffy, Dec. 8, 1903.
No. 794,827, A. C. Wiechers, July 18, 1905.
No. 819,275, W. N. Hall, May 1, 1906.

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

Complainant's patent, and the Duffy Patent No. 746,052, mentioned in the opinion, are illustrated in the following diagrams:

Diagram of Complainant's Patent.

Fig. 5

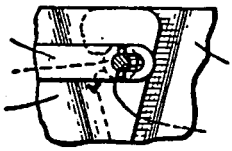


Fig. 6

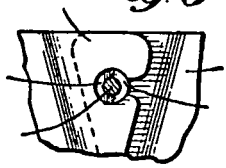


Diagram of Duffy Patent.

Fig 4.

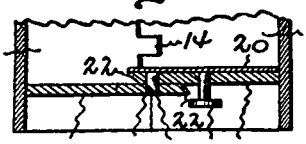
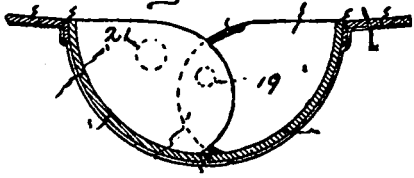


Fig. 5.



The facts are stated in the opinion.

Charles B. Gillson, for appellant.

John H. Lee, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion.

The prior art in loose leaf binders is shown in the Duffy patent. It shows a binder comprising curved binder plates, pivotally connected together, and having end flanges adapted to slide past each other with a shearing action, one of the end flanges being equipped with a leaf-spring carrying a beveled locking-stud, adapted to register with a perforation in the companion end-flange—the leaf-spring being equipped with a push-button, adapted to force the spring inwardly and withdraw the locking-stud from locking engagement. The locking is automatic.

The complainant's patent differs from this in nothing except that in complainant's patent the latching device is through a T-shaped slot, the locking stud having a beveled surface, automatically locking the moment that the stud gets to the enlarged opening of the slot. What the patentee did, in the patent in suit, was to simply change the stud from its place on one of the flanges to its present place, together with the T-shaped slot, essential to the working of such a stud.

Possibly there might have been invention in this change from one locking device to another, were the supplanting locking device itself new in the art. But it is not new in the art. It appears, precisely as the patent in suit adopts it, in the Lehy patent in the art of box fasteners. The patent in suit, therefore, has made no advance upon the previous art of loose leaf binders, except to substitute, for the lock previously existing in those binders, a lock that previously existed in box

fastenings. In our judgment, this transposition is not patentable invention. As stated in the opinion of the Court below, "it is like putting the ordinary door-lock into a new place, or using a lock-buckle on a saddle girth or stirrup strap, and claiming for the result a patentable combination. In the new binder, there is an old combination considerably improved, and a better result; but an old operation by old means."

The decree of the Circuit Court is affirmed.

TROY BANK OF TROY, IND., et al. v. WHITEHEAD et al.

(Circuit Court, W. D. Kentucky, at Owensboro. December 28, 1910.)

1. COURTS (§ 328*)—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY—JOINDER OF CLAIMS—VENDOR'S LIEN.

A purchaser of real estate executed two vendor's lien notes for $1,200 each, one of which was transferred to each of the plaintiffs, and, not having been paid, plaintiffs joined in a suit in the federal court to recover judgment on the notes and foreclose the lien. *Held*, that the lien which secured both notes was but an incident to the notes, and that the two notes could not be added for the purpose of establishing an amount in controversy sufficient to sustain federal jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 891; Dec. Dig. § 328.*

Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459; O. J. Lewis Mercantile Co. v. Klepner, 100 C. C. A. 288.]

2. COURTS (§ 312*)—FEDERAL COURTS—JURISDICTION—SIGNED NOTE.

Judiciary Act (Act March 3, 1875, c. 137, § 1, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508]), declares that no Circuit or District Court of the United States shall have cognizance of any suit except on foreign bills of exchange to recover the contents of any note or chose in action in favor of any assignee or subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless suit might have been prosecuted in such court to recover the contents if no assignment had been made. *Held*, that where separate assignees of two vendor's lien notes brought suit thereon in a federal court, and it did not appear that the notes were foreign bills of exchange, or that suit might have been brought in the federal court by the assignor, federal jurisdiction was not shown.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865–875; Dec. Dig. § 312.*]

In Equity. Bill by the Troy Bank of Troy, Indiana, and others, against G. A. Whitehead and others. On demurrer to bill. Demurrer sustained, and bill dismissed.

George W. Jolly, for complainants.
J. D. Atchison, for defendants.

EVANS, District Judge. It appears from the bill that on July 18, 1908, one Henry W. Eigenmann and wife by deed conveyed to G. A. Whitehead certain lands in Owensboro, Ky., in consideration: First, of $3,600, which the grantee assumed to pay upon an indebtedness of the grantor to the Owensboro Planing Mill Company, and which

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

was secured by a previously created and then existing vendor's lien on the property; and, second, of $2,400, which latter sum was evidenced by two promissory notes executed by Whitehead to Eigenmann for $1,200 each, one payable 12 months after date and the other 24 months after date. Subsequently Whitehead and his wife conveyed the lands to the defendant corporation. The bill of complaint gives no intimation as to whether the previous lien for $3,600 has been discharged, nor, if it has not, why the Owensboro Planing Mill Company was not made a party to the action, so that the existence and amount of that lien might be ascertained, and, if desired, a sale made subject thereto. The note due at 12 months was discounted by and transferred to complainant the Troy Bank, and the other note was assigned to complainant Biedenkopf, and the two present owners of the notes have joined as complainants in this action and seek an enforcement of the vendor's lien reserved in the deed to Whitehead to secure the payment of the notes. The complainants also ask "for a judgment against defendant Whitehead for the same if necessary."

The corporation defendant, G. A. Whitehead & Co., has filed a demurrer to the bill, whereby three distinct objections are taken to the jurisdiction of the court. They are:

First. That it does not appear, upon the face of the bill, and it is not shown, that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000.

Second. That it does appear upon the face of the bill that this court has no jurisdiction of the action in that the complainant Biedenkopf sues upon a separate and distinct note for $1,200 and no more, and that the complainant the Troy Bank sues upon another separate and distinct obligation for $1,200 and no more, and that separate decrees are prayed in their favor respectively, and that they have no joint interest in the two notes.

Before noticing the third ground of demurrer, it will be convenient to dispose of the first two, which may be treated together, as they depend largely, if not altogether, upon the same considerations.

Section 1 of the judiciary act (Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508]) provides:

> "That the Circuit Courts of the United States shall have original jurisdiction * * * 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 * * * in which there shall be a controversy between citizens of different states in which the matter in dispute exceeds" the sum or value aforesaid.

Here the complainants being citizens of Indiana and the defendants citizens of Kentucky, and the amount in dispute (which means the amount claimed in the bill) obviously exceeding $2,000 exclusive of interest and costs, the two statutory prerequisites to the jurisdiction of this court are met, provided the claims of the complainants can be united so as to make up the amount in dispute. Whether, in order to maintain the jurisdiction of the court in this case, we are at liberty to add together the separate claims of the complainants, has been the subject of very industrious research and careful consideration.

Undoubtedly, unless the limited jurisdiction of the federal courts prevents, the proper practice would be for both holders of the two promissory notes to join in the suit to enforce a lien in which, obviously, they have a common and an equal interest. 9 Encyclopedia of Pleading & Practice, 268–271. In no jurisdiction, probably, could the holder of either of the notes enforce his lien without making the holder of the other note a party to any suit filed for that purpose. Indeed, each of the equal beneficiaries of the lien would be an indispensable party to the suit. If the holder of one of the notes sued and made the holder of the other note a defendant, the latter, by a cross-bill, could join in a prayer for the appropriate relief. In this instance the vendor's lien was properly created under the law of Kentucky by the terms of the deed to Whitehead. That lien secured both notes—one as much as the other—and, when the vendor assigned the notes and passed the title to one of them to the plaintiff bank and the title to the other of them to plaintiff Biedenkopf, the lien also thereby passed to the new holders of the notes, though the indebtedness continued to be the principal thing to which the lien was an incident. The title to one note passed altogether to the bank. The title to the other passed to Biedenkopf alone. Neither of them has any interest in the note not owned by him nor any interest in the money to be collected upon it. In other words, neither plaintiff either has or claims to have any interest in that part of the purchase money which must go to the other, though each has an equal interest in the incident—the lien.

Is the latter a joint interest or right sufficient to support the jurisdiction, is the question upon which the learned counsel have presented two separate lines of cases, many of which, in terms, relate to the appellate jurisdiction of the Supreme Court, but by analogy they indicate the rules for construing those provisions of the judiciary act which fix the limits of the jurisdiction of the Circuit Courts. The first line (as we shall call it) of such cases is relied upon by the complainants in support of the jurisdiction, while the second of them is advanced in opposition thereto. Our effort has been to find the test by which to determine in which line this case should be placed. There could be no doubt of the jurisdiction if a trustee in whom the right to the lien had vested for the security of both notes had sued, for in that event his suit would have put the entire indebtedness, thus secured, in litigation. Freeman v. Dawson, 110 U. S. 264, 4 Sup. Ct. 94, 28 L. Ed. 141; New Orleans, etc., Ry. v. Parker, 143 U. S. 50, 12 Sup. Ct. 364, 36 L. Ed. 66. Nor would there be any doubt in a case where one tax had been levied for the payment of several demands which in the aggregate exceed $2,000. Davies v. Corbin, 112 U. S. 36, 5 Sup. Ct. 4, 28 L. Ed. 627. Equally the jurisdiction could be maintained if the entire estate of a decedent were sued for. Nor would this be affected by the fact that when that entire estate should be recovered it would have to be divided among heirs whose individual shares would be less than $2,000. Overby v. Gordon, 177 U. S. 214, 20 Sup. Ct. 603, 44 L. Ed. 741.

In McDaniel v. Traylor, 196 U. S. 415, 25 Sup. Ct. 369, 49 L. Ed. 533, the relief sought was the removal of a cloud upon the title to

all the real estate of a decedent. The heirs at law were permitted to unite their undivided interests, though that of neither would separately exceed in value $2,000. The one title was to be cleared.

In Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, it was held that as the several judgments at law obtained in a state court, and which were sought to be enjoined as having been wrongfully obtained, were held in the same right and against the same person, and as their validity depended upon the same facts, the plaintiffs in said judgments might be united as defendants in one bill, although no judgment separately was for the jurisdictional amount. The fact was emphasized that the cases at law were practically one case, as all the plaintiffs in them had agreed to abide by the judgment in one of them.

In The Connemara, 103 U. S. 754, 26 L. Ed. 322, joint claimants of a single salvage united in an action for its recovery, and were decreed $5,000. The jurisdiction was upheld, though the individual share of no one claimant, when the sum was divided by the decree, was sufficient in amount to have given the Circuit Court jurisdiction. In its opinion the court very significantly said that the claimants when suing had a common and undivided interest, and that it was immaterial to the other side how the entire fund was to be shared among the claimants after it was obtained.

There are many other cases to the same effect, but we will only notice the two which appear to come most nearly to complainant's contention. In Clay v. Field, 138 U. S. at page 479, 11 Sup. Ct. at page 425 (34 L. Ed. 1044), after alluding to several cases directly and to others incidentally, the court stated the rule by which that and similar cases should be governed, as follows:

"The general principle observed in all is that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone. The principal cases in which the interest has been deemed common and undivided, and appeals have been sustained, are Shields v. Thomas, 17 How. 3 [15 L. Ed. 93]; Market Co. v. Hoffman, 101 U. S. 112 [25 L. Ed. 782]; The Connemara, 103 U. S. 754 [26 L. Ed. 322]; The Mamie, 105 U. S. 773 [26 L. Ed. 937]; Davies v. Corbin, 112 U. S. 36 [5 Sup. Ct. 4, 28 L. Ed. 627]; Estes v. Gunter, 121 U. S. 183 [7 Sup. Ct. 854, 30 L. Ed. 884]; and Handley v. Stutz, 137 U. S. 366 [11 Sup. Ct. 117, 34 L. Ed. 706]."

In New Orleans Pacific Ry. v. Parker, 143 U. S. 43, 12 Sup. Ct. 364, 36 L. Ed. 66, it was held that where the claims of several plaintiffs were united in the same bill, and the determination of the cause necessarily involved the validity of the title under which all claimed if the whole amount involved exceeds $5,000, the Supreme Court had jurisdiction.

If other cases had not furnished a guide for applying the general language used in some of the opinions in the cases we have referred to, our difficulties would have been much increased.

Coming to the second line of cases, we shall only notice two of them specifically. Many of the others are referred to in the opinions in those two.

In Russell v. Stansell, 105 U. S. 303, 26 L. Ed. 989, it appeared that lands in a particular district were assessed for taxation; each owner being liable only for the amount charged upon his land. It was held that the several persons thus assessed could not unite the several amounts assessed against them separately in order to make up the jurisdictional sum. Quite a number of other cases reassert this proposition.

In Walter v. Northeastern Railroad Co., 147 U. S. 370, 373, 13 Sup. Ct. 348, 349 (37 L. Ed. 206), a bill was filed by the railroad company to enjoin the collection of taxes assessed against it by several counties acting separately but no one of which counties assessed taxes which amounted to $2,000. The Supreme Court held that the separate assessments could not be united for jurisdictional purposes, and that a separate suit must be brought against each county. It was said:

"Is the plaintiff entitled to join them all in a single suit in a federal court, and sustain the jurisdiction by reason of the fact that the total amount involved exceeds $2,000? We think not. It is well settled in this court that when two or more plaintiffs, having several interests, united for the convenience of litigation in a single suit, it can only be sustained in the court of original jurisdiction, or on appeal in this court, as to those whose claims exceed the jurisdictional amount; and that when two or more defendants are sued by the same plaintiff in one suit the test of jurisdiction is the joint or several character of the liability to the plaintiff. This was the distinct ruling of this court in Seaver v. Bigelow, 5 Wall. 208 [18 L. Ed. 595]; Russell v. Stansell, 105 U. S. 303 [26 L. Ed. 989]; Farmers' Loan & Trust Co. v. Waterman, 106 U. S. 265 [1 Sup. Ct. 131, 27 L. Ed. 115]; Hawley v. Fairbanks, 108 U. S. 543 [2 Sup. Ct. 846, 27 L. Ed. 820]; Stewart v. Dunham, 115 U. S. 61 [5 Sup. Ct. 1163, 29 L. Ed. 329]; Gibson v. Shufeldt, 122 U. S. 27 [7 Sup. Ct. 1066, 30 L. Ed. 1083]; Clay v. Field, 138 U. S. 464 [11 Sup. Ct. 419, 34 L. Ed. 1044]."

The general language used in the opinions in the various cases cited must, of course, be construed with reference to the facts of the particular case, and, if at first blush there should appear to be difficulty in the premises, the key for its solution is found, as we think, in Illinois Central Railroad Co. v. Adams, 180 U. S. 28, 40, 21 Sup. Ct. 251, 255 (45 L. Ed. 410). There the railroad company filed its bill against Adams, a revenue agent of the state of Mississippi, to enjoin the collection of over $20,000 taxes assessed against it by the state railroad commission for the benefit of several counties. The court below dismissed the bill for want of jurisdiction, but its decree was reversed. In its opinion the court, after referring to Walter v. Northeastern R. R. Co. and other cases of that class, said:

"These cases are quite distinguishable from those which hold that an action may be maintained for a lump sum, though such sum when collected may be subsequently distributed among various parties, each receiving less than the jurisdictional amount. Shields v. Thomas, 17 How. 3, 4 [15 L. Ed. 93]; Rodd v. Heartt, 17 Wall. 354 [21 L. Ed. 627]; The Connemara, 103 U. S. 754 [26 L. Ed. 322]; New Orleans Pacific Railway Co. v. Parker, 143 U. S. 42 [12 Sup. Ct. 364, 36 L. Ed. 66]."

We find in the part of the opinion which we have extracted what we conceive to be the test by which we may safely differentiate the

principle upon which the two lines of cases to which we have referred proceed. Where a lump sum, or what may be treated as such, is sued for, if it exceed $2,000, the court has jurisdiction regardless of how the amount recovered may ultimately be distributed among the plaintiffs; but, if each party plaintiff has a separate debt in which no other plaintiff has or can have any interest, the separate claims cannot be united to make up the jurisdictional amount. The case before us is not one in which a lump sum is sued for. It is one in which two separate debts belonging absolutely to two separate persons is each less than $2,000. It is not one where a single fund is to be "distributed," nor one where the plaintiffs claim "collectively," nor one in which they have a "common and undivided interest." Here the "common and undivided interest" is not in the indebtedness sued for, which is the principal thing, but is in the lien which is incident thereto. While a common and undivided interest in the indebtedness would, if it existed, sustain the jurisdiction, we think it must be otherwise where that sort of interest exists only in the mere lien. The amount in controversy, within the meaning of the judiciary act, is the indebtedness and not the lien, and, if the jurisdiction must be denied because the act does not authorize the adding together of the two separate debts of two different creditors in order to make up an amount sufficient to sustain the jurisdiction for the purpose of obtaining a judgment for the indebtedness, it necessarily follows that it cannot be done to enforce a mere lien by which the indebtedness is secured. For these reasons we have concluded that this is not a case where the different plaintiffs can unite their claims in order to make up the necessary $2,000.

Upon the authorities we do not doubt that if the demand of either complainant exceeded $2,000, for convenience and economy both might have joined in this action to enforce a lien in which they had an equal interest, although they could not have done so if judgments in personam only had been sought in a suit at law upon the notes. But where the claim of one complainant exceeds $2,000, or where a creditor, by his bill (as in Handley v. Stutz, 137 U. S. 368, 11 Sup. Ct. 117, 34 L. Ed. 706), seeks to subject a trust fund exceeding in amount $2,000 to debts which in the aggregate exceed that sum—in which case the jurisdiction is obvious—the joinder of other persons having other claims with him in a suit to enforce a common lien would become a mere question of equity practice and procedure, and not one of jurisdiction, the existence or nonexistence of the latter not being dependent upon a mere misjoinder.

We therefore hold that the first and second grounds of demurrer should be sustained.

Third. The third ground of demurrer is based upon other provisions of section 1 of the present judiciary act (25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), which reads as follows:

"Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

This proposition is, of course, jurisdictional in the broadest sense. It indeed excludes any complainant or plaintiff from access to the courts of the United States who is the assignee of a promissory note, unless either: First, such suit might have been brought by the assignor of the note; or, second, unless it was upon a foreign bill of exchange. At least this is so so far as the provision applies to this case. There is no averment in the bill which shows that Eigenmann could have sued here. When he transferred the note to the complainant Biedenkopf, he may have been a citizen of Kentucky, and so he may have been when this action was commenced. Jurisdiction cannot be inferred, but must be expressly shown to exist before we can exercise it. These remarks apply especially to complainant Biedenkopf, but they might equally apply to the Troy Bank, unless it be conceded that its note has been placed upon the footing of a foreign bill of exchange by the law of Indiana. If they apply to either, there would be only one of the complainants who could sue here, and, as his claim alone would be less than $2,000, the jurisdiction might be defeated because of the express provision last referred to. On account of this defect, the third ground of demurrer must also be allowed and sustained.

The complainants may have leave to amend the bill so as to show the citizenship of Eigenmann both at the times of the transfers of the respective notes and at the time of the institution of this suit, and particularly the latter, if they desire to do so before the entry of a judgment dismissing the bill for want of jurisdiction. This might be important if there is a desire to appeal to the Supreme Court.

In re MORGAN & WILLIAMS.

(District Court, N. D. Georgia, E. D. January 16, 1911.)

1. BANKRUPTCY (§ 58*)—ACTS OF BANKRUPTCY—PREFERENCES—PAYMENTS IN DUE COURSE OF BUSINESS.

   Payments made by alleged bankrupts to creditors in due course of business and without an intent to prefer the creditors paid, or knowledge of a claim subsequently made, which if sustained might render the debtors insolvent, did not constitute acts of bankruptcy.

   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 78; Dec. Dig. § 58.*]

2. BANKRUPTCY (§ 54*)—INSOLVENCY—TERMINATION—PARTNERSHIP.

   Even under the entity doctrine as applicable to the assets of a partnership, the test of solvency or insolvency within the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) depends on whether the real indebtedness of the firm to the petitioning creditor or creditors independent of the personal assets of the partners exceeds the aggregate at a fair valuation of the alleged bankrupt firm's property.

   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 84; Dec. Dig. § 54.*]

3. BANKRUPTCY (§ 91*)—PETITIONING CREDITORS—CLAIMS—EVIDENCE.

   Evidence *held* insufficient to sustain the claim of a petitioning creditor in a bankruptcy proceeding, so as to show the creditor's capacity to institute involuntary proceedings.

   [Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 91.*]

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

In the matter of bankruptcy proceedings of Morgan & Williams. Petition dismissed.

F. H. Colley, L. C. Russell, Hamilton McWhorter, and E. K. Lumpkin, for petitioning creditor.

W. E. Simmons and G. A. Johns, for alleged bankrupt.

NEWMAN, District Judge. On February 22, 1908, an involuntary petition in bankruptcy was filed against Morgan & Williams, a firm composed of A. S. Morgan and J. M. Williams, doing business at Winder, Ga. The petition was by one creditor, the Washington Cotton Company, a corporation of Wilkes County, Ga., the allegation being that there were less than 12 creditors of Morgan & Williams. After alleging insolvency the petition further alleges that within four months preceding the filing of the petition Morgan & Williams, while insolvent, committed an act of bankruptcy, in that they did transfer to N. S. Turner, of Covington, Ga., a creditor, a portion of their property, some $300, with intent to prefer said creditor over their other creditors. The same allegation is made with reference to Duckworth & Co., of Savannah, Ga., the amount alleged being $600, and the same with reference to Lehardy, Thesmer Company, of Savannah, Ga., the allegation being that they were paid the sum of $100. The prayer of the petition is as follows:

"Wherefore your petitioner prays that service of this petition, with subpœna, may be made upon Morgan & Williams, a copartnership, and also upon A. S. Morgan and J. M. Williams, members of said copartnership, as provided by said bankruptcy act of 1898, as amended, and that said Morgan & Williams, a copartnership, and the said A. S. Morgan and J. M. Williams, be adjudged bankrupt within the purview of such law."

At the time this petition in bankruptcy was filed, an application was made to the referee in Athens for the appointment of a receiver on an ancillary petition of the Washington Cotton Company and a receiver was appointed. After the appointment of the receiver the alleged bankrupts made application to the court for the release of the property, under section 69 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]), and entered into bond in compliance with the law, and the property was returned to them. Subsequently, on the 29th day of February, 1908, Morgan & Williams appeared and denied that they committed the acts of bankruptcy set forth in the petition, and denied that they were insolvent, and denied that they should be declared bankrupt for any cause alleged in said petition, and demanded that the same be inquired of by a jury. Afterwards this demand for a jury trial was withdrawn, and it was agreed that the case should be tried by the court, without the intervention of a jury, upon the evidence as reported by an auditor and the other documentary evidence and the files. Before this last order was made, however, an order appointing an auditor had been entered, with the written consent of counsel for the petitioner and the alleged bankrupt firm, it being stated in the order that "the question of the nature and amounts of the claims of the Washington Cotton Company, and other creditors, consist of so many detailed transactions, involv-

ing numerous and long calculations, as to make it absolutely necessary that said evidence be first heard and properly tabulated and reported by an auditor," who was "to hear and ascertain the facts hereon and report thereon to wit, his conclusions to this court, so that the evidence and these issues can be properly submitted to a jury to pass on the issues on which jury trial is prayed." This was not an agreement to liquidate this claim, under section 63b of the bankruptcy act, in the sense that it would then be entitled to proof and allowance as a claim. The appointment of the auditor, by written consent of the parties, was for the purpose of getting a statement of the claim of the Washington Cotton Company against Morgan & Williams itemized and set out in such a way that it would be available for use before a jury on the trial of the question of solvency or insolvency. He has made such a statement, and it is before the court, and is available, as I look at it, only for the purpose of ascertaining what the claim of the Washington Cotton Company is, provided it is entitled to recover at all.

The real question on this part of the case is as to the right of the Washington Cotton Company to recover this amount, or as to whether it is a real claim, for the sum indicated by the various items, against Morgan & Williams. The respective contentions are with reference to the right of Morgan & Williams to have what they call "franchise" on cotton; that is, to raise the weight of the cotton somewhat to cover what, it is claimed, is the increase in weight in crossing the ocean. A paper was offered in evidence, which seems to me would be a proper subject for consideration, showing that Morgan & Williams did have a contract with a cotton firm in Savannah, allowing them 1 per cent. "franchise." That would, I suppose, average something like five pounds to the bale. Morgan & Williams, and a witness named Wages, testified that Mr. Sims, representing the Washington Cotton Company, desiring, in October, to renew business with Morgan & Williams, which had been broken off in September, 1907, agreed with Morgan & Williams to allow them the same "franchise" they were getting by shipping to Savannah. Sims denied this, and said he had no such arrangement with them. The master found in favor of the Washington Cotton Company on this issue. I do not see how he could have done this. The witnesses all seem to be truthful and reputable gentlemen, there is nothing in this record to show that they were not all men of good character, and the burden was clearly on the Washington Cotton Company to establish their claim by a preponderance of testimony. It looks very much like the preponderance of testimony, assuming them all, as I have said, to be equally creditable, was with Morgan & Williams. This case having been submitted to the court for trial without jury, I would be unwilling to find upon this evidence that there was such a claim on the part of the Washington Cotton Company against Morgan & Williams.

But even if this claim should be admitted as correct, the evidence fails, manifestly, in showing the commission of the acts of bankruptcy alleged in the bankruptcy petition. The three claims paid by Morgan & Williams, and set up as acts of bankruptcy, were evidently paid by

them in the due course of business and without any knowledge whatever at the time that the Washington Cotton Company would make any claim against them. The Washington Cotton Company being the only other creditor, the payments could not have been made with intent to prefer the three firms as to whom the preference is alleged, or for the purpose of giving them preference over the Washington Cotton Company.

The amount of the claim of the Washington Cotton Company, as found by the auditor, is $4,297.85. It is conceded that the assets of the firm amounted to $4,087.43. The excess of the firm's liabilities over the firm's assets was $210.42. By apparent consent of the parties the auditor reported that the individual property of A. S. Morgan and J. M. Williams amounted to $29,000 or $30,000 of apparently good property; mainly real estate located in the town of Winder or near by.

Assuming the entity doctrine to prevail under the more recent decisions of the courts, as contended by counsel for petitioning creditor, and that the firm's assets and liabilities would be the test of solvency or insolvency as against the firm, and that notwithstanding the fact that the individuals composing the firm are proceeded against also, still it must appear, to justify an adjudication in bankruptcy, that the real indebtedness on the part of the alleged bankrupt firm to the petitioning creditor or creditors exceeds the aggregate, at a fair valuation, of the alleged bankrupt firm's property. Even if this could be passed and determined in favor of the petitioning creditor, there remains the fact that, so far as this record shows, there has never been anything done by the alleged bankrupt firm which could fairly and justly be called an act of bankruptcy.

What has been said above is entirely without prejudice to the right of the Washington Cotton Company to proceed on this claim, in a court of competent jurisdiction, and have its rights ascertained and determined. I simply find that, even assuming the auditor in this case to have had the right under the reference to pass upon the question as to whether Morgan & Williams were indebted to the Washington Cotton Company, the latter failed to carry the burden here and to show by a preponderance of the evidence that such indebtedness existed.

The petition in bankruptcy should be dismissed, and it will be so ordered.

SUSQUEHANNA COAL CO. v. MAYOR AND COMMON COUNCIL OF CITY OF SOUTH AMBOY et al.

(Circuit Court, D. New Jersey. January 20, 1911.)

1. JUDGMENT (§ 828*)—DECREE OF STATE COURT—RES JUDICATA.

Where complainant elected to test in the state courts the legality of certain state taxes, assessed on coal claimed to have been passing through the state in interstate commerce when the taxes were assessed, a judgment confirming the taxes was res judicata, and precluded a subsequent

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

retrial of the question on a bill to set aside the taxes and restrain their collection in a federal court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504–1509; Dec. Dig. § 828.*

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

2. COMMERCE (§ 72*)—"INTERSTATE COMMERCE"—COAL DEPOSITED WITHIN A STATE FOR LATER TRANSPORTATION—TAXATION.

Complainant shipped coal from Pennsylvania to its own order to a dock in New Jersey, where it was transferred from the cars either into bottoms for continued transportation to consignees then determined upon, or, when no bottoms were available, the coal was dumped onto a dock, from which it was later transferred to bottoms as occasion required. *Held*, that the coal so temporarily stored at the dock ceased to be "interstate commerce," notwithstanding the intention to transship, and was therefore subject to state taxation, under the rule that, to claim exemption from taxation under the commerce clause of the federal Constitution, there must be a continuous movement of the merchandise in interstate commerce, pursuant to an existing contract of sale or consignment.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 123–136; Dec. Dig. § 72.*

For other definitions, see Words and Phrases, vol. 4, pp. 3724–3731.]

In Equity. Suit by the Susquehanna Coal Company against the Mayor and Common Council of the City of South Amboy and another. Bill dismissed.

James B. Vredenburgh and Alan H. Strong, for complainant.
Frederic M. P. Pearse, for defendants.

RELLSTAB, District Judge. The complainant is a corporation of the state of Pennsylvania, engaged in mining, buying, selling, and shipping coal. The city of South Amboy is a municipality of the state of New Jersey, bordering on tidewater. The complainant seeks to set aside taxes assessed by such municipality on its coal for the years 1906, 1907, and 1908, and to restrain it from seizing and selling the same, or in any way interfering with it, upon the ground that such property was in transit across the state of New Jersey, from the state of Pennsylvania, to states beyond, and the taxes were imposed in violation of article 1, § 8, cl. 3, of the Constitution of the United States, relating to interstate commerce.

The coal taxed was owned by complainant, and stored within the defendant municipality awaiting further shipment; and the question is whether the coal obtained a situs in the state of New Jersey for taxing purposes. The complainant shipped its coal from its mines in Pennsylvania, to New York and states east thereof, by the Pennsylvania Railroad, across New Jersey, to leave the latter state at Harsimus Cove, Greenville, or South Amboy piers, the termini of such railroad on New York Harbor. The cars reaching Harsimus Cove and Greenville were floated across the harbor and transferred to railroads on the opposite side. The bills of lading for the coal thus shipped were to designated purchasers as consignees, while those of

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

the coal arriving at South Amboy were consigned to complainant at such place. This latter coal was intended to be transferred to bottoms at tidewater at that point, and shipped to states east of New Jersey. This coal was forwarded from the mines on orders from the complainant's Philadelphia agents, who issued such orders upon requisitions made upon them from complainant's New York agents. Neither the agents at the mines nor at Philadelphia knew for which particular customers the coal thus forwarded to South Amboy was intended. Complainant had a number of regular customers east of New Jersey, to whom it promised to make deliveries on monthly contracts. The exact requirements of such customers, in tonnage and kind of coal, were known only to the New York agents. These agents from time to time totaled such requirements, plus other orders for coal, and issued their requisition, based upon such totals, to the Philadelphia agents. Such requirements, and the shipments made thereunder, varied in tonnage and kind of coal. At South Amboy complainant had an agent who, upon the orders of the New York agents, superintended the loading upon such bottoms of the kind and amount of coal required for designated customers. When so loaded, the master of the bottoms issued bills of lading in the name of the complainant as shipper, and particular persons as consignees. These bills of lading were sent to complainant's New York agents, whereupon the latter made out invoices to the consignees. Up to the time of loading the bottoms the title of the coal was in complainant.

If, upon arrival of the coal at South Amboy, bottoms were on hand to take the kind of coal arriving, such coal was transferred from the cars to the bottoms. If not, such coal was dumped into a coal depot or storage yard of the railroad company, located about 2,000 feet from the piers, equipped with derricks for the loading and unloading of coal, and where the different kinds of coal of the complainant were put into piles, which would be subsequently transferred into bottoms; not necessarily the first bottoms arriving, as the preference was given to coal subsequently arriving and still in cars. In the year 1906 the expense of dumping the coal from the cars and its subsequent transfer into bottoms was borne by the railroad company. Subsequently such expense was borne by complainant. By this storage of coal complainant obtained two beneficial results: First, cars arriving when no bottoms were on hand could be released, and demurrage charges saved; second, when bottoms arrived, and no cars were on hand containing the kinds of coal desired, such vessels could be loaded from the piles, resulting in a saving of time in the departure of such bottoms.

The basis for the taxes of all three years is the same. Those of 1906 were attacked by certiorari proceedings in the New Jersey state courts; the ground of illegality there asserted being the same as raised in the present proceedings. The state courts sustained such taxes. Susquehanna Coal Co. v. South Amboy, 76 N. J. Law, 412, 69 Atl. 454, affirmed 77 N. J. Law, 796, 72 Atl. 361. Complainant having elected to test the legality of the taxes of 1906 in the state courts, that question is res adjudicata.

The provision of the United States Constitution, relied upon by the complainant as furnishing immunity from these taxes, is as follows:

"The Congress shall have the power * * * to regulate commerce * * * among the several states." Article 1, § 8, cl. 3.

This provision does not comprehend taxes, except when directly imposed upon articles in course of commerce among the states. Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257.

Assuming, but not deciding, that the coal in question, before it was dumped into the storage yard at South Amboy, was "interstate commerce," I am satisfied that under the authorities, in the circumstances, and the purposes of its subsequent storage at South Amboy, it lost its character as "interstate commerce," and became a part of the general mass of the property in New Jersey subject to taxation. The coal in storage was the property of the complainant. It had not been sold or set aside to any purchaser. It was there, not because the carriage to any particular consignee had been interrupted by any of a number of causes that may occur in transportation, but because it had reached its destination—not the ultimate, but the intermediate, destination. It had been consigned to South Amboy to the shipper's own order, and its storage was for the benefit of the shipper, and not the carrier. It was undoubtedly intended to go further, but not on that carriage. It was there at rest, no longer in transit, and could, at the will of the shipper, be forwarded to any point within as well as without the state. Any further shipment would be in response to new orders, and would be a new and different carriage. In General Oil Co. v. Crain, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754, and Lehigh & Wilkes-Barre Coal Co. v. Junction (Err. & App.) 75 N. J. Law, 922, 68 Atl. 806, 15 L. R. A. (N. S.) 514, the courts reviewed the state and United States decisions dealing with the taxation of property brought into a state, and which was intended to be shipped beyond it, and in which the question whether such property was engaged in interstate commerce was the determining factor on the right to tax. In the former case it was held:

"Merchandise may cease to be interstate commerce at an intermediate point between the place of shipment and ultimate destination; and if kept at such point for the use and profit of the owners, and under the protection of the laws of the state, it becomes subject to the taxing and police power of the state."

And in the latter, which was followed by Susquehanna Coal Co. v. South Amboy, supra, it was held:

"To claim exemption from taxation under the protection of the commerce clause of the federal Constitution, there must be a continuous movement of merchandise in interstate commerce; that is, transportation from one state to another pursuant to some existing contract of sale or consignment."

These cases control the present one, and the bill is dismissed.

MEYER, WILSON & CO. v. EVERETT PULP & PAPER CO.

(Circuit Court, W. D. Washington, N. D. January 26, 1911.)

1. SALES (§ 271*)—SAMPLE—QUALITY—IMPLIED WARRANTY.
On a sale by sample, there is an implied warranty of quality.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 769–771; Dec. Dig. § 271.*]

2. SALES (§ 428*)—QUALITY—IMPLIED WARRANTY—RIGHTS OF BUYER.
Breach of an implied warranty of quality authorizes the buyer to retain the goods, and, when sued for the price, to set up the breach of warranty, to reduce the sum recoverable by the seller.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1214–1223; Dec. Dig. § 428.*]

3. SALES (§ 442*)—WARRANTY OF QUALITY—BREACH—DAMAGES.
The measure of damages for breach of an implied warranty of quality is the difference between the actual value of the property delivered and the higher value of the warranted quality; and, if there is no evidence of value, the price agreed to be paid will be regarded as the value of the property warranted.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284–1301; Dec. Dig. § 442.*]

4. SALES (§ 428*)—IMPLIED WARRANTY—DAMAGES—RECOUPMENT.
Where defendant purchased china clay by sample, and a portion of the clay was not equal to the sample, whereupon defendant offered to return such portion, and to hold it subject to plaintiff's disposition, defendant was entitled to recoup the contract price of the portion rejected, as its measure of damages, when sued for the contract price of the entire consignment.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1214–1223; Dec. Dig. § 428.*]

At Law. Action by Meyer, Wilson & Co. against the Everett Pulp & Paper Company to recover the price of certain china clay delivered pursuant to an executory contract of sale by sample. Findings for defendant for breach of an implied warranty of quality.

Williams, Wood & Linthicum, Isaac D. Hunt, and Peters & Powell, for plaintiff.

F. H. Brownell, for defendant.

HANFORD, District Judge. This is an action at law, tried by the court; a jury trial having been waived. The action is to collect the price of 400 tons of china clay sold and delivered by the plaintiffs to the defendant. The contract for the sale of the clay was made by correspondence between the parties, and, as construed by the court, it is a contract for a sale by sample, and there is an implied warranty of quality corresponding to the sample referred to in the correspondence. 15 Am. & Eng. Enc. of Law (2d Ed.) pp. 1225, 1226. The clay was bought in England, and transported by ship to Seattle, and there is no dispute between the parties as to the quantity of the clay shipped and delivered, nor as to the contract price which the defendant promised to pay therefor. It is admitted, also, that payment of the purchase price has been demanded and

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

refused, except as to part, and other jurisdictional facts are admitted.

The contract, as construed by the court, obligated the defendant to receive the clay from the ship, which condition precluded inspection by the purchaser before delivery. This is so for the reason that clay, to be of the quality warranted, must be of uniform white color and free from grit; and to determine the quality, time, favorable conditions, and special conveniences for testing are necessary, and these essentials make a fair inspection while the ship is being discharged impracticable. The defendant did not in fact inspect the clay to ascertain its quality before receiving it, but afterwards ascertained that it came from two different sources of supply, and that it is not uniform in quality; 800 barrels thereof being inferior to the sample and unsuitable for the defendant's use. The defendant used, and has tendered payment at the contract rate for, 861 barrels, and disputes its liability to pay for 800 barrels because of the inferior quality thereof.

The plaintiff's contention is that, notwithstanding the inferior quality of 800 barrels of the clay, the defendant accepted delivery of the entire consignment, and by doing so waived its right to reject any part of the same. The defendant did not intend a waiver of its right to have delivered that which it had agreed to buy and pay for, viz., clay of the same quality as the sample. On the contrary, it was prompt in giving notice to the plaintiffs of the inferior quality of the clay, and has acted fairly towards them in minimizing the loss by making use of, and tendering payment for, all of the clay fit for use, and by holding the rejected portion subject to the plaintiff's right to dispose of it.

The plaintiff's contention is founded upon the false idea that the defendant was legally bound to either accept the commodity of which delivery was tendered, and pay the contract price for all of it, regardless of its quality, or else refuse to receive possession of it. This idea is contrary to the rule of law applicable to the case, because it ignores the implied warranty upon which the defendant had a right to rely. The defendant acted within its legal rights in taking possession of the clay and resisting the plaintiff's demand for the price of the portion inferior to the sample. In this country the rule is well established, by numerous decisions of the courts, that a breach of an implied warranty of quality entitles the vendee to retain the goods, and, when sued for the purchase price, to set up the breach of warranty to reduce the sum recoverable by the vendor. 15 Am. & Eng. Enc. of Law (2d Ed.) p. 1255; 24 Id. p. 1158; Saunders v. Short, 86 Fed. 225, 30 C. C. A. 462; Andrews v. Schreiber (C. C.) 93 Fed. 367; Florence Oil & Refining Co. v. Farrar, 109 Fed. 254, 48 C. C. A. 345.

The measure of damages which the vendee may claim for breach of an implied warranty of quality is the difference between the actual value of the property delivered and the higher value of the warranted quality; and if there is no other evidence of value, the price agreed to be paid will be regarded as the value of the property

of the quality warranted. In this case, the defendant having offered to return the inferior clay and to hold it subject to disposition by the plaintiffs, the contract price is the measure of damages which it is entitled to recoup.

The court directs that findings be prepared in accordance with this opinion, and the judgment to be entered will be that the plaintiffs take nothing, save and except the amount of money deposited in the registry of the court by the defendant, and that the defendant recover the taxable costs occasioned by the litigation subsequent to the making of said deposit.

PACIFIC CREOSOTING CO. v. THAMES & MERSEY MARINE INS. CO., Limited.

(District Court, W. D. Washington, N. D. January 16, 1911.)

No. 4,354.

1. INSURANCE (§ 478*)—MARINE INSURANCE—"FREE FROM PARTICULAR AVERAGE"—"PARTICULAR AVERAGE."

A clause in a marine policy, "Warranted free from particular average, unless the vessel or craft or the interest insured be stranded, sunk, or on fire," means that the insurer does not assume liability for a partial loss, in the absence of occurrence of the casualties specified.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1230–1238; Dec. Dig. § 478.*

For other definitions, see Words and Phrases, vol. 6, p. 5186.]

2. INSURANCE (§ 478*)—MARINE INSURANCE—PARTICULAR AVERAGE CLAUSE—"ON FIRE"—"BURNT."

A marine policy contained a clause, "Warranted free from particular average, unless the vessel or craft or the interest insured be stranded, sunk, or on fire." The libel alleged that on November 18th, while the ship was lying in port and before discharge, a fire broke out in the after 'tween-decks of the ship and burned the bulkhead forward of the lazarette, the door thereof, and a considerable portion of dunnage and other parts of the ship. An exhibit, quoting from the ship's protest, recited that the master, on the alarm being given, went below through the lazarette and saw the reflection of the fire over the top of the bulkhead between the after 'tween-decks and the lazarette, which were then full of cargo, and that after considerable trouble the fire was extinguished, with considerable damage. *Held*, that the words "on fire," as used in the particular average clause, were not synonymous with the word "burnt," contained in former policies, but were indicative of a happening whereby the ship was endangered by actual fire burning some part of it, necessitating extraordinary efforts to prevent serious damage, and that under such definition the libel was not subject to exception as stating a loss from which the insurer was exempted by the particular average clause as matter of law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1230–1238; Dec. Dig. § 478.*]

In Admiralty. Libel in personam by the Pacific Creosoting Company against the Thames & Mersey Marine Insurance Company, Limited. On exceptions to the libel. Overruled.

Bogle, Merritt & Bogle, for libelant.

Brady & Rummens, for claimant.

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

HANFORD, District Judge. This suit is founded on a marine policy insuring a cargo of iron drums containing creosote oil shipped from London, England, to Eagle Harbor, in Puget Sound, by the British ship Sardhana. In storms encountered during the voyage the cargo was battered and damaged, and after the arrival at her port of discharge a gale of wind caused a barge used for lightering the cargo from the ship to land, having a load of 272 drums, to be capsized, and by that casualty four drums were lost and a large salvage expense was incurred. The losses from the causes indicated amount in the aggregate to more than 20 per cent. of the total value of the cargo, and by a marine survey and report of average adjusters the respondent's liability was fixed at $1,197.20, which is the amount of insurance on that part of the cargo lost, added to expenses incurred under the sue and labor clause of the policy.

The respondent claims exemption from liability on a condition of the contract known in the insurance business as the "F. P. A. clause," which reads as follows:

"Warranted free from particular average, unless the vessel or craft or the interest insured be stranded, sunk, or on fire. * * *"

In marine insurance law the phrase "Warranted free from particular average" means that the insurer does not assume liability for a partial loss, and the controverted question in this case is whether the conditional liability in this case became absolute by reason of a fire in the ship after her arrival at her port of discharge. In the libel it is averred that:

"* * * On November 18th, while lying in said port of Eagle Harbor, and before discharging said cargo, a fire broke out in the after 'tween-decks of said ship, and burned the bulkhead forward of the lazarette, the door thereof; and a considerable portion of dunnage and other parts of said ship. * * *"

And in an exhibit attached to the libel there is quoted from the ship's protest a statement concerning the fire as follows:

"November 18th. Stevedores continued to discharge the cargo and at 5 p. m. finished for the day. 291 further drums were discharged. About 9:30 p. m. smoke was discovered issuing from the after hatch, by one of the crew, who immediately notified the master and then gave the alarm. This alarm was responded to by the crews of the ship Jupiter, the S. S. Hornelen, and the employés of the Pacific Creosoting Company, who brought with them several chemical fire extinguishers. The master went below through the lazarette and saw the reflection of the fire over the top of the bulkhead between the after 'tween-decks and the lazarette. The after 'tween-decks were still full of cargo. After considerable trouble the fire was extinguished, and it was then discovered that the aforesaid bulkhead, together with the door thereof (the bulkhead was built in the vessel), and the dunnage in the after 'tween-decks, were burned, and some of the ship's stores in the lazarette were damaged by water and chemicals. The origin of the fire was not discovered."

In their argument in support of exceptions to the libel, proctors for the respondent urge that the libelant's claim is based upon a bare technicality. If so, the claim is nevertheless the assertion of a substantial and legal right. By the contract insurance was paid for and written, the "F. P. A. clause" makes an exception to the liability of the

insurer and is to be construed strictly. 19 Am. & Eng. Enc. of Law (2d Ed.) 1065; Canton Insurance Office v. Woodside, 90 Fed. 301, 33 C. C. A. 63.

The proctors on both sides of the case have informed the court that after diligent search they have been unable to find any adjudicated case, English or American, giving an interpretation of the "F. P. A. clause," since the words "on fire" came into use as a substitute for the word "burnt" in the forms of policy used previous to the decision in the Glenlivet Case, 7 Aspinwall, Mar. Cases (N. S.) 342, 395; 19 Am. & Eng. Enc. of Law (2d Ed.) 1070. The words "on fire" are not synonymous with the word "burnt," and the change of phraseology, manifestly, was not made without a purpose. Having no precedent to follow, this case must be decided according to reason and good sense.

The words "on fire," in connection with a ship, do not comprehend, necessarily, every fire that may be on board of the ship, nor do they have the same meaning as "consumed by fire" or "destroyed by burning." They are indicative of a happening whereby the ship is endangered by actual fire burning some part of it, and necessitating extraordinary efforts to prevent serious damage. A bulkhead between-decks is part of a ship, as an inner partition wall is part of a house. A fire in that part of a ship would justify an alarm, and, if not promptly subdued, would certainly be destructive, and such a happening would be truthfully described by saying that the ship was "on fire."

It is the opinion of the court that the libel tenders an issue as to whether the ship was in fact on fire within the meaning of the clause of the policy relied upon to exempt the respondent from liability. Therefore the exceptions must be overruled.

In re EAGLE STEAM LAUNDRY CO. OF QUEENS COUNTY.

(District Court, E. D. New York. February 8, 1911.)

1. BANKRUPTCY (§ 72*)—PERSONS SUBJECT TO ADJUDICATION—LAUNDRY CORPORATION.

Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), prior to amendment by Act Cong. June 25, 1910, c. 412, 36 Stat. 838, conferred no jurisdiction on the bankruptcy court to declare a corporation organized to operate a laundry a bankrupt and to administer its property.

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

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

2. BANKRUPTCY (§ 469*)—PROCEEDINGS—DISMISSAL—FEES TO TRUSTEE'S ATTORNEY—DISBURSEMENTS.

Bankruptcy proceedings having been instituted against a laundry corporation, a receiver was appointed, and the bankrupt's property sold. After ratification of the sale, an alleged lien creditor applied to dismiss the bankruptcy proceedings for want of jurisdiction. This application having been granted, the attorney for the trustee secured a judgment against the corporation, on which execution was issued, and a receiver appointed, and he demanded the funds of the estate from the trustee in

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

bankruptcy. The creditor objecting to the bankruptcy proceedings proved no claim in bankruptcy, but had a general debt which had not become a lien on the property. *Held*, that an order granting an allowance out of the proceeds of the property to the trustee's attorney was unsustainable for want of jurisdiction, beyond actual disbursements and compensation for services rendered in the necessary preservation of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 469.*]

In the matter of bankruptcy proceedings against the Eagle Steam Laundry Company of Queens County. On proceedings for the allowance of fees for the services of the trustee's attorney, and for other disbursements in the administration of the estate. Petition denied, except as to actual disbursements and compensation for services rendered in the necessary preservation of the estate.

See, also, 178 Fed. 308.

Wyckoff, Clarke & Frost, for Ellen Meaney.

Robert McC. Robinson, for trustee.

CHATFIELD, District Judge. The property belonging to the above-named corporation was in the hands of officers of this court for some time, and was sold by its direction; the proceeds from this sale being still in the possession of the trustee. Upon the 11th day of August, 1910, an order was made directing the trustee to pay out of this fund certain amounts for the services of his attorney and other disbursements in the administration of the estate. Shortly previous thereto the present petitioner, who had made claim to the entire property of the corporation, under a chattel mortgage which was held invalid by this court, moved to dismiss the proceeding, upon the ground that this court had no jurisdiction in bankruptcy over a corporation engaged in the occupation and with the powers of the Eagle Steam Laundry Company.

Under the decisions of the higher courts, this objection had to be sustained, and, although the question may have been open (some cases having held that jurisdiction existed) at the time the petition was filed and the adjudication in bankruptcy was originally made, nevertheless at the time the objection was raised it was conclusively established that, before its amendment in 1910 (Act June 25, 1910, c. 412, 36 Stat. 838), the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) conferred no jurisdiction whatever over such corporations. The receiver and trustee in bankruptcy, therefore, had but a de facto possession, and no title, and the sale of the bankrupt's property, while capable of ratification, should not have taken place. But ratification did occur. Both the purchaser and the bankrupt corporation, and all of the various parties to the proceedings, acquiesced in that sale. The proceeds thereof were admittedly within the control of this court for distribution, and the present petitioner, as has been said, claimed them from this court as payable upon her mortgage.

After the dismissal of the bankruptcy proceedings, the attorney for the trustee secured a judgment against the corporation, upon which

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

execution was issued and a receiver appointed, and this receiver has demanded from the trustee in bankruptcy the funds of the estate.

The petitioner, Ellen Meaney, has also brought suit against the trustee as an individual, for the money in his hands, and it is unnecessary to consider here the various defenses which the trustee may have against an attempt to hold him personally, as the proceedings were justified by a judicial interpretation of the statute, up to the time when the trustee's attention was called to the alleged defect in jurisdiction.

The petitioner, Ellen Meaney, proved no claim in bankruptcy, has but a general debt, which as yet has not become a valid lien upon the property in question, and the receiver appointed in the County Court of Queens county has at least an equitable lien, by virtue of his appointment, under a valid and subsisting judgment. Under these circumstances, the application of the petitioner to have the allowance to the trustee's attorney set aside must be granted, as to everything beyond actual disbursements and compensation for services rendered in the necessary preservation of the estate.

The attorney for the trustee and the judgment creditor for whose benefit the receiver has been appointed, however, being the same individual, the trustee may be liable to turn over to this receiver the balance of the fund, if ordered to do so by a court having jurisdiction. This court can do nothing beyond protecting the trustee in what he did under an apparently well-based, but really unfounded, exercise of jurisdiction.

GEORGE v. TENNESSEE COAL, IRON & R. CO.

(Circuit Court, N. D. Georgia. January 5, 1911.)

No. 2,244, at Law.

1. REMOVAL OF CAUSES (§ 102*)—REMAND—RESIDENCE OF PARTIES—DISTRICT.
   Where a suit is brought in a state court in a federal judicial district of which neither plaintiff nor defendant is a resident, it will be remanded on seasonable motion, unless the plaintiff consents to the suit proceeding in the district by appearance and pleading.
   [Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218–220; Dec. Dig. § 102.*]

2. REMOVAL OF CAUSES (§ 4*)—RIGHT OF REMOVAL—NATURE OF ACTION—ATTACHMENT.
   Act Cong. March 3, 1875, c. 137, § 8, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), as amended by Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433, declares that, when any suit commenced in any Circuit Court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance, or lien, or cloud on the title to, real or personal property within the district where the suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the district, or shall not voluntarily appear, the court may direct the absent defendant or defendants to appear by a certain day, to be designated, etc., and be served by publication. *Held*, that where an action was brought in a state court between nonresidents, and an attachment was levied on property of the defendant within the state solely to obtain jurisdiction, the action was

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

not brought to enforce a legal or equitable lien on the property within such act, and was therefore not removable to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 11–20; Dec. Dig. § 4.*]

Action by Wiley George against the Tennessee Coal, Iron & Railroad Company. On motion to remand. Granted.

Reuben R. Arnold and Lamar Hill, for plaintiff.

Smith, Hammond & Smith, for defendant.

NEWMAN, District Judge. This suit was brought in the city court of Atlanta, Ga., and was removed by the defendant to this court. A motion is seasonably made to remand the case to the state court. The petition to remove shows that the defendant is a citizen and resident of the state of Tennessee, and the plaintiff a citizen of the state of Alabama, and the suit was brought by the levy of an attachment on property wholly within the state of Georgia. The contention for the defendant is this:

"If this were an ordinary suit in personam, and service had been perfected on the defendant, it would not be a removable cause, under the settled rule laid down in the Wisner Case, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, as construed and restricted in Western Loan Co. v. Butte, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101, and In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904. We contend that the rule as to cases brought by attachment is different. * * * An attachment suit may be rightfully removed to the United States court, although it would not have been originally brought in the United States court for lack of ability to obtain personal service."

In the Wisner Case it was held that, where a suit was brought in a district where neither the plaintiff nor defendant resided, such jurisdiction could not be maintained, even with the consent of both parties. This was modified by the decision of the court in the Moore Case, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, to the extent that consent to be sued in a particular district in which neither the plaintiff nor the defendant was a resident might be waived by the defendant in a suit originally brought, and after removal might be waived by the plaintiff by appearance and pleading. The Supreme Court, in Re Winn, 213 U. S. 458, 469, 29 Sup. Ct. 515, 519, 53 L. Ed. 873, in referring to the Wisner Case, and its modification in the Moore Case, said:

"But that case [referring to the Moore Case] simply held that where there was a diversity of citizenship, which gave jurisdiction to some Circuit Court, the objection that there was no jurisdiction in a particular district might be waived by appearing and pleading to the merits, and anything to the contrary said in Ex parte Wisner, 203 U. S. 449 [27 Sup. Ct. 150, 51 L. Ed. 264], was overruled, though the Wisner Case was otherwise left untouched."

So it seems clear, taking these decisions all together, that when a suit is brought in a district of which neither the plaintiff nor the defendant are residents, it will be remanded if a motion is seasonably made for that purpose, but if the plaintiff consents to the suit proceeding in the particular district, by appearance and pleading, the case will be retained in the Circuit Court. So the only question for consid-

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

eration is whether the fact that the suit was brought by an attachment on land in this district is sufficient to give the court jurisdiction.

It is claimed that it comes within the provisions of Act March 3, 1875, c. 137, § 8, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), as kept in force and amended by the acts of 1887 (Act March 3, 1887, c. 373, 24 Stat. 552) and 1888 (Act Aug. 13, 1888, c. 866, 25 Stat. 433). That statute provides:

"That when any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a certain day to be designated," etc.

And it proceeds to provide for service by publication and for judgment to be effective on the property which is the subject of the suit and under the jurisdiction of the court.

The contention here is that, this suit having been brought by attachment on real estate in the state court, it becomes a suit within this section. I do not think so. The suit is not brought "to enforce any legal or equitable lien upon," or to enforce any "claim to," and certainly not "to remove any incumbrance or lien or cloud upon the title to," the real estate attached. There is nothing in this suit which seeks any peculiar right whatever with reference to the real estate attached. The Wisner Case was brought by attachment, and it was not suggested in that case that it was not an ordinary suit between citizens of different states.

Counsel rely upon certain language in Pennoyer v. Neff, 95 U. S. 714, 743, 24 L. Ed. 565. The language referred to is this:

"It is true that in a strict sense a proceeding in rem is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but in a larger and more general sense the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings in rem in the broader sense in which we have mentioned."

Of course this language was used in connection with the important question of the right to a general judgment against a defendant without personal service, and has no reference to the statute which is invoked to sustain the jurisdiction here. While it is true that the property attached may, if judgment is obtained, be used to satisfy the judgment, still it is not because of any special claim the plaintiff has against the property, or any right in or to it, different from any other general creditor of the defendant, or any one having a right to sue the defendant in tort. The plaintiff has no special claim of any kind against the land, but simply uses it as a basis for bringing his action here, and in which he seeks to recover for matters not in any way connected with the property attached.

Motion to remand is granted.

In re L. B. PICKENS & BRO.

(District Court, N. D. Georgia. January 23, 1911.)

No. 308.

BANKRUPTCY (§ 209*)—CLAIMS TO PROPERTY—DETERMINATION—PLENARY SUIT—PARTIES.

Where a bankrupt, having borrowed money from A., executed a deed to certain real estate to him, receiving back a bond for title, and thereafter transferred the bond to his aunt, to whom he was indebted, and it was doubtful whether such transfer was an absolute assignment or as security, the determination of that question could not be had in a summary proceeding to compel the bankrupt to turn over the property to his trustee, in which the aunt was not a party, but could only be determined in a plenary suit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 318; Dec. Dig. § 209.*]

In the matter of bankruptcy proceedings of L. B. Pickens & Bro. On petition to review a referee's order requiring the bankrupt to turn over certain property, in which it was alleged he had an equity of redemption, to his trustee. Reversed, with directions to dismiss.

Lipscomb, Willingham & Doyal, for trustee.

Max Meyerhardt, for petitioner.

NEWMAN, District Judge. This case is in a rather peculiar situation, and I have had some difficulty in knowing how to dispose of it. L. B. Pickens, one of the bankrupt firm, it is claimed, owned a small tract of land in Cobb county, which he did not turn over to the trustee in bankruptcy. A petition was filed by the trustee, W. B. Everett, asking the bankruptcy court to require L. B. Pickens to surrender the land in question to him, as trustee in bankruptcy for the firm of L. B. Pickens & Bro. The referee in bankruptcy at Rome issued a rule requiring L. B. Pickens to show cause why he should not turn over the land, and it seems that Pickens appeared and made a general denial of his ownership of the land.

There was a hearing before the referee, and it appeared that Pickens owned the land in April, 1908, when he borrowed $200 from J. T. Echols, making him a deed to this land, and receiving back a bond for title. Subsequently, in April, 1909, he paid Echols $50 principal and $16 as interest, and, it seems, still owes him the remainder. On April 6, 1909, L. B. Pickens seems to have transferred the bond for title to Miss E. A. Pickens, his aunt, to whom both L. B. Pickens and Miss Pickens testified he was indebted at that time. There seems some doubt from the evidence whether the transfer from Pickens to his aunt was a transfer to secure his indebtedness to her, or an absolute transferring of the bond for title.

The referee, after hearing the evidence, found that the land should be turned over to the trustee, and that the land should be sold by the trustee, subject to the right of Echols to have the balance of his debt paid, and subject to whatever debt is due Miss Pickens. To this

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

report of the referee L. B. Pickens filed exceptions, and asked that the matter be brought before the District Court for review. He denies, in the paper that he files, that the referee found correctly, and says that he erred in his decision. He then says:

"Wherefore petitioner prays that the issues of fact in the foregoing case be submitted to a jury in said court."

The referee, in the course of his findings in this case, says:

"There seems to have been some uncertainty as to whether L. B. Pickens meant by the transfer of the bond for title to give all his interest in the property to his aunt, or whether, upon the payment of the amount he owed her he was to receive the property back."

This indicates, and it is shown all through the case, that there was a clear assertion of right to the property on the part of Miss Pickens. There can be little doubt that there was error in the referee undertaking to dispose of this matter under a rule to show cause, and by a summary proceeding like this to require that the land be turned over to the trustee in bankruptcy. In the first place, so far as I can see, Miss Pickens was not a party to this proceeding at all, and the evidence indicates, as well as the findings of the referee, that she was the person who was claiming the land.

The appearance and pleadings in opposition to the trustee all seem to be by L. B. Pickens. However, there does not seem to have been, up to the time of the recent demand for jury trial, any objection to the right of the referee to hear the matter. If the trustee has rights in this matter, the same should, undoubtedly, have been asserted by plenary suit in the proper court. This is clearly evidenced by the decisions in Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, Bardes v. Hawarden Bank, 178 U. S. 524, 20, Sup. Ct. 1000, 44 L. Ed. 1175, and Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405.

In a case decided by Judge Jones in the Northern District of Alabama—In re Tune (D. C.) 115 Fed. 906—the judge draws from the decisions just referred to the rule on this subject as follows:

"It is apparent from reading the opinion in Nugent's Case that the only adverse claim which could oust the summary jurisdiction was a claim which was not merely colorable. To use its language again, there must be an 'actual basis' for the claim. This is only the application of the familiar principle regarding equity jurisdiction in cases where it is essential to injunctive relief to have a superior legal title or right to the defendant. A bare claim, a bare denial of the plaintiff's right, no matter how positive, will not dissolve the injunction; but the defendant must go further, and show facts in support of the denial, which at least give color of right in him, and make the contested matter of right between him and the complainant one of some fair doubt. There must be reasonable room for controversy."

The ninth headnote to this case, which is a summary of what is held, is in this language:

"The summary jurisdiction is ousted, if determination of the validity of the adverse claim involves the decision of matters in pais and the weighing of conflicting evidence and finding of facts, which, when presented, leave room for fair doubt as to the invalidity of the claim, since such a claim is not merely colorable. Delivery must then be compelled by suit in plenary proceedings in a proper court."

On this question of the right of the bankruptcy court to proceed summarily, and whether a plenary suit is necessary, this is said in the opinion in Mueller v. Nugent, 184 U. S. at page 15, 22 Sup. Ct. at page 275, 46 L. Ed. 405:

"But suppose that respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt. The bankruptcy court had the power to ascertain whether any basis for such claim actually existed at the time of the filing of the petition. The court would then have been bound to enter upon the inquiry, and in so doing would have undoubtedly acted within its jurisdiction, while its conclusion might have been that an adverse claim, not merely colorable, but real, even though fraudulent and voidable, existed in fact, and so that it must decline to finally adjudicate on the merits. If it erred in its ruling either way, its action would be subject to review."

So that, if the claim is "real," and not "merely colorable," the claimant of the property, as against the trustee in bankruptcy, is entitled to have his rights determined by a plenary proceeding, and not by summary proceeding instituted before the referee in bankruptcy.

If Miss Pickens had been made a party to this proceeding, and had appeared, as did L. B. Pickens, she might thereby have waived the jurisdiction and been bound by the action of the referee, subject to the review of the court, of course. She not being a party, however, and not appearing, so far as can be ascertained from the record, except as a witness in the case, I do not see how she can be bound by this decision of the referee. Her adverse claim appears clearly from the record, and that the same was determined against her without her being a party to the proceeding. This was manifestly erroneous.

I do not pass at all upon the merits of the matter, but disapprove the action of the referee for the reasons stated. If Miss Pickens desires to appear in this proceeding and prefers to dispose of it before the referee, I see no reason why they may not enter into a stipulation to that effect, and let the referee, after hearing from Miss Pickens, make such disposition of it as may be proper.

If no agreement is reached, the referee should dismiss this proceeding, without prejudice to the right of the trustee to institute such proceedings as he may be advised, in conformity with what has been said herein.

MOTLEY v. SOUTHERN RY. CO.

(Circuit Court, N. D. Georgia. February 3, 1911.)

No. 1,023.

1. EQUITY (§ 132*)—SUIT BY COMPLAINANT FOR THE BENEFIT OF CLASS—BILL. Where complainant sued in equity to compel defendant railroad company to deliver certain of its stock in exchange for stock of another corporation under a reorganization agreement, and alleged that complainant did not know how many others were similarly situated, but averred on information and belief that there were many others similarly situated, and that their stock amounted to at least $500,000, such allegation was

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

not sufficient to justify the court in entertaining the bill as one brought by complainant on behalf of a class.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 312; Dec. Dig. § 132.*]

2. CORPORATIONS (§ 575*)—REORGANIZATION—EXCHANGE OF STOCK—RAILROADS —NATURE OF RELIEF..

Where a plan for the reorganization of a railroad company, of which complainant was a stockholder, contemplated that he should have one share of the new corporation stock for every two shares of the old company, and the new company issued such stock, and undertook and agreed in the plan of reorganization or otherwise with the purchasing committee to deliver the exchanged stock to the respective shareholders in the old company, but on demand by complainant failed and refused to deliver new stock in exchange for his stock in the old company, complainant was entitled to a mandatory injunction or an alternative decree for a delivery of the stock or for the payment of the money value thereof.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 575.*]

In Equity. Suit by T. N. Motley against the Southern Railway Company. On demurrer to bill. Sustained in part.

Burton Smith, for complainant.

McDaniel, Alston & Black, for defendant.

NEWMAN, District Judge. This case was removed from the state court to this court. On a demurrer to the declaration, filed in the state court, the following order was entered, after removal:

"This case was removed to the Circuit Court from the state court. Plaintiff's pleading was drawn under the practice prevailing in the state court. It is a blending of law and equity. When removed here it was placed, and properly, I think, by the clerk on the equity docket. The plaintiff, in my judgment, has foundation for a good case in equity. His pleading, however, needs reframing. The plaintiff having asked leave to replead, if in the judgment of the court repleading be necessary, it is ordered that he have 60 days in which to reframe his pleading, so as to conform to proper equity practice in that respect.

"No further order will be made in the case at present, and not until the plaintiff has an opportunity to replead, as indicated. This 5th day of July, 1910."

The time given in this order to reframe the bill was, on August 30, 1910, extended for 60 days. On September 28, 1910, reframed pleadings were filed by the complainant. Subsequently, on October 25, 1910, a demurrer was filed, and on the same day a special demurrer was also filed.

The substance of the bill as it now stands is that the complainant was a stockholder, having 100 shares of the stock of the Georgia Pacific Railway Company, of the par value of $100, at the time it went into the hands of receivers; that a plan of reorganization was framed by which the stockholders in the Georgia Pacific Railway Company were to receive one share of the stock of the new company, the Southern Railway Company, for every two shares of stock held in the Georgia Pacific Railway Company; that the plan contemplated that this stock of the Southern Railway Company should be delivered by it to all the stockholders of the Georgia Pacific Railway Company, respec-

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

tively, in the proportion named, and, by a recent amendment, it is alleged that the Southern Railway Company undertook and agreed to do this. It is alleged that demand has been made on the Southern Railway Company for the delivery of the stock, and it has failed and refused to deliver the same. The bill prays:

"That the court pass a decree ordering and directing the defendants to deliver to your orator, and to the other parties herein referred to, such an amount of stock as the court shall determine they are entitled to" and "if it should appear that the defendants cannot deliver such stock, judgment be rendered against the defendants, in behalf of each of the parties at interest, as herein set forth, fixing a money judgment of the highest proved market value of the stock at any time between the final judgment in this cause and the date of the decree of August 18, 1894."

As to this the complainant seeks to make a case in behalf of a class; that is to say, of all parties in similar situation to the complainant, and who were stockholders in the Georgia Pacific Railway Company, and entitled to have stock in the Southern Railway Company delivered to them, to whom such stock has not been delivered.

The demurrer makes two questions: First, that the complainant does not make out a case which, under equity practice, would entitle him to make the proceeding one for a class; and, second, that, if there be such other parties, they would be guilty of gross laches in not proceeding sooner to assert their rights, and that any claims they might have would be barred, and should not be recognized and enforced by the court.

It is unnecessary to determine the last contention, because, in my opinion, a case is not made where the complainant can sue for a class in like situation with himself. In the first place, the bill as amended fails to state with any sort of definiteness that there is such a class. The allegation on this subject is this:

"Your orator does not know how many others are similarly situated; but he avers, on information and belief, that there are many other stockholders of the Georgia Pacific Railway similarly situated, and that their stock amounts to at least $500,000."

I do not think this is such an allegation as would justify entertaining the bill as one brought by the complainant on behalf of a class. Nothing is shown to indicate whether the rights of the class, if there be such a class, should be entertained and determined in this proceeding, nor do the allegations in any way indicate that the decision of this question would in any way bind others similarly situated or determine the defendant company's rights as to any others of the same class. I am therefore satisfied that the demurrer should be sustained as to that portion of the bill.

As to the other parts of the bill, it appears to me that, while some parts of the first 17 pages of the bill are irrelevant and immaterial, as a whole they may not be subject to demurrer; while the remainder of the bill, including the interrogatories on the part of the defendant, seems to me to be subject to demurrer. I do not see that any of the interrogatories propounded relate to anything material to the complainant's right. That right is to show that he was a stockholder in the Georgia Pacific Railway Company; that the plan of reorganization

contemplated that he should have one share of the Southern Railway Company's stock for every two of the Georgia Pacific Railway Company's stock; that the Southern Railway Company issued such stock, and undertook and agreed, in the plan of reorganization or otherwise, with the purchasing committee to deliver the stock to the respective shareholders in the Georgia Pacific Railway Company; and that on demand they have failed and refused to do this. This makes his case, it seems to me, and all the other matters inquired of by the interrogatories seem to me to be wholly immaterial.

I think the right of the complainant, if he should show the necessary facts, would be for a decree in the nature of a mandatory injunction, or an alternative decree, probably, for the money value of the stock, if it cannot be delivered. Whether the prayer states this with sufficient distinctness I am not entirely clear at present; but it may be that, if a case is satisfactorily made out, the prayer is sufficient to justify it.

The bill will be sustained to the extent indicated, and the demurrer overruled; and to the extent also indicated the demurrer to the bill will be sustained, and the same stricken.

SOUTHERN RY. CO. v. SIMON.

(Circuit Court, E. D. Louisiana. November 25, 1910.)

No. 13,300.

1. EQUITY (§ 410*)—FINDINGS OF MASTER—EFFECT.

Though defendant did not object to the taking of evidence before a master, he did not thereby consent to the master's appointment, nor is he estopped to controvert his findings of fact.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 905–919; Dec. Dig. § 410.*]

2. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—SERVICE ON SECRETARY OF STATE—DUE PROCESS OF LAW.

Acts La. 1904, No. 54, § 1, requires foreign corporations doing business in Louisiana to file a written declaration, naming an agent on whom process may be served; and section 2 declares that, if a foreign corporation does business of any nature in the state without having complied with section 1, it may be sued in any parish where it does business, and service may be made on the Secretary of State with the same effect as if the corporation had been personally served. *Held* that, there being no provision in such act for actual notice to the corporation, either within or without the state, by mail or otherwise, in case of service on the Secretary of State, such service was insufficient.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 668.*

Service of process on foreign corporations, see notes to Eldred v. American Palace Car Co., 45 C. C. A. 3; Cella Commission Co. v. Bohlinger, 78 C. C. A. 473.]

In Equity. Bill by the Southern Railway Company against Ephraim Simon to restrain the execution of a judgment recovered by Simon against the railway company in the state court. Decree for complainant.

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

Harry H. Hall, for plaintiff.
Henry L. Lazarus, for defendant.

FOSTER, District Judge. In this case complainant, the Southern Railway Company, seeks an injunction to restrain the defendant, Ephraim Simon, from executing a certain judgment of the civil district court on the ground that said judgment is null and void for want of citation. A demurrer attacking the jurisdiction of this court to issue the injunction was overruled by my predecessor, Hon. Charles Parlange, and the jurisdiction of this court was also maintained by my predecessor, Hon. Eugene D. Saunders. See, also, Ex parte Simon, 208 U. S. 144, 28 Sup. Ct. 238, 52 L. Ed. 429. From a careful consideration of the law as I understand it, I agree with them, and cannot add to the reasons they assign.

The defendant, Ephraim Simon, was injured while a passenger on one of the complainant's trains in Alabama. Thereafter he filed suit against the complainant in the civil district court for the parish of Orleans, La., alleging complainant to be a foreign corporation doing business in Louisiana; that it had not appointed an agent to receive service of citation, and therefore service should be made upon the Secretary of State, in accordance with the law of Louisiana (Act No. 54 of 1904). Judgment was obtained in his favor and against the Southern Railway Company in the sum of $13,348. After this judgment had become final, complainant filed its bill in this court, alleging the service upon the Secretary of State to be null and void, and the judgment against it rendered without due process of law, in violation of the Constitution of the United States; that the demand of complainant in said suit was unconscionable, and was obtained by fraudulent and false testimony; that the claim consisted in part of remote and consequential damages, not recoverable; that complainant had no knowledge of the pendency of proceedings until after the rendition of the judgment; and that it had a good and valid defense to the action. Issue was finally joined, and the matter was referred to a master, who in due course filed his report. The defendant has excepted to the master's report, as a whole and specially, both as to his conclusions of law and the findings of fact.

It is contended by complainant that defendant, by not having objected to the taking of evidence before the master, has consented to his appointment, and is now estopped to controvert his findings of fact. I do not agree with this contention. The court could not, except by consent of all parties, abdicate its duty to determine, by its own judgment, the facts and the law applicable to them. The report of the master is merely advisory to the court, and, while entitled to great weight on findings of fact deduced from conflicting testimony, where the master has had opportunity to form his own opinion as to the truthfulness of the witnesses, the court may weigh the evidence and find its own facts, and, indeed, it is the court's duty to do so whenever either side excepts to the report of the master. In this case I consider the entire matter is before me for decision.

It is evident that the first question to be considered is that of cita-

tion. Act No. 54 of 1904, relied upon by the defendant, Ephraim Simon, is as follows:

"Section 1. Be it enacted by the General Assembly of the state of Louisiana, that it shall be the duty of every foreign corporation doing any business in this state to file in the office of the Secretary of State a written declaration, setting forth and containing the place or locality of its domicile, the place or places in the state where it is doing business, and the name of its agent or agents or other officer in this state upon whom process may be served.

"Sec. 2. Be it further enacted, etc., that whenever any such corporation shall do any business of any nature in this state without having complied with the requirements of section 1 of this act, it may be sued for any legal cause of action in any parish of the state, where it may do business, and such service of process in such suit may be made upon the Secretary of State the same and with the same validity as if such corporation had been personally served."

Undoubtedly the state of Louisiana has the right to require foreign corporations doing business within its borders to appoint an agent upon whom service of legal process can be made. In default of the appointment of such an agent, the state can appoint one for the corporation, or require service to be made upon some designated state official, provided such service shall constitute due process of law. Insurance Association v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987; Petroleum Co. v. West Virginia, 203 U. S. 183, 27 Sup. Ct. 132, 51 L. Ed. 144.

What is or is not due process of law must depend upon the facts in each case, and the Supreme Court of the United States has carefully refrained from laying down any general rule. But it is fundamental that the method of citation should be fairly calculated to bring home to the defendant actual notice of the pendency of the action and allow him a reasonable time to put in his defense. Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616.

In the case first above cited the state of Kentucky required insurance companies doing business in the state to consent that service of process be had upon the Commissioner of Insurance; but the statute further required the Commissioner to give the corporation actual notice by mail. In the second case, the state of West Virginia required foreign corporations to appoint the State Auditor attorney in fact to accept service of process, but also made it his duty to transmit the process or notice by registered mail to the corporation.

It will be observed that the statute of Louisiana imposes no duty whatever on the Secretary of State regarding his representing a foreign company. He is not made its agent in any way. He is not required to appear for it in a suit wherein he is served, nor is he even required to notify the corporation of the pendency of the action.

The evidence in this case shows, and it is not disputed, that the complainant had no actual notice of the pendency of the action in the state court until after the final judgment. By advice of the Attorney General of the state of Louisiana, the Secretary of State merely filed away the process and made no effort to notify the complainant. The Supreme Court of Louisiana, in Gouner v. Mississippi Valley Bridge &

Iron Company, 123 La. 964, 49 South. 657, in considering Act No. 54 of 1904, held a service upon the Secretary of State to be null and void. In the course of his opinion the Chief Justice took occasion to say:

"There is a feature in the law last cited that is peculiar, and adds something to its illegality when it is proposed to maintain a service, as in this case. As applying exclusively to foreign corporations absent from the state, within the extreme meaning of the word 'absentee,' we will state: This law makes no provision whatever for the service on the defendant. The officer may decline to communicate with the person sued, and give no notice whatever, not even by mail. A judgment might be obtained without the least knowledge of the person sued. Under the phrasing of the statute, the duty of the officer begins and ends in his office. If such a judgment were rendered, it could receive no recognition whatever at the place of the domicile."

See, also, Pinney v. Providence Loan & Investment Co., 106 Wis. 396, 82 N. W. 308, 50 L. R. A. 577, 80 Am. St. Rep. 41.

In the light of these decisions I am constrained to hold that the judgment of the civil district court was rendered without due process of law, and is therefore null and void. Entertaining these views, it is unnecessary to pass upon the other questions presented by the record.

There will be a decree in favor of the complainant, perpetually enjoining the defendant, as prayed for.

In re FLAHERTY.

(District Court, E. D. Virginia. February 11, 1911.)

BANKRUPTCY (§ 188*)—RETAIL LIQUOR LICENSE—ASSIGNMENT AS SECURITY—VALIDITY AS AGAINST TRUSTEE.

The Virginia Law (Laws 1910, c. 190) regulating the sale of intoxicating liquors provides that a license can only be granted to a qualified voter, and, if taken out by a corporation, the officer dispensing liquor must be a voter of the county or city where it is carried on. An application for the license must be made to the corporation court where it may be defended by any party in interest, and the court before granting it must find that the applicant is a fit person, that he will keep an orderly house and personally superintend the same, and that the place at which it is to be conducted is suitable. He is also required to give a bond to comply with the law. No licensee may hire his license or allow its use by any other person, firm, or corporation on pain of forfeiture, and any other person using such a license becomes subject to a penalty of $400. The license must be posted in the licensee's place of business, and a general provision declares that it shall confer on the licensee a personal privilege to transact the business which shall not be exercised by the licensee except as specially authorized by law. The license is made assignable to any person to whom it might have been originally granted, and, in the event of the licensee's death, may be assigned by his personal representative. An assignment shall not be valid without certificate of the court issuing the regular license, or without bond and oath of assignee. *Held*, that under such provisions a liquor license granted to a bankrupt could not be made the subject of a valid pledge to a brewery corporation which advanced nearly all of the license fee, taking the bankrupt's note with an attempted assignment of the license as security.

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

In the matter of bankruptcy proceedings by John F. Flaherty. On petition to review a Referee's order awarding the proceeds of a retail

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

liquor license to the trustee instead of claimant, the Hoster-Columbus Associated Breweries Company. Affirmed.

Allan D. Jones, for Hoster-Columbus Associated Breweries Co. and the bankrupt.

W. B. Colonna and J. Winston Read, for creditors.

L. A. McMurran, trustee, pro se.

ROSE, District Judge. This is a controversy between the Hoster-Columbus Associated Breweries Company and the trustee in bankruptcy. The former will be called the "Brewery." Each of the parties claims to be entitled to $650 realized by the trustee from a retail liquor license which on July 15, 1910, the date of the adjudication, stood in the name of the bankrupt.

The referee in a learned and well-considered report decides in favor of the trustee. I am asked to review his conclusions.

The license was issued by the corporation court of the city of Newport News, Va., on the 28th day of April, 1910. It covered the period from May 1, 1910, to April 30, 1911, both dates inclusive. The license fee prescribed by law was $1,000. This sum he paid. The agreement under which the Brewery claims to be entitled to the sum obtained by the trustee from this license was executed April 27, 1910. It recites a loan of $975 by the Brewery to the bankrupt, and the execution of a promissory note by the bankrupt to the Brewery for that sum. The note was by its terms payable in weekly installments of $25 each. The bankrupt agreed that while any part of the sum lent was unpaid not to buy without the written consent of the Brewery beer, porter, or ale from any one else. If the bankrupt disposed of his retail liquor license, then the sum remaining due on the note was at once to become due and payable. The agreement further provided:

"The said party of the second part has this day assigned and by these presents doth assign unto the said party of the first part, and its assigns, the license granted unto the said party of the second part by the * * * court of * * * as additional and collateral security for the faithful performance of this contract and payment of the aforesaid debt, subject, however, to the provisions of section 559 of the Code of Virginia. It is especially agreed that should default be made by the said party of the second part in the performance of this contract or in the payment of the aforesaid debt that the said party of the first part shall immediately and forthwith take possession of the said license, crediting the aforesaid debt with the pro rata value of the license at that date, and it is agreed and understood that any surplus shall be paid to the said party of the second part or his assigns."

The license in question was not issued by the corporation court until the day after the execution of the agreement. The evidence shows that the $975 mentioned in the agreement was borrowed and used by the bankrupt for the purpose of making, with the $25 furnished by him, the $1,000 required by law to be paid for the license.

Under the law of Virginia (Laws 1910, c. 190, § 8), no license to retail ardent spirits may be granted to any person who is not a qualified voter of the county or city in which the business is to be conducted. If a license is taken out by a corporation, the officer or agent of such corporation selling or dispensing ardent spirits must be a qualified voter of the county or city in which the business is carried on.

One who wants a liquor license makes an application to the commissioner of revenue and deposits with him the amount which the law fixes as the price of the license. The application is then referred to the corporation court.

Any person who thinks he will be aggrieved by the issuing of a license may have himself made a party defendant to the application. Section 10.

Before granting a license, the court must from the evidence be fully satisfied that the applicant is a fit person to conduct the business; that he will keep an orderly house and personally superintend the same; and that the place at which it is to be conducted is a suitable, convenient, and appropriate place for carrying on such business. He must give bond in the penalty of $500, conditioned to comply with all the requirements of the law.

In another section (section 12) the law provides that no licensee shall hire his license or allow the use of it by any other person, firm, or corporation. A licensee who violates this provision of law forfeits his license. The other person who uses the license becomes subject to a penalty of $400 for each offense.

The license is to be posted in the place at which the business is carried on under it. Section 18. By general provision of law applicable to all licenses in Virginia (Code 1904, § 558), it is provided that every license shall be held to confer a personal privilege to transact the business which may be the subject of the license and shall not be exercised except by the licensee, unless specially authorized by law to do so.

It is further provided (Laws 1902–3–4, c. 356) that a license may be assigned to any person to whom it might have been originally granted. In the event of the death of the licensee, the license may be assigned by his personal representative in like manner and with the like effect as might have been done by the licensee himself. If the license was obtained or had its validity by reason of a certificate of any court, or of an oath or bond, the assignment shall not be valid without a like certificate in favor of the assignee, and a like oath or bond by the assignee as is required by the original grant. When assigned the law declares the license shall be a personal privilege to the assignee and shall not be exercised by any person other than the assignee unless otherwise authorized by law.

The policy of the state of Virginia is shown by the above-cited provisions of its statute law. It is well settled that whether a liquor license can be mortgaged depends upon the qualities imparted to it by the local law. Where it is a mere privilege and not a property right, it is incapable of being the subject of a chattel mortgage. Jones on Chattel Mortgages, § 114; 1 Woolen & Thornton on Intoxicating Liquors, § 424; Joyce on Intoxicating Liquors, § 228; 23 Cyc. 110; 17 Am. & Eng. Enc. 232; Gilday v. Warren, 69 Conn. 237, 37 Atl. 494.

In New York and Texas persons standing in the position of the Brewery in this case have been held entitled to enforce their chattel mortgages or equitable assignments of liquor licenses. McNeeley v.

Welz, 166 N. Y. 124, 59 N. E. 697; Nicolini v. Langermann (Tex. Civ. App.) 104 S. W. 501.

The policy of these states with reference to such licenses as shown by their legislation appears to be so different from that of Virginia that the rules laid down in them are not here applicable.

It is contended on behalf of the Brewery that, if the trustee may realize money from an assignment of the license, the license must be such property as can be mortgaged or equitably assigned. The rules laid down in Fisher v. Cushman, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, are relied upon in support of this contention. The same argument was made in Re McArdle (D. C.) 126 Fed. 442. The case arose in the same state and in the same city as did Fisher v. Cushman. Judge Lowell pointed out that the local law there, declining on grounds of public policy and interest to recognize any right of a licensee to mortgage his license and any claim of the mortgage thereupon, a mortgagee has no rights which he can assert as against the bankrupt's trustee. The same principle of law is distinctly affirmed by the Supreme Judicial Court of Massachusetts in Tracy v. Ginzberg, 189 Mass. 260, 75 N. E. 637. The person claiming to be the equitable owner of the liquor license in the last-cited case appealed to the Supreme Court on the ground that he had been deprived of his property without due process of law. This contention the Supreme Court held inadmissible in Tracy v. Ginzberg, 205 U. S. 170, 27 Sup. Ct. 461, 51 L. Ed. 755.

The trustee in bankruptcy is entitled to the money realized from the bankrupt's liquor license.

The petition of the Brewery asserting its rights to the license or its proceeds must be dismissed, with costs.

In re LODEN.

(District Court, N. D. Georgia. December 28, 1910.)

1. BANKRUPTCY (§ 336*)—CLAIMS—WRITTEN INSTRUMENT—WITHDRAWAL.
Where a claim based on a note had been allowed, the claimant was expressly authorized, by Bankr. Act July 1, 1898, c. 541, § 57b, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), to withdraw the original note by permission of the court on leaving a copy on file.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 336.*]

2. BANKRUPTCY (§ 363*)—CLAIMS—WAIVER—PROCEEDINGS.
Where petitioner, holding a note against a bankrupt containing a waiver of homestead exemption, filed the note as an unsecured claim in the bankruptcy proceedings, he did not thereby waive his right to proceed in a court of competent jurisdiction to subject the homestead to the payment of the balance of the debt, after crediting his dividends in bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 363.*]

In the matter of bankruptcy proceedings against F. M. Loden. Application by B. D. Langford to withdraw a claim proven in bankruptcy proceedings. On petition to review an order of the referee denying such application. Reversed in part.

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

Geo. K. Looper, for bankrupt.
B. P. Gaillard, for movant.

NEWMAN, District Judge. The movant, Langford, after having proven his claim, and the same having been allowed, asked leave to withdraw it. The referee allowed him to withdraw the original note, and to leave a copy on file in the bankruptcy court. He refused to allow the claim to be withdrawn for the following reasons:

"(1) Because the claim had been regularly filed and allowed by the court, and the claim is therefore adjudicated as an unsecured claim in favor of B. D. Langford, and against the estate of F. M. Loden, bankrupt.

"(2) Because the said B. D. Langford, having filed the claim as an unsecured creditor, and exercised the right to vote as an unsecured claim, is now estopped from withdrawing the same on the ground that the same is a secured claim.

"(3) Because, having proved said claim as an unsecured claim, and submitted to the jurisdiction of the bankruptcy court, he is now estopped from withdrawing the same for the purpose of proceeding in another jurisdiction."

To this exceptions were filed by Langford, and it comes before the court now on petition to review the action of the referee, properly certified.

The referee was clearly right in allowing the movant to withdraw his original note and leave a copy. Bankr. Act July 1, 1898, c. 541, § 57b, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443). Whether the referee ruled correctly on the question as to his right to withdraw the claim entirely need not now be determined; that is, whether he was right in holding that Langford could not wipe out what he had done by making formal proof of his claim and having it allowed as an unsecured debt.

Counsel for both sides, in argument at the bar, agreed that proceedings had been instituted on the original note, the same containing a waiver of homestead exemption, for the purpose of enforcing the same against any exemption allowed. It is my opinion that that question should be left for determination in the court in which the proceeding is pending, and should not be decided in advance of its consideration.

It is not at all clear to me that, because a creditor has proven his claim as unsecured in the bankruptcy court, he may not, notwithstanding this, assert whatever peculiar right he may have against the homestead exemption. His claim may not be a secured one in the ordinary meaning of that term, and yet he may have his peculiar right by reason of a waiver of exemption against exempt property. In Bell v. Dawson County Grocery Company, 120 Ga. 628, 48 S. E. 150, Simmons, Chief Justice, speaks of the rights of a creditor holding waiver note in this way:

"The waiver becomes in the nature of a security, in that the debt may be made out of any property owned by the debtor, without regard to any exemption rights which the debtor would have had but for the waiver."

The question here involved has been to a large extent determined, I think, by the judge of this district. In re Meredith, 144 Fed. 230. The interesting question there was how to reach the amount for which

the creditor holding a waiver note could prove his claim as an unsecured debt in the bankruptcy court, and the whole matter is fully gone into and determined. I do not see anything in that decision, which was made after very careful consideration of the subject, which would prevent a creditor holding a waiver note from participating in a bankruptcy proceeding, and also asserting, in a court of competent jurisdiction, his peculiar claim against the homestead estate.

The action of the referee in allowing the withdrawal of the original note is approved. His views, expressed in his return upon the petition for review, are so far revised as to leave the effect of the proof of the claim in bankruptcy an open matter, to be determined in a court of competent jurisdiction when the question may arise.

In re GLICK et al.

(District Court, S. D. New York. February 8, 1911.)

BANKRUPTCY (§ 316*)—CLAIMS—COMMERCIAL AGENCY SUBSCRIPTION.

Where the bankrupt contracted for financial reports from a commercial agency, agreeing to pay $150 on May 1, 1910, for reports for the period extending from February 1, 1910, to April 30, 1911, and from the date of the contract until March 4, 1910, when the subscriber became bankrupt, reports were furnished as demanded, but no service was rendered after that date, the subscription was provable for the entire amount as a promise to pay a definite sum of money contained in a nonnegotiable instrument in writing.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 316.*]

In the matter of bankruptcy proceedings of David Glick and others. On petition to review the disallowance of a claim filed by the Bradstreet Company by the referee. Ruling reversed, and claim allowed.

Mr. Frederick, for petitioner.

Mr. Roth, opposed.

HOUGH, District Judge. The Bradstreet Company (the well-known Mercantile Agency) on January 31, 1910, entered into a written contract with the bankrupts (who were merchants in this city), whereby it agreed to furnish information regarding the character and credit of persons in business in the United States and Canada to the bankrupts for the period February 1, 1910, to April 30, 1911. For this service the bankrupts agreed to pay the Bradstreet Company $150 "payable May 1, 1910."

From the date of the contract until March 4, 1910, Bradstreets (it is admitted) did whatever they were called upon to do, and on the date last given a petition in bankruptcy was filed against their customer or client.

Adjudication having followed in due course, Bradstreets filed a proof of claim for the $150 called for by the contract. There is no evidence that either the receiver or the trustee endeavored to keep alive the contract in question, or that the claimant was ever called

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

upon to render any service subsequent to March 4, 1910. The question submitted is whether this debt is provable, and, if provable at all, for what amount.

Admittedly the facts are exactly like those in Matter of Buffalo Mirror & Beveling Co., 15 Am. Bankr. Rep. 122. In my judgment that case was properly decided, and there is little to add to the opinion of Referee Hotchkiss.

Let it be assumed that the contract out of which the claim in suit grew was executory; that is, when the contract was made, something remained to be done on both sides. Yet it has been settled upon much consideration in this circuit that an executory contract will give rise to a provable claim. In re Stern, 116 Fed. 604, 54 C. C. A. 60. Since therefore the claim is provable, the only inquiry remaining is: What is the measure of damages? Obviously such measure must be sought in the contract itself, and under that instrument it made no difference whether the bankrupts ever called for any information or not. What they sold (if they can be said to have sold anything) was the right to get information, and that right was considered by the parties to the agreement to be worth $150. It appears to me therefore clear that no other measure of damage is possible except the face of the contract and the amount for which claim is filed. Agreements such as this are very frequent, and may almost be said nowadays to constitute a legal class by themselves; but, if an analogy be sought among older and more familiar legal documents, it seems to me that the written contract at the basis of this claim is a promise to pay a definite sum of money contained in a nonnegotiable instrument in writing. It is therefore a provable debt for the full amount of the promise, just as is a promissory note, with of course due allowance for interest in the events provided for by the statute.

The claim is allowed as filed.

THE MAME.

(District Court, D. Connecticut. January 6, 1911.)

No. 1,639.

MARITIME LIENS (§ 13*)—GROUNDS OF LIEN—INSURANCE PREMIUMS PAID BY BROKER.

A lien does not attach to a vessel for the premiums paid by a broker on a contract of insurance obtained at the request of the owner.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 17; Dec. Dig. § 13.*]

In Admiralty. Suit by Frank H. Mason against the barge Mame. On exceptions to petition of libelant. Exceptions sustained.

Edward H. Rogers and James D. Dewell, Jr., for libelant.

Arthur C. Graves and Carver, Wardner & Goodwin, for claimant.

PLATT, District Judge. Frank H. Mason filed a petition in this court in September of this year, alleging that he was a marine in-

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

surance broker in New Haven, and on January 5, 1910, at the request of Michael J. Connolly, owner of the scow or barge Mame, placed insurance upon her for $1,500; that the premium thereon, which was $67.50, which he had paid to the insurance company, was still due and owing from the owner to him. He thereupon prayed process in rem against the Mame, which was granted, and such proceedings were had that the proceeds derived from the sale are now in the registry of the court, less the marshal's fees, which have been duly paid.

Michael J. Connolly, the owner of the Mame, has since become a voluntary bankrupt in the Massachusetts court, and O. Weld Richardson has been elected trustee of his estate. Said trustee has filed exceptions to said petition and libel, setting up in effect that the same does not present a cause of action in rem against the Mame, and that the petitioner is not entitled in this court to the relief sought.

The exceptions raise squarely the issue whether or not a lien attaches to a vessel for the premiums paid by a broker upon a contract of insurance obtained at the request of the owner. The English rule is undoubtedly to that effect, and the tendency in this country was for a time in the same direction. See The Dolphin, Fed. Cas. No. 3,974. Since the Dolphin decision, however, the weight of authority, as well as the reason of the case, appears to lead directly to the opposite conclusion. In this circuit the decision of then District Judge Coxe (In re Ins. Co. of Penn., 22 Fed. 109), affirmed by Circuit Judge Wallace (24 Fed. 559), is so forceful and compelling as to make it unnecessary for this court to give the matter further attention.

The exceptions are sustained, and the petition ought to be dismissed.

KLINE BROS. & CO. v. LIVERPOOL & LONDON & GLOBE INS. CO.

(Circuit Court, S. D. New York. January 14, 1911.)

DEPOSITIONS (§ 56*)—DE BENE ESSE—NOTICE—VACATION—EXTENSION—JURISDICTION.

Since Rev. St. § 863 (U. S. Comp. St. 1901, p. 661), authorizes the taking of depositions de bene esse without any application to or assistance from the court, the court has no jurisdiction to vacate or extend a notice; the party taking the deposition taking the risk of having it suppressed if the notice does not comply with the statute.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 56.*]

Action by Kline Bros. & Co. against the Liverpool & London & Globe Insurance Company, with which were heard four other cases. Application to vacate or extend a notice to take depositions de bene esse. Denied.

Fried & Czaki, for plaintiff.

Ivins, Mason, Wolff & Hoguet, for defendant.

WARD, Circuit Judge. The party having the right to take depositions de bene esse under section 863 of the Revised Statutes (U. S. Comp. St. 1901, p. 661) without any application to or assistance from

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

the court, I doubt the power of the court to vacate or extend the notice. The party who gives the notice takes the risk of the deposition being suppressed if it does not comply with the requirements of the statute. It would greatly impair the efficiency of the statute, which is aimed at emergencies, if courts were to intervene. If the plaintiff thinks the notice is bad, his course is to treat it as a nullity, and move to suppress the depositions, if taken.

The motion to vacate the notice to take depositions is denied.

In re HUDSON RIVER ELECTRIC CO.

(District Court, N. D. New York. January 16, 1911.)

BANKRUPTCY (§ 468*)—REVIEW—MANDATE—LIMITATION.

Where an order dismissing an involuntary bankruptcy petition was affirmed by the Circuit Court of Appeals, the District Court, on remand, had no jurisdiction, on motion of petitioning creditors, to modify the order to be entered on the mandate, so as to provide that it should not prejudice the rights of petitioners to apply to the Supreme Court of the United States for a writ of certiorari to review the order.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 468.*

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

In Bankruptcy. Separate petitions in the matter of the Hudson River Electric Power Company, the Hudson River Electric Company, the Hudson River Power Transmission Company, and the Saratoga Gas, Electric Light & Power Company, alleged bankrupts. An order dismissing the petitions (173 Fed. 934) having been affirmed by the Circuit Court of Appeals (183 Fed. 701), petitioners move to have inserted in the order entered on the mandate of the Circuit Court of Appeals a provision that it should not be prejudicial to their right to apply to the Supreme Court of the United States for a writ of certiorari to review the order. Motion denied.

C. S. & C. C. Lester, for the motion.

Geo. B. Curtiss, opposed.

RAY, District Judge. I know of no power in the District Court to limit in any way the effect of the judgment or order of the Circuit Court of Appeals on affirmance of the order of the lower court. The mandate comes down from the Circuit Court of Appeals, and the lower court is bound to obey such mandate and carry it into effect without any limitation whatever. The District Court is a mere instrument to make effectual the mandate sent down. Billings v. Aspen M. & S. Co. (C. C.) 53 Fed. 561; Gaines v. Caldwell, 148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed. 432; Bissell C. S. Co. v. Goshen S. Co., 72 Fed. 545, 19 C. C. A. 25; Aspen M. & S. Co. v. Billings, 150 U. S. 31, 14 Sup. Ct. 4, 37 L. Ed. 986. No order this court makes in any way limits, restricts, or enlarges the right to apply to the Supreme Court for certiorari, or to appeal. If certiorari may be granted by

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

the Supreme Court to review the order of the District Court, there must first be a final order.

Motion denied.

UNITED STATES v. LEHIGH VALLEY R. CO. (three cases).

(Circuit Court, W. D. New York. January 9, 1911.)

1. CARRIERS (§ 211*)—TRANSPORTATION OF LIVE STOCK—28-HOUR LAW—APPLICATION—CARRIAGE FROM ONE STATE TO ANOTHER THROUGH FOREIGN COUNTRY.

Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), prohibiting interstate carriers from confining animals transported in interstate commerce for more than 28 or 36 hours without unloading them for feed, water, and rest, applies to shipments passing from one state through a foreign country (Canada) to another state.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 211.*]

2. CARRIERS (§ 211*) — TRANSPORTATION OF ANIMALS — 28-HOUR LAW — CONSTRUCTION—CONNECTING CARRIERS.

Under the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]), prohibiting interstate carriers in transportation of animals from retaining them in the cars for a longer period than 28 or 36 hours without unloading them for food, water, and rest, where animals have been confined for the entire statutory period before being delivered to a connecting carrier, it is not necessary that a new period equal to the statutory time must again expire before the connecting carrier can be held guilty of violating the act; the liability being complete on the connecting carrier continuing the transportation toward the destination except to transport them to the yards at the junction point to unload them, under the provision that, in estimating the confinement, the time consumed in loading and unloading shall not be considered, but the time during which they have been confined on connecting roads is to be included.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 211.*]

3. CARRIERS (§ 211*) — TRANSPORTATION OF ANIMALS — 28-HOUR LAW — CONSTRUCTION—EXTRATERRITORIAL OPERATION.

The 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. 1909, p. 1178]), prohibiting interstate carriers from confining animals in cars more than 28 or 36 hours without unloading them for food, water, and rest, though construed to apply to interstate shipments from one state to another through a foreign country, is not objectionable as extraterritorial in operation, since the offense is complete by continued confinement only after the statutory time has expired; it being immaterial that a part of the time has been consumed by transportation in a foreign country.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 211.*]

Actions by the United States against the Lehigh Valley Railroad Company (three cases), against the New York Central & Hudson River Railroad Company, against the Michigan Central Railroad Company, and against the Grand Trunk Railway Company of Canada, to recover penalties for violation of the 28-hour law. Judgment for plaintiff in each case.

John Lord O'Brian, U. S. Atty.

Kenefick, Cooke, Mitchell & Bass (James McCormick Mitchell, of counsel), for defendant Lehigh Valley Railroad Company.

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

Hoyt & Spratt (Alfred L. Becker, of counsel), for defendants New York Central & Hudson River R. Co. and Michigan Central R. Co.

Moot, Sprague, Brownell & Marcy, for defendant Grand Trunk Railway Co.

HOLT, District Judge. These cases are brought to recover penalties under Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), to prevent cruelty to animals while in transit by railroad, commonly called the "28-hour law."

In each of these cases cattle were shipped in cars from places in the state of Illinois or Michigan to Detroit, thence through Canada to Niagara Falls, and thence to places in the state of New York. In each case the cattle were confined in the cars more than 36 hours without being fed or watered or unloaded for rest, in violation of the statute. In some of these cases formal demurrers have been filed, and in the other cases it has been stipulated that they be deemed brought to trial, and motions made to dismiss the complaint.

All these cases have been argued together, and in them two defenses are urged. One is that the 28-hour law does not apply to a shipment of cattle which passes from one state through a foreign country to another state. In some of the cases the claim is also made that, the statutory period of confinement having expired before the cattle came into the defendants' possession, no liability under the act could be imposed upon them until an additional 28 or 36 hours had passed.

The claim that the 28-hour law does not apply to the case of a shipment of cattle through any foreign country is based upon the language of the act, which makes it an offense for any railroad company, transporting cattle or other animals from one state into or through another state, to confine them in cars for a period longer than 28 consecutive hours, without unloading them for water, feeding, and rest, for a period of at least five consecutive hours, with the provision that under certain circumstances 36 hours should be the limit of time. In short, the claim is that the words in the statute "from one state into another state" cannot properly be held to include transportation from one state through a foreign jurisdiction into another state. It is claimed that Congress might have made the provisions of this statute applicable to foreign commerce, for example, that the act by its terms might have been made expressly applicable (1) to shipments originating in Canada and passing into and terminating in one of the United States; (2) to shipments originating in Canada, passing into the United States, and terminating in Canada; (3) to shipments originating in the United States, passing into Canada, and terminating in the United States. The defendants claim that the act clearly does not apply to either of such cases, and that Congress intended not to legislate in respect to such cases, in view of the fact that Canada has a law for the prevention of cruelty to animals, and international complications might result from an attempt by the United States to deal with the question of such shipments. It is argued that, as the law is well settled that transportation which originates and terminates in one

state nevertheless constitutes interstate commerce if it passes in transit, at any point, beyond the boundaries of said state (Hanley v. Kansas City Southern Ry. Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333), it follows that, when transportation passes beyond the boundaries of a single state into a foreign country and then terminates in the United States, it becomes foreign commerce, and that the 28-hour law does not assume to regulate foreign commerce, but only commerce between the several states.

The defendants' counsel, in support of this contention, also refers to the fact that several acts of Congress, dealing with questions arising under the commerce clause of the Constitution, expressly provide for such a case. Thus, the first section of the act to regulate commerce, of 1887, provides that the provisions of that act shall apply to any common carrier engaged in the transportation of passengers or property "from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, * * * or shipped from a foreign country to any place in the United States." Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154). The arbitration act, approved June 1, 1898, provides that the provisions of that act shall apply to any common carrier engaged in the transportation of passengers or property from one state to any other state, "or from any place in the United States through a foreign country to any other place in the United States." Act June 1, 1898, c. 370, 30 Stat. 424 (U. S. Comp. St. 1901, p. 3205). There is a similar provision in the hours of service law, approved March 4, 1907 (chapter 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1909, p. 1170]).

Undoubtedly, if the 28-hour law had contained such a provision as is contained in the other statutes referred to, and had expressly provided that it should apply to the case of the transportation of cattle from any place in the United States through a foreign country to any other place in the United States, that would have been decisive of the question raised in this case; but I cannot think that the mere omission of that expression in the act justifies the inference that Congress did not intend to have the 28-hour law apply to such a case. These shipments of cattle came within the literal provisions of the law. They were shipments from one state into another state. The fact that, in the course of such shipment, they passed through the Dominion of Canada, did not alter the fact that the shipments were from places in the state of Illinois or Michigan to places in the state of New York. The railway routes from Detroit to Niagara Falls, through the Province of Ontario, form parts of great standard railroad lines from Chicago and the West to New York. Congress concededly had the power to regulate shipments over such a line. The object of the act was obviously to prevent cruelty to animals, to protect the property of shippers, and to prevent injury to the public health from the sale for food of cattle made ill

and feverish by hunger, thirst, and exhaustion. I cannot believe that Congress intended to impose a penalty for such cruelty to animals on a line from Chicago to New York, which passes entirely through the United States, and not impose any penalty for similar cruelty on another line from Chicago to New York which between Detroit and Niagara Falls passes through Canada. If such a distinction be recognized, it will be possible for the shippers, and the railroads themselves, to avoid all liability under the act, in transporting cattle from Chicago to New York, by shipping them all by the routes which pass through Canada.

It may be that the omission of any provision in the 28-hour law for the punishment of cruelty to animals shipped from Canada into the United States was intentional. Congress may have taken into consideration the fact that Canada has a similar law, and may have intended to avoid any international complications which might arise in such cases. But I cannot think that Congress intended to exempt from the operations of the act such shipments between points in the Western and Eastern states as, during a part of the trip, happen to pass through Canada, especially in view of the fact that cattle upon such routes are usually taken through in sealed cars, bonded under the customs laws. Such a shipment is in fact from a state to a state. The provisions in the other acts cited, specifically providing for the case of a shipment from a state through a foreign country to another state, may be considered as having been inserted in those acts from excessive caution. In my opinion, its omission from the 28-hour act does not necessarily imply that such a shipment does not come within the provisions of the act.

In some of these cases, the period of 28 hours, during which the animals were confined without food or water or being unloaded for rest, expired before the delivery of the cattle by the connecting road to the defendant, and it is claimed in those cases that, the statutory penalty having been incurred while the cattle were in the possession of the connecting line, no new penalty can be imposed upon the defendant until an additional period of 28 hours after the delivery of the cattle to the defendant had passed. This view of the operation of the act has been taken by Judge Reed, in the Circuit Court of Iowa, in United States v. Sioux City Stock Yards Co., 162 Fed. 556, 561, and by Judge Willard, in the Circuit Court of Minnesota, in United States v. Stockyards Terminal Co., 172 Fed. 452. The latter case, upon appeal to the Circuit Court of Appeals for the Eighth Circuit, was affirmed (178 Fed. 19); but the ground upon which the affirmance was put by Judge Riner, who wrote the opinion of the majority, was that the proof showed that the defendant did not know that the cattle had been confined without unloading for a period in excess of 28 hours before it received them, and that therefore it had not knowingly and willfully violated the act. Judge Sanborn, who concurred in the decision, also held that the defendant was not guilty of any offense, on the ground that one offense had already been committed before the defendant received the cattle, and that it could not "commit a second offense by prolonging the confinement of the cattle over the 36 hours unless they

confined them 28 hours more." An exactly contrary view is taken by Judge Hazel, in United States v. N. Y. C. & H. R. R. Co. (C. C.) 156 Fed. 249; by Judge McPherson, in United States v. St. Joseph Stockyards Co. (D. C.) 181 Fed. 625; and by Judge Wolverton, in United States v. Northern Pacific Terminal Co. (C. C.) 181 Fed. 879.

These are all decisions by courts of first instance, except the decision by the Circuit Court of Appeals for the Eighth Circuit in United States v. Stock Yards Terminal Ry. Co., 178 Fed. 19, and in that case the majority of the court affirmed the judgment on the ground that there was no proof that the defendant had knowingly and willfully violated the act, and expressed no opinion on the question whether, one penalty having been incurred by the connecting carrier, the defendant could incur another penalty until the additional 28 hours of confinement had passed. In this condition of conflicting authority, I think that it is obviously my duty to decide the question according to my own convictions. With the highest respect for the eminent judges expressing the contrary opinion, I think that any railroad company which takes from a connecting road cattle that have been confined without food, water, or unloading more than 28 or 36 hours, as the case may be, and which knowingly and willfully continues to transport them, immediately incurs a new penalty. The act in terms expressly provides that:

"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."

The thing intended to be prevented by this legislation was cruelty to the animals, and, as the act expressly provides that the time during which the animals have been confined on connecting roads shall be included, I think that the act clearly makes it the duty of any railroad receiving animals, knowing them to have been confined longer than the statutory term, to unload, water, and feed them, and give them time to rest. The counsel for the defendant urged that, if this view be taken, the mere receipt of such animals immediately imposes a liability upon the receiving road; that, as the term of confinement has been already exceeded, a further confinement for an instant makes the receiving road liable. But the act should be reasonably construed. It provides that, in estimating such confinement, the time consumed in loading and unloading shall not be considered, and therefore, if a road receiving animals which have been confined longer than the statutory period proceeds with reasonable speed to unload, water, and feed them, in my opinion no penalty will be incurred. The fact that it may be necessary to move the cars containing them a short distance to the yards would not necessarily involve a penalty. The question would be: Is the movement substantially a part of the process of unloading, or is it a continuance of transportation? If this construction of the act makes it necessary for railroads engaging in the transportation of cattle to provide suitable yards at which cattle can be unloaded, at the point where the roads connect with other roads, that must be

done. Such a requirement seems to me entirely reasonable, in view of the very large number of cattle shipped over long distances in this country, and the possibility of their suffering great cruelties during such transportation.

It is urged in behalf of the defendants that, if the time occupied in the transportation of the cattle through Canada is included in computing the period of detention, the effect will be to give to this law an extraterritorial force. The general rule is, of course, fundamental that the penal laws of one country have no force in another country. But, in my opinion, that rule has no application in these cases. The offense with which these defendants are charged is continuing the confinement of the cattle in this state after the term of confinement permitted by the statute has expired. It is, of course, true that their confinement in New York would not have constituted an offense without their previous confinement, part of which was in Canada; but the previous confinement in Canada or elsewhere is not a part of the offense, although a fact necessary to its existence. There are various cases in which the question whether an act constitutes a crime depends upon the question whether certain previous acts have occurred. Take, for instance, the crime of receiving stolen property. The property must have been stolen; but the crime consists in receiving it, knowing it to have been stolen. It is immaterial where the theft took place. It would be no defense to prove that it took place in another state or country; nor would the punishment of a man convicted in such a case violate the rule that criminal statutes have no extraterritorial force. Suppose a man were prosecuted criminally for cruelty to a horse by working the horse with a galled back. Would it be a defense to prove that the horse's back became galled originally while working in a foreign country? This case seems to me in principle the same as those at bar.

My conclusion is that there should be judgment for the United States in each of these cases. In the three cases against the Lehigh Valley Railroad Company the demurrers are overruled, with leave to answer within 20 days upon payment of costs. In the cases against the New York Central & Hudson River Railroad Company and the Grand Trunk Railway Company of Canada, the motions to dismiss the complaint are denied. In the case against the Michigan Central Railroad Company, which is submitted for final judgment on proofs taken, the evidence shows a case of serious cruelty. Twenty-three horses were confined in a car for a period of over 40 hours, without food, water, or rest, in extremely cold weather, with the result that one of the horses died, and all suffered severely. I think that there should be judgment for the plaintiff for $500, the extreme penalty provided in the act.

SELLMAN et al. v. GERMAN UNION FIRE INS. CO. OF BALTIMORE.

(Circuit Court, D. Delaware. June 16, 1909.)

No. 293.

(Syllabus by the Court.)

1. CORPORATIONS (§ 393*)—DIRECTORS—CONTROL OF BUSINESS—INTERFERENCE BY COURTS.

The board of directors of a corporation is charged by law with the control and management of its business and affairs; and when the law making power has declared that the business and affairs of a corporation, created and organized under that power, shall be directed by its board, it ill-becomes courts created for the administration of the law, unless under special and peculiar circumstances, to declare that its business and affairs shall not be directed by such board.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1574, 1575; Dec. Dig. § 393.*]

2. CORPORATIONS (§ 393*)—DISTRIBUTION OF ASSETS—JURISDICTION IN EQUITY.

If it has become impossible for the corporation to answer any of the ends of its creation, and it has thus utterly failed of its purpose, a court of equity would under its general jurisdiction and powers, and wholly aside from any statutory provision in that behalf, be authorized to wind up its business and affairs for the benefit of those really interested, namely, its creditors and stockholders, although not involving a dissolution or termination of the corporate franchise.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1574, 1575; Dec. Dig. § 393.*]

In Equity. Bill by James L. Sellman and others against the German Union Fire Insurance Company of Baltimore. On motion for appointment of receiver and preliminary injunction. Denied.

Charles M. Curtis, Anthony Higgins, Edgar H. Gans, and Charles Markell, for complainants.

Andrew C. Gray and George A. Finch, for defendant.

BRADFORD, District Judge. This is a motion for an injunction, and the appointment of a receiver of the German Union Fire Insurance Company of Baltimore, a corporation of Delaware, in a suit in equity brought against that corporation by James L. Sellman and others, stockholders and creditors thereof. It is alleged in the bill that the defendant is under the control of Robert Dickson and Robert D. Tweeddale who by various alleged misrepresentations and fraudulent acts and purposes have disregarded the rights and jeopardized the interests of the stockholders and creditors, and brought such peril to the corporation as to render necessary a receivership and the winding up of its affairs and a distribution of its assets. The bill prays:

"(1) That a receiver may be appointed to collect and take charge of all the assets, effects, books and papers of account, and to collect the debts of the defendant corporation, and to preserve or dispose of the same under the directions of this court.

(2) That the said assets, property and effects of the defendant corporation may be sold or distributed to the persons rightfully entitled thereto, and the business of the defendant corporation may be wound up.

(3) That the said corporation, its board of directors, officers, agents and employees may be enjoined by writ of permanent injunction, and pending the

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

decision of this court on final decree, by writ of preliminary injunction, from disposing of any of the assets or property of the said corporation, or from interfering in any way with the possession or authority or control of the receiver to be appointed by this honorable court, or from paying the check for $15,000 hereinbefore mentioned, or any part thereof.

(4) That your orators may have such other and further relief as their case may require."

The purpose of the bill is to secure a winding up of the affairs and a distribution of the assets of the defendant, and as incidental thereto to obtain an injunction restraining the defendant from interfering with such winding up and distribution by a receiver. The laws of Delaware authorize the appointment of receivers of insolvent corporations, other than those for public improvement, on the application and for the benefit of creditors and stockholders. But the bill does not allege that the defendant is insolvent; and from the answer, affidavits and exhibits to which attention was drawn during the hearing on the motion it clearly appears that the defendant is a solvent going concern. It does not follow, however, that, in the absence of a statutory provision authorizing a receivership in the case of a solvent corporation, a receiver may not under certain circumstances be appointed to wind up the affairs and make distribution of the assets of such corporation. The board of directors of a corporation is charged by law with the control and management of its business and affairs; and when the law making power has declared that the business and affairs of a corporation, created and organized under that power, shall be directed by its board, it ill-becomes courts created for the administration of law, unless under special and peculiar circumstances, to declare that its business and affairs shall not be directed by such board. But such special or peculiar circumstances may sometimes exist, fully warranting and justifying a receivership of a corporation technically or substantially solvent. If it has become impossible for the corporation to answer any of the ends of its creation and it has thus utterly failed of its purpose, a court of equity would under its general jurisdiction and powers, and wholly aside from any statutory provision in that behalf, be authorized to wind up its business and affairs for the benefit of those really interested, namely, its creditors and stockholders, although not involving a dissolution or termination of the corporate franchise. There are many authorities supporting the view just expressed. So there are many authorities to the effect that, although the legitimate purposes of a corporation may not have become impossible of accomplishment, where the facts clearly disclose such fraudulent or wrongful management of its business and affairs as to produce a conviction that further control of the corporation by its board would result in the destruction of its business or create a great and unnecessary loss to its creditors and stockholders, a receivership properly may be constituted. But in the case of a corporation which is a solvent and going concern the proofs must be clear and convincing to justify the winding up of its business and affairs. Especially is this true where, as in the present case, the stockholders are by no means unanimous on the question of the wisdom or propriety of the relief sought by the bill. After a careful consideration of the bill, answer, affidavits, exhibits and arguments of counsel and the author-

ities referred to by them respectively, I am far from satisfied that this is a case in which a receiver should be appointed. If the contract between the defendant and Dickson and Tweeddale is void as being ultra vires, or be voidable by reason of the fiduciary relations borne by Dickson and Tweeddale to the defendant, the complainants are not without a remedy as against that contract in any court of competent jurisdiction. Further, should it be made hereafter to appear that the defendant, at the instance and under the control of Dickson and Tweeddale has after this time deliberately persevered in a course ruinous or threatening ruin to the interests of the stockholders and creditors, it may be that such a bill as the present could then be maintained. But this point is not necessary to a decision of the present motion, and the court is not to be understood as expressing any opinion touching it. For the reasons hereinabove expressed the motion for the appointment of a receiver and for a preliminary injunction must be denied, and the restraining order heretofore awarded dissolved, with costs, and it is so ordered.

EDWARDS et al. v. BAY STATE GAS CO.

In re HINCHMAN et al.

(Circuit Court, D. Delaware. March 20, 1911.)

No. 203.

(Syllabus by the Court.)

ASSIGNMENTS (§ 78*)—EFFECT ON COLLATERAL SECURITY.

It is a general rule that, in the absence of an agreement to the contrary, the assignee for value of a note, bill, judgment, decree or other evidence of indebtedness, for the payment of which the assignor holds collateral security, is in equity entitled, by virtue of the assignment to him of the principal obligation or evidence of indebtedness, to the collateral as such, although not named in the instrument of assignment, and regardless of his knowledge or lack of knowledge of the existence of such collateral.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 145; Dec. Dig. § 78.*]

In Equity. Bill by Jacob Edwards and others against the Bay State Gas Company. In the matter of the petitions of Charles S. Hinchman and the Arizona Blue Bell Copper Company. Decree for petitioner Hinchman.

Charles H. Burr, for petitioner Hinchman.

Walter H. Hayes, for petitioner Arizona Blue Bell Copper Co.

BRADFORD, District Judge. George W. Pepper as receiver of the Bay State Gas Company, hereinafter referred to as the gas company, obtained June 14, 1907, in the circuit court of the United States for the eastern district of Pennsylvania a decree against John Edward Addicks for the sum of $1,399,080. This decree remains unsatisfied. Subsequently the Arizona Blue Bell Copper Company, hereinafter referred to as the copper company, at the instance and by the procurement of Addicks who was its president, executed under seal August

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

2, 1907, an assignment for the considerations therein mentioned to Pepper as such receiver of all royalties or profits which were then or might become payable to the copper company under a certain contract between it and John L. Elliot, dated September 15, 1906, as collateral security for the payment of the above mentioned decree. Charles S. Hinchman, one of the petitioners, made November 13, 1907, the following written offer to the receiver:

George Wharton Pepper, "November 13, 1907.
Receiver Bay State Gas Co. (of Delaware).

Dear Sir: I hereby offer to pay you on or before June 15th, 1908, one hundred thousand dollars in cash for an assignment by you to me, or in accordance with my direction, of the decree entered in your favor against J. Edward Addicks, in the sum of one million three hundred and ninety nine thousand and eighty dollars, on June 14, 1907, by the United States Circuit Court for the Eastern District of Pennsylvania (in the suit of Pepper, Receiver, v. Addicks, Oct. Sessions, 1903, No. 41, In Equity,) and of all claims that you have against the said Addicks. In case you accept this offer it is understood that your acceptance shall be subject to the approval of the United States Circuit Court for the District of Delaware.

Yours very truly, C. S. Hinchman."

On the same day the receiver accepted the offer by writing beneath the same as follows:

"To Charles S. Hinchman, Esq.
I hereby accept the above offer. G. W. Pepper, Receiver.
November 13, 1907."

This court duly approved this acceptance December 27, 1907, and discharged Pepper as receiver August 1, 1908, before Hinchman had paid the consideration for the assignment to him of the decree against Addicks. The court, however, carefully avoided taking any action which might terminate or injuriously affect any rights or obligations as between Hinchman and the gas company; for in the decree of discharge the receiver was directed, not only to assign and mark to the use of the gas company the decree which he, as its representative, had obtained June 14, 1907, but also to assign to it all his right, title and interest in his contract with Hinchman bearing date November 13, 1907, and approved December 27, 1907, for the assignment to him of the above mentioned decree and of all other claims against Addicks; the learned judge who signed the decree discharging the receiver evidently treating the day of judicial approval of the last mentioned contract as the proper contractual date. Pursuant to the decree of August 1, 1908, the receiver on or about August 5, 1908, assigned to and marked to the use of the gas company the decree of June 14, 1907, and assigned to it all his right, title and interest in and under his contract with Hinchman for the assignment of such decree, but did not assign or transfer to the gas company the assignment executed to the receiver as collateral security as above mentioned by the copper company of its rights under the contract with Elliot. This collateral assignment was withheld by the receiver owing to some doubt he had as to its proper disposition. The gas company October 6, 1908, for the consideration of $100,000, together with legal interest thereon from June 15, 1908, the date on or before which Hinchman was to

make payment under his contract with the receiver, assigned to Hinchman that decree and all its rights thereunder and all its claims against Addicks. The assignment from the copper company to the receiver of its interest in the contract with Elliot as collateral security for the payment of that decree was in the possession of the receiver at the time of the assignment of the decree to Hinchman, who filed in this court May 2, 1910, his petition setting forth, among other things, that in November, 1909, he learned of the assignment from the copper company to the receiver of its rights under the contract with Elliot as collateral security as above stated; that he had made demand upon the receiver to assign to him such collateral security; and that the receiver had declined and refused to do so; and praying for an order directing the receiver to assign and transfer the same to him. On the same day the receiver or late receiver filed his answer to the above petition, in which, after giving certain reasons why he did not transfer to the gas company the assignment to him by the copper company of its rights under the contract with Elliot, he stated:

"The said assignment is in my hands as a stakeholder for delivery to Addicks, or to said Bay State Gas Company, or to the said Hinchman, in case the Court shall be of opinion that he is entitled thereto, and I submit myself to your Honorable Court in the premises."

This court, on the same day, viewing Hinchman's petition as in substance a bill of interpleader, and having grave doubt as to its jurisdictional power by reason of the citizenship of the parties to entertain the proceeding, took no action upon the petition; but on the statement, contained in the answer and made orally in open court by the receiver and his counsel, that he still had in his possession the assignment from the copper company to him by way of collateral security for the payment of the decree of June 14, 1907, and recognizing that the receiver had acquired its possession solely in his representative capacity as an officer of this court and receiver of the gas company, and had been discharged from his receivership with respect to all other matters, made an order authorizing and directing him to assign and transfer the assignment to him from the copper company to the clerk of this court, to be disposed of pursuant to further order or decree, after due notice to all persons claiming an interest therein as should thereafter be directed by the court. In obedience to the above order the receiver, May 9, 1910, assigned and transferred the collateral assignment to the clerk and on the same day an order was made directing notice to be given to all such persons to file proofs of their claims on or before May 23, 1910. Notice having been given as directed Hinchman and the copper company filed their verified claims respectively. Addicks has neither made claim nor appeared. The only claimants are Hinchman on the one hand and the copper company on the other. Their claims were referred June 27, 1910, to a special examiner, with authority to take and report evidence in their support. The evidence duly taken and returned consists of sundry exhibits and the testimony of Hinchman. No other witness was produced. Counsel on both sides have in their briefs of argument assumed that Hinchman did not learn of the existence of the assignment executed by the copper company to the receiver as col-

lateral security until long after he, Hinchman, became the assignee of the decree against Addicks. But the evidence does not clearly disclose the date when Hinchman first learned of the existence of such collateral assignment, or whether he first acquired that knowledge before or only after the assignment, October 6, 1908, by the gas company to him of the decree against Addicks. There is nothing in the evidence, however, to show that Hinchman by any act or contract on his part either expressly or impliedly released or relinquished any right which might be acquired to such collateral security in equity or at law through the purchase by and assignment to him of that decree, or that he ever had such intention. There can be no question as to the purpose for which the collateral assignment was executed. Whatever negotiations may have transpired between the receiver and the copper company or Addicks with respect to the satisfaction of the decree through the giving of $250,000 in indorsed paper, there is no evidence that Hinchman took part in or was cognizant of them. The evidence is to the contrary. And that the interest of the copper company was assigned to the receiver solely as collateral security for the payment of the decree against Addicks is accentuated by the fact that from the original draft of the collateral assignment the words and figures "compromise sum of Two Hundred and Fifty Thousand Dollars in a note at twelve months from September 1, 1907" were stricken out, and before execution the words and figures "decree of about $1,400,000 held by the said Receiver against the said Addicks" inserted in lieu thereof. When Hinchman became the purchaser and assignee of the decree against Addicks on the payment of $100,000 and interest, as above mentioned, he became and has ever since continued to be entitled to the collateral security for the payment of that decree. It is a general rule that, in the absence of an agreement to the contrary, the assignee for value of a note, bill, judgment, decree or other evidence of indebtedness, for the payment of which the assignor holds collateral security, is in equity entitled, by virtue of the assignment to him of the principal obligation or evidence of indebtedness, to the collateral as such, although not named in the instrument of assignment, and regardless of his knowledge or lack of knowledge of the existence of such collateral. Daniel on Neg. Instr. § 748; Colebrooke on Col. Sec. § 79; Jones on Pl. and Col. Sec. § 418; Bispham's Eq. § 337; Carpenter v. Longan, 16 Wall. 271, 21 L. Ed. 313; Batesville Institute v. Kauffman, 18 Wall. 151, 21 L. Ed. 775; National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; Esty v. Graham, 46 N. H. 169; Cutting v. Whittemore, 72 N. H. 107, 54 Atl. 1098; Hawkins, Receiver, v. Fourth Nat'l Bank, 150 Ind. 117, 49 N. E. 957; Perry v. Parrott, 135 Cal. 238, 67 Pac. 144; Painter v. Harding, 3 Phila. (Pa.) 449; Gay v. Hudson River Electric Power Co. (C. C.) 180 Fed. 222. Daniel in § 748 says:

"The assignment of any particular claim is considered an equitable assignment of all securities held by the assignor to assure it. Thus the assignment of a debt by whatever form of transfer, carries with it any bill or note by which it is secured; and the converse of the proposition is equally true, that the transfer by indorsement or assignment of a bill or note carries with it all securities for its payment, whether a mortgage or otherwise."

Colebrooke in § 79 says:

"The securities pledged for a debt follow it, in equity, no matter how the debt be modified, or into whose hands it may come. Until the debt is paid, the pledge accompanies it, and remains for its repayment, and is available to all who may acquire title thereto."

Jones in § 418 says:

"As the security, however, is a mere incident of the principal debt, just as a mortgage is a mere incident of the debt secured, an assignment of the debt passes either a legal or equitable interest in the pledge, unless it is otherwise agreed between the parties."

In Carpenter v. Longan, 16 Wall. 271, 21 L. Ed. 313, the court said with respect to a note secured by a mortgage:

"The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter."

And so with respect to a note secured by a trust deed the court in National Bank v. Matthews, 98 U. S. 621, 625, 25 L. Ed. 188, said:

"The deed, as a mortgage would have been, was an incident to the note and a right to the benefit of the deed, whether mentioned or delivered or not, when the note was assigned would have passed with the note to the transferee of the latter."

The counsel for the copper company claims that Hinchman "invokes the doctrine of subrogation," and necessarily unsuccessfully, for the reason, among others, that he was neither surety for Addicks nor under any compulsion or obligation to purchase the decree against him, but was a mere volunteer and stranger in the matter. It is true that the doctrine of subrogation in its strict and original sense is not applicable in Hinchman's case. In Prairie State Bank v. United States, 164 U. S. 227, 231, 17 Sup. Ct. 142, 144 (41 L. Ed. 412) the court speaking of subrogation said:

"That doctrine is derived from the civil law, and its requirements are, as stated in Ætna Life Insurance Company v. Middleport, 124 U. S. 534 [8 Sup. Ct. 625, 31 L. Ed. 537]: '1, that the person seeking its benefits must have paid a debt due to a third party before he can be substituted to that party's rights; and, 2, that in doing this he must not act as a mere volunteer, but on compulsion to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in cases of sureties, prior mortgagees, etc. The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another.'"

But Hinchman does not invoke that doctrine as above defined. He sets up an equitable right as purchaser and assignee of the decree against Addicks to the benefit of the collateral assignment, that right being incidental to and growing out of the assignment of that decree to him by the gas company. His claim is not based upon payment and extinguishment of the debt against Addicks as evidenced by that decree, but upon its continued existence and ownership by him, Hinchman, under and by virtue of its express assignment to him. His right to the collateral assignment whether it be termed subrogation or not seems indisputable. Bispham in his Principles of Equity, § 337, says:

"A mere stranger who pays the debt cannot claim to be subrogated; but if such payment is in fact a purchase of the debt, and is intended to operate

as such, the assignee will acquire as an incident to his purchase the right of subrogation."

While the cases cited on the part of the copper company correctly treat the subject of subrogation they have no pertinency here.

The circumstances that the receiver did not transfer to the gas company the collateral assignment and that by direction of this court the same was transferred to the clerk can in no wise prejudice Hinchman. The receiver acquired and retained possession of the collateral assignment solely as officer of this court and representative of the gas company, and, having been in other respects discharged from the receivership, was required to transfer it to the clerk, another officer of this court, without prejudice to any one and to the end that the same might be disposed of in accordance with right and equity.

It is contended on the part of the copper company that it does not sufficiently appear that it conveyed to Elliot the mines and mining properties mentioned in the contract of September 15, 1906, between it and him, and that, therefore, it cannot be held that the company had acquired from him any right to royalties or profits as referred to in the collateral assignment in question, and the same must be treated as a nullity. To this contention there are two answers. First, the copper company having in due form and under its seal executed and delivered to the receiver the collateral assignment cannot now be heard to allege that it contained an incorrect statement of vital facts and was wholly without effect. Second, this is not the proper occasion nor is the present the right time for an inquiry into the validity or invalidity, or effect or want of effect, of the collateral assignment. It was executed by the copper company and it was taken by the receiver for what it was worth. And whether it be worth much, little or nothing are questions which can properly arise only when Hinchman or his assignee shall proceed to realize upon it.

For the foregoing reasons a decree must be made in favor of Hinchman, directing the clerk to assign and transfer to him the collateral assignment as security for payment of the decree.

UNITED STATES v. CHICAGO, B. & Q. R. CO.

(District Court, D. Nebraska, Omaha Division. December 8, 1910.)

CARRIERS (§ 211*)—CARRYING ANIMALS — TWENTY-EIGHT HOUR LAW — CONSTRUCTION.

Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), prohibits interstate carriers from confining animals in cars for more than 28 consecutive hours without unloading for rest, water, and food, except that, when the animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, they need not be unloaded. *Held*, that a carrier, in order to bring itself within the exception, must not only show that the animals can have the supplies specified, but that they are in fact afforded proper food, water, space, and opportunity to rest, so that where animals were in charge of the shipper, and were retained in the cars for a longer period than 28 hours without proper food, water, and

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

an opportunity to rest, it was no answer to the carrier's liability that the shipper could have provided proper attention, and, on being inquired of en route as to how he was faring, stated that he was "all right," and that he could feed and water his stock.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 926–928; Dec. Dig. § 211.*]

Suit by the United States against the Chicago, Burlington & Quincy Railroad Company. Judgment for the United States.

F. S. Howell, U. S. Dist. Atty.

J. E. Kelby and Arthur R. Wells, for defendant.

THOMAS C. MUNGER, District Judge. This is a suit to recover a penalty for failure to comply with the provisions of section 1 of the act of Congress approved June 29, 1906, known as the "28-hour law." Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178).

The defendant received for shipment a freight car, of the ordinary box car type, containing household goods, farm implements, and some horses, cows, and hogs belonging to one shipper. The consignor signed what is known as a "live stock contract," which permitted the shipper to ride on the train with the stock in order to care for them. As a part of such contract the shipper agreed that the animals were in his sole charge, during the shipment, for the purpose of attention and care of the animals, and that they were to be watered and fed by him. While admitting that the animals were confined in the cars for more than 28 consecutive hours without unloading for rest, water, and feeding, the defendant contends that it is not liable to a penalty because it is within the terms of the proviso in section 3 of the act of Congress, reading:

"Provided, that when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply."

The evidence shows that the animals did not have proper food and water during the period of shipment. Those in charge of the train asked the shipper how he was faring, and he answered that he was "all right," and that he could feed and water his stock. No efforts, other than these inquiries, were made by the defendant's employés to ascertain whether the animals had food and water.

The defendant has not brought itself within the terms of the exception contained in section 3 of the act of Congress. Unless the animals "can and do have proper food, water, space and opportunity to rest," the provisions in regard to their being unloaded apply.

It is not enough to show that the animals "can" have such supplies, as, for instance, that the one in charge may procure water and food at the stations where stops are made; but it must be shown that the animals "do" have proper food, water, space, and opportunity to rest in the cars, boats, or other vessels where carried.

As this is not shown in this case, a verdict will be directed against the defendant.

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

MEMORANDUM DECISIONS

BANKARD v. IRVINE. (Circuit Court of Appeals, Fourth Circuit. February 23, 1911.) No. 1,006. In Error to the Circuit Court of the United States for the District of Maryland, at Baltimore. Joseph C. France, for plaintiff in error. W. Calvin Chestnut, J. Morfit Mullen, and Fred. C. Rector, for defendant in error. Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

PER CURIAM. We find no error, and the judgment of the trial court is affirmed. See Irvine v. Bankard, 181 Fed. (C. C.) 206.

BANK OF MARION v. NORWOOD. (Circuit Court of Appeals, Fourth Circuit. February 15, 1911.) No. 978. Appeal from the District Court of the United States for the District of South Carolina, at Charleston, in Bankruptcy. B. A. Hagood and F. L. Willcox (Willcox & Willcox, on the brief), for appellant. J. W. Johnson and L. D. Lide (Montgomery & Lide, on the brief), for appellee. Before PRITCHARD, Circuit Judge, and DAYTON and CONNOR, District Judges.

PER CURIAM. In a very clear and admirable opinion (178 Fed. 487) the learned judge who determined this case below has discussed the law and facts involved in it. We are in full accord with his reasoning and the conclusions arrived at by him, and therefore direct the decree complained of to be in all respects affirmed.

BARREDA Y OSMA v. BROWN et al. (Circuit Court of Appeals, Fourth Circuit. February 8, 1911.) No. 997. Appeal from the Circuit Court of the United States for the District of Maryland, at Baltimore. S. S. Field (James H. Preston and F. C. Dugan, on the brief), for appellant. Edgar H. Gans, for appellees. Before PRITCHARD, Circuit Judge, and McDOWELL and ROSE, District Judges.

PER CURIAM. We find no error. The decree below (180 Fed. 194) is affirmed with costs. Affirmed.

In re BOEKER. (Circuit Court of Appeals, Eighth Circuit. December 15, 1910.) No. 108. On Petition for Review. Chester H. Krum, for petitioner. Walter H. Saunders, for respondent.

PER CURIAM. Dismissed, with costs, for failure to print record, on motion of respondent.

C. B. NASH CO. v. CITY OF COUNCIL BLUFFS et al. (Circuit Court of Appeals, Eighth Circuit. January 17, 1911.) No. 3,458. Appeal from the Circuit Court of the United States for the Southern District of Iowa. For opinion below, see 174 Fed. 182. Lodowick F. Crofoot and Edgar H. Scott, for appellant. Clem F. Kimball, Emmet Tinley, and W. E. Mitchell, for appellees.

PER CURIAM. Dismissed, at costs of appellant, per stipulation, with prejudice to future action. Appellees waive claim for damages under injunction bond.

CHARLESTOWN LIGHT & POWER CO. v. DELONE et al. (Circuit Court of Appeals, Fourth Circuit. March 3, 1911.) No. 1,017. Appeal from the District Court of the United States for the Northern District of West Virginia,

at Martinsburg, in Bankruptcy. Forrest W. Brown, for appellant. George M. Beltzhoover, Jr., for appellees. Before GOFF and PRITCHARD, Circuit Judges, and CONNOR, District Judge.

PER CURIAM. The record of this cause discloses no error. The assignments of error are without merit. We are in full accord with the opinion of the court below. 183 Fed. 160. Affirmed.

CHICAGO, ST. P., M. & O. RY. CO. v. LATTA. (Circuit Court of Appeals, Eighth Circuit. January 11, 1911.) No. 3,444. In Error to the Circuit Court of the United States for the District of Nebraska. B. T. White, C. C. Wright, and B. H. Dunham, for plaintiff in error. H. C. Brome, for defendant in error.

PER CURIAM. Affirmed, with costs, on opinion of this court in former case between same parties. 172 Fed. 850, 97 C. C. A. 198.

FAWN et al. v. HOLLANDER.† (Circuit Court of Appeals, Fifth Circuit. March 7, 1911.) No. 2,134. In Error to the Circuit Court of the United States for the Eastern District of Louisiana. E. T. Merrick, Walter S. Lewis, Philip Gensler, Jr., and R. J. Schwarz, for plaintiffs in error. Jewell A. Sperling and B. B. Howard, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This suit was brought by a citizen of the state of Louisiana against the five defendants, all alien citizens, to recover individually and in solido the sum of $2,095 for professional services. The jurisdiction of the court clearly attached upon the filing of the suit, and we find nothing pointed out in the record which thereafter ousted the jurisdiction. None of the assignments of error are well taken, except the fifth, which complains of the interest allowed upon the judgment, while no interest was allowed by the jury. In this respect the judgment is amended, by striking out the provision with regard to interest, and, as amended, it is affirmed, each party to pay his own costs, because the error in regard to interest was not called to the attention of the trial court.

HERMAN KECK MFG. CO. v. LORSCH et al. (Circuit Court of Appeals, Sixth Circuit. October 4, 1910.) No. 2,044. Appeal from the District Court of the United States for the Southern District of Ohio. Hoffman, Bode & Le Blond and C. W. Baker, for appellant. J. W. O'Hara and Jonas B. Frenkel, for appellees.

PER CURIAM. Dismissed, on stipulation of counsel. See, also, 179 Fed. 485, 103 C. C. A. 65.

JACKSONVILLE TOWING & WRECKING CO. v. LACHTIMAKER. (Circuit Court of Appeals, Fifth Circuit. December 20, 1910.) No. 2,131. In Error to the Circuit Court of the United States for the Southern District of Florida. N. P. Bryan and James M. Carson, for plaintiff in error. John E. Hartridge, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. We find no reversible error in the record in this case. The judgment of the Circuit Court is affirmed. See, also, 181 Fed. 276.

JONES v. AUG. WRIGHT CO. et al. (Circuit Court of Appeals, Fourth Circuit. December 21, 1910.) No. 988. Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond. G. A. Han-

† Rehearing denied April 4, 1911.

son and Wyndham R. Meredith, for appellant. Bartlett Roper, Jr., and Carl H. Davis, for appellees. Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge.

PER CURIAM. The court below properly found that the appellant was not engaged chiefly in farming and the tillage of the soil, and was impelled to the conclusion that the appellant committed the act of bankruptcy alleged by the petitioning creditors, that at the time of the filing of the petition he was insolvent, and that, being so insolvent, he did prefer certain of his creditors, who then held his notes, which had been theretofore executed for value by him, and were then held by the banks in Petersburg, Va., as was shown by the testimony submitted to said court. We find no error. Affirmed.

KENNON v. BROOKS-SCANLON CO. (Circuit Court of Appeals, Fifth Circuit. March 14, 1911.) No. 2,157. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. Harry H. Hall, J. Blanc Monroe, and Monte M. Lemann, for appellant. J. D. Rouse, Wm. Grant, Wm. B. Grant, and Robt. R. Reid, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the judges are of opinion that the contract, which is the basis of this suit, lacks mutuality in this: That Kennon does not contract to receive and pay for all the shavings furnished or tendered him, nor any definite quantity thereof, but only such shavings as he shall be able to receive and take care of; so that in case Kennon's electric light plant should break down or be otherwise disabled, or Kennon should find other and cheaper fuel, or, in short, find any reason satisfactory to himself, he could decide not to receive and pay for any more shavings, and the Brooks-Scanlon Company could have no relief, except the right to temporary use of Kennon's blowpipe. See Rutland Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955, and cases 7 Rose's Notes, p. 332. And it is further concluded that, if the mutuality of the contract be conceded, the specific performance thereof is within the discretion of a court of equity, and should be refused, because it can only be enforced by a mandatory injunction covering a term of years, and particularly in this case, where the plaintiff has a remedy at law substantial, if not fully complete and adequate, from the equity standpoint. See Javierre v. Central Altagracia, 217 U. S. 502, 508, 30 Sup. Ct. 598, 54 L. Ed. 859. The decree of the Circuit Court is affirmed.

McKENZIE v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. March 21, 1911.) No. 2,133. In Error to the Circuit Court of the United States for the Northern District of Florida. William W. Flournoy, for plaintiff in error. F. C. Cubberly, for the United States. Before McCORMICK and SHELBY, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. The judgment of the Circuit Court is affirmed. See Parish et al. v. United States (decided by this court January 3, 1911) 184 Fed. 590.

McRAE et al. v. DAVID. (Circuit Court of Appeals, Ninth Circuit. February 20, 1911.) No. 1,940. Appeal from the Circuit Court of the United States for the Northern Division of the Western District of Washington. For opinion below, see 183 Fed. 812. Charles F. Munday, for appellants. Kerr & McCord, for appellee.

PER CURIAM. On consideration of, and pursuant to, the stipulation of counsel filed on the 18th day of February, A. D. 1911, in the above-entitled cause, it is ordered that the appeal in the above-entitled cause be and hereby is dismissed, and that the decree of the court below in the above-entitled cause be and hereby is affirmed, and that the surety upon the supersedeas

bond filed in the court below be and hereby is released and discharged from liability. It is further ordered that a mandate of this court under rule 32 (150 Fed. xxxvi, 79 C. C. A. xxxvi) forthwith issue in the above-entitled cause.

RAILROAD COMMISSION OF LOUISIANA et al. v. TEXAS & P. RY. CO. et al.† (Circuit Court of Appeals, Fifth Circuit. March 21, 1911.) No. 2,167. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. Walter Guion and E. Howard McCaleb, for appellants. T. Alexander, J. D. Wilkinson, Fred G. Hudson, Bernard J. Mayer, and Chas. Payne Fenner, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. On the facts found by the master, the court below held that the commerce involved in the case was interstate and decreed accordingly. 183 Fed. 1005. After full consideration, we concur in the finding, and the decree appealed from is therefore affirmed.

RICKEY LAND & CATTLE CO. v. NICHOL et al. (Circuit Court of Appeals, Ninth Circuit. February 20, 1911.) Appeals from the Circuit Court of the United States for the District of Nevada. With this case has been consolidated in this court cases bearing titles as follows: Rickey Land & Cattle Co. v. Patrick J. Conway et al.; Same v. L. R. Ames et al.; Same v. J. E. Gignoux; Same v. Mickey Ditch Co. et al.; Same v. Patrick Gallagher. Nos. 1,372–1,374, 1,395, 1,396, 1,424. Jas. F. Peck and Chas. C. Boynton, for appellants. Mack & Farrington, for appellees.

PER CURIAM. Following order entered in each of the cases herein referred to: On the oral motion of Mr. Edward F. Treadwell, on behalf of the appellees, and Mr. Treadwell having advised the court that the counsel for the appellants consent thereto, it is ordered that the decree of the court below in the above-entitled cause be and hereby is affirmed.

ST. CLAIRE FOUNDRY CO. v. UNION JACK CO. et al. (Circuit Court of Appeals, Seventh Circuit. November 18, 1910.) No. 1,578. Appeal from the Circuit Court of the United States for the District of Indiana. John C. Higdon, for appellant. V. H. Lockwood, for appellee. Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. This appeal is from a decree dismissing the appellant's bill which charges infringement of six patents issued to one William H. Cox at various dates. While the bill alleges the appellant to be the owner of such patents, no assignment thereof by the patentee appears in evidence, nor is testimony of record tending to prove title derived from his estate or heirs at law, as an alleged decedent. Evidence thereof is tendered, however, on this appeal as omitted by oversight, and for that reason the cause is remanded, with instructions that the bill be dismissed unless within 60 days from the date hereof the costs in the cause in both the Circuit Court and this court up to this date shall have been paid, and appellant (complainant below) shall have submitted to the Circuit Court his further proofs on the question of complainant's title. In case appellant complainant complies with these conditions, the cause shall be open for rehearing in the court below to the extent that equity may require. Costs in this court are hereby assessed against appellant.

ST. LOUIS, K. C. & C. R. CO. v. WABASH R. CO. et al. (Circuit Court of Appeals, Eighth Circuit. October 20, 1910.) No. 2,788. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. See,

† Rehearing denied April 11, 1911.

also, 152 Fed. 849, 81 C. C. A. 643. W. F. Evans, M. A. Low, and Frank Hagerman, for appellant. Wells H. Blodgett and James L. Minnis, for appellees.

PER CURIAM. Agreed order to omit case from docket at defendants' costs.

THE SIKH. (Circuit Court of Appeals, Second Circuit. February 14, 1911.) No. 171. Appeal from the District Court of the United States for the Southern District of New York. J. M. Woolsey and J. Parker Kirlin, for appellant. Lawrence Kneeland, for appellees. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Decree affirmed, with interest and costs, on opinion below. 175 Fed. 869.

TEXAS & P. RY. CO. v. CAUBLE. (Circuit Court of Appeals, Fifth Circuit. November 29, 1910.) No. 2,127. In Error to the Circuit Court of the United States for the Northern District of Texas. J. M. Wagstaff and W. L. Hall, for plaintiff in error. S. P. Hardwicke and Theodore Mack, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The real issue in this case was one of fact as to whether the defendant company was guilty of negligence in regard to the alarm of danger given, and, under the evidence, the matter was bound to be submitted to a jury. In the submission of the case we find no reversible error in any of the rulings made or instructions given. The judgment of the Circuit Court is affirmed.

TEXAS & P. RY. CO. v. HARVEY. (Circuit Court of Appeals, Fifth Circuit. November 22, 1910.) No. 2,038. In Error to the Circuit Court of the United States for the Eastern District of Texas. F. H. Prendergast and W. L. Hall, for plaintiff in error. S. P. Jones, Cone Johnson, and James M. Edwards, for defendant in error. Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. None of the assignments of error are well taken. The judgment of the Circuit Court is affirmed. See, also, 166 Fed. 385.

UNITED STATES v. FOKSCHAUER. (Circuit Court of Appeals, Second Circuit. February 14, 1911.) No. 145. Appeal from the Circuit Court of the United States for the Southern District of New York. Petition of Max Fokschauer to be admitted to citizenship. Petition granted. The following is the opinion below of Noyes, Circuit Judge: "In my opinion this court acquired jurisdiction of this matter when the petitioner as an alien resident of this district filed his petition, and did not lose it by reason of his moving to the Eastern district. Whether jurisdiction would have been lost had the petitioner moved out of the state need not be determined. The case of United States v. Breen, 135 App. Div. 824, 120 N. Y. Supp. 304, recently decided by the Appellate Division of the Supreme Court of New York, Second Department, is not distinguished, and is followed. The petitioner, upon taking the oath, may be admitted to citizenship." Henry A. Wise, U. S. Atty., and I. H. Levy, Asst. U. S. Atty. (Addison S. Pratt, of counsel), for the United States. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Order affirmed, on opinion below.

UNITED STATES v. OWEN et al. (Circuit Court of Appeals, Eighth Circuit. October 17, 1910.) No. 3,172. Appeals from Circuit Court of the United States, for the Eastern District of Oklahoma. With this case has been consolidated in this court 105 other cases by the United States against different

defendants. Attorney General Wickersham and A. N. Frost, Sp. Asst. Atty. Gen., for the United States.

PER CURIAM. Reversed, without costs to either party in this court, on motion of appellant, and remanded, with directions for further proceedings therein in conformity with the views expressed in the opinion of this court in the case of United States v. Allen (No. 3,150) 179 Fed. 13, 103 C. C. A. 1.

WEFEL v. D. C. BACON CO. (Circuit Court of Appeals, Fifth Circuit. March 7, 1911.) No. 2,120. In Error to the Circuit Court of the United States for the Southern District of Mississippi. Wm. C. Fitts, for plaintiff in error. J. I. Ford, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Under the exceptions taken, no one of the five counts in the amended declaration was sufficient to require the defendant to answer. The third count comes nearest to being sufficient, but that is defective, in that the averment that the purchaser found by the plaintiff "who was ready, able, and willing to buy said property" was qualified by the statement, "if the same was as defendant represented it to be," and, further, in not averring that the procured purchaser was tendered to the defendant before the sale was made to another party. The judgment of the Circuit Court is affirmed.

In re WHITE. (Circuit Court of Appeals, Second Circuit. December 12, 1910.) No. 75. Petition to Review Order of the District Court of the United States for the Southern District of New York. M. P. Davidson, for respondent. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. We have already decided this controversy in opinion handed down a year ago. In re White, 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. (N. S.) 451. We then held that the clause in the policy which provides that it is understood and agreed that "the insured himself shall have the option of surrendering this trust certificate for paid-up insurance or other value at any time" gave the bankrupt at the time of bankruptcy the right to turn the policy into cash to be paid to himself, and that this right passed to the trustee. We did not make any adjudication against the wife, because she was not a party to the proceedings. Since our former decision the bankrupt has joined with the trustee in executing a surrender of the policy to the company. The question presented on the former appeal, and here also, is whether under the policy the husband had the right to surrender and demand the proper cash equivalent from the company, without the wife's consent and against her protest. That question called for the construction of a written instrument, and there was no evidence then, nor is there any now, indicating that a proper construction of the instrument cannot be arrived at from a consideration of its expressed terms. We have construed the instrument, and find in this record nothing to call for any modification of that construction. The order is affirmed, with costs.

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(D) Reversal.

§ 1175. Where a judgment was reversed for an error of law, and there was no disputed question of fact in the case, final judgment would be rendered, instead of remanding the case for new trial.—Fellman v. Royal Ins. Co. (C. C. A.) 577.

(F) Mandate and Proceedings in Lower Court.

§ 1195. Where an appellate court has placed a construction on a written contract sued on, it becomes the law of the case for the trial court on a retrial.—Columbia Chemical Co. v. Duff (C. C. A.) 876.

§ 1195. Reversal of a judgment for plaintiff for denial of defendant's motion for a peremptory instruction at the close of all the evidence is the law of the case on retrial, unless the evidence is different or the decision of the Circuit Court of Appeals has been reversed.—Toledo, St. L. & W. R. Co. v. Sellers (C. C. A.) 885.

§ 1213. A plaintiff who gave testimony on a second trial inconsistent with and directly contradictory of her testimony on the first trial *held* not entitled to recover on such testimony uncorroborated.—Smith v. Boston Elevated Ry. Co. (C. C. A.) 387.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

On appeal in criminal prosecutions, see Criminal Law, §§ 1194–1199.

APPEARANCE.

Waiver of jurisdiction of bankruptcy court, see Bankruptcy, § 293.
Waiver of right to remove cause to federal court, see Removal of Causes, § 106.

§ 9. The filing of a demurrer to the declaration on the merits, by attorneys authorized to represent a defendant, constituted a general appearance.—Order of United Commercial Travelers of America v. Bell (C. C. A.) 298.

§ 9. Where defendants obtained surreptitiously an ex parte order extending the time to appear, answer, or otherwise plead to the action, they thereby appeared generally for all purposes and waived any objection to the service of process.—Murphy v. Herring-Hall-Marvin Safe Co. (C. C.) 495.

§ 19. A general appearance and the filing of a demurrer *held* a waiver of any objections to the court's jurisdiction over defendant's person.—Sheppard v. Lincoln (D. C.) 182.

APPLIANCES.

Defective and dangerous appliances, liability of master for injuries to servant, see Master and Servant, §§ 101, 102–125.

APPLICATION.

For patent, see Patents, § 101.
Of instructions to case, see Trial, § 253.

For particular remedies or forms of relief.

See Injunction, § 146; Motions.
Appointment of receiver for insolvent corporation, see Corporations, § 557.
Striking out pleading or defense, see Pleading, § 359.

APPOINTMENT.

Judicial appointment of trustees, see Trusts, § 160.
Of receivers, see Receivers, §§ 9, 29–58.
Of receivers for insolvent corporations, see Corporations, §§ 553–557.
Of receivers pending bankruptcy proceedings, see Bankruptcy, § 114.

APPORTIONMENT.

Of property to public use, see Eminent Domain.
Of salvage services, see Salvage, § 38.

ARBITRATION AND AWARD.

I. SUBMISSION.

§ 3. To constitute an arbitration, the matter submitted must be one in dispute between the parties, and not some matter which it is expected may arise between them or a matter of accounting or appraisal.—Toledo S. S. Co. v. Zenith Transp. Co. (C. C. A.) 391.

§ 16. Where a submission to arbitration was of the question of fault and liability for a collision and in case the parties could not agree thereon to determine the damages, a party could not revoke the submission after an award had been made determining which vessel was in fault.—Toledo S. S. Co. v. Zenith Transp. Co. (C. C. A.) 391.

§ 16. Where the owners of two vessels in collision entered into an agreement submitting to arbitration the question of fault and liability and if the parties failed to agree thereon the question of damages also, one of the parties who attempted to revoke the submission after an award fixing the fault for the collision *held* not entitled to maintain a suit in admiralty to relitigate the question.—Toledo S. S. Co. v. Zenith Transp. Co. (C. C. A.) 391.

II. ARBITRATORS AND PROCEEDINGS.

§ 35. Where an agreement for arbitration by three arbitrators provided for an award by two, the fact that one refused to sign the award or to participate in a further ascertainment of damages which the submission required did not invalidate the award nor the subsequent proceeding for ascertaining damages.—Toledo S. S. Co. v. Zenith Transp. Co. (C. C. A.) 391.

ARREST.

See Bail.
Illegal arrest, see False Imprisonment.

ASSENT.

Of owner of property to improvements thereon as affecting right to lien, see Mechanics' Liens, § 78.
To jurisdiction of bankruptcy court, see Bankruptcy, § 293.
To jurisdiction to appoint receiver, see Receivers, § 29.

ASSIGNMENTS.

In bankruptcy, see Bankruptcy, §§ 136–156.
Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Transfers of particular species of property, rights, or instruments.

Patents for inventions, see Patents, § 196.

II. OPERATION AND EFFECT.

§ 78. Assignee of principal obligation *held* entitled to collateral security in the possession of his assignor.—Edwards v. Bay State Gas Co. (C. C.) 979.

IV. ACTIONS.

Jurisdiction of federal courts as affected by citizenship of assignee, see Courts, § 312.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy, §§ 136–363.

ASSUMPSIT, ACTION OF.

Particular implied contracts as grounds of action, see Money Received; Work and Labor.

ASSUMPTION.

Of risk by employé, see Master and Servant, §§ 205–219, 288.

ATTACHMENT.

See Execution.
Adoption by federal court of practice of state court, see Courts, § 346.

ATTORNEY AND CLIENT.

Attorneys in fact, see Principal and Agent.

II. RETAINER AND AUTHORITY.

§ 95. While an attorney has large discretionary powers in the conduct of a suit, he has

no power, by virtue of his mere authority to conduct a suit and collect the judgment, to purchase property for his client under the judgment, and thereby substitute such property for the money.—Bauman v. Eschallier (C. C. A.) 710.

§ 98. A defendant *held* not liable for money paid to her attorney on an agreement by him for a sale of property purchased by him in her name under a judgment in her favor, which purchase was without authority from her.—Bauman v. Eschallier (C. C. A.) 710.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

Allowance from property in hands of receiver, see Receivers, § 154.

(B) Lien.

§ 192. Act Tex. Nov. 9, 1866 (5 Gammell's Laws, 125), authorizing the court to appoint an attorney to represent absent defendants in an action to recover lands in which service was made by publication, to allow compensation to such attorney and enter judgment therefor which should be a lien on the land, did not authorize the issuance of an execution on such judgment and the sale of the land thereunder, but the lien given could only be foreclosed by an equitable suit on due notice to the owner.—Middlesworth v. Houston Oil Co. of Texas (C. C. A.) 857.

ATTORNEYS IN FACT.

See Principal and Agent.

AUDITA QUERELA.

Relief against judgment by equitable proceedings, see Judgment, § 419.

AUTHORITY.

Of attorneys, see Attorney and Client, §§ 95–98.
Of guardians, see Guardian and Ward, §§ 42–44.
Of interstate commerce commission, see Commerce, § 85.
Of officers and agents of corporations in general, see Corporations, §§ 428–432.
Of receivers, see Receivers, § 90.
Of trustees, see Trusts, §§ 217–239.

AUTHORS.

Rights in respect to literary work, see Copyrights.

AUTOMATIC COUPLERS.

On railroad cars, sufficiency of evidence in action for injuries to servant, see Master and Servant, § 278.

AVERAGE.

General average, see Shipping, § 194.

AVOIDANCE.

Of contract, see Contracts, §§ 261–265.

BAIL.

II. IN CRIMINAL PROSECUTIONS.

§ 63. While a writ of error to review a conviction for a noncapital crime and a supersedeas are effective to stay execution pending review, an appearance or bail bond is required to entitle accused to go at large during that period.—Hardesty v. United States (C. C. A.) 269.

BAILMENT.

Particular species of bailments, and bailments incident to particular occupations.

See Pledges.

Carriage of goods, see Carriers, § 149½; Shipping, §§ 120–140.

BANKRUPTCY.

II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(A) Jurisdiction and Course of Procedure in General.

§ 20. Where a corporation had instituted proceedings in a state court for dissolution, such proceedings were not suspended by insolvency or commission of an act of bankruptcy.—In re Standard Cordage Co. (D. C.) 156.

(C) Involuntary Proceedings.

§ 54. The test of a firm's solvency or insolvency within the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) is whether the real indebtedness of the firm to the petitioning creditor or creditors exceeds the aggregate at a fair valuation of the firm's property.—In re Morgan & Williams (D. C.) 938.

§ 58. Payments made by an alleged bankrupt to creditors in the ordinary course of business, and without intent to prefer the creditors paid, *held* not to constitute acts of bankruptcy.—In re Morgan & Williams (D. C.) 938.

§ 68. A person engaged in feeding cattle for market *held* engaged in "farming," and therefore not subject to adjudication as an involuntary bankrupt.—In re Dwyer (C. C. A.) 880.

§ 72. Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), before amendment by Act Cong. June 25, 1910, c. 412, 36 Stat. 838, *held* not to confer jurisdiction to declare a laundry corporation bankrupt.—In re Eagle Steam Laundry Co. of Queens County (D. C.) 949.

§ 91. Evidence *held* insufficient to sustain the claim of a petitioning creditor in a bankruptcy proceeding, so as to show that creditor's capacity to institute involuntary proceedings.—In re Morgan & Williams (D. C.) 938.

(D) Warrant and Custody of Property.

§ 114. An order appointing a receiver for a bankrupt would not be vacated for lack of notice of the appointment to the bankrupt, where all the parties were before the court.—In re Standard Cordage Co. (D. C.) 156.

§ 114. On an application for the appointment of a receiver for an alleged bankrupt, it must appear affirmatively that the bankrupt's assets are likely to be dissipated or wasted pending adjudication.—In re Standard Cordage Co. (D. C.) 156.

§ 114. Facts *held* insufficient to justify the appointment of a receiver for an alleged bankrupt.—In re Standard Cordage Co. (D. C.) 156.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

§ 136. A bankrupt *held* to be required to account to his trustee for the entire proceeds of stocks sold by him, of which he was only part owner, where he converted the share of the other owners, and they were unable to trace it into any particular fund or property, and filed as general creditors.—Cummings v. Synnott (C. C. A.) 718.

§ 136. In a proceeding for contempt in a District Court against a bankrupt for failure to comply with an order of the referee to turn over money or property to his trustee, such order, not appealed from, is conclusive of the fact that at the date of its entry the bankrupt had the money or property in his possession or under his control.—In re Frankel (D. C.) 539.

§ 136. Evidence *held* to establish that a bankrupt had withheld from his trustee money and property of the value of $6,028.05.—In re Lippman (D. C.) 551.

§ 136. Evidence *held* insufficient to falsify a bankrupt's claim of loss of assets by theft, so as to authorize an order requiring the surrender of additional property as withheld assets.—In re Chamelin (D. C.) 553.

§ 138. The interest of a stockbroker in a stock pool constitutes property, within the bankruptcy act.—In re Lathrop, Haskins & Co. (D. C.) 534.

§ 140. Where a bankrupt firm of brokers converted stock purchased for a customer, other stock of the same kind found in their possession after their bankruptcy, not shown to have been bought with the proceeds of that converted, cannot be claimed by such customer to the exclusion of general creditors, but is a part of the general assets.—In re Brown (C. C. A.) 454.

§ 156. Where the judgment of a trustee concurs with that of a great majority of the creditors who speak, that it would not be advisable or for the best interest of the estate to defend a pending suit against the bankrupt, he is justified in refusing to defend, and it is not error for the referee, on application of the minority, to refuse to direct him to do so.—In re Kearney (D. C.) 190.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

Knowledge and intent of corporate officers as affecting corporation, see Corporations, § 428.

§ 178. Where a bankrupt purchased deferred annuities with money fraudulently obtained from his creditors, the trustees could not recover the amount so paid from the insurance company, or cancel the contract, but was only entitled to the proceeds of a sale of the bankrupt's contingent interest in the contract.—Mutual Life Ins. Co. of New York v. Smith (C. C. A.) 1.

§ 181. A chattel mortgage executed by a bankrupt within four months prior to the filing of a bankruptcy petition, in the absence of actual fraud, *held* valid to the extent of the cash actually advanced at the time the mortgage was given.—In re Mahland (D. C.) 743.

§ 181. A chattel mortgage, executed in part for a present consideration on the mortgagor's stock of goods and valid under the state law, is valid to the extent of such consideration under the bankruptcy law (Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]).—In re Mahland (D. C.) 743.

§ 188. Under the Virginia law (Laws 1910, c. 190) regulating the sale of intoxicating liquors, a liquor license is a personal privilege and cannot be made the subject of a valid pledge to a brewery corporation to secure a loan for a large part of the license fees.—In re Flaherty (D. C.) 962.

§ 196. A judgment foreclosing a mechanic's lien in the state court, notwithstanding bankruptcy proceedings against the owner of the property, was not reviewable in bankruptcy proceedings with reference to the amount involved, or whether parts of the property were covered by the lien.—Hobbs v. Head & Dowst Co. (C. C. A.) 409.

§ 209. Whether a bond for title to certain land previously owned by a bankrupt and transferred to his aunt, to whom he was indebted, was transferred absolutely or as security, could not be determined in a summary proceeding to which the aunt was not a party.—In re L. B. Pickens & Bro. (D. C.) 954.

§ 215. Where a suit to foreclose a mechanic's lien was permitted, notwithstanding the bankruptcy of the owner of the property, to continue to judgment, the judgment would not be regarded as void in the bankruptcy proceedings, though the bankruptcy court might exercise certain revisory powers with reference thereto.—Hobbs v. Head & Dowst Co. (C. C. A.) 409.

(D) Administration of Estate.

See Interpleader, § 11.

§ 229. In proceedings against a bankrupt for contempt for failure to obey an order of the referee, such order and whatever occurred before the referee may be referred to as having some weight pro and con, but it is not conclusive on any issue in the contempt proceeding,

and the court should receive all material evidence relating to what preceded as well as what followed the referee's report, although it may tend to show that the order was not justified. —In re Goodrich (C. C. A.) 5.

§ 229. In proceedings against a bankrupt for contempt for refusal to comply with an order of the referee, whether and the extent to which the court will consider the prior proceedings in the bankruptcy matter rests largely in its discretion, provided only that it gives the parties concerned notice of what it regards as evidence.—In re Goodrich (C. C. A.) 5.

§ 229. In proceedings for contempt before a court of bankruptcy while perhaps no pleading on the part of the respondent is necessary, it is often advantageous to set out the defense in a definite manner with a view of bringing the issues clearly before the appellate tribunal.— In re Goodrich (C. C. A.) 5.

§ 242. In an inquiry in bankruptcy, certain questions asked a witness *held* relevant, and a failure to answer the same was contumacious.— In re Lathrop, Haskins & Co. (D. C.) 534.

§ 258. One claiming a lien on personal property of a bankrupt, which is in the possession of his trustee, may be brought into the court of bankruptcy by service of a rule to show cause for the purposes of a petition by the trustee for an order to sell the property free of liens and transferring all liens to the proceeds.—In re E. A. Kinsey Co. (C. C. A.) 694.

§ 262. A court of bankruptcy has power to order property of a bankrupt which has come into the possession of his trustee sole free of liens, and to transfer all claims against it to the proceeds, notwithstanding the objection of one claiming a lien thereon.—In re E. A. Kinsey Co. (C. C. A.) 694.

§ 272. A bankrupt's trustee *held* not entitled to an allowance for the removal of a bankrupt's personal property from a rented building after sale thereof and for the storage thereof in another place.—In re Criblier (D. C.) 338.

§ 274. Where a bankrupt's trustee was properly required to file his final account, and obtained a petition to revise an order requiring him to do so before a specified date or be committed to jail prior to the expiration of the time so fixed, the petition to revise would be dismissed.— O'Conor v. Sunseri (C. C. A.) 712.

(E) Actions by or Against Trustee.

§ 293. Bankr. Act July 1, 1898, c. 541, § 23b, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3431), as amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1312), *held* not to confer jurisdiction on the bankruptcy court of a suit by a bankrupt's trustee to set aside a fraudulent conveyance under section 70e, unless with defendant's consent.—Sheppard v. Lincoln (D. C.) 182.

§ 293. In a suit by a bankrupt's trustee to set aside a fraudulent conveyance under Bankr. Act July 1, 1898, c. 541, § 70e, 30 Stat. 566 (U. S. Comp. St. 1901, p. 3452), a general appearance by defendant and a demurrer to the merits, as well as to the court's jurisdiction, operated as a consent that the court take jurisdiction of the cause.—Sheppard v. Lincoln (D. C.) 182.

(F) Claims Against and Distribution of Estate.

§ 309. A mortgage given by a bankrupt partner on his own property to secure the purchase price of goods bought by himself and partner, in fact for the firm, *held* not that of a surety, but of a principal debtor, which was assignable by the mortgagee, together with the sale contract before default and enforceable by the assignee as against the creditors of the mortgagee's individual estate.—In re Forse (D. C.) 85.

§ 314. Where a creditor of a bankrupt filed a claim for a balance due on purchases and sales of stock on the theory that they were actual transactions, and it appeared that they were not, he was nevertheless entitled to an allowance of his claim for the amount of cash deposited and interest thereon, under Rev. Laws Mass., c. 99, § 4.—Streeter v. Lowe (C. C. A.) 263.

§ 314. A purchaser of a bankrupt's saloon business, having sold his interest for $200 more than he paid, after having failed to get possession, *held* not entitled to allowance of a claim against the bankrupt's estate for a disbursement in his endeavor to gain possession.—In re Criblier (D. C.) 338.

§ 314. Landlords *held* not entitled to the allowance of a claim against a bankrupt's estate for water rent paid after the landlords were in undisputed possession.—In re Criblier (D. C.) 338.

§ 316. The amount agreed to be paid for commercial reports under a subscription commercial agency contract *held* provable against the subscriber's estate in bankruptcy for the unpaid price, though only a small portion of the time contracted for had expired.—In re Glick (D. C.) 967.

§ 318. A conveyance by a trustee in bankruptcy under order of the court of the equitable interest of the bankrupt in real estate under an executory contract of purchase to the vendor and its acceptance *held* to operate as a rescission of the contract which precluded the vendor from proving a claim for purchase money against the estate.—Kenyon v. Mulert (C. C. A.) 825.

§ 318. Where a bankrupt was prevented from carrying out the contract for a change of its location, because of financial embarrassment and bankruptcy, claimant, the other party to the contract, could not rescind and recover contribution made thereunder against the bankrupt's estate.—In re Morgantown Tin Plate Co. (D. C.) 109.

§ 318. Where a bankrupt's trustee surrendered the rented premises as soon as he obtained possession, he incurred no liability for rent which accrued before he took possession.—In re Criblier (D. C.) 338.

§ 336. A proof of claim in bankruptcy, which was defective in some formal particular, may be amended either before or after the ex-

piration of the year limited by Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444).—In re Kessler (C. C. A.) 51.

§ 336. A claim against a bankrupt's estate, though defective, *held* to contain sufficient to authorize its amendment, even after the year prescribed by Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), for proof of claims.—In re Kessler (C. C. A.) 51.

§ 336. Claimants against a bankrupt *held* not negligent or guilty of laches in not moving to amend proof of claim until after the year prescribed therefor had elapsed.—In re Kessler (C. C. A.) 51.

§ 336. After allowance of a claim on a note, the claimant was entitled to withdraw the original note and deposit a copy, under Bankr. Act July 1, 1898, c. 541, § 57b, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443).—In re Loden (D. C.) 965.

§ 341. Where a creditor filed a claim against a bankrupt for a balance due on certain speculative stock transactions, and it was found that neither party intended an actual purchase or sale, the creditor was entitled to an allowance of his claim without amendment for the amount of cash deposited and interest, under Rev. Laws Mass. c. 99, § 4.—Streeter v. Lowe (C. C. A.) 263.

§ 342. A claimant whose claim has been allowed against a bankrupt estate *held* to have waived the right to object to a petition for reconsideration of such claim on the ground of laches by consenting to a reference and hearing thereon.—In re Effinger (D. C.) 724.

§ 342. Where creditors of the estate of a bankrupt partnership filed a petition for the reconsideration of a claim filed by one of the partners for the benefit of his individual estate, and his trustee did not oppose such petition, creditors who have proved claims against the individual estate, and who are alone beneficially interested, are entitled to an opportunity to appear and be heard.—In re Effinger (D. C.) 724.

§ 351. Bankr. Act July 1, 1898, c. 541, § 5g, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), construed in connection with subdivision f., does not change the established equity rule of distribution between partnership and individual creditors, and, while the trustee of a partnership estate may prove a claim against the individual estate of a partner, such claim is not entitled to payment pro rata with those of individual creditors, but only for the surplus, if any, remaining after the individual claims have been paid. —In re Telfer (C. C. A.) 224.

§ 351. Neither the judicial recognition by the courts of a state of the partnership entity nor the provisions of the bankruptcy act, which define a partnership to be a "person" within the meaning of the act, and authorize it to be adjudged a bankrupt (Bankr. Act July 1, 1898, c. 541, §§ 1a, subd. 19, 5a, 30 Stat. 544, 547 [U. S. Comp. St. 1901, pp. 3418, 3424]), work a change of the established rule fixing the substantive rights of creditors, respectively, of the partnership and of its individual members.—In re Telfer (C. C. A.) 224.

§ 351. Under Bankr. Act, § 5f, section 1, par. 11, and section 63a (1) and (5), an individual creditor of a partner of a bankrupt firm *held* not entitled to payment of interest accruing subsequent to bankruptcy out of the individual assets of the partner as against partnership creditors.—In re Chandler (C. C. A.) 887.

§ 351. An insolvent partner's individual estate does not contribute to the payment of partnership debts until after all his individual creditors have been paid in full.—In re Effinger (D. C.) 728.

§ 351. Though a partner who has advanced money to the firm in excess of his contribution to the capital is entitled to prove his claim therefor against the partnership estate in bankruptcy, he cannot share in the distribution of the partnership estate until all the firm creditors are paid, neither under Bankr. Act July 1, 1898, c. 541, § 5g, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), or independent thereof.—In re Effinger (D. C.) 728.

§ 351. Where a partner pledged his individual property for a firm debt, and the creditor sold the property and retained the proceeds, and proved an entire debt against the firm's estate in bankruptcy, the individual estate of the partner was entitled to share in the dividends declared from the firm assets to the amount of the difference between the entire dividend and so much as with the proceeds of the property paid the creditor's claim in full.—In re Effinger (D. C.) 728.

§ 363. The holder of a note containing a waiver of homestead exemption, having filed the same as a claim against the maker in bankruptcy, was not thereby precluded from proceeding against the homestead in a court of competent jurisdiction to recover the balance. —In re Loden (D. C.) 965.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 400. Where property of a bankrupt has been properly set off to him as a homestead, the court of bankruptcy has no further jurisdiction over it, and the bankrupt's trustee has no equity therein that can be made the subject of a sale by him.—Sullivan v. Mussey (C. C. A.) 60.

§ 404. Discharge in bankruptcy of a former firm within six years *held* no bar to a subsequent discharge of a new firm in which one of the partners of the old firm was a member.—In re Neyland & McKeithen (D. C.) 144.

§ 404. The discharge in bankruptcy of a firm for a firm debt would not relieve the individual members of the firm from liability for firm debts as a matter of law, where no individual adjudication has been had.—In re Neyland & McKeithen (D. C.) 144.

§ 404. Where, in former bankruptcy proceedings against a firm, the firm only was adjudged a bankrupt, an order of discharge would be

construed only to discharge the firm.—In re Neyland & McKeithen (D. C.) 144.

§ 407. A firm was not entitled to a discharge in bankruptcy, where one of the members thereof made a materially false statement in writing to obtain credit from an objecting creditor, who extended credit on the faith thereof.—In re Neyland & McKeithen (D. C.) 144.

§ 407. Where a materially false statement, in writing, was made by one member of a firm to obtain credit from an objecting creditor, it was not essential that such creditor investigate the truthfulness of the statement.—In re Neyland & McKeithen (D. C.) 144.

§ 407. Where the statement made by one of the members of a firm to obtain credit appeared to be that of a partnership then existing, the creditor was not required to investigate when one of the members became a partner.—In re Neyland & McKeithen (D. C.) 144.

VI. APPEAL AND REVISION OF PROCEEDINGS.

(A) Superintendence and Revision.

§ 439. Denial of an application by an individual creditor of a bankrupt member of a firm for interest subsequent to the allowance of the claim *held* reviewable on a petition to review and revise.—In re Chandler (C. C. A.) 887.

(B) Appeal.

§ 455. A trustee's objection to a partial allowance of a creditor's claim on a different basis from that which the claim was filed, on the theory that the estate would thereby incur unnecessary costs in defending the claim, *held* for the determination of the District Court.—Streeter v. Lowe (C. C. A.) 263.

§ 468. On return of the mandate of the Circuit Court of Appeals, affirming an order dismissing involuntary bankruptcy proceedings, the District Court had no jurisdiction to incorporate in a judgment to be rendered a provision that it should not prejudice a petitioners' right to apply to the United States Supreme Court for certiorari.—In re Hudson River Electric Co. (D. C.) 970.

VII. COSTS AND FEES.

§ 469. Where, after the property of an alleged bankrupt had been sold, the proceedings were dismissed for want of jurisdiction, an order allowing fees and disbursements to the trustee's attorney would be set aside as to everything beyond actual disbursements and compensation for services rendered in preserving the estate.—In re Eagle Steam Laundry Co. of Queens County (D. C.) 949.

BAR.

Of action by laches or staleness of demand, see Equity, § 85.

BENEFICIARIES.

Of trust, see Trusts.

BEQUESTS.

See Wills.

BETTERMENTS.

Liens for improvements on real estate, see Mechanics' Liens.
Public improvements, see Municipal Corporations, § 350.

BILL IN EQUITY.

See Equity, § 132.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF INTERPLEADER.

See Interpleader.

BILL OF PARTICULARS.

In criminal prosecutions, see Indictment and Information, § 121.

BILL OF RIGHTS.

See Constitutional Law.

BILLS AND NOTES.

Parol or extrinsic evidence, see Evidence, § 459.

II. CONSTRUCTION AND OPERATION.

Parol evidence, see Evidence, § 459.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(A) Indorsement Before Delivery to or Transfer by Payee.

§ 253. Under Pennsylvania Negotiable Instruments Law (P. L. 1901, p. 203) § 64, the liability of an irregular indorser of a note is no longer that of second indorser, but prior to that of the payee.—American Trust Co. v. Canevin (C. C. A.) 657.

VIII. ACTIONS.

Parol evidence, see Evidence, § 459.

BOATS.

See Collision; Pilots.

BONDS.

Filing petition and bond for removal of cause, see Removal of Causes, § 89.
Municipal bonds, see Municipal Corporations, § 878.
Sureties on bonds, see Principal and Surety.

Bonds in judicial proceedings.
See Bail; Injunction, § 244.
Appeal or writ of error in general, see Appeal and Error, § 395; Criminal Law, §§ 1194–1199.

BOOKS OF ACCOUNT.

Production in proceedings for reliquidation of duties, see Customs Duties, § 81.

BOROUGHS.

See Municipal Corporations.

BREACH.

Of contract in general, see Contracts, § 305.

BROKERS.

Property vesting in broker's trustee in bankruptcy, see Bankruptcy, § 140.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

Claim against estate of bankrupt broker, see Bankruptcy, § 314.
Property vesting in broker's trustee in bankruptcy, see Bankruptcy, § 140.

IV. COMPENSATION AND LIEN.

§ 49. A contract with real estate brokers with reference to land in controversy construed, and *held*, that, in case of sale, the brokers were bound by the conditions specified in the option part of the contract.—Robertson v. Allen (C. C. A.) 372.

§ 49. Where brokers did not follow their instructions in making a contract for the sale of land, and contracted with the purchaser for an interest in the land in addition to their commissions without the seller's knowledge, the contract was void.—Robertson v. Allen (C. C. A.) 372.

§ 54. Commissions are not earned by a broker by his procuring a purchaser who is irresponsible and insolvent.—Robertson v. Allen (C. C. A.) 372.

VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

§ 94. Brokers employed to find a purchaser, or to purchase themselves, had no power to bind their principal by a contract to sell and convey.—Robertson v. Allen (C. C. A.) 372.

BUILDING CONTRACTS.

Liens for labor and materials, see Mechanics' Liens.

BUILDINGS.

Fixtures, see Fixtures.
Lien for construction or repair, see Mechanics' Liens.
Public building, public policy affecting validity of conditions in private contributions, see Contracts, § 131.

BUSINESS.

Regulation of conduct of business as regulation of commerce, see Commerce, §§ 61, 62.

CANCELLATION OF INSTRUMENTS.

See Quieting Title.
Cancellation of certificate of naturalization, see Aliens, § 71½.
Cancellation of contracts of sale, see Vendor and Purchaser, § 85.
Setting aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 241.

CARELESSNESS.

See Negligence.

CARGO.

Of vessel, carriage in general, see Shipping, §§ 120–140.

CARRIERS.

As employers, see Master and Servant.
Construction, regulation, and operation of railroad in general, see Railroads.
Injuries to employés engaged in interstate commerce, see Commerce, §§ 5, 27.
Transfer of cause to federal court, see Removal of Causes, § 19.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

Statutory and municipal regulation of railroads in general, see Railroads, §§ 229–254.

(A) In General.

Due process of law, see Constitutional Law, § 298.
Interstate commerce regulations, see Commerce, §§ 7, 8, 10, 12, 62.
Presumptions as to validity of legislative regulation of rates, see Constitutional Law, § 48.
Regulation of charges as deprivation of property without due process of law, see Constitutional Law, § 298.

§ 12. The net income of 7 per cent. per annum on the value of railroad property in Minnesota devoted to public use is no more than a fair return to which a railroad is entitled under Const. Amend. U. S. 14.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 13. A rate fixed by a state railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by the railroad company for interstate traffic.—Woodside v. Tonopah & G. R. Co. (C. C.) 358.

§ 18. The showing made by complainants in suits on behalf of railroad companies to enjoin

the enforcement of rates for the transportation of timber products between certain points in Nevada, fixed by the railroad commission of the state after a hearing, *held* not sufficient to support the claim that such rates are unjust and unreasonable and would not be remunerative, or to warrant the granting of a preliminary injunction.—Woodside v. Tonopah & G. R. Co. (C. C.) 358.

§ 18. The cost of reproduction new of the Minnesota properties of the defendant companies devoted to the public use of transportation is more persuasive evidence of their values than the market value of their stocks and bonds or the original cost of their acquisition and construction.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 18. Interest on the cost of reproduction at 4 per cent. per annum during one-half of the time requisite to acquire and construct it is a necessary expense of reproduction.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 18. Apportionment on the basis of revenue is a most equitable method of assigning the value of railroad property in the state to the various classes of its business, to determine the reasonableness of fares and rates.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

(B) Interstate and International Transportation.

Exclusive or concurrent powers of congress and states, see Commerce, § 8.
Interference with interstate commerce, see Commerce, § 62.
Nonexercise of powers of congress, see Commerce, § 10.
Powers of congress as to intrastate commerce, see Commerce, § 7.
Powers of state, see Commerce, § 12.
Reduction of rates as interference with interstate commerce, see Commerce, § 62.

§ 38. A terminal railroad company, which received from a connecting carrier a car load of horses, which had been transported in interstate commerce, and had been kept confined for more than 28 hours, and moved them over its line with all speed possible for 1,300 feet to stockyards, and there unloaded them for rest, water, and feed, *held* not chargeable with violation of the 28-hour law (Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]).—Northern Pac. Terminal Co. v. United States (C. C. A.) 603.

§ 38. Questions raised on the trial of indictments against a railroad company for granting concessions to a shipper in violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1909, p. 1138), *held* to be ones of fact for the jury.—United States v. Philadelphia & R. Ry. Co. (D. C.) 543; Same v. Bethlehem Steel Co. (D. C.) 546; Same v. Lehigh Valley R. Co., Id.

§ 38. An indictment against a railroad company for giving concessions to a shipper in violation of the Elkins Act of Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1909, p. 1138), *held* supported by the evidence.—United States v. Philadelphia & R. Ry. Co. (D. C.) 543; Same v. Bethlehem Steel Co. (D. C.) 546; Same v. Lehigh Valley R. Co., Id.

II. CARRIAGE OF GOODS.

Matters peculiar to carriage by vessel, see Shipping, §§ 120–140.

(F) Loss of or Injury to Goods.

By vessel, see Shipping, §§ 120–140.

(H) Limitation of Liability.

By vessel, see Shipping, § 140.

§ 149½. A limited liability contract between carrier and shipper, in which the value of the goods was placed at a sum much less than the actual value, and the carrier relieved from liability for more than the agreed value, except for gross negligence, *held* not contrary to public policy.—Blackwell v. Southern Pac. Co. (C. C.) 489.

III. CARRIAGE OF LIVE STOCK.

§ 211. The 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]) *held* applicable to shipments of cattle passing from one state to another state through a foreign country.—United States v. Lehigh Valley R. Co. (C. C.) 971.

§ 211. Under the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]), where the entire statutory time during which animals in transit may be confined expired before they are delivered to a connecting carrier, any transportation towards destination except to unload them constitutes a new violation of the statute by the connecting carrier.—United States v. Lehigh Valley R. Co. (C. C.) 971.

§ 211. The 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]), though construed to apply to shipments of animals from one state to another through a foreign country, *held* not objectionable as operating extraterritorially.—United States v. Lehigh Valley R. Co. (C. C.) 971.

§ 211. Where animals in charge of the shipper were retained in the cars more than 28 hours without proper food, water, and rest, it was no answer to the carrier's liability for violating Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), that the shipper could have properly cared for the animals, and, on being asked how he was faring, stated that he was "all right," etc.—United States v. Chicago, B. & Q. R. Co. (D. C.) 984.

§ 223. Where a railroad company contracted to carry cattle, to be shipped from a quarantined district, it cannot avoid liability for the damages caused by its refusal to receive the cattle from the connecting carrier, on the ground that it was without facilities for transporting them in the manner required by law with respect to such cattle.—Chicago, B. & Q. Ry. Co. v. Frye-Bruhn Co. (C. C. A.) 15.

IV. CARRIAGE OF PASSENGERS.

Matters peculiar to carriage by vessels, see Shipping, § 166.

(D) Personal Injuries.

§ 280. Though a carrier of passengers is not an insurer of their safety, it is bound to use the utmost care to guard against the possibility of accidents.—Irvine v. Delaware, L. & W. R. Co. (C. C. A.) 664.

§ 286. A railroad company is under obligation to take due care to secure the safety of a passenger who is on its platform to board its train.—Pennsylvania R. Co. v. Stockton (C. C. A.) 422.

§ 316. Though the burden of proof of a carrier's negligence, in an action for injuries to a passenger, is on the plaintiff in the first instance, it may shift to the carrier to rebut a presumption of negligence.—Irvine v. Delaware, L. & W. R. Co. (C. C. A.) 664.

§ 318. In an action for injury to a passenger when attempting to board a railroad train at a station, negligence may fairly be inferred by the jury from the starting of the train without warning when a large number of passengers were attempting to enter.—Pennsylvania R. Co. v. Stockton (C. C. A.) 422.

§ 320. The question of the negligence of a railroad company in failing to provide for the protection of passengers seeking to board its trains at a station at a time when crowds were to be expected *held* properly submitted to the jury in an action to recover for the death of a passenger who was pushed by the crowd under the moving cars.—Pennsylvania R. Co. v. Stockton (C. C. A.) 422.

§ 321. Where, in an action for injuries to a passenger, defendant denied that the train had started with a jerk which was the alleged cause of the passenger's fall, the court properly refused to charge that, if plaintiff was injured while exercising ordinary care as a passenger, such facts raised the prima facie presumption of defendant's negligence.—Irvine v. Delaware, L. & W. R. Co. (C. C. A.) 664.

§ 321. In an action for injuries to a passenger, the granting of a request to charge that if plaintiff accidentally slipped from the steps of a car to the ground, or stumbled and fell before reaching the steps, she could not recover, was not error.—Irvine v. Delaware, L. & W. R. Co. (C. C. A.) 664.

CARS.

In general, see Carriers; Railroads.
Equipment, see Railroads, §§ 229, 254.

CAUSE OF ACTION.

See Action.

CERTIFICATE.

Of indebtedness of municipal corporation, see Municipal Corporations, § 905.
Of residence by Chinese, see Aliens, § 29.

CESTUI QUE TRUST.

See Trusts.

CHANCERY.

See Equity.

CHANGE.

Of rate of transportation, interstate commerce regulations, see Commerce, §§ 7, 8, 10, 12, 62.

CHANNELS.

Collision in channels, see Collision, § 95.

CHARACTER.

Of accused or other persons, evidence in criminal prosecutions, see Criminal Law, §§ 377–379.
Of parties as determining jurisdiction of federal courts, see Courts, §§ 300–312.

CHARGE.

By carrier, see Carriers, §§ 12, 13, 38.
Criminal accusation, see Indictment and Information.
Instructions to jury, see Trial, §§ 253–296.
Regulation of charges as deprivation of property without due process of law, see Constitutional Law, § 298.

CHATTEL MORTGAGES.

See Pledges.
Transfers operating to hinder, delay, or defraud creditors in general, see Fraudulent Conveyances.

V. RIGHTS AND REMEDIES OF CREDITORS.

§ 187. Under the New York law, the validity of a mortgage on a stock of goods remaining in the mortgagor's possession depends on the actual intent of the parties at the time.—In re Mahland (D. C.) 743.

CHATTELS.

Annexation to real property, see Fixtures.
Pledge, see Pledges.
Sale, see Sales.

CHILDREN.

See Guardian and Ward.
Care required of infant servant, see Master and Servant, § 230.
Care required of master as to infant servant, see Master and Servant, § 153.

CHINESE.

Exclusion or expulsion, see Aliens, §§ 24–32.

CIRCUIT COURTS.

See Courts, § 414.

CITATION.

In proceedings for reliquidation of customs duties, see Customs Duties, § 81.

CITIES.

See Municipal Corporations.

CITIZENS.

See Aliens.
Admission of aliens to citizenship, see Aliens, § 71½.
Citizenship as ground of jurisdiction of United States courts, see Courts, §§ 300–312.
Equal protection of laws, see Constitutional Law, § 243.

§ 7. Under Rev. St. § 1994 (U. S. Comp. St. 1901, p. 1268), the wife of a citizen of the United States, who, although an alien at the time of her marriage, might then have been lawfully naturalized, is also a citizen, and cannot be excluded from entry into the United States under the immigration laws, although there may be grounds for her exclusion, if she were an alien. —In re Nicola (C. C. A.) 322.

CIVIL ACTION.

See Action.

CIVIL RIGHTS.

Constitutional guaranty of civil rights, see Constitutional Law, § 89.
Constitutional guaranty of trial by jury, see Jury, § 14.
Denial of equal protection of laws, see Constitutional Law, § 243.
Deprivation of life, liberty, or property without due process of law, see Constitutional Law, §§ 298–311.

CLAIMS.

Against estate of bankrupt, see Bankruptcy, §§ 309–363.
Against property in hands of receiver, see Receivers, §§ 149–154.
Notice of claim for injuries from fire caused in operation of railroad, see Railroads, § 473.
Of mechanic's lien, see Mechanics' Liens, § 154.
Substitution of claimants, see Interpleader.

CLIENTS.

See Attorney and Client.

CLOUD ON TITLE.

See Quieting Title.

COASTING TRADE.

Exemption of vessels from state pilotage laws, see Pilots, § 3.

COLLATERAL SECURITY.

See Pledges.

COLLATERAL UNDERTAKINGS.

See Principal and Surety.

COLLISION.

I. RULES AND PRECAUTIONS FOR PREVENTING COLLISIONS IN GENERAL.

§ 11. A crossing vessel privileged under the starboard hand rule (Inland Navigation Rules, Act June 7, 1897, c. 4, art. 19, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]) waives her privilege by assenting to the crossing of the other vessel across her bows.—The Albatross (D. C.) 363.

§ 17. Obedience to the rules of navigation is not a fault, even if a different course would have prevented a collision, and the necessity must be clear, and the emergency sudden and alarming, before an act of disobedience can be excused.—The Lauretta Speddin (C. C. A.) 283.

III. STEAM VESSELS MEETING OR CROSSING.

§ 39. A collision at night in New York Bay between a ferryboat and tug on crossing courses *held* on the evidence to have been due to the fault of the ferryboat in changing her course. —The Transfer No. 10 (C. C. A.) 451.

IV. STEAM VESSELS AND SAIL VESSELS.

§ 45. A tug *held* solely in fault for a collision between her tow and a sailing vessel meeting in Patapsco river in the daytime for failure to keep her tow out of the way so as to allow the sailing vessel to keep her course and speed as required by articles 20 and 21 of the inland rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]).—The Lauretta Speddin (C. C. A.) 283.

VI. VESSELS IN TOW.

§ 61. A collision between meeting tows in Long Island Sound in a dense fog *held* not due to any fault of the tugs, which were passing safely under a signal agreement, but to an error of the steersman of the injured barge in turning to port, instead of following the tug to starboard.—The John A. Hughes (C. C. A.) 308.

X. NARROW CHANNELS, HARBORS, RIVERS, AND CANALS.

§ 95. A collision in lower New York Bay at the lower junction of the Swash Channel with the Main Channel between a steamship and a barge in tow, both passing out, *held* due solely to the fault of the steamship.—The Albatross (D. C.) 363.

XII. SUITS FOR DAMAGES.

Submission of cause to arbitration, see Arbitration and Award, § 16.

(E) Trial or Hearing, Judgment, and Review.

§ 153. A finding of the trial court, that an injury to libelant's barge through a collision while she was moored at night in a fog to respondent's pier was caused by a tug owned by respondent, affirmed on the evidence.—New York & New Jersey Transp. Co. v. Pennsylvania R. Co. (C. C. A.) 319.

COLOR OF TITLE.

See Adverse Possession.

COMBINATIONS.

Infringement of patents for combinations, see Patents, §§ 243–245.

COMITY.

Between courts, see Courts, § 508.

COMMERCE.

Carriage of goods and passengers, see Carriers; Shipping.

Construction and operation of regulations in respect to interstate or international transportation, see Carriers, § 38.

I. POWER TO REGULATE IN GENERAL.

Delegation of legislative powers to interstate commerce commission, see Constitutional Law, § 62.

§ 1. The provision of Const. U. S. art. 1, § 9, that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another," does not prevent the exercise of the power of Congress by delegated authority to regulate commerce between ports of different states merely because such regulation may incidentally affect the commerce of a port in still another state.—Louisville & N. R. Co. v. Interstate Commerce Commission (C. C.) 118.

§ 5. In order to establish a cause of action for injuries to a servant under Federal Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), the offending carrier at the time of the injury must have been engaged in interstate commerce, and the injury must have been suffered by the employé while employed by such carrier in such commerce.—Pedersen v. Delaware, L. & W. R. R. (C. C.) 737.

§ 5. The power to regulate commerce among the states, granted to the nation, may be exercised to its utmost extent by the use of all means requisite to its exercise.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 7. To the extent necessary to protect interstate commerce, but no further, the nation may by Congress and its courts regulate intrastate commerce.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 7. The nation has by Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), prohibited undue discriminations between localities in different states caused by unreasonable differences between intrastate commerce and legal interstate rates on reduction of the former by acts of a state.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 8. No state, by virtue of its police power or any other power, may restrict the power to regulate commerce among the states, granted by the Constitution.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 8. Where the attempted exercise of the power of the state to regulate intrastate commerce conflicts with the constitutional power of the nation to regulate interstate commerce and the fares and rates therein, the latter must prevail.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 10. The fares and rates of transportation in interstate commerce, so far as the nation has not regulated them, are free from regulation by virtue of the commerce clause of the Constitution.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 12. A state may regulate intrastate commerce and the fares and rates therein to the extent that it does not substantially regulate interstate commerce.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 12. State laws concerning intrastate commerce, which substantially regulate interstate commerce, are unconstitutional.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 12. The effect, and not the terms or purpose, of state regulations, determines whether they substantially or only incidentally affect interstate commerce.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

II. SUBJECTS OF REGULATION.

§ 27. Where a workman on a railroad bridge was injured by being struck by an intrastate train operated by a railroad company engaged in both interstate and intrastate commerce, plaintiff could not recover under Federal Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171).—Pedersen v. Delaware, L. & W. R. R. (C. C.) 737.

III. MEANS AND METHODS OF REGULATION.

Conclusiveness in federal court of judgment of state court as to validity of taxes, see Judgment, § 828.

§ 52. The provisions of orders Nos. 106 and 107 of the Secretary of Agriculture, promulgated March 10 and 13, 1903, respectively, under authority of Act Feb. 2, 1903, c. 349, §§ 1, 2, 32 Stat. 791, 792 (U. S. Comp. St. Supp. 1909, pp. 1183, 1184), establishing quarantine districts for cattle and regulations to be ob-

served by carriers in the shipment of cattle from such districts, and which provide (Order No. 107, § 4) that "cattle from said area may be transported by boat or rail for immediate slaughter" subject to such regulations, have the force of law and are paramount with respect to interstate shipments; and Code Wash. 1896, §§ 3216, 6431, which prohibit the introduction of Texas cattle into the state, so far as they conflict with the federal regulations, are void.—Chicago, B. & Q. Ry. Co. v. Frye-Bruhn Co. (C. C. A.) 15.

§ 61. Act Minn. April 18, 1907 (Gen. Laws 1907, c. 232 [Rev. Laws Supp. 1909, §§ 2007—11 to 2007—17]), reducing commodity rates within the state about 7.37 per cent., and the orders of its Railroad and Warehouse Commission reducing merchandise rates, *held* to directly regulate interstate commerce and create unjust discrimination between localities in Minnesota and those in adjoining states, in violation of Const. U. S. art. 1, § 8.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 61. The facts considered, and *held*, that the unavoidable effect of the general and sweeping reductions of intrastate rates in Minnesota, made by the acts and orders considered, was and is substantially to burden, directly to regulate, and to discriminate against the interstate commerce of the defendant companies, and to create undue and unjust discriminations between localities in Minnesota and those in other states, in violation of the commerce clause of the Constitution.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 62. Acts Minn. April 4, 1907 (Gen. Laws 1907, c. 97 [Rev. Laws Supp. 1909, §§ 2007—1 to 2007—2]), reducing passenger fares within the state about 33⅓ per cent. *held* to directly regulate interstate commerce and create unjust discrimination between localities in Minnesota and those in adjoining states, in violation of Const. U. S. art. 1, § 8.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 62. The facts considered, and *held*, that the unavoidable effect of the general and sweeping reductions of intrastate fares in Minnesota, made by the acts and orders considered, was and is substantially to burden, directly to regulate, and to discriminate against the interstate commerce of the defendant companies, and to create undue and unjust discriminations between localities in Minnesota and those in other states, in violation of the commerce clause of the Constitution—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 72. Coal shipped from Pennsylvania and dumped on a dock in New Jersey, preliminary to being transshipped in bottoms to other states, *held* not merchandise in interstate commerce while located on the dock, and was not, therefore, exempt from state taxation as such.—Susquehanna Coal Co. v. City of South Amboy (C. C.) 941.

IV. INTERSTATE COMMERCE COMMISSION.

Delegation of legislative powers to interstate commerce commission, see Constitutional Law, § 62.

§ 85. Section 15 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1909, p. 1158), which authorizes and empowers the Interstate Commerce Commission "whenever, after full hearing upon a complaint * * * it shall be of the opinion" that the prescribed conditions exist, to determine and prescribe maximum rates to be charged by a carrier, places no restrictions on the commission in respect to the matters which it may take into consideration or the weight it shall give to each of such matters in informing itself what opinion it ought to give, except that it shall not abuse its authority, and proceed arbitrarily without regard to the justice of the case, or give a judgment not fairly within its power.—Louisville & N. R. Co. v. Interstate Commerce Commission (C. C.) 118.

§ 85. The interstate commerce act (Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1909, p. 1158), conferring power on the Interstate Commerce Commission to determine and prescribe "just and reasonable maximum rates," does not intend to prescribe any closer definition of the quality of an act done by the commission which will defeat its validity than that it is prohibited by the Constitution, or by legislation clearly or by necessary implication forbidding it.—Louisville & N. R. Co. v. Interstate Commerce Commission (C. C.) 118.

§ 88. Under the interstate commerce act (Act Feb. 4, 1887, c. 104, § 13, 24 Stat. 383 [U. S. Comp. St. 1901, p. 3164]), and section 15 as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1909, p. 1158), it is no objection to the validity of an order of the Interstate Commerce Commission prescribing rates to be charged by a carrier that it will affect the rates of connecting carriers not before the commission.—Louisville & N. R. Co. v. Interstate Commerce Commission (C. C.) 118.

§ 88. It is no objection to the validity of an order of the Interstate Commerce Commission determining and prescribing rates to be charged by a carrier that it would derange the schedule of rates on other routes.—Louisville & N. R. Co. v. Interstate Commerce Commission (C. C.) 118.

§ 88. An order of the Interstate Commerce Commission prescribing maximum rates to be charged by a carrier *held* within its powers and valid.—Louisville & N. R. Co. v. Interstate Commerce Commission (C. C.) 118.

§ 92. Congress did not undertake by the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) and its amendments to confer any new judicial power upon the courts, but assumed that their ordinary powers would continue and might be invoked by parties complaining of injuries, past or apprehended, from some abuse of its power by the commission resulting in a trespass upon vested rights.—Louisville & N.

R. Co. v. Interstate Commerce Commission (C. C.) 118.

§ 96. A Circuit Court in a suit to enjoin the enforcement of a rate prescribed by the Interstate Commerce Commission does not act as an appellate rate-making commission, but its office is to see that the commission does not exceed its powers, and not to determine whether it erred in the exercise of them.—Louisville & N. R. Co. v. Interstate Commerce Commission (C. C.) 118.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION.

Interstate commerce commission, see Commerce, §§ 85–96.

COMMISSIONERS.

See United States Commissioners.

COMMISSIONS.

Of agent, see Principal and Agent, §§ 81–89.
Of broker, see Brokers, §§ 49–54.

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See Carriers.

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COMPENSATION.

For property taken for public use, see Eminent Domain, §§ 91–106.
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Of particular classes of officers or other persons.

Of attorneys, see Attorney and Client, § 192.
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Of witnesses, see Witnesses, § 196.

COMPLAINT.

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CONDITIONS.

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See Brokers; Guardian and Ward; Principal and Agent; Trusts.
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CONFLICTING CLAIMS.

Determination of conflicting claims to real property, see Quieting Title.
Interpleader in general, see Interpleader.

CONFLICT OF LAWS.

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Of United States courts to state practice, see Courts, §§ 334–347.

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Power to regulate commerce, see Commerce, §§ 5–10.

CONSENT.

Of owner of property to improvements thereon as affecting right to lien, see Mechanics' Liens, § 78.
To jurisdiction of bankruptcy court, see Bankruptcy, § 293.
To jurisdiction to appoint receiver, see Receivers, § 29.

CONSERVATORS.

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For modification of contract, see Contracts, § 237.
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Authority in federal courts of decisions of state courts as to validity and construction of state constitutions, see Courts, § 366.

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Privilege of witnesses, see Witnesses, § 293.
Regulation of commerce, see Commerce, §§ 1–12.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 48. The presumption that rates made by Commission and Legislature are reasonable *held* overcome by evidence and findings of the master that the rates were unjust and confiscatory.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

§ 55. Act Cong. June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1909, p. 485), providing for cancellation of certificates of naturalization obtained by fraud, *held* not unconstitutional because providing that the acquisition of a new domicile within five years shall be prima facie evidence of fraud.—United States v. Luria (D. C.) 643.

§ 62. The power delegated by Congress to the Interstate Commerce Commission to prescribe railroad rates for the future is legislative in its nature, and, since it concerns the administrative affairs of the government which by reason of variable conditions cannot be covered in detail by direct legislation, its delegation is not in violation of the Constitution, and it may be as fully exercised by the commission as Congress might have exercised it, subject to any limitations imposed by Congress itself.—Louisville & N. R. Co. v. Interstate Commerce Commission (C. C.) 118.

(B) Judicial Powers and Functions.

§ 70. Whether state regulations substantially or only incidentally affect interstate commerce must be determined by the court on the special facts before it.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

V. PERSONAL, CIVIL AND POLITICAL RIGHTS.

§ 89. In the absence of fraud the courts cannot review the action of a corporation, taken in accordance with its charter, in ordering an assessment on its unpaid stock.—Car Trust Inv. Co. v. Metropolitan Trust Co. of New York (C. C. A.) 443.

§ 89. A stockholder in a corporation organized under the English Companies Acts, whose stock was only partly paid up, *held* liable for a call made on the winding up of the company under the provisions of such acts.—Car Trust Inv. Co. v. Metropolitan Trust Co. of New York (C. C. A.) 443.

X. EQUAL PROTECTION OF LAWS.

§ 243. The fact that a trustee who was prohibited by law from investing the trust funds in the stock of a corporation took such stock in payment of a debt did not vest the estate with such ownership as makes it liable for what may be due thereon for the benefit of the corporation's creditors; it subsequently appearing that the stock was not paid for.—Bagnell v. Ives (C. C.) 466.

XI. DUE PROCESS OF LAW.

§ 298. Acts Minn. April 4, 1907 (Gen. Laws 1907, c. 97 [Rev. Laws Supp. 1909, §§ 2007—1 to 2007—2]), and April 18, 1907 (Gen. Laws 1907, c. 232 [Rev. Laws Supp. 1909, §§ 2007—11 to 2007—17]), and orders of Railroad and Warehouse Commission prescribing maximum rates and fares, *held* to prohibit a fair return on the values of Minnesota property devoted to railroads and take the property of the companies without just compensation, in violation of Const. U. S. Amend. 14.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 298. The just compensation secured by Const. U. S. Amend. 14 entitles defendant railroad companies to a fair return upon the reasonable value of their property in Minnesota devoted to public use of transportation.—Shepard v. Northern Pac. Ry. Co. (C. C.) 765.

§ 311. In a particular case a statutory presumption applied to the trial of an issue determined by the facts which occurred before the presumption existed was nevertheless due process of law.—United States v. Luria (D. C.) 643.

CONSTRUCTION.

Of statutes, see Statutes, § 219.
Parol or extrinsic evidence to aid construction of written instruments, see Evidence, § 459.

Of contracts, instruments, or judicial acts or proceedings.

Assignments, see Assignments, § 78.
Constitutional provisions, see Constitutional Law, § 48.
Instructions, see Trial, § 296.
Letters patent, see Patents, §§ 167–177.
Patents for public lands, see Public Lands, § 114.
Sales of realty, see Vendor and Purchaser, § 54.

Of buildings or other works.

See Railroads, § 93.

CONSULS.

See Ambassadors and Consuls.

CONTEMPT.

Orders in bankruptcy proceedings, see Bankruptcy, § 229.

CONTRACTORS.

Right to mechanic's lien, see Mechanics' Liens, § 93.

CONTRACTS.

Agreements within statute of frauds, see Frauds, Statute of.
As claims provable against bankrupt's estate, see Bankruptcy, § 318.
Assignment, see Assignments.
Constitutional guaranty of liberty to contract, see Constitutional Law, § 89.
Ground for mechanics' liens, see Mechanics' Liens, § 78.
Parol or extrinsic evidence affecting written contract, see Evidence, § 459.
Specific performance, see Specific Performance.

Contracts of particular classes of persons.

See Brokers, § 94; Corporations, § 481; Municipal Corporations, § 350; United States, § 75.
Attorney, with client, see Attorney and Client, §§ 95–98.
Insurance companies, see Insurance.
Officers and agents of corporations in general, see Corporations, §§ 428–432.
Shipowners, see Shipping, § 140.

Contracts relating to particular subjects.

See Insurance.
Compensation of agent, see Principal and Agent, §§ 81–89.
Compensation of broker, see Brokers, §§ 49–54.
Limitation of liability of shipowner in respect to cargo, see Shipping, § 140.
Public improvements, see Municipal Corporations, § 350.
Transportation of goods, see Shipping, § 140.

Particular classes of express contracts.

See Bills and Notes; Joint Adventures; Sales.
Affreightment, see Shipping, § 140.
Agency, see Principal and Agent.
Indorsement of bill or note, see Bills and Notes, § 253.
Insurance policies, see Insurance.
Leases, see Landlord and Tenant.
Maritime contracts, see Shipping, § 140.
Sales of realty, see Vendor and Purchaser.
Submission to arbitration, see Arbitration and Award, §§ 3–16.
Suretyship, see Principal and Surety.

Particular classes of implied contracts.

See Money Received; Work and Labor.

Particular modes of discharging contracts.

See Payment.

I. REQUISITES AND VALIDITY.

(F) Legality of Object and of Consideration.

Limitation of liability of shipowner, see Shipping, § 140.

§ 131. Selection of a site for a post office worth more than twice the value limited by the act authorizing the securement thereof *held* not objectionable, because private citizens agreed to donate the balance in case the more valuable site were selected.—Currier v. United States (C. C. A.) 700.

II. CONSTRUCTION AND OPERATION.

Assignments, see Assignments, § 78.
Effect of express contract on implied obligation to pay for services rendered and materials furnished incident thereto, see Work and Labor, § 14.
Sales of realty, see Vendor and Purchaser, § 54.

(A) General Rules of Construction.

Parol or extrinsic evidence affecting written contract, see Evidence, § 459.

(B) Parties.

Parol or extrinsic evidence as to parties, see Evidence, § 459.

III. MODIFICATION AND MERGER.

§ 237. An agreement by the owners of buildings under construction to extend the time for their completion beyond that fixed by the contract, on the promise by the contractor to have them completed within a further time stated, was without consideration, and constituted no defense to an action for breach of the contract by failure to complete them by the time provided for therein, where the agreement did not induce the default.—Empire State Surety Co. v. Hanson (C. C. A.) 58.

IV. RESCISSION AND ABANDONMENT.

Recovery on quantum meruit for part performance of services where contract is rescinded or abandoned, see Work and Labor, § 14.
Rescission of contract of sale, see Vendor and Purchaser, § 85.

§ 261. Where a contract has been partially executed, and one party has derived substantial benefit therefrom, or has imposed material losses on the other, through the latter's partial performance, the first party cannot rescind on account of the second party's failure to complete performance.—In re Morgantown Tin Plate Co. (D. C.) 109.

§ 265. A contract cannot be rescinded because of the failure of one of the parties to perform, where both parties cannot be restored to statu quo.—In re Morgantown Tin Plate Co. (D. C.) 109.

V. PERFORMANCE OR BREACH.

Affecting right of contractor to mechanic's lien, see Mechanics' Liens, § 93.
Enforcement of specific performance, see Specific Performance.
Of employment of broker, see Brokers, §§ 49–54.
Recovery on quantum meruit on part performance where contract for services is rescinded or abandoned or full performance is prevented, see Work and Labor, § 14.

§ 305. In an action to recover on a contract by which plaintiff was to install an extensive heating and ventilating plant in defendant's manufacturing buildings, where the work was delayed through the acts and omissions of both parties, but was continued without objection beyond the time fixed by the contract and until nearly completed, the jury were justified in finding that defendant had waived such time limit.—N. P. Pratt Laboratory v. Buffalo Forge Co. (C. C. A.) 287.

VI. ACTIONS FOR BREACH.

Effect of express contract on right to recover on quantum meruit, see Work and Labor, § 14.
Parol or extrinsic evidence affecting written contract, see Evidence, § 459.

§ 346. Under Code Civ. Proc. N. Y. § 481, which provides that a complaint shall contain a plain and concise statement of the facts and a demand of the judgment to which plaintiff supposes himself entitled, and which by the conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) is made applicable to the federal courts in that state, it is not fatal to a recovery for work done under a contract that plaintiff declares on the contract when he should have declared on a quantum meruit, where his complaint fully sets out the facts.—N. P. Pratt Laboratory v. Buffalo Forge Co. (C. C. A.) 287.

CONTRIBUTION.

To general average, see Shipping, § 194.

CONTROVERSY.

Amount in controversy as affecting jurisdiction of courts, see Courts, § 328.
Submission to arbitrators, see Arbitration and Award.

CONVERSION.

Of chattels into realty, see Fixtures.

CONVEYANCES.

Absolute deed as mortgage, see Mortgages, § 32.
Contracts to convey, see Vendor and Purchaser.
Fraudulent as to creditors or subsequent purchasers, see Fraudulent Conveyances.
Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Conveyances by or to particular classes of persons.

See Guardian and Ward, § 42.
Purchasers at execution sales, see Execution, § 320.
Sheriffs, see Execution, § 320.

Conveyances of particular species of, or estates or interests in, property.

Personal property in general, see Chattel Mortgages; Sales.
Real property in general, see Mortgages; Vendor and Purchaser.

Particular classes of conveyances.

See Assignments; Chattel Mortgages; Mortgages.

COPYRIGHTS.

I. NATURE AND ACQUISITION.

§ 15. The copyrights covering the Reporters of the National Reporter System, and the Digests of the American Digest System, *held* valid.—West Pub. Co. v. Edward Thompson Co. (C. C.) 749.

III. INFRINGEMENT.

(A) What Constitutes Infringement.

§ 55. The copyrights covering the Reporters of the National Reporter System *held* infringed by the American and English Encyclopædia of Law and the Encyclopædia of Pleading and Practice.—West Pub. Co. v. Edward Thompson Co. (C. C.) 749.

§ 61. The copyrights covering the Digests of the American Digest System *held* infringed by the American and English Encyclopædia of Law and the Encyclopædia of Pleading and Practice.—West Pub. Co. v. Edward Thompson (Co. (C. C.) 749.

(B) Actions.

§ 87. A court of equity, in a suit for infringement of copyright, may award complainant damages, to be assessed by a master, in lieu of an injunction and an accounting.—West Pub. Co. v. Edward Thompson Co. (C. C.) 749.

CORPORATIONS.

Corporation as person entitled to privilege as witness, see Witnesses, § 293.
Interests of bankrupt in corporation stock pool as property passing to trustee, see Bankruptcy, § 138.

Particular classes of corporations.

See Carriers; Municipal Corporations; Railroads.
Insurance companies, see Insurance.

IV. CAPITAL, STOCK, AND DIVIDENDS.

Investment of trust funds in corporate stock, see Trusts, §§ 217, 239.

V. MEMBERS AND STOCKHOLDERS.

(D) Liability for Corporate Debts and Acts.

§ 245. Facts stated *held* no defense to a suit against the estate of a deceased stockholder of an insolvent corporation for an assessment against her.—Converse v. Spargo (C. C.) 324.

§ 245. For the purpose of assessment against a deceased stockholder of an insolvent corporation under personal liability fixed during her lifetime, her executor is deemed a stockholder.—Converse v. Spargo (C. C.) 324.

§ 259. Power to fix the statutory personal liability of a stockholder in a suit adjudging the corporation insolvent exists on the theory that presence of the corporation carries with it presence of the stockholders.—Converse v. Spargo (C. C.) 324.

§ 265. Owners of separate judgments against an insolvent Missouri corporation, each entitled under the statutes of that state to maintain an action against any stockholder of such corporation whose stock is not fully paid for to recover the amount due thereon to the extent of his judgment, cannot join in such an action against a stockholder; their causes of action being personal and several.—Bagnell v. Ives (C. C.) 466.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

§ 370. "Ultra vires," defined.—Wykes v. City Water Co. of Santa Cruz (C. C.) 752.

§ 389. The burden of pleading and proving the defense of ultra vires is on defendant.—Wykes v. City Water Co. of Santa Cruz (C. C.) 752.

§ 393. Except under special circumstances, courts will not take away from the directors the control of the corporate business.—Sellman v. German Union Fire Ins. Co. of Baltimore (C. C.) 977.

§ 393. Equity, where it is impossible for a corporation to carry on its business, will wind up the same for the benefit of its creditors and stockholders.—Sellman v. German Union Fire Ins. Co. of Baltimore (C. C.) 977.

(B) Representation of Corporation by Officers and Agents.

§ 428. Where an officer of defendant corporation without authority and fraudulently, and without the knowledge of the other officers or directors, lent money of such corporation to a bankrupt corporation, of which he was also president and practically sole owner, and before the bankruptcy repaid the same, his knowledge of the intended preference was not imputable to defendant, so as to render the preference recoverable by the bankrupt's trustee, under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445).—High v. Opalite Tile Co. (C. C. A.) 450.

§ 432. The general manager of a corporation, who on its behalf made a contract, the validity and binding effect of which is not denied, is presumed to have authority to accept performance of such contract, and the other party thereto is justified in acting on such presumption.—Redwine v. Continental Realty Co. (C. C. A.) 851.

(D) Contracts and Indebtedness.

§ 481. The trustee in a corporation mortgage *held* to have the right to foreclose on default in the payment of interest under the terms of the mortgage.—Gay v. Hudson River Electric Power Co. (C. C. A.) 689.

§ 481. A court of equity has no power to deny to the trustee under a corporation mortgage the right to foreclose on default, expressly given by the contract, on the ground that a sale of the mortgaged property at the time and under the particular circumstances will work a hardship to other creditors of the mortgagor and other affiliated corporations.—Gay v. Hudson River Electric Power Co. (C. C. A.) 689.

(E) Torts.

Of carriers, see Carriers, §§ 149½, 211–231.
Of railroads, see Railroads, §§ 275–473.

(F) Civil Actions.

By or against carriers, see Carriers, §§ 223, 316–321.
By or against railroads, see Railroads, §§ 282, 345–350, 384, 473.
Insurance companies, see Insurance, § 623.

(G) Crimes and Criminal Prosecutions.

Corporation as person entitled to privilege as witness, see Witnesses, § 293.
Of carriers, see Carriers, § 38.
Subpœna duces tecum for production of books and papers in proceedings by grand jury, see Grand Jury, § 36.

VIII. INSOLVENCY AND RECEIVERS.

Bankruptcy proceedings, see Bankruptcy, § 72.

§ 553. The inability of a corporation to pay its current obligations as they mature in the ordinary course of its business constitutes insolvency in a general sense, which will authorize the appointment of a receiver by a court of equity in a creditor's suit.—Cincinnati Equipment Co. v. Degnan (C. C. A.) 834.

§ 557. A creditor's bill against a corporation sufficiently alleges insolvency, when it alleges facts from which such condition may be naturally and reasonably deduced.—Cincinnati Equipment Co. v. Degnan (C. C. A.) 834.

IX. REINCORPORATION AND REORGANIZATION.

Pleading in suit to compel delivery of stock under reorganization agreement, see Equity, § 132.

§ 575. On refusal of a new corporation to deliver new stock to complainant as a stockholder in a consolidated corporation under a reorganization agreement, complainant *held* entitled to a mandatory injunction or an alternative decree requiring such delivery or payment of the money value of the stock.—Motley v. Southern Ry. Co. (C. C.) 956.

XII. FOREIGN CORPORATIONS.

§ 668. Service of process on the Secretary of State in an action against a foreign corporation doing business in Louisiana, but not having complied with the Louisiana law, pursuant to Acts 1904, No. 54, §§ 1, 2, *held* not to constitute due process of law.—Southern Ry. Co. v. Simon (C. C.) 959.

CORRECTION.

Of erroneous instructions by other instructions, see Trial, § 296.
Of irregularities and errors at trial, see Criminal Law, § 901.

COSTS.

In actions by or against receivers, see Receivers, § 189.
In bankruptcy proceedings, see Bankruptcy, § 469.
Payment or security on taking appeal or other proceeding for review, see Appeal and Error, § 395.

IV. SECURITY FOR PAYMENT.

Security to perfect appeal or other proceeding for review, see Appeal and Error, § 395.

V. AMOUNT, RATE, AND ITEMS.

§ 189. Where an auditor was appointed in an action at law in a federal court by agreement of the parties, and a stenographer selected by the parties was employed on the hearing before the auditor, the case stands the same legally as to costs as though the stenographer had been expressly selected and appointed by the auditor.—Corporation of St. Anthony in New Bedford v. Houlihan (C. C. A.) 252.

§ 189. The fees of an auditor appointed by agreement of parties by a federal court and the charges of a stenographer employed on the hearing before the auditor *held* properly taxable as costs against the losing party.—Corporation of St. Anthony in New Bedford v. Houlihan (C. C. A.) 252.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

Security to perfect appeal or other proceeding, see Appeal and Error, § 395.

VIII. PAYMENT AND REMEDIES FOR COLLECTION.

Payment or security on taking appeal or other proceeding for review, see Appeal and Error, § 395.

CO-TRUSTEES.

Joint or several authority, see Trusts, § 239.

COUNSEL.

See Attorney and Client.

COUNTIES.

See Municipal Corporations.

COUPLERS.

Automatic couplers on railroad cars, sufficiency of evidence in action for injuries to servant, see Master and Servant, § 278.

COURT COMMISSIONERS.

See United States Commissioners.

COURTS.

See Judgment.
Commissioners, see United States Commissioners.
Constitutional exercise of judicial powers in general, see Constitutional Law, § 70.
Effect in United States courts of judgments of state courts, see Judgment, § 828.
Judicial supervision of corporations in general, see Corporations, § 393.
Jurisdiction of court to appoint receiver, see Receivers, § 29.
Removal of action from state court to United States court, see Removal of Causes.
Right to trial by jury, see Jury, § 14.

Jurisdiction of proceedings affecting particular classes of persons.

See Corporations, § 393.
Bankrupts, see Bankruptcy, § 293.
Trustees in bankruptcy, see Bankruptcy, § 293

Jurisdiction of proceedings relating to particular species of property or estates.

Bankrupts' estates, see Bankruptcy, § 293.

Jurisdiction of particular actions or proceedings.

For cancellation of certificate of naturalization, see Aliens, § 71½.

Special jurisdictions and particular classes of courts.

See Admiralty.
Supervision of corporations in general, see Corporations, § 393.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

Appearance, see Appearance, § 19.
Consent to jurisdiction to appoint receiver, see Receivers, § 29.
Objections to jurisdiction ground for abatement, see Abatement, and Revival, § 3.

§ 37. Objection to jurisdiction in equity must be taken before the case has been entered on the merits, and an intervener who in his petition did not question the jurisdiction cannot do so after an answer has been filed to his petition, and property has been surrendered to him under a stipulation.—Cincinnati Equipment Co. v. Degnan (C. C. A.) 834.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(D) Rules of Decision, Adjudications, Opinions, and Records.

Decision of appellate court as law of the case in lower court, see Appeal and Error, § 1195.
Destruction of records as affecting time to answer, see Pleading, § 85.
Former decision of appellate court as law of the case on subsequent appeal, see Appeal and Error, §§ 1097–1099.
Record of judgments, see Judgment, § 270.

VI. COURTS OF APPELLATE JURISDICTION.

Decisions reviewable, see Appeal and Error, §§ 80–113.

VII. UNITED STATES COURTS.

Effect in United States courts of judgments of state courts, see Judgment, § 828.

(A) Jurisdiction and Powers in General.

§ 276. The objection to the jurisdiction of a particular federal Circuit Court of a suit between citizens of different states because neither of the parties is a resident of the district is waived by the defendant by appearing and filing a motion to vacate an order on grounds going to the merits of the bill as well as for want of jurisdiction.—Bluefields S. S. Co. v. Steele (C. C. A.) 584.

(B) Jurisdiction Dependent on Nature of Subject-Matter.

Admiralty jurisdiction, see Admiralty, §§ 1–5.
Federal question as ground for removal from state to federal court, see Removal of Causes, § 19.

(C) Jurisdiction Dependent on Citizenship, Residence, or Character of Parties.

§ 300. A suit in a federal court for the appointment of an ancillary receiver is ancillary to the primary suit in another federal court in such sense as to give the court jurisdiction regardless of the citizenship of the parties.—Bluefields S. S. Co. v. Steele (C. C. A.) 584.

§ 307. While a domicile once acquired by intention and acts may be held by intention alone so far as relates to citizenship necessary to support the jurisdiction of a federal court, to constitute a change of domicile which will confer such jurisdiction the intention must be supported by such acts as are consistent with the change, and not contradictory of it.—Davis v. Dixon (C. C.) 509.

§ 307. A change of citizenship, although for the purpose of acquiring a right to sue in federal court, is not unlawful, and does not deprive the court of jurisdiction if there is an actual bona fide change, with the intention of remaining in the new domicile.—Davis v. Dixon (C. C.) 509.

§ 307. A plaintiff *held*, under the facts shown, not to have effected a change of domicile which would support an action by him in a federal court in the state of his previous residence.—Davis v. Dixon (C. C.) 509.

§ 312. Under Judiciary Act March 3, 1875, c. 137, § 1, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), where separate assignees of notes secured by a vendor's lien joined in a suit thereon in the federal court, and it did not appear that the notes were foreign bills of exchange, or that the assignor could have sued thereon in such court, federal jurisdiction was not shown.—Troy Bank of Troy, Ind., v. Whitehead (C. C.) 932.

(D) Jurisdiction Dependent on Amount or Value in Controversy.

§ 328. Where vendors' lien notes, each for $1,200, were transferred to different indorsees, the amounts could not be added to establish an amount sufficient to sustain federal jurisdiction in a suit to recover judgment thereon and enforce the lien.—Troy Bank of Troy, Ind., v. Whitehead (C. C.) 932.

(E) Procedure, and Adoption of Practice of State Courts.

§ 334. In a suit for partition in a federal court sitting in West Virginia the court was authorized by Code W. Va. c. 79, § 1, to determine all questions of title arising therein.—Woods v. Woods (C. C.) 159.

§ 346. In an action by the government against a nonresident, jurisdiction cannot be obtained in a federal court by the levy of an attachment on defendant's property, notwithstanding Rev. St. §§ 914, 915 (U. S. Comp. St. 1901, p. 684).—United States v. Brooke (D. C.) 341.

§ 347. Rights of parties with reference to amendment of pleadings in an action at law brought in the federal court sitting in New York are governed by the New York Code of Civil Procedure and the rules and practice of the Supreme Court of that state.—Hannum v. Jerome (C. C.) 179.

(F) State Laws as Rules of Decision.

Effect in United States courts of judgments of state courts, see Judgment, § 828.

§ 359. A federal court sitting in New York administering an insolvent's estate will follow

the New York rule as to what constitutes a breach of an employment contract made and broken in the United States.—Ely v. Van Kannel Revolving Door Co. (C. C.) 459.

§ 359. The federal court will determine a nonfederal question on which Congress has not acted in accordance with the declared policy of the state in which the court sits, as found either in its statutes or the decisions of its highest tribunal.—Blackwell v. Southern Pac. Co. (C. C.) 489.

§ 366. A complainant in a federal court, who filed petition to enforce mechanic's lien within the time limited by statute, *held* not guilty of fatal laches if process is not issued until after expiration of such time.—Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. A.) 199.

§ 366. A decision of the highest court of a state, construing the recordation acts of the state as respects what is necessary to be done to secure liens thereunder, will be followed by the federal courts.—Tygart Valley Brewing Co. v. Vilter Mfg. Co. (C. C. A.) 845.

§ 366. The federal courts are bound by decisions of the Illinois Supreme Court that the phrase "any person interested," as used in Illinois Statute of Wills, § 7, as amended by Laws 1903, p. 355, does not include persons having a mere expectancy.—Selden v. Illinois Trust & Savings Bank (C. C. A.) 872.

§ 374. The Washington rule, that a holder of municipal warrants may not recover judgment at law thereon, but is limited to mandamus, does not obtain in the federal courts sitting in that state, where judgment may be recovered on the warrants preliminary to mandamus proceedings.—First Nat. Bank of Central City v. City of Port Townsend, Wash. (C. C. A.) 574.

(I) Circuit Courts.

§ 414. The Circuit Courts of the United States have a jurisdiction in law and a jurisdiction in equity, vested in the same judges.—Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. A.) 199.

(K) Territorial and Provisional Courts.

§ 433. Separate causes of action to recover usury may be joined under Alaska Code authorizing joinder of actions on implied contracts.—Washington-Alaska Bank v. Stewart (C. C. A.) 673.

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. One contract creditor cannot maintain a suit in equity in a federal court to enjoin another creditor of the same debtor from prosecuting an action on his demand in a state court on the ground that the defendant will thereby secure a prior lien on the debtor's property, both because such a case presents no ground of equity jurisdiction and because such a suit is prohibited by Rev. St. § 720 (U. S. Comp. St. 1901, p. 581).—Maxwell v. McDaniels (C. C. A.) 311.

COVENANTS.

In lease, see Landlord and Tenant, § 157.

CREDIBILITY.

Of witness, see Witnesses, § 389.

CREDITORS.

See Bankruptcy; Execution; Fraudulent Conveyances; Payment.

Rights and remedies as to mortgage by debtor, see Chattel Mortgages, § 187.

CREDITORS' SUIT.

Remedies in cases of fraudulent transfers, see Fraudulent Conveyances, § 241.

CREW.

Of vessel, see Seamen.

CRIMES.

See Criminal Law.

CRIMINAL LAW.

Bail, see Bail, § 63.

Grand jury, see Grand Jury.

Habeas corpus to review proceedings, see Habeas Corpus.

Indictment, information, or complaint, see Indictment and Information.

Offenses by particular classes of persons.

See Carriers, § 38.

Particular offenses.

See Perjury.

Discrimination and overcharge by carrier, see Carriers, § 38.

Violations of interstate commerce regulations, see Carriers, § 38.

Violations of postal laws, see Post Office, § 49.

IV. JURISDICTION.

Of consular officers, see Ambassadors and Consuls, § 6.

X. EVIDENCE.

Credibility, impeachment, contradiction, and corroboration of witnesses, see Witnesses, § 389.

In prosecution for violation of postal laws, see Post Office, § 49.

In prosecution for wrongfully inclosing public land, see Public Lands, § 19.

(C) Other Offenses, and Character of Accused.

§ 377. Good character of accused, when established, is to be considered, with all the other facts, in determining the final issue of guilt or innocence.—Searway v. United States (C. C. A.) 716.

§ 379. A character witness having testified to the good reputation of accused, a further question as to whether, if anything derogatory had been said of defendant, he would likely have heard it, was immaterial.—Simpson v. United States (C. C. A.) 817.

(E) Best and Secondary and Demonstrative Evidence.

§ 404. A letter, not admitted or treated as genuine by accused, *held* inadmissible as a standard for comparison of handwriting, under B. & C. Comp. Or. § 777.—United States v. North (D. C.) 151.

§ 404. Writings cannot be introduced for the sole purpose of enabling the jury to institute a comparison of handwriting.—United States v. North (D. C.) 151.

(F) Admissions, Declarations, and Hearsay.

§ 406. On the trial of a criminal case it was competent to prove a statement made by defendant to the effect that he could implicate another in the offense, as one against interest.—Adamson v. United States (C. C. A.) 714.

XII. TRIAL.

(D) Objections to Evidence, Motions to Strike Out, and Exceptions.

§ 695. Where two defendants were being tried together, it was not error to overrule an objection, made on behalf of both defendants jointly, to testimony which was competent and admissible against one.—Adamson v. United States (C. C. A.) 714.

(L) Waiver and Correction of Irregularities and Errors.

§ 901. Introduction of evidence by accused in his own behalf is a waiver of previous motions for an instructed verdict.—Simpson v. United States (C. C. A.) 817.

XV. APPEAL AND ERROR, AND CERTIORARI.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1044. A request for a directed verdict at the close of all the evidence is essential to authorize a review of the sufficiency of the evidence to sustain a conviction on a writ of error.—Simpson v. United States (C. C. A.) 817.

(G) Review.

§ 1166½. Error in sustaining government's challenge of two jurors for cause *held* not prejudicial to defendant, where the record failed to show that any objectionable juror was selected over defendant's challenge for cause, or that he had exhausted his peremptory challenges.—Simpson v. United States (C. C. A.) 817.

(I) Liabilities on Bonds.

§ 1194. Where defendants were sentenced to imprisonment and fined, and on a writ of error gave a supersedeas and appearance bond, the United States on affirmance could recover the fine in a proceeding on the supersedeas bond under Rev. St. §§ 1000, 1007, 1041 (U. S. Comp. St. 1901, pp. 712, 714, 724), and Appellate Court Rules 13, 37 (150 Fed. xxviii, 79 C. C. A. xxviii, 150 Fed. lxxxv, 79 C. C. A. lxxxv), and District Court Rule 2.—Hardesty v. United States (C. C. A.) 269.

§ 1199. Under facts stated, *held* that after affirmance of a conviction, the government could recover in the same case judgment for the fines imposed as against the surety on the supersedeas bond.—Hardesty v. United States (C. C. A.) 269.

CROSS-BILL.

In action to quiet title, see Quieting Title, § 39.

CROSS-EXAMINATION.

Of witnesses in general, see Witnesses, § 275.

CROSSINGS.

Railroad crossings, see Railroads, § 93.
Railroad crossings, accidents at, see Railroads, §§ 320–350.

CUMULATIVE REMEDIES.

See Election of Remedies.

CURATORS.

See Guardian and Ward.

CUSTODY.

Of debtor's property pending bankruptcy proceedings, see Bankruptcy, § 114.

CUSTOMS DUTIES.

Excise duties and other internal taxes, see Internal Revenue.

IV. ENTRY AND APPRAISAL OF GOODS, BONDS, AND WAREHOUSES.

§ 63. A passenger bringing dutiable merchandise into the United States in her baggage *held* to have sufficiently described the same in her declaration made on landing and to have "mentioned" the articles to the collector "at the time of making entry" within the meaning of Rev. St. § 2802 (U. S. Comp. St. 1901, p. 1873), by furnishing consular invoice at the custom house later when making the regular entry.—United States v. One Trunk (C. C. A.) 317.

§ 80. An appraisement of goods under Tariff Act Aug. 5, 1909, c. 6, § 28, subsec. 13, 36 Stat. 99 (U. S. Comp. St. Supp. 1909, p. 819), does not exclude a reappraisement provided for by the

same subsection.—United States v. Calhoun (D. C.) 499.

§ 80. Under Tariff Act Aug. 5, 1909, c. 6, § 28, subsecs. 13, 14, 15, 36 Stat. 99, 100 (U. S. Comp. St. Supp. 1909, pp. 819–821), and Act Cong. June 22, 1874, c. 391, 18 Stat. 186 (U. S. Comp. St. 1901, p. 2018), where goods are appraised by an appraiser, the collector has no jurisdiction to compel the importer to testify concerning the value of the goods, to lay a foundation for reappraisement, and this though the original appraisement was induced by fraud.—United States v. Calhoun (D. C.) 499.

§ 80. The reappraisement of goods entered for importation under Tariff Act Aug. 5, 1909, c. 6, § 28, subsec. 13, 36 Stat. 99 (U. S. Comp. St. Supp. 1909, p. 819), must be made by the appraising officers and not by the collector.—United States v. Calhoun (D. C.) 499.

§ 81. Where proceedings were instituted against a corporation importer to reliquidate duties, a citation was properly issued against the corporation requiring it to produce its books of account for examination.—United States v. Calhoun (D. C.) 499.

§ 81. Right of a collector to examine an importer in a proceeding to reliquidate duties under Tariff Act Aug. 5, 1909, c. 6, § 28, subsec. 15, 36 Stat. 100 (U. S. Comp. St. Supp. 1909, p. 821), is not affected by the fact that the forfeiture provision contained in subsection 16 does not apply to reliquidation proceedings.—United States v. Calhoun (D. C.) 499.

§ 81. Under Tariff Act Aug. 5, 1909, c. 6, § 28, subsecs. 13, 14, 36 Stat. 99, 100 (U. S. Comp. St. Supp. 1909, pp. 819, 820), and Act Cong. June 22, 1874, c. 391, 18 Stat. 186 (U. S. Comp. St. 1901, p. 2018), a collector within a year after importation *held* entitled to institute proceedings for a reliquidation of duties in which the importer may be subjected to examination though there can then be no reappraisement.—United States v. Calhoun (D. C.) 499.

§ 81. It is no excuse for a corporation's refusal to appear before a collector and produce books and papers in a proceeding within the collector's jurisdiction that he intended to investigate matters beyond such jurisdiction.—United States v. Calhoun (D. C.) 499.

DAMAGES.

Compensation for property taken for public use, see Eminent Domain, §§ 91–106.

Damages for particular injuries.

Breach of covenant by tenant to make improvements, see Landlord and Tenant, § 159.
Breach of warranty of goods sold, see Sales, § 442.
Infringement of copyright, see Copyrights, § 87.

VI. MEASURE OF DAMAGES.

For breach of covenant by tenant to make improvements, see Landlord and Tenant, § 159.
For breach of warranty of goods sold, see Sales, § 442.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(B) Evidence.

§ 168. In an action by a young woman to recover for a severe personal injury, evidence was admissible on the question of damages to show that plaintiff's injuries were of such a character that child bearing would thereby be rendered dangerous to her life, and also to show that she had endured mental suffering on account of such fact.—Partridge v. Boston & M. R. Co. (C. C. A.) 211.

(D) Computation and Amount, Double and Treble Damages, and Remission.

Remission of part of recovery as condition of affirmance on appeal or other proceeding for review, see Appeal and Error, § 1140.

DEATH.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

§ 31. Employer's liability act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]) *held* not to supersede the Missouri statute authorizing the widow of an employé to maintain an action for the wrongful death of her husband.—Thompson v. Wabash R. Co. (C. C.) 554.

§ 31. An action for death of a railroad employé under federal employer's liability act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]) could not be brought by the decedent's widow, or other beneficiary, but only by his personal representative.—Thompson v. Wabash R. Co. (C. C.) 554.

(B) Jurisdiction, Venue, and Limitations.

Transfer of cause to federal court, see Removal of Causes, § 19.

DE BENE ESSE.

See Depositions.

DEBTOR AND CREDITOR.

See Bankruptcy; Execution; Fraudulent Conveyances; Payment.

DECEDENTS.

Estates, see Wills.

DECLARATION.

In pleading, see Pleading.

DECREE.

In equity, see Equity, § 430.
Judgments in general, see Judgment.

DEEDS.

Absolute deed as mortgage, see Mortgages, § 32.
By sheriffs, see Execution, § 320.

To property of infant, see Guardian and Ward, § 42.
To purchasers at execution sales, see Execution, § 320.
Trust deeds, see Chattel Mortgages; Mortgages.
Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

DEFAULT.

In performance of contracts in general, see Contracts, § 305.

DEFECTS.

In performance of contracts in general, see Contracts, § 305.
Waiver and correction of defects on trial, see Criminal Law, § 901.

DEFERRED ANNUITY.

See Annuities, § 1.

DELAY.

Creating liability for demurrage, see Shipping, § 177.
Hindering and delaying creditors by fraudulent transfers, see Fraudulent Conveyances.
Laches, see Equity, § 85.

DELEGATION.

Of legislative power, see Constitutional Law, § 62.

DEMISE.

See Landlord and Tenant.

DEMONSTRATIVE EVIDENCE.

See Criminal Law, § 404.

DEMURRAGE.

See Shipping, § 177.

DEMURRER.

Operation and effect as appearance, see Appearance, § 9.
To pleading in action to set aside probate of will, see Wills, § 284.

DEPORTATION.

Of Chinese, see Aliens, § 32.
Of immigrants excluded, see Aliens, § 54.

DEPOSITIONS.

§ 56. The court has no jurisdiction to vacate or extend a notice for the taking of depositions, under Rev. St. § 863 (U. S. Comp. St. 1901, p. 661).—Kline Bros. & Co. v. Liverpool & London & Globe Ins. Co. (C. C.) 969.

DESCENT AND DISTRIBUTION.

See Wills.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

Partition among coheirs, see Partition.

(A) Nature and Establishment of Rights in General.

Right to sue for causing death of intestate, see Death, § 31.

DESTRUCTION.

Of records as affecting time for answer, see Pleading, § 85.

DEVISES.

See Wills.

DIGEST.

Infringement of copyright, see Copyrights, § 61.

DILIGENCE.

Affecting right to equitable relief in general, see Equity, § 85.

DIPLOMATIC OFFICERS.

See Ambassadors and Consuls.

DISBURSEMENTS.

Costs in general, see Costs.

DISCHARGE.

Of bankrupts, see Bankruptcy, §§ 404–407.
Of sureties in general, see Principal and Surety, § 123.

DISCOVERY.

See Depositions.

DISCRETION OF COURT.

Allowance of supersedeas or stay on appeal or writ of error, see Appeal and Error, § 479.
Review of discretion in civil actions, see Appeal and Error, § 954.

DISCRIMINATION.

By carriers, see Carriers, § 13.
Denial of equal protection of laws, see Constitutional Law, § 243.

DISMISSAL AND NONSUIT.

Dismissal before hearing of bankruptcy proceedings, see Bankruptcy, § 92.

DISPUTE.

Amount in dispute as affecting jurisdiction of courts, see Courts, § 328.
Submission to arbitrators, see Arbitration and Award.

DISTILLERS.

Internal revenue taxes, see Internal Revenue, § 9.

DISTRIBUTION.

Of estate of bankrupt, see Bankruptcy, §§ 309–363.
Of governmental powers and functions, see Constitutional Law, §§ 55–70.

DISTRICTS.

Judicial districts in which suits in federal courts must be brought, see Courts, § 276.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see Courts, §§ 300–312.

DOMICILE.

Of parties to action as determining jurisdiction of courts, see Courts, §§ 300–312.

§ 4. Removal of a person to a new country to stay until his health is restored does not operate as a loss of his original domicile unless he has no expectation of returning.—United States v. Luria (D. C.) 643.

DRUGGISTS.

Internal revenue taxes, see Internal Revenue, § 9.

DUE PROCESS OF LAW.

See Constitutional Law, §§ 298–311.

DUTIES.

Customs duties, see Customs Duties.
Excise duties, see Internal Revenue.

DWELLING PLACE.

See Domicile.

EASEMENTS.

Grant of right of way to railroad, see Railroads, § 79.

EJECTMENT.

See Trespass to Try Title.

ELECTION OF REMEDIES.

In establishment and enforcement of trust, see Trusts, § 350.

§ 7. Filing of a landlord's counterclaim for lessee's breach of covenant in a suit by the lessee to recover money *held* not an election of remedies.—Susswein v. Pennsylvania Steel Co. (C. C.) 102.

EMINENT DOMAIN.

Public improvements by municipalities, see Municipal Corporations, § 350.

II. COMPENSATION.

(B) Taking or Injuring Property as Ground for Compensation.

§ 91. A property owner cannot recover for damages to his property by the operation of an adjoining railroad, without proof of injury different in kind from that suffered by the public at large.—Idaho & W. N. R. R. v. Nagle (C. C. A.) 598.

§ 104. Jarring the earth in the operation of a railroad, casting soot and cinders thereon, the emission of smoke physically injuring adjoining property, *held* to constitute "damage" within Const. Wash. art. 1, § 16.—Idaho & W. N. R. R. v. Nagle (C. C. A.) 598.

§ 106. A railroad's interference with a property owner's right to ingress and egress by means of a street is "damage" for which compensation should be made under Const. Wash. art. 1, § 16.—Idaho & W. N. R. R. v. Nagle (C. C. A.) 598.

EMPLOYER'S LIABILITY ACTS.

Interstate commerce regulations, see Commerce, §§ 5, 27.

EMPLOYÉS.

See Master and Servant.

ENCROACHMENT.

By judiciary on Legislature, see Constitutional Law, § 70.
By Legislature on judiciary, see Constitutional Law, § 55.

ENTRY.

Of dutiable merchandise, see Customs Duties, § 63.
Of judgment, see Judgment, § 270.
Of verdict, see Trial, § 342.

ENTRY, WRIT OF.

Actions for recovery of possession of real property and damages for detention thereof, see Trespass to Try Title.

ENVOYS.

See Ambassadors and Consuls.

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, § 243.

EQUIPMENT.

Of trains, see Railroads, § 229.

EQUITABLE ESTATES.

See Mortgages; Trusts.

EQUITABLE ESTOPPEL.

See Estoppel, § 69.

EQUITY.

Equitable estates, see Mortgages; Trusts.
Equitable estoppel, see Estoppel, § 69.

Particular subjects of equitable jurisdiction and equitable remedies.

See Fraudulent Conveyances, § 241; Injunction; Interpleader; Quieting Title; Receivers; Specific Performance; Trusts.
Infringement of copyrights, see Copyrights, § 87.
Infringement of patents, see Patents, §§ 310–327.
Relief from judgment, see Judgment, § 419.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(B) Remedy at Law and Multiplicity of Suits.

See Quieting Title, § 4.

II. LACHES AND STALE DEMANDS.

§ 85. The rule that laches cannot be invoked against the United States does not apply where the government is not the real party in interest, but, if successful, the litigation must inure to the benefit of private individuals.—La Clair v. United States (C. C.) 128.

III. PARTIES AND PROCESS.

§ 114. Leave to file a petition of intervention *held* properly denied on the ground of laches, where application was not made until more than four years after the suit was commenced, without any reason for the delay being shown.—Leary v. United States (C. C. A.) 433.

IV. PLEADING.

See Quieting Title, § 39.

(A) Original Bill.

§ 132. An allegation in a bill by a stockholder to compel defendant railroad company to issue its stock in exchange for stock of another corporation under a reorganization agreement *held* insufficient to justify entertaining a bill as one brought by complainant on behalf of a class.—Motley v. Southern Ry. Co. (C. C.) 956.

(C) Cross-Bill and Plea and Answer Thereto.

In suits to quiet title, see Quieting Title, § 39.

(F) Amended and Supplemental Pleadings and Revivor.

§ 275. An amendment setting forth no new cause of action relates back to the filing of the pleading amended.—Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. A.) 199.

§ 296. A complainant *held* not entitled to file a supplemental bill after final hearing and decision on the original bill to set up facts to make a new and different case and which, so far as appeared, were known to complainant long before the hearing.—Healey Ice Mach. Co. v. Green (C. C.) 515.

(H) Issues, Proof, and Variance.

§ 324. Where a bill presents no ground which gives the court jurisdiction to grant equitable relief, such jurisdiction cannot be sustained on the ground that complainant was given a lien by a conveyance made by his debtor, which the bill alleges was fraudulent and void as to him.—Maxwell v. McDaniels (C. C. A.) 311.

(I) Defects and Objections, and Waiver Thereof.

§ 330. Defendants, who have been subpœnaed, have appeared, and defended, *held* estopped from defeating the suit on the ground that the bill contains no prayer for process.—Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. A.) 199.

IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

§ 410. Defendant in not having objected to the taking of testimony before a master, did not consent to his appointment, nor estop himself to controvert his findings of fact.—Southern Ry. Co. v. Simon (C. C.) 959.

X. DECREE AND ENFORCEMENT THEREOF.

§ 430. Where the complainant and his counsel failed to appear at the final hearing of an equity cause, from whatever cause, the opening of the decree to permit him to have another hearing is a matter of discretion, and should only be granted upon terms.—Karns v. W. L. Imlay Rapid Cyanide Process Co. (C. C.) 479.

EQUIVALENTS.

In patent law, see Patents, § 245.

ERROR, WRIT OF.

See Appeal and Error.

ESTABLISHMENT.

Of trusts, see Trusts, §§ 350–354.

ESTATES.

Bankrupts' estates, see Bankruptcy.
Decedents' estates, see Wills.
Estates for years, see Landlord and Tenant.

ESTOPPEL.

See Election of Remedies.
To object to finding of master in chancery, see Equity, § 410.

III. EQUITABLE ESTOPPEL.

(B) Grounds of Estoppel.

See Municipal Corporations, § 878.

§ 69. A plaintiff testifying to facts within his knowledge before one jury should not be permitted to swear to facts directly inconsistent, and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false.—Smith v. Boston Elevated Ry. Co. (C. C. A.) 387.

EVIDENCE.

See Depositions; Witnesses.
False swearing, see Perjury.
Legislative power to change rules of evidence, see Constitutional Law, § 55.
Motion to strike out evidence, see Trial, § 89.
Objections to evidence, see Criminal Law, § 695.
Offer of proof, see Trial, § 45.
Reception at trial, see Trial, §§ 45–84.
Rules of evidence as denying due process of law, see Constitutional Law, § 311.

As to particular facts or issues.

Authority of corporate officer or agent, see Corporations, § 432.
Claims against bankrupt's estate, see Bankruptcy, § 336.
Corporate powers, see Corporations, § 389.
Damages, see Damages, § 168.
Health and physical condition of person injured, see Damages, § 168.
Negligence of master causing injury to servant, see Master and Servant, § 278.
Patentable novelty, see Patents, § 45.
Prior knowledge or use of invention, see Patents, §§ 58–62.
Statute of frauds, see Frauds, Statute of, § 158.

In actions by or against particular classes of persons.

See Carriers, §§ 316–321; Master and Servant, §§ 265–278.

In particular civil actions or proceedings.

See Partition, § 63.
Bankruptcy proceedings, see Bankruptcy, § 91.
For deportation of Chinese, see Aliens, § 32.
For injuries to cargo, see Shipping, § 132.
For injuries to passengers, see Carriers, §§ 316–318.
For injuries to servants, see Master and Servant, §§ 265–278.
To cancel certificate of naturalization, see Aliens, § 71½.

In criminal prosecutions.

See Criminal Law, §§ 377–406.
For wrongfully inclosing public land, see Public Lands, § 19.
Violations of postal laws, see Post Office, § 49.

Review and procedure thereon in appellate courts.

Review of rulings as dependent on prejudicial nature of error, see Appeal and Error, §§ 1048–1056.
Review of sufficiency of evidence, see Appeal and Error, §§ 1005–1008.

I. JUDICIAL NOTICE.

§ 15. The federal court will not take judicial notice of the degree of Indian blood of a citizen of the Five Civilized Tribes.—Bettes v. Brower (D. C.) 342.

§ 47. Regulations of the Secretary of the Treasury and forms adopted for applications for the abatement of internal revenue taxes assessed, and for the return of moneys paid, have the force of law and will be judicially noticed.—Hastings v. Herold (C. C.) 759.

II. PRESUMPTIONS.

As to constitutionality of statutes, see Constitutional Law, § 48.
As to prior knowledge or use of invention, see Patents, § 58.

III. BURDEN OF PROOF.

As to particular facts or issues.

Prior knowledge or use of invention, see Patents, § 58.

In particular civil actions or proceedings.

Chinese deportation proceedings, see Aliens, § 32.
For injuries to cargo, see Shipping, § 132.
For injuries to passengers, see Carriers, § 316.
For injuries to servants, see Master and Servant, § 265.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(B) Res Gestæ.

§ 123. A statement made by defendant's engineer to plaintiff 10 hours after the injury admitting that the engineer was in fault *held* inadmissible as res gestæ.—Kyner v. Portland Gold Mining Co. (C. C. A.) 43.

VI. DEMONSTRATIVE EVIDENCE.

In criminal prosecutions, see Criminal Law, § 404.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(D) Construction or Application of Language of Written Instrument.

§ 459. Under Pennsylvania Negotiable Instruments Law (P. L. 1901, p. 198) § 20, a Roman Catholic Bishop, having indorsed the note of a congregation as irregular indorser with the words "trustee" following his name, *held* entitled to show that he intended to sign as trustee only, and that the payee and indorsee had knowledge thereof.—American Trust Co. v. Canevin (C. C. A.) 657.

XIV. WEIGHT AND SUFFICIENCY.

As to negligence of master causing injury to servants, see Master and Servant, § 278.
As to prior knowledge or use of invention, see Patents, § 62.
In action for injuries to passenger, see Carriers, § 318.

In action for injuries to servant, see Master and Servant, § 278.
Scope and extent of review, see Appeal and Error, §§ 1005–1008.

EXAMINATION.

Of bankrupt or others in bankruptcy proceedings, see Bankruptcy, § 242.
Of witnesses, see Witnesses, §§ 248–293.

EXCEPTIONS.

In judicial proceedings.

Bill of exceptions in general, see Exceptions, Bill of.
Necessity and sufficiency for purpose of review in civil cases, see Appeal and Error, §§ 248–274.
Requisites of record for purpose of review, see Appeal and Error, § 501.
To pleading in admiralty, see Admiralty, § 65.
To report on reference, see Equity, § 410.

EXCEPTIONS, BILL OF.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

§ 8. Bills of exception, including objections to the admission of evidence, should contain the grounds of the objection.—Atlantic Coast Line R. Co. v. Linstedt (C. C. A.) 36.

§ 24. It is improper to include all the proceedings of the trial in a single bill of exceptions.—Atlantic Coast Line R. Co. v. Linstedt (C. C. A.) 36.

EXCISE.

Duties, see Internal Revenue.

EXCLUSION.

Of Chinese, see Aliens, §§ 24–32.

EXECUTION.

VII. SALE.

(A) Manner, Conduct, Validity, and Confirming or Vacating.

§ 256. The question of the validity of a sheriff's sale of land *held*, under the evidence, one for the jury.—Middlesworth v. Houston Oil Co. of Texas (C. C. A.) 857.

(D) Conveyance to Purchaser.

§ 320. Under the law of Texas, where the court records showing the judgment and execution under which a sheriff's sale of land was made have been destroyed, proof of such judgment and execution may be made by other legal evidence, and after the lapse of 30 years the existence of the judgment and execution recited in the sheriff's deed may be presumed; but there can be no presumption of a judgment or execution varying from that described in the deed.—Middlesworth v. Houston Oil Co. of Texas (C. C. A.) 857.

§ 320. The rule of decision in Texas is that a misrecital of the judgment in a sheriff's deed, such recital not being required by statute, is not material if it is shown that the sale was under a valid and subsisting judgment and execution.—Middlesworth v. Houston Oil Co. of Texas (C. C. A.) 857.

XI. EXECUTION AGAINST THE PERSON.

Jurisdiction of United States commissioners, see United States Commissioners, § 5.

EXECUTORS AND ADMINISTRATORS.

See Wills.
Testamentary trustees, see Trusts.

VII. DISTRIBUTION OF ESTATE.

Partition of property of estate, see Partition.

X. ACTIONS.

Right of action for wrongful death, see Death, § 31.
Right to sue for causing death of decedent, see Death, § 31.
Substitution of parties, see Parties, § 59.

EXECUTORY CONTRACTS.

In general, see Contracts.
Effect of on title to property, see Vendor and Purchaser, § 54.

EXEMPTIONS.

From internal revenue tax, see Internal Revenue, § 9.
From liability for loss of or injury to goods, see Carriers, § 149½; Shipping, § 140.
From state pilotage laws, see Pilots, § 3.
Of bankrupt, see Bankruptcy, § 400.

EX PARTE PROCEEDINGS.

Habeas corpus, see Habeas Corpus.

EXPROPRIATION.

See Eminent Domain.

EXPULSION.

Of Chinese, see Aliens, § 32.

EXTRINSIC EVIDENCE.

In general, see Evidence, § 459.

FACT.

Judicial notice of facts, see Evidence, §§ 15–47.

FACTORS.

See Brokers.

FALSE IMPRISONMENT.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

§ 2. The gist of an action for false imprisonment is a trespass committed either personally or by procurement upon the body of the plaintiff; and it is essential to the successful maintenance of the action that the act alleged to constitute the trespass be unlawful.—Polonsky v. Pennsylvania R. Co. (C. C.) 558.

§ 2. The substance of false arrest or imprisonment is trespass vi et armis, and neither malice nor probable cause can constitute elements in the case except in aggravation or mitigation of damages.—Polonsky v. Pennsylvania R. Co. (C. C.) 558.

§ 7. A plaintiff *held*, under the facts shown to have a right of action for false imprisonment against the employer of a Pullman car conductor who caused him to be arrested and confined in jail without cause, and without any proceedings being instituted against him, either before or after his arrest.—Polonsky v. Pennsylvania R. Co. (C. C. A.) 561.

§ 7. An arrest is not necessarily unlawful so as to afford ground for an action for false imprisonment because the plaintiff was innocent of the offense for which the arrest was made if the forms of law were observed.—Polonsky v. Pennsylvania R. Co. (C. C.) 558.

§ 7. Where an officer making an arrest is protected by his warrant or by a statute authorizing the arrest without warrant, neither he nor the person at whose instance the arrest was made is liable in an action for false imprisonment.—Polonsky v. Pennsylvania R. Co. (C. C.) 558.

FALSE REPRESENTATIONS.

Ground for refusal of discharge in bankruptcy, see Bankruptcy, § 407.

FALSE SWEARING.

See Perjury.

FARMERS.

Persons subject to adjudication as bankrupts, see Bankruptcy, § 68.

FAULT.

See Negligence.
As cause of collision, see Collision.

FEDERAL COURTS.

See Courts, §§ 276–433, 508.
Removal of causes to federal courts from state courts, see Removal of Causes.

FEDERAL GOVERNMENT.

See United States.

FEDERAL OFFICERS.

In general, see United States, § 52.
Court commissioners, see United States Commissioners.

FEDERAL QUESTIONS.

Grounds for removal of cause, see Removal of Causes, § 19.

FEES.

Of attorneys, see Attorney and Client, § 192.

FIDEI COMMISSUM.

See Trusts.

FIDUCIARY RELATIONS.

See Brokers; Guardian and Ward; Principal and Agent; Trusts.

FIERI FACIAS.

See Execution.

FILING.

Claim against property in hands of receiver, see Receivers, § 149.
Conditional sale contract, see Sales, § 474.
Petition and bond for removal of cause, see Removal of Causes, § 89.

FINAL JUDGMENT.

Decisions reviewable, see Appeal and Error, § 80; Patents, § 324.
Rendering final judgment on appeal or other proceeding for review, see Appeal and Error, § 1175.

FINDINGS.

Of master in chancery, see Equity, § 410.
Review in appellate court, see Appeal and Error, § 1008.

FIRE INSURANCE.

See Insurance.

FIRES.

Civil liability for injuries from fires caused by operation of railroad see Railroads, §§ 249, 473.

FISCAL MANAGEMENT.

Of municipal corporations, see Municipal Corporations, §§ 878–905.

FIXTURES.

§ 1. In Pennsylvania whether a structure is a fixture depends, not on physical attachment, but rather on intention of the parties.—In re Beeg (D. C.) 522.

§ 4. The true test of the character of an improvement is the intent of the owner of the real estate to incorporate or not to incorporate permanently as a part of the realty.—Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. A.) 199.

§ 14. The line of demarkation between realty and personalty in cases of landlord and tenant differs from that in cases of vendor and vendee or mortgagor and mortgagee.—Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. A.) 199.

§ 14. Intention to annex *held* to be a determining factor in ascertaining whether a structure is part of the freehold as between landlord and tenant.—In re Beeg (D. C.) 522.

§ 18. In Pennsylvania machinery of a factory which is a necessary part thereof and without which it is not fully equipped is a fixture and a part of the freehold as between a mortgagee and assignee for benefit of creditors. —In re Beeg (D. C.) 522.

§ 21. Intention to annex *held* not to be a determining factor in ascertaining whether a structure is part of the freehold as between vendor and vendee, especially where the structure is necessary to the use of the property for a particular purpose.—In re Beeg (D. C.) 522.

§ 28. In Pennsylvania machinery of a factory which is a necessary part thereof and without which it is not fully equipped is a fixture, subject to the lien of a mortgage or judgment against the owner of the freehold.—In re Beeg (D. C.) 522.

§ 28. Machinery and equipment of a sausage factory essential to its operation as such, though conveyed to the bankrupt separately, the land by deed and the equipment by bill of sale, *held* part of the realty and subject to the lien of a judgment thereon.—In re Beeg (D. C.) 522.

FOLLOWING TRUST PROPERTY.

See Trusts, §§ 350–354.

FOOD.

Duty of carrier to feed live stock, see Carriers, § 211.

FORECLOSURE.

Of mechanics' liens, see Mechanics' Liens, §§ 245–260.

FOREIGN CORPORATIONS.

See Corporations, § 668.

FOREIGNERS.

See Aliens.

FOREIGN JUDGMENTS.

See Judgment, § 828.

FOREIGN MINISTER.

See Ambassadors and Consuls.

FOREIGN RECEIVERSHIP.

See Receivers, §§ 206, 207.

FORFEITURES.

Of license of patent, see Patents, § 214.

FORMS OF ACTION.

See Action, § 30; Trespass to Try Title.

FOURTEENTH AMENDMENT.

See Constitutional Law, §§ 243, 298–311.

FRANCHISES.

§ 3. Legislative or municipal grants or franchises in which the public has an interest are to be strictly construed in favor of the public.—City of Shelbyville, Ky., v. Glover (C. C. A.) 234.

FRAUD.

Conveyances and transactions fraudulent as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Ground for refusal of discharge in bankruptcy, see Bankruptcy, § 407.

In obtaining certificate of naturalization, see Aliens, § 71½.

FRAUDS, STATUTE OF.

VII. SALES OF GOODS.

(B) Acceptance of Part of Goods.

§ 90. Evidence *held* not to show a delivery of goods under an alleged contract of sale such as to take the sale out of the statute of frauds. —Van Boskerck v. Torbert (C. C. A.) 419.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§ 115. A writing not signed *held* insufficient to establish a sale of goods under the New York statute of frauds.—Van Boskerck v. Torbert (C. C. A.) 419.

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 158. The contents of a written memorandum of sale required by the statute of frauds, which has been lost, may be proved by parol, and proof of a statement by a defendant that an order for merchandise sent by letter had been accepted by mail is sufficient to establish such a written memorandum of sale, although the acceptance was not received by plaintiff.—Van Boskerck v. Torbert (C. C. A.) 419.

FRAUDULENT CONVEYANCES.

By debtor prior to bankruptcy proceedings, see Bankruptcy, §§ 178–181.

I. TRANSFERS AND TRANSACTIONS INVALID.

(D) Indebtedness, Insolvency, and Intent of Grantor.

§ 62. A mortgagor's inability to pay debts will not invalidate a chattel mortgage given for a valid present consideration by one having no reason to know that a fraud will be committed. —In re Mahland (D. C.) 743.

(I) Retention of Possession or Apparent Title by Grantor.

Retention of possessions by chattel mortgagor, effect as to mortgagor's creditors, see Chattel Mortgages, § 187.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(C) Right of Action to Set Aside Transfer, and Defenses.

§ 241. A simple contract creditor whose claim has not been reduced to judgment cannot maintain a suit in a federal court of equity to set aside an alleged fraudulent conveyance of property by his debtor.—Maxwell v. McDaniels (C. C. A.) 311.

FREIGHT.

Carriage of goods, see Carriers, § 149½; Shipping, §§ 120–140.
Carriage of live stock, see Carriers, §§ 211–223.

FUNDS.

Public funds, see Municipal Corporations, §§ 878–905.

GAMING.

I. GAMBLING CONTRACTS AND TRANSACTIONS.

(B) Rights and Remedies of Parties.

Claim against estate of bankrupt broker, see Bankruptcy, § 314.

GENERAL APPEARANCE.

See Appearance, § 9.

GENERAL AVERAGE.

See Shipping, § 194.

GOOD FAITH.

Affecting adverse possession, see Adverse Possession, § 84.

GOODS.

Mortgage, see Chattel Mortgages.
Sale, see Sales.

GOVERNMENT.

See United States.
Distribution of governmental powers, see Constitutional Law, §§ 55–70.

GRABIRONS.

Equipment of cars, see Railroads, §§ 229, 254.

GRAND JURY.

See Indictment and Information.

§ 25. A federal grand jury has inquisitorial powers.—In re Bornn Hat Co. (C. C.) 506.

§ 36. A subpœna duces tecum may issue against a corporation requiring it to produce books and papers before a grand jury.—In re Bornn Hat Co. (C. C.) 506.

GRANTS.

Of public lands, see Public Lands.

GUARANTY.

See Principal and Surety.

GUARDIAN AND WARD.

III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

§ 42. An arbitrary declaration in a bill of sale by a guardian of timber growing on his ward's land, that the timber should be considered personalty, will not be given effect to validate the conveyance.—Bettes v. Brower (D. C.) 342.

§ 42. An instrument executed by a guardian for sale of standing timber of his ward *held* void under Mansf. Dig. Ark. §§ 3502–3511 (Ind. T. Ann. St. 1899, §§ 2398–2407).—Bettes v. Brower (D. C.) 342.

§ 44. Under Snyder's Comp. Laws Okl. 1909, §§ 5489, 5491, *held*, that a guardian may lease the land of his ward for agricultural purposes for a term not exceeding the minority of the ward without an order of the probate court.—Bettes v. Brower (D. C.) 342.

HABEAS CORPUS.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 92. Where an order of deportation had been entered against an alleged undesirable alien, the court, on a writ of habeas corpus, had no jurisdiction to refer the proceedings to a commissioner to take testimony on a new issue as to the alien's alleged citizenship.—De Bruler v. Gallo (C. C. A.) 566.

HABITATION.

See Domicile.

HANDHOLDS.

Equipment of cars, see Railroads, §§ 229, 254.

HARBORS.

Collisions between vessels, see Collision, § 95.

HARMLESS ERROR.

In civil actions, see Appeal and Error, §§ 1039–1056.
In criminal prosecutions, see Criminal Law, § 1166½.

HEIRS.

Right to set aside probate of will, see Wills, § 229.

HIGHWAYS.

Crossing by railroads, see Railroads, §§ 93, 320–350.
Rights in and use of highways by railroads, see Railroads, § 79.

HINDERING.

Creditors, by fraudulent transfers in general, see Fraudulent Conveyances.

HIRING.

Of premises, see Landlord and Tenant.

HOME.

See Domicile.

HOMICIDE.

Civil liability for causing death, see Death, § 31.

HUSBAND AND WIFE.

Citizenship of alien woman married to citizen, see Citizens, § 7.

HYPOTHECATION.

See Chattel Mortgages; Pledges.
Of vessels, see Maritime Liens.

IDENTIFICATION.

Of parties to written instrument, parol or extrinsic evidence, see Evidence, § 459.

IDENTITY.

Of invention affecting question of infringement of patent, see Patents, §§ 243–245.

ILLEGAL IMPRISONMENT.

See False Imprisonment.

ILLEGALITY.

Of contracts, see Contracts, § 131.

IMMIGRATION.

See Aliens, § 54.

IMMOVABLES.

Mortgages, see Mortgages.
Sales, see Vendor and Purchaser.

IMMUNITY.

From liability for loss of or injury to goods, see Shipping, § 140.

IMPEACHMENT.

Of witness, see Witnesses, § 389.

IMPLIED CONTRACTS.

See Money Received; Work and Labor.

IMPLIED WARRANTY.

On sale of personal property, see Sales, § 271.

IMPORTS.

Duties, see Customs Duties.

IMPRISONMENT.

See Bail; False Imprisonment.
Release on habeas corpus, see Habeas Corpus.

IMPROVEMENTS.

Liens, see Mechanics' Liens.
Public improvements, see Municipal Corporations, § 350.

INCLOSURE.

Of public land, see Public Lands, § 19.

INCOME.

Of carriers affecting right to regulate charges, see Carriers, § 12.

INCONSISTENCY.

Statements by witnesses inconsistent with testimony as ground for impeachment, see Witnesses, § 389.

INCUMBRANCES.

See Mechanics' Liens; Mortgages.

INDEBTEDNESS.

Of corporations in general, see Corporations, § 481.
Of municipal corporations, see Municipal Corporations, §§ 878, 905.

INDEMNITY.

See Principal and Surety.

INDIANS.

Judicial notice, see Evidence, § 15.

§ 13. Act April 23, 1904, c. 1489, 33 Stat. 297, which authorizes the Secretary of the Interior to rectify mistakes and cancel patents to Indian allottees during the whole of the trust period for defects therein expressly mentioned, was not intended to render the general statute of limitations inapplicable by retaining jurisdiction over the lands during the whole of the trust period, except in the cases specified, and a suit by the United States to cancel such patents on other grounds is subject to the limitation of six years from the date of their issuance imposed by Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 (U. S. Comp. St. 1901, p. 1521), on suits generally to cancel patents.—La Clair v. United States (C. C.) 128.

§ 13. The adoption into the Yakima Tribe of Indians of Indians of Yakima half blood, for the express purpose of having them share in the allotments of lands as members of the tribe, which was done with the knowledge and approval of the agents of the Interior Department, *held* sufficient to uphold the patents issued to such allottees.—La Clair v. United States (C. C.) 128.

§ 13. The fact that the parents of allottees of land on the Yakima Indian reservation had received allotments on the Puyallup reservation as heads of families *held* not to invalidate the allotments to the children who had subsequently been adopted into the Yakima Tribe.—La Clair v. United States (C. C.) 128.

§ 13. Where the Interior Department by its officers and agents has recognized the right of Indians to allotments of land as members of a tribe, after full investigation with full knowledge of the facts and without fraud, and allotments have been made and patents issued to the allottees, the department is without authority to subsequently cancel such patents because of a change in its interpretation of the law; nor is there any equity which warrants a court in canceling the patents at suit of the government, the allotments being satisfactory to the tribe from whose lands they were made.—La Clair v. United States (C. C.) 128.

INDICTMENT AND INFORMATION.

See Grand Jury.

Against particular classes of persons.

Clerks of government land offices, see United States, § 52.

For particular offenses.

See Perjury, §§ 19–26.

Discrimination and overcharge by carrier, see Carriers, § 38.

Receiving compensation by land office clerk for services to entryman, see United States, § 52.

Wrongfully inclosing public land, see Public Lands, § 19.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 121. An indictment charging an unlawful inclosure of public lands by posts and wire fences *held* not so indefinite as to require a bill of particulars.—Simpson v. United States (C. C. A.) 817.

INDORSEMENT.

Of bill of exchange or promissory note, see Bills and Notes, § 253.

INFANTS.

See Guardian and Ward.

Care required of infant servant, see Master and Servant, § 230.

Care required of master as to infant servant, see Master and Servant, § 153.

INFORMATION.

Criminal accusation, see Indictment and Information.

INFRINGEMENT.

Of copyright, see Copyrights, §§ 55–87.

Of patent, see Patents, §§ 243–328.

Of trade-mark or trade-name, see Trade-Marks and Trade-Names, § 97.

INJUNCTION.

Incidental to particular remedies or proceedings.

See Specific Performance, § 108.

Relief against particular acts or proceedings.

Enforcement of judgment, see Judgment, § 419.

Enforcement of rates prescribed by interstate commerce commission, see Commerce, § 96.

Enforcement of regulations in respect to interstate transportation, see Carriers, § 18.

Infringement of trade-mark, see Trade-Marks and Trade-Names, § 97.

Judicial proceedings, concurrent and conflicting jurisdiction of state and federal courts, see Courts, § 508.

Review of proceedings for injunction.

Decisions reviewable, see Appeal and Error, § 954.

II. SUBJECTS OF PROTECTION AND RELIEF.

(B) Property, Conveyances, and Incumbrances.

§ 52. Equity will take jurisdiction of a suit to restrain the cutting and removal of growing trees regardless of the question of defendant's insolvency.—Bettes v. Brower (D. C.) 342.

(D) Corporate Franchises, Management, and Dealings.

Mandatory injunction to compel delivery of stock in reorganized company, see Corporations, § 575.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

Review of decisions, see Appeal and Error, § 954.

(A) Grounds and Proceedings to Procure.

§ 146. Where the equities of a bill are fully and specifically denied by a sufficient answer under oath, the court usually denies an injunction pendente lite for the reason that such an answer is deemed to overcome the equities of the bill.—Woodside v. Tonopah & G. R. Co. (C. C.) 358.

VIII. LIABILITIES ON BONDS OR UNDERTAKINGS.

§ 244. Under the law of Colorado, where an injunction bond is conditioned as provided by Code Civ. Proc. Colo. § 147, no action can be maintained against the surety thereon prior to an award or assessment of damages against the principal, unless they are joined as defendants as permitted by section 161 of such Code. —Wirt v. Peck (C. C. A.) 54.

INJURIES.

In general, see Damages; Negligence.

IN PAIS.

Estoppel, see Estoppel, § 69.

INSOLVENCY.

See Bankruptcy.

Of corporations in general, see Corporations, § 553–557.

Of grantor, element of fraud as to creditors or subsequent purchasers, see Fraudulent Conveyances, § 62.

INSTRUCTIONS.

By court to jury, see Trial, §§ 253–290.

By master to servant, see Master and Servant, §§ 150–153.

INSTRUMENTS.

Parol or other extrinsic evidence, see Evidence, § 459.

Requisites and sufficiency of writing to satisfy statute of frauds, see Frauds, Statute of, § 115.

Particular classes of written instruments.

See Bills and Notes; Chattel Mortgages; Indictment and Information; Insurance; Mortgages; Wills.

Patents for public lands, see Public Lands, § 114.

INSURANCE.

Contracts for payment of annuities, see Annuities.

Maritime lien for insurance premiums, see Maritime Liens, § 13.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

Annuity contract, see Annuities, § 1.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(A) Marine Insurance.

§ 478. Libel on a marine policy *held* not subject to exception as stating a loss within the exception of a particular average clause, as a matter of law.—Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co. (D. C.) 947.

§ 478. "Warranted free from particular average" defined.—Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co. (D. C.) 947.

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

Action by insurer as real party in interest, see Parties, § 6.

§ 606. An employer's liability insurer which had paid a loss to the assured incurred by the killing and injury of employés through the negligence of a third person *held* entitled in right of subrogation to maintain an action over against such person.—Travelers' Ins. Co. v. Great Lakes Engineering Works Co. (C. C. A.) 426.

§ 606. In an action by an employer's liability insurer, which has paid a loss incurred by the assured through the death of an employé, to recover in right of subrogation from a third person whose negligence caused such death, it is not essential to the right of recovery that a judgment should have been recovered against the assured before the claim was paid.—Travelers' Ins. Co. v. Great Lakes Engineering Works Co. (C. C. A.) 426.

§ 606. The doctrine of subrogation which gives a fire or marine insurer, who has paid a loss to the assured, a right of action against any other person responsible for the loss, is equally applicable to cases of employer's liability insurance.—Travelers' Ins. Co. v. Great Lakes Engineering Works Co. (C. C. A.) 426.

§ 606. An insurer of cargo becomes a surety for the faithful performance of the contract of the carrier whether such carrier be a common or special carrier, and, where the insurer has paid salvage on behalf of the cargo made necessary by the fault of the ship, it is no defense to a suit brought to recover the amount from the owner and charterer that under the terms of the insurer's contract he was not bound for the salvage because the ship deviated from her voyage.—British & Foreign Marine Ins. Co. v. Kilgour S. S. Co. (D. C.) 174.

XVIII. ACTIONS ON POLICIES.

§ 623. A contract limitation against an action on an insurance policy *held* not applicable to an action by insured on an award pursuant to an arbitration under the terms of the policy.—Fellman v. Royal Ins. Co. (C. C. A.) 577.

§ 623. A policy provision imposing a short limitation will be regarded as waived, if there is any reasonably sufficient evidence on which to base such finding.—Fellman v. Royal Ins. Co. (C. C. A.) 577.

INTENT.

As affecting character of improvement as fixture, see Fixtures, § 4.
As to change of domicile, see Domicile, § 4.

INTEREST.

See Usury.
Liability of trustees, see Trusts, § 219.

INTERLOCUTORY INJUNCTION.

See Injunction, § 146.

INTERNAL REVENUE.

Judicial notice of internal revenue regulations, see Evidence, § 47.

§ 8. A will devising and bequeathing the residuary estate of the testator in trust construed and the beneficiaries *held* to have taken a vested interest which became subject to legacy tax under War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307).—Title Guarantee & Trust Co. v. Ward (C. C. A.) 447.

§ 8. Under War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307) legacy taxes were "imposed" at the time they became due and payable one year after the testator's death within the meaning of the repealing act of April 12, 1902, c. 500, § 8, 32 Stat. 97 (U. S. Comp. St. Supp. 1909, p. 876), which excepts from the effects of the repeal taxes imposed before the repealing act took effect, July 1, 1902, although such taxes may have been assessed after that date.—Title Guarantee & Trust Co. v. Ward (C. C. A.) 447.

§ 9. A manufacturer of ginger ale paste, distilling unnecessary alcohol from the oleoresin derived from percolation of alcohol and ginger root *held* engaged in rectifying, purifying, and refining distilled spirits and subject to internal revenue taxation under Rev. St. § 3244 (U. S. Comp. St. 1901, p. 2096).—United States v. S. Twitchell Co. (D. C.) 525.

§ 9. Manufacturer of ginger ale paste distilling unnecessary alcohol from oleoresin obtained in the manufacture of ginger ale paste *held* not exempt from internal revenue taxation under Rev. St. § 3246 (U. S. Comp. St. 1901, p. 2103), exempting apothecaries, etc.—United States v. S. Twitchell Co. (D. C.) 525.

§ 9. The phrase, "through continuous closed vessels and pipes until the manufacture thereof is complete," as used in Rev. St. § 3244 (U. S. Comp. St. 1901, p. 2096), defining rectifiers, *held* to relate to the exception in the section, to wit, "other than by original and continuous distillation from mash, wort or wash," etc.—United States v. S. Twitchell Co. (D. C.) 525.

§ 9. A distiller of alcohol from the dregs of ginger root remaining in the manufacture of fluid extract of ginger and used in repeating the process of extracting ginger from root *held* not exempt from internal revenue tax under Rev. St. § 3246 (U. S. Comp. St. 1901, p. 2103).—United States v. Hance (D. C.) 528.

§ 9. Under Rev. St. §§ 3232, 3244 (U. S. Comp. St. 1901, pp. 2091, 2096), a manufacturer of ginger extract by alcohol percolation, who distilled the dregs remaining to save the alcohol therein, which was used in repeating the process, *held* engaged in rectifying, purifying, and refining distilled spirits and was subject to internal revenue tax as such.—United States v. Hance (D. C.) 528.

§ 9. A distiller of alcohol from the dregs of ginger root to be reused in the manufacture of fluid extract of ginger or in the manufacture of medicinal preparations *held* not exempt from internal revenue taxation as an apothecary under Rev. St. § 3246 (U. S. Comp. St. 1901, p. 2103).—United States v. Smith, Kline & French Co. (D. C.) 532.

§ 9. Defendant engaged in separating alcohol from the dregs of ginger root in the manufacture of fluid extract of ginger by distillation *held* engaged in the business of rectifying, purifying, and refining distilled spirits and subject to internal revenue taxation under Rev. St. § 3244 (U. S. Comp. St. 1901, p. 2096).—United States v. Smith, Kline & French Co. (D. C.) 532.

§ 38. In a suit against an internal revenue collector to recover oleomargarine taxes, facts *held* to justify the amendment of the summons which ran against defendant as an individual, so as to direct it to the defendant in his official capacity or otherwise as might be necessary.—Hastings v. Herold (C. C.) 759.

§ 38. No suit lay at common law to recover taxes illegally assessed and paid; the right to do so being entirely statutory.—Hastings v. Herold (C. C.) 759.

§ 38. Rev. St. §§ 3221, 3226 (U. S. Comp. St. 1901, pp. 2087, 2088), relating to the recovery of internal revenue taxes wrongfully assessed, *held* applicable to special taxes collected under the acts regulating the manufacture and sale of oleomargarine.—Hastings v. Herold (C. C.) 759.

§ 38. Where internal revenue taxes on oleomargarine were alleged to have been wrongfully assessed and collected, a suit against the collector to recover the taxes could not be maintained in advance of an application to the Secretary of the Treasury to refund under Rev. St. § 3226 (U. S. Comp. St. 1901, p. 2088).—Hastings v. Herold (C. C.) 759.

§ 45. Under Rev. St. § 1047 (U. S. Comp. St. 1901, p. 727), the United States may not recover special taxes and penalties imposed on the person rectifying, purifying, and refining distilled spirits for a period longer than five years before suit brought.—United States v. Smith, Kline & French Co. (D. C.) 532.

INTERNATIONAL LAW.

See Aliens; Ambassadors and Consuls.

INTERPLEADER.

I. RIGHT TO INTERPLEADER.

§ 11. An order of interpleader in an action for conversion against a warehousing company in a federal court in Pennsylvania, and discharging defendant on bringing the property into court, *held* properly made under Act Pa. March 11, 1836 (P. L. 76).—Huxley v. Pennsylvania Warehousing & Safe Deposit Co. (C. C. A.) 705.

INTERPRETATION.

Of contracts, instruments, or judicial acts and proceedings.

See Statutes, § 219.
Assignments, see Assignments, § 10.
Constitutional provisions, see Constitutional Law, § 48.
Contracts of sale, see Vendor and Purchaser, § 54.
Instructions, see Trial, § 296.
Letters patent, see Patents, §§ 167–177.
Parol or extrinsic evidence to aid interpretation of written instruments, see Evidence, § 459.
Patents for public lands, see Public Lands, § 114.

INTERPRETERS.

Compensation as charge against vessel at harbor, see Shipping, § 194.

INTERROGATORIES.

In pleading in admiralty, see Admiralty, § 64.

INTERSTATE COMMERCE.

Power to regulate, see Commerce.
Regulation of transportation by carriers in general, see Carriers, § 38.

INTERVENTION.

In suit in equity, see Equity, § 114.
Interpleading, see Interpleader.
Right of interveners to question validity of appointment of receiver, see Receivers, § 56.

INTOXICATING LIQUORS.

IV. LICENSES AND TAXES.

Internal revenue tax, see Internal Revenue, §§ 9, 45.
Pledge or assignment of license by bankrupt, see Bankruptcy, § 188.

INVENTION.

See Patents, § 16.

INVESTMENT.

By trustees, see Trusts, § 217.

INVOLUNTARY BANKRUPTCY.

See Bankruptcy, §§ 54–91.

ISSUES.

In civil actions in general, see Equity, § 324.
Instructions ignoring, see Trial, § 253.
Judgment on trial of issues, see Judgment, § 256.
Presented for review on appeal, see Appeal and Error, § 171.

JOINDER.

Of causes of action in territorial court, see Courts, § 433.

JOINT ADVENTURES.

Splitting causes of action, see Action, § 53.

§ 5. In a suit for the dissolution of a joint adventure and for an accounting, complainants *held* not entitled to a receiver.—Bernitt v. Smith-Powers Logging Co. (C. C.) 139.

§ 8. Two out of three joint owners of property used in a joint adventure could not sue a third person for a debt due the joint enterprise.—Bernitt v. Smith-Powers Logging Co. (C. C.) 139.

JOINT TENANCY.

Partition of joint property, see Partition.

JUDGES.

See Courts.
Judicial powers and functions in general, and delegation thereof, see Constitutional Law, § 70.

JUDGMENT.

Practice in equity, see Equity, § 430.

Review.

See Appeal and Error; Criminal Law, §§ 1044–1199.
Finality for purpose of review, see Appeal and Error, § 80.
Judgment on appeal or writ of error, see Appeal and Error, §§ 1140–1213.

VI. ON TRIAL OF ISSUES.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

§ 256. A judgment, which purports to have been entered on the verdict of a jury, is not supported by the record, where that discloses no verdict, but shows a compulsory nonsuit.—Moss v. City of Pittsburgh (C. C. A.) 325.

VII. ENTRY, RECORD, AND DOCKETING.

§ 270. Findings and proceedings in a state court in a suit between a bankrupt's trustee and the bankrupt and his wife, in which a judgment was ordered in their favor but never entered, *held* inadmissible in resistance of the bankrupt's discharge.—In re Borg (D. C.) 640.

IX. OPENING OR VACATING.

Decree in equity, see Equity, § 430.
Review of proceedings, see Appeal and Error, § 113.

X. EQUITABLE RELIEF.

(A) Nature of Remedy and Grounds.

§ 419. The filing of a demurrer to the declaration on the merits by attorneys authorized to represent a defendant gave the court jurisdiction over the defendant, which was not affected by the subsequent striking of the demurrer from the files and the entering of a default by the court, so as to constitute ground for enjoining the enforcement of the judgment for want of jurisdiction.—Order of United Commercial Travelers of America v. Bell (C. C. A.) 298.

XIV. CONCLUSIVENESS OF ADJUDICATION.

Decision of appellate court as law of the case in lower court, see Appeal and Error, § 1195.
Former decision in same case as law of the case, see Appeal and Error, §§ 1097, 1099.

XVII. FOREIGN JUDGMENTS.

§ 828. Where complainant elected to test in the state court the legality of certain taxes, a decree confirming the taxes was res judicata, and precluded a retrial of the question in the federal courts.—Susquehanna Coal Co. v. City of South Amboy (C. C.) 941.

XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.

Pending appeal or other proceeding for review, see Appeal and Error, § 479.

JUDICIAL DISCRETION.

Allowance of supersedeas or stay on appeal or writ of error, see Appeal and Error, § 479.
Review of discretion in civil actions, see Appeal and Error, § 954.

JUDICIAL LEGISLATION.

Encroachment by courts on legislative functions, see Constitutional Law, § 70.

JUDICIAL NOTICE.

In civil actions, see Evidence, §§ 15–47.

JUDICIAL OFFICERS.

See United States Commissioners.

JUDICIAL POWER.

See Constitutional Law, § 70.

JUDICIAL SALES.

Of property of bankrupts, see Bankruptcy, §§ 258–262.
On execution, see Execution, § 320.

JURISDICTION.

Acquisition by appearance, see Appearance, § 19.
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 States court, see Removal of Causes.
Want of jurisdiction as ground for remand of cause to state court, see Removal of Causes, § 102.

Jurisdiction of particular actions or proceedings.

By or against trustees in bankruptcy, see Bankruptcy, § 293.
Cancellation of certificate of naturalization, see Aliens, § 71½.
To appoint receiver, see Receivers, § 29.

Jurisdiction of particular classes of persons.

See Corporations, § 393.
Trustees in bankruptcy, see Bankruptcy, § 293.

Jurisdiction of particular species of property or estates.

Bankrupts' estates, see Bankruptcy, § 293.

Special jurisdictions and jurisdictions of particular classes of courts.

Admiralty jurisdiction, see Admiralty, §§ 1–5; Maritime Liens, § 60.
Federal courts in general, see Courts, §§ 276–433.
Of United States commissioners, see United States Commissioners, § 5.
Supervision of corporations in general, see Corporations, § 393.

JURY.

See Grand Jury.
Instructions, see Trial, §§ 253–296.
Verdict in civil actions, see Trial, § 342.

II. RIGHT TO TRIAL BY JURY.

§ 14. Naturalized alien *held* not entitled to a jury trial of a proceeding by the United States to cancel his certificate.—United States v. Luria (D. C.) 643.

KNOWLEDGE.

Of defect or danger as affecting contributory negligence of person injured on or near railroad tracks, see Railroads, § 384.

Of defect or danger in machinery and appliances as affecting liability of master for injuries to servant, see Master and Servant, § 125.
Prior knowledge affecting anticipation of invention, see Patents, §§ 58–62.

LABOR.

See Master and Servant; Seamen; Work and Labor.
Liens on real property for work and materials, see Mechanics' Liens.
Salvage services, see Salvage.

LABORERS.

Exclusion of Chinese laborers, see Aliens, § 24.

LACHES.

In equity, see Equity, §§ 85, 114.

LANDLORD AND TENANT.

Fixtures as between landlord and tenant, see Fixtures, § 14.
Lease by guardian, see Guardian and Ward, § 44.
Liability of reversion to mechanic's lien, see Mechanics' Liens, §§ 23, 78.
Notice of protest by lessor to prevent mechanic's lien, see Mechanics' Liens, § 78.

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(D) Repairs, Insurance, and Improvements.

Election of remedies, see Election of Remedies, § 7.
Fixtures as between landlord and tenant, see Fixtures, § 14.
Mechanic's lien for improvement, see Mechanics' Liens, §§ 23, 78.

§ 157. Contract construed, and *held* to require defendant to fill certain land within the crib of a dock, and also certain adjoining premises as well.—Susswein v. Pennsylvania Steel Co. (C. C.) 102.

§ 157. Covenants in a lease by which the lessor was to pay the lessee $3,500 on the lessee's completion of a dock, and the lessee agreed to do certain necessary grading, *held* independent so that the lessor's failure to pay was no excuse for the lessee's default.—Susswein v. Pennsylvania Steel Co. (C. C.) 102.

§ 157. Dismissal of a lessor's counterclaim for the lessee's failure to do certain grading, as premature, in a suit by the lessee to recover certain money from the lessor, *held* not to release the lessee from its covenant to grade.—Susswein v. Pennsylvania Steel Co. (C. C.) 102.

§ 157. Under a covenant in a lease requiring defendant to grade certain land from Y. avenue to a dock, defendant was bound to bring such land to a uniform grade.—Susswein v. Pennsylvania Steel Co. (C. C.) 102.

§ 159. In an action for breach of a covenant in a lease by which the lessee agreed to fill the crib of a dock and adjoining premises, the measure of damages is the cost of the repairs.—Susswein v. Pennsylvania Steel Co. (C. C.) 102.

§ 159. Where a lease provided that the lessee should do certain grading on the leased premises which he failed to do, the lessor's damages would date from the lessee's actual removal from the land and not from the date of the lessor's notice of default.—Susswein v. Pennsylvania Steel Co. (C. C.) 102.

VIII. RENT AND ADVANCES.

Claims provable against estate of bankrupt, see Bankruptcy, § 318.
Right to rents and profits of mortgaged property, see Mortgages, § 199.

LANDS.

Conveyance, see Vendor and Purchaser.
Indian lands, see Indians, § 13.
Mortgage, see Mortgages.
Public lands, see Public Lands.

LATENT DEFECTS.

In machinery, appliances, and places for work as affecting assumption of risk by servant, see Master and Servant, § 219.

LAUNDRIES.

Corporations subject to adjudication as bankrupts, see Bankruptcy, § 72.

LAW.

Due process of law, see Constitutional Law, §§ 208–311.
Maritime law, see Maritime Liens; Pilots; Salvage; Seamen; Shipping; Towage.
Statutory law, see Statutes.

LAW OF THE CASE.

Former decision on appeal, see Appeal and Error, §§ 1097, 1099, 1195.

LAWYERS.

See Attorney and Client.

LEASE.

See Landlord and Tenant.
By guardian, see Guardian and Ward, § 44.

LEGACIES.

See Wills.

LEGAL RESIDENCE.

See Domicile.

LEGISLATION.

In general, see Statutes.

LEGISLATIVE POWER.

See Constitutional Law, §§ 55–62.

LETTERS.

See Post Office.

LETTERS PATENT.

For inventions, see Patents.
For public lands, see Public Lands, § 114.

LEX LOCI.

Conflicting jurisdiction of courts, see Courts, § 508.

LIBEL.

In action for injuries to seaman, see Seamen, § 29.

LIBERTY.

Constitutional guaranty of liberty to contract, see Constitutional Law, § 89.

LICENSES.

I. FOR OCCUPATIONS AND PRIVILEGES.

Mandatory injunction to compel delivery of stock in reorganized company, see Corporations, § 575.

II. IN RESPECT OF REAL PROPERTY.

Injuries to licensees on or about railroads, see Railroads, §§ 275–282.

LIENS.

Effect of proceedings in bankruptcy, see Bankruptcy, §§ 188–215.

Particular classes of liens.

See Maritime Liens; Mechanics' Liens; Pledges.
Of attorney for compensation, see Attorney and Client, § 192.

LIFE INSURANCE.

See Insurance.

LIMITATION.

Of claims of patents, see Patents, §§ 167–177.

LIMITATION OF ACTIONS.

See Adverse Possession.
Contract limiting time to sue on insurance policies, see Insurance, § 623.
Laches, see Equity, § 85.
To recover penalty for violation of internal revenue laws, see Internal Revenue, § 45.

I. STATUTES OF LIMITATION.

(A) Nature, Validity, and Construction in General.

§ 11. The rule that limitation cannot be invoked against the United States does not apply where the government is not the real party in interest, but, if successful, the litigation must inure to the benefit of private individuals.—La Clair v. United States (C. C.) 128.

(B) Limitations Applicable to Particular Actions.

§ 19. An action brought in the state of Washington to recover land which had been occupied and used by a railroad company as right of way for 18 years *held* barred by limitation.—Nielsen v. Northern Pac. R. Co. (C. C. A.) 601.

II. COMPUTATION OF PERIOD OF LIMITATION.

(H) Commencement of Action or Other Proceeding.

Enforcement of mechanic's lien, see Mechanics' Liens, § 260.

§ 118. A suit is commenced by the filing of the bill if there is no unreasonable delay in issue or service of subpœna.—Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. A.) 199.

LIMITATION OF LIABILITY.

Of carrier in respect to goods, see Carriers, § 149½.
Of shipowner, see Shipping, § 140.

LIQUIDATION.

In general, see Bankruptcy.
Of corporations in general, see Corporations, §§ 553–557.
Of duties on imports, see Customs Duties, § 81.

LIS PENDENS.

§ 22. Notice of lis pendens is not given to a bona fide purchaser until subpœnas are served on material defendants.—Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. A.) 199.

LITERARY PROPERTY.

See Copyrights.

LIVE STOCK.

Carriage of, see Carriers, §§ 211–223.

LOANS.

Usurious loans, see Usury.

LOGS AND LOGGING.

Restraining cutting or removal of timber, see Injunction, § 52.

MACHINERY.

Annexation to real property, see Fixtures.

MAIL.

See Post Office.

MALICIOUS PROSECUTION.

See False Imprisonment.

MANDATE.

To lower court on decision on appeal or other proceeding for review, see Appeal and Error, §§ 1195–1213.

MARINE INSURANCE.

See Insurance, §§ 478, 606.

MARITIME CONTRACTS.

For carriage of passengers, see Shipping, § 166
Limitation of liability for loss of or injury to goods, see Shipping, § 140.

MARITIME LAW.

See Admiralty; Collision; Maritime Liens; Pilots; Salvage; Seamen; Shipping; Towage.

MARITIME LIENS.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

(A) Under Maritime Law.

§ 13. A lien does not attach to a vessel for the premiums paid by a broker on a contract of insurance obtained at the request of the owner.—The Mame (D. C.) 968.

(B) Under Statutory Provisions.

§ 24. One furnishing coal to a domestic vessel in New Jersey, which is used by the vessel in the ordinary course of her business, is entitled to a lien therefor under the state statute (2 Gen. St. 1895, p. 1966, § 46), which may be enforced by a court of admiralty; the presumption being that credit was given to the vessel.—Hitchings v. Olsen (C. C. A.) 305.

II. CREATION, OPERATION, AND EFFECT.

§ 38. Under Rev. St. § 4192 (U. S. Comp. St. 1901, p. 2837), a bill of sale of a New Jersey vessel to a resident of New York not recorded as required by such section is invalid to defeat a lien for supplies furnished the vessel in New Jersey by one having no actual knowledge of the sale under the New Jersey statute. (2 Gen. St. 1895, p. 1966, § 46).—Hitchings v. Olsen (C. C. A.) 305.

III. ENFORCEMENT.

(A) In Admiralty.

§ 60. A lien on a vessel for supplies given by a state statute cannot be enforced by a proceeding in rem in a state court if the vessel is one employed on the navigable waters of the United States, but such proceeding can only be maintained in a court of admiralty.—Hitchings v. Olsen (C. C. A.) 305.

MARITIME TORTS.

Delay in delivery of or loss of or injury to goods shipped, see Shipping, §§ 120–140.
Injuries to passengers on vessels, see Shipping, § 166.
Liabilities of vessels and owners in general, see Shipping, § 84.
Loss of or injury to tow, see Towage, § 11.

MARK.

See Trade-Marks and Trade-Names.

MARRIED WOMEN.

Citizenship of alien woman married to citizen, see Citizens, § 7.

MASTER AND SERVANT.

See Seamen.
Implied liabilities for services rendered not in performance of duties of employment, see Work and Labor.

I. THE RELATION.

(B) Statutory Regulation.

Interstate commerce regulations, see Commerce, §§ 5, 27.

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

Of agent, see Principal and Agent, §§ 81–89.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

Interstate commerce regulations, see Commerce, §§ 5, 27.
Statutory actions for death, see Death, § 31.

(B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102. A master is bound to furnish reasonably safe and suitable instrumentalities for the work.—Atlantic Coast Line R. Co. v. Linstedt (C. C. A.) 36.

§§ 101, 102. A master is only required to exercise ordinary care to make the place in which machinery about which a servant is required to work reasonably safe.—Kyner v. Portland Gold Mining Co. (C. C. A.) 43.

§ 125. In an action for death of a servant, facts *held* insufficient to show actionable negligence.—Commonwealth Steel Co. v. McCash (C. C. A.) 882.

(D) Warning and Instructing Servant.

§ 150. A master is entitled to assume that a servant will not expose himself to dangers apparent, and that he will do nothing heedlessly to bring about his own injury.—Atlantic Coast Line R. Co. v. Linstedt (C. C. A.) 36.

§ 153. A master is bound to warn an inexperienced servant concerning the special hazards or dangers connected with the employment.—Atlantic Coast Line R. Co. v. Linstedt (C. C. A.) 36.

(F) Risks Assumed by Servant.

§ 205. A servant is entitled to presume that the duty to furnish reasonably safe and suitable instrumentalities for the work has been performed.—Atlantic Coast Line R. Co. v. Linstedt (C. C. A.) 36.

§ 219. In an action for injuries to a servant, plaintiff *held* to have assumed the risk of the absence of a guard about the drum and cable of a mine hoist.—Kyner v. Portland Gold Mining Co. (C. C. A.) 43.

(G) Contributory Negligence of Servant.

§ 230. In determining whether or not a brakeman was chargeable with contributory negligence in going between two cars to uncouple the same, whereby he was injured, his knowledge and experience in the work are proper elements to be considered.—Norfolk & W. R. Co. v. Hazelrigg (C. C. A.) 828.

(H) Actions.

Right of action for wrongful death, see Death, § 31.

Transfer of cause to federal court, see Removal of Causes, § 19.

§ 265. In an action for injuries to a servant, the burden is on plaintiff to affirmatively establish the master's negligence in failing to make the place in which machinery about which a servant was required to work reasonably safe.—Kyner v. Portland Gold Mining Co. (C. C. A.) 43.

§ 278. In an action for injuries to a servant, evidence *held* insufficient to warrant a finding of negligence of the engineer of a mine hoist in suddenly increasing the speed of the engine without signal or warning to plaintiff.—Kyner v. Portland Gold Mining Co. (C. C. A.) 43.

§ 278. Evidence *held* sufficient to make a prima facie case in an action by a brakeman against a railroad to recover for an injury resulting from the use of cars not equipped with automatic couplers, as required by Safety Appliance Act, § 2.—Norfolk & W. R. Co. v. Hazelrigg (C. C. A.) 828.

§ 286. In an action for injuries to a servant, evidence *held* to require submission of the issue of defendant's negligence to the jury.—Atlantic Coast Line R. Co. v. Linstedt (C. C. A.) 36.

§ 288. In an action for injuries to a servant involving the master's neglect to furnish suitable appliances, it is not enough to defeat a recovery to show that the danger was apparent, but it must also appear that the servant apprehended the danger, and appreciated the particular peril.—Atlantic Coast Line R. Co. v. Linstedt (C. C. A.) 36.

§ 288. In an action for injuries to a servant, evidence *held* to require submission of the issue of plaintiff's assumed risk to the jury.—Atlantic Coast Line R. Co. v. Linstedt (C. C. A.) 36.

§ 289. A brakeman *held* under the evidence not chargeable with contributory negligence as matter of law for going between cars to make a coupling, when, owing to defects in the coupler mechanism, it could not be operated from the side.—Norfolk & W. R. Co. v. Hazelrigg (C. C. A.) 828.

§ 291. In an action for injuries to a child employed in violation of Burns' Ann. St. Ind. 1908, § 8022, an instruction authorizing a recovery based on defendant employing plaintiff in violation of the statute, without requiring any proof to show a causal connection between the violation of the statute and the injury, *held* erroneous.—Steel Car Forge Co. v. Chec (C. C. A.) 868.

MASTERS IN CHANCERY.

See Equity, § 410.

MASTERS OF VESSELS.

See Shipping, § 63.

MATERIALS.

Liens on real property for materials furnished, see Mechanics' Liens.

MECHANICS' LIENS.

Liens for construction and repair of vessels, see Maritime Liens.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

§ 10. Personal property is not liable for a mechanic's lien.—Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. A.) 199.

II. RIGHT TO LIEN.

(A) Nature of Improvement.

§ 23. The reversion of a lessor *held* not liable to a mechanic's lien for the price of insulation put on the premises by the lessee.—Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. A.) 199.

(C) Agreement or Consent of Owner.

§ 78. The record of a lease is notice to a subsequent contractor with the lessee of the

terms of the lease pertinent to the question of a mechanic's lien on the reversion of the lessee.—Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. A.) 199.

(D) Persons Entitled in General.

§ 93. Where a contractor was prevented from continuing performance of a contract by the owner's failure to make payments as they matured, it was entitled to foreclose a mechanic's lien for the amount due in an action on the contract, and was not limited to its remedy on quantum meruit.—Hobbs v. Head & Dowst Co. (C. C. A.) 409.

III. PROCEEDINGS TO PERFECT.

§ 154. Under Code W. Va. 1906, c. 75, and chapter 130, § 31, it is essential to the validity of a mechanic's lien that the statement filed, when verified before a notary of another state, should have attached the certificate of the clerk or some officer of a court of record of such state authenticating the signature of the notary and his authority to administer oaths.—Tygart Valley Brewing Co. v. Vilter Mfg. Co. (C. C. A.) 845.

§ 154. "Verification," as contemplated by Code W. Va. 1906, c. 130, § 31, relating to mechanics' liens, defined.—Tygart Valley Brewing Co. v. Vilter Mfg. Co. (C. C. A.) 845.

VII. ENFORCEMENT.

§ 245. A suit to enforce a mechanics' lien is in the federal courts, a suit in equity, and not an action at law.—Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. A.) 199.

§ 246. A mechanic's lien is purely statutory, and, where the complainant in a suit to enforce such a lien has failed to perfect it in the manner required by the statute, the court cannot establish a lien on equitable considerations, however meritorious the claim may be.—Tygart Valley Brewing Co. v. Vilter Mfg. Co. (C. C. A.) 845.

§ 260. Filing of original bill in suit to foreclose mechanics' lien *held* the commencement of the suit, and an amended bill related back to that time, so that the suit was not barred by laches though subpœnas were not issued until three days after the time to commence suit had expired.—Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. A.) 199.

MEMBERS.

Of corporations in general, see Corporations, §§ 245–265.

MEMORANDA.

Required by statute of frauds, see Frauds, Statute of, § 115.

MISREPRESENTATION.

Grounds for refusal of discharge in bankruptcy, see Bankruptcy, § 407.

MISTAKE.

In detention and return of immigrants excluded, see Aliens, § 54.

MODIFICATION.

Of contract, see Contracts, § 237.

MONEY LENT.

Bill or note given for loan of money, see Bills and Notes.
Usurious loans, see Usury.

MONEY PAID.

Recovery of payments in general, see Payment, § 82.

MONEY RECEIVED.

Recovery of payments in general, see Payment, § 82.

§ 1. Plaintiff, in order to recover for money received, must show that defendant holds money which in equity and good conscience belongs to plaintiff.—The John Francis (D. C.) 746.

MORTGAGES.

By or to corporations, see Corporations, § 481.
Fixtures as between mortgagee and mortgagor or others, see Fixtures, § 18.
Of personal property in general, see Chattel Mortgages.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§ 32. Absolute conveyance by a bankrupt to his wife to secure her for money alleged to have been contributed to the erection of buildings on the property, as against bankrupt's subsequent creditors, *held* mortgage.—In re Borg (D. C.) 640.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 199. A mortgagee has no interest in the property, or in the profits to be derived therefrom, except to have it sold for his debt, so long as it remains adequate security.—Primeau v. Granfield (C. C.) 480.

MOTIONS.

For particular purposes or relief.

See Injunction, § 146.
Extension of time to answer as general appearance, see Appearance, § 9.
Presentation of objections for purpose of review, see Criminal Law, § 1044.
Relating to pleadings, see Pleading, § 359.
Striking out evidence, see Trial, § 89.

§ 8. An ex parte order extending defendants' time to plead, signed by the judge as he

was leaving the courthouse, *held* valid.—Murphy v. Herring-Hall-Marvin Safe Co. (C. C.) 495.

MOTIVE.

Evidence in prosecution for mailing obscene letters, see Post Office, § 49.

MUNICIPAL CORPORATIONS.

IX. PUBLIC IMPROVEMENTS.

(C) Contracts.

§ 350. A city may be estopped to claim that certain of its acts in contracting for waterworks were ultra vires.—Wykes v. City Water Co. of Santa Cruz (C. C.) 752.

(D) Damages.

Compensation or damages for property taken under power of eminent domain, see Eminent Domain.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

Rights in and use of streets by railroads, see Railroads, § 79.
Street and railroad crossings, see Railroads, § 93.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(A) Power to Incur Indebtedness and Expenditures.

§ 878. A city *held* estopped to claim that certain bonds issued by a water company for property which the city thereafter acquired were ultra vires.—Wykes v. City Water Co. of Santa Cruz. (C. C.) 752.

(B) Administration in General, Appropriations, Warrants, and Payment.

§ 905. In a suit on municipal warrants, facts alleged *held* insufficient to show a breach of contract on the part of the city, or to entitle plaintiff to mandamus to compel a higher levy to provide funds to pay the warrants.—First Nat. Bank of Central City v. City of Port Townsend, Wash. (C. C. A.) 574.

NAMES.

See Trade-Marks and Trade-Names.

NATIONAL GOVERNMENT.

See United States.

NATURALIZATION.

See Aliens, § 71½.

NAVIGABLE WATERS.

See Pilots; Shipping.
Collision between vessels, see Collision.

NAVIGATION.

See Collision; Maritime Liens; Pilots; Salvage; Shipping; Towage.
Administration of maritime law, see Admiralty.
Marine insurance, see Insurance, § 478.

NEGLIGENCE.

Causing death, see Death, § 31.

By particular classes of persons.

See Carriers, §§ 149½, 280–321; Railroads, §§ 275–282, 320–350, 384, 473.
Creditors, as release of sureties, see Principal and Surety, § 123.
Employers, see Master and Servant, §§ 101, 102–291.
Shipowners, see Shipping, §§ 84, 120–140, 166.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See Railroads, §§ 275–282, 320–350, 384, 473.
Carrier's premises, see Carriers, § 286.
Tools, machinery, appliances, and places for work, see Master and Servant, §§ 101, 102–125.
Vessels, see Collision; Shipping, §§ 84, 120–140, 166; Towage, § 11.

Injuries to particular species of property.

Goods shipped, see Shipping, §§ 120–140.
Vessels, see Collision; Towage, § 11.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(C) Condition and Use of Land, Buildings, and Other Structures.

Carrier's premises, see Carriers, § 286.
Tools, machinery, appliances, and places for work, see Master and Servant, §§ 101, 102–125.
Vessels, see Collision.

II. PROXIMATE CAUSE OF INJURY.

§ 56. Violation of certain penal statutes, though negligence per se, does not constitute actionable negligence, unless the proximate cause of the injury.—Steel Car Forge Co. v. Chec (C. C. A.) 868.

III. CONTRIBUTORY NEGLIGENCE.

Of person injured by operation of railroad, see Railroads, §§ 324, 384.
Of servants, see Master and Servant, §§ 230, 289.

IV. ACTIONS.

(B) Evidence.

Acts and statements accompanying or connected with transaction as constituting part of res gestæ, see Evidence, § 123.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.
Municipal warrants or certificates of indebtedness, see Municipal Corporations, § 905.

NEW PARTIES.

See Parties, § 59.

NEW TRIAL.

Granted by appellate court, see Appeal and Error, § 1213.

NONRESIDENCE.

See Domicile.
Appearance by nonresident, see Appearance, § 19.

NOTES.

Promissory notes, see Bills and Notes.

NOTICE.

Judicial notice, see Evidence, §§ 15–47.

As affecting particular classes of persons.

See Corporations, § 428; Railroads, § 473.
Sureties, see Principal and Surety, § 123.

As affecting particular rights, duties, and liabilities.

Liability for fire caused in operation of railroad, see Railroads, § 473.
Liability of corporation in general as affected by notice to officers or agents, see Corporations, § 428.
Liability of surety, see Principal and Surety, § 123.

Of particular facts, acts, or proceedings not judicial.

Claim for injuries from fire caused in operation of railroads, see Railroads, § 473.
To surety, of default of principal, see Principal and Surety, § 123.

Of particular judicial proceedings.

Appointment of receiver in bankruptcy, see Bankruptcy, § 114.
Taking deposition, see Depositions, § 56.

NOVATION.

Modification of contracts in general, see Contracts, § 237.

NOVELTY.

Patentable novelty, see Patents, § 45.

OATH.

False swearing, see Perjury.

OBJECTIONS.

Removal of cause as waiver of objections to jurisdiction or service of process of state court, see Removal of Causes, § 112.

In judicial proceedings.

Necessity and sufficiency for purpose of review in criminal prosecutions, see Criminal Law, § 1044.
Setting forth objections in bill of exceptions, see Exceptions, Bill of, § 8.
To evidence at trial, see Criminal Law, § 695.
To pleadings, see Equity, § 330.
To report on reference, see Equity, § 410.

OBSTRUCTIONS.

Of access to property as ground for compensation, see Eminent Domain, § 106.

OFFENSES.

See Criminal Law.

OFFER.

Of proof, see Trial, § 45.

OFFICERS.

Contracts to influence action of administrative officer, see Contracts, § 131.

Particular classes of officers.

See Receivers; United States Commissioners.
Attorneys, see Attorney and Client.
Interstate commerce commission, see Commerce, §§ 85–96.
Masters in chancery, see Equity, § 410.
Referees in bankruptcy, see Bankruptcy, § 229.
Trustees, see Trusts.
Trustees in bankruptcy, see Bankruptcy, §§ 136–363.
United States officers, see United States, § 52.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

Of receivers, see Receivers, §§ 29–58.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

Liability for false imprisonment, see False Imprisonment, §§ 2–7.
Of receivers, see Receivers, § 90.

OPENING.

Decree in equity, see Equity, § 430.
Execution sale, see Execution, § 256.

ORAL AGREEMENTS.

See Frauds, Statute of.

ORDERS.

Of interstate commerce commission, see Commerce, § 88.
Review of appealable orders, see Appeal and Error; Criminal Law, §§ 1044–1199.

ORGANIC LAW.

See Constitutional Law.

ORIGINAL BILL.

See Equity, § 132.

OWNERSHIP.

Of patents, see Patents, §§ 196–214.
Of property as affecting rights of trustees in bankruptcy, see Bankruptcy, § 140.

PAIS.

Estoppel in pais, see Estoppel, § 69.

PARENT AND CHILD.

See Guardian and Ward.

PAROL AGREEMENTS.

See Frauds, Statute of.

PAROL EVIDENCE.

In civil actions, see Evidence, § 459.

PARTICULARS.

Bill of, in criminal prosecutions, see Indictment and Information, § 121.

PARTIES.

As witnesses, cross-examination of, see Witnesses, § 275.
Character, ground of jurisdiction, see Courts, §§ 300–312.
In actions by or against stockholders, see Corporations, § 265.
In actions to enforce liability of stockholders for corporate debts and acts, see Corporations, § 265.
Interpleading, see Interpleader.
Joint interests, see Joint Adventures.
Parol or extrinsic evidence to identify parties, see Evidence, § 459.
Practice in equity, see Equity, § 114.
Rights and liabilities as to costs, see Costs.

I. PLAINTIFFS.

(A) Persons Who may or must Sue.

§ 6. Under Rev. St. Ohio 1908, § 4993, which requires actions to be prosecuted in the name of the real party in interest, an insurer, who by payment of a loss has been subrogated to a right of action of the assured against a third person, may maintain an action at law thereon in its own name.—Travelers' Ins. Co. v. Great Lakes Engineering Works Co. (C. C. A.) 426.

III. NEW PARTIES AND CHANGE OF PARTIES.

Interpleading, see Interpleader.
Intervention in equity, see Equity, § 114.

§ 59. In a suit to recover for the conversion of certain funds belonging to plaintiff by decedent, plaintiff *held* entitled to amend by making decedent's widow a party in her individual capacity.—Hannum v. Jerome (C. C.) 179.

PARTITION.

Of Indian lands, see Indians, § 13.

II. ACTIONS FOR PARTITION.

(B) Proceedings and Relief.

§ 63. Where, in partition, complainants claimed part of the land in possession of certain of the defendants, they were bound to establish an identity so as to enable the court to place them in possession of the portion which they should recover.—Woods v. Woods (C. C.) 159.

§ 70. In a suit for partition, the court *held* authorized to submit certain questions of title to a jury.—Woods v. Woods (C. C.) 159.

§ 83. In a suit for partition and for an accounting, equity *held* to have jurisdiction, though the case involved a determination of the validity of certain adverse claims of defendants.—Woods v. Woods (C. C.) 159.

PARTNERSHIP.

See Joint Adventures.
Claims against bankrupt partnership, see Bankruptcy, § 309.
Priorities between partnership and individual creditors of bankrupt, see Bankruptcy, § 351.
Right to discharge in bankruptcy, see Bankruptcy, §§ 404, 407.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Representation of Firm by Partner.

False statements by partner as grounds for refusal of discharge of partnership in bankruptcy, see Bankruptcy, § 407.

PART PERFORMANCE.

Recovery on quantum meruit for part performance of services where contract is rescinded or abandoned, see Work and Labor, § 14.

PASSENGERS.

See Carriers, §§ 280–321; Shipping, § 166.

PATENTS.

For public lands, see Public Lands, § 114.

II. PATENTABILITY.

(A) Invention.

§ 16. Changes in degree, proportion, or symmetry in a machine where it does the same thing in the same way and by substantially the same means, although it may produce better results, does not amount to patentable invention.—Torrey v. Hancock (C. C. A.) 61.

(B) Novelty.

§ 45. General public acceptance and use of a patented device is only a fact to be consider-

ed with all the other facts in the case on the issue of patentable novelty, and is most appropriately resorted to where that issue is in grave doubt.—Torrey v. Hancock (C. C. A.) 61.

(D) Anticipation.

§ 58. Where an anticipatory device is shown to have been in use prior to the application for a patent, the burden rests upon the patentee to carry the date of his invention back to a time antedating such use by satisfactory and convincing proof.—Torrey v. Hancock (C. C. A.) 61.

§ 58. A patentee is conclusively presumed to have been entirely familiar with all the prior art, as disclosed either by patents or prior devices.—Torrey v. Hancock (C. C. A.) 61.

§ 62. Where an anticipatory device is shown to have been in use prior to the application for a patent, oral testimony to carry the date of his invention back to a time antedating such use, given many years after the event, unsupported by physical exhibits, and which is in itself somewhat contradictory, is not sufficient. —Torrey v. Hancock (C. C. A.) 61.

§ 62. Prior use, in order to show anticipation of a patent, must be proved beyond a reasonable doubt, and it cannot be said to have been proved with such degree of certainty by oral testimony where it may be reasonably deduced from all the record that other and conclusive evidence might have been obtained and no effort was made to produce it nor to excuse the omission.—H. Mueller Mfg. Co. v. Glauber (C. C. A.) 609.

§ 65. Where the disclosures of a process patent in regard to the machines and method employed were so uncertain that they can only be spelled out tentatively, such patent is not an anticipation of a later one for a definitely described process.—Asbestos Shingle, Slate & Sheathing Co. v. H. W. Johns-Manville Co. (C. C.) 620.

§ 65. A patent must do more than make untested suggestions or pregnant surmises to constitute an anticipation of a later patent.—Asbestos Shingle, Slate & Sheathing Co. v. H. W. Johns-Manville Co. (C. C.) 620.

IV. APPLICATIONS AND PROCEEDINGS THEREON.

§ 101. A patent is granted for solving a problem, not for stating one, and a claim for a combination which embraces an element only in case it is made capable of being employed in the combination and without disclosing means of adapting it is invalid as disclosing nothing definite.—Columbia Motor Car Co. v. C. A. Duerr & Co. (C. C. A.) 893.

V. REQUISITES AND VALIDITY OF LETTERS PATENT.

§ 117. Where an applicant for a patent followed strictly the statutes and rules of procedure of the Patent Office, the courts cannot exact a greater measure of diligence from him, and the fact that he took advantage of the delays which the law permitted him cannot affect the consideration to which his patent is entitled when granted.—Columbia Motor Car Co. v. C. A. Duerr & Co. (C. C. A.) 893.

VII. REISSUES.

§ 141. A patent for the product of a process is for the same invention as the process itself, and a reissue of a process patent, containing a new claim for the product, is not a departure from the original invention.—Asbestos Shingle, Slate & Sheathing Co. v. H. W. Johns-Manville Co. (C. C.) 620.

§ 144. The ruling of the Patent Office, on an application for reissue, that the failure of the patentee to include certain features of his invention was due to accident or inadvertence or mistake, cannot be reviewed by the courts on the facts.—Asbestos Shingle, Slate & Sheathing Co. v. H. W. Johns-Manville Co. (C. C.) 620.

IX. CONSTRUCTION AND OPERATION OF LETTERS PATENT.

(B) Limitation of Claims.

§ 167. A patentee cannot read the specification into a claim for the purpose of changing it, or to escape anticipation or establish infringement, and much less can be read into it a feature not shown in either the specification or drawings.—H. Mueller Mfg. Co. v. Glauber (C. C. A.) 609.

§ 177. In patents for a combination if the patentee specifies any element as entering into the combination, either directly by the language of the claim or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial.—Electric Protection Co. v. American Bank Protection Co. (C. C. A.) 916.

X. TITLE, CONVEYANCES, AND CONTRACTS.

(B) Assignments and Other Transfers.

§ 196. An instrument granting the sole and exclusive license to manufacture, sell, and use a patented article, but reserving to the grantor the exclusive right to manufacture, sell, and use certain specific apparatus only, for certain purposes, although called a license, was in legal effect an assignment, with reservation of a license to the grantor.—Sirocco Engineering Co. v. Monarch Ventilator Co. (C. C.) 84.

(C) Licenses and Contracts.

§ 211. A contract granting a license under certain patents covering a process, and providing for the payment of a stipulated sum in lieu of royalties, if defendant should discontinue the use of such process "for any other" during the life of the patents, construed, and defendant *held* not to have become liable under such provision.—William F. Jobbins, Inc., v. Kendall Mfg. Co. (C. C.) 463.

§ 214. While the licensor under a patent may forfeit the license by a notice and without resort to a suit on default by the licensee, where the contract so provides, such a provision

does not preclude a court of equity from relieving against such a forfeiture at suit of the licensee if the default is only in failure to pay royalties promptly, and their payment, with interest, will fully compensate the licensor.—Foster Hose Supporter Co. v. Taylor (C. C. A.) 71.

XII. INFRINGEMENT.

(A) What Constitutes Infringement.

§ 243. In determining the question of infringement of a patent for a combination, it is necessary to look at the mode of operation or the way the device works, as well as at the result, and the means by which that result is attained.—Electric Protection Co. v. American Bank Protection Co. (C. C. A.) 916.

§ 245. A constant volume engine is not the equivalent of a constant pressure engine under a patent entitled to fair and reasonable, but not a broad, range of equivalents.—Columbia Motor Car Co. v. C. A. Duerr & Co. (C. C. A.) 893.

(C) Suits in Equity.

§ 310. A bill for infringement of a patent, alleging title in complainant, based on an instrument of transfer of several patents and containing reservations, if it does not appear that such reservations apply to the patent in suit, is not demurrable for want of title in complainant.—Sirocco Engineering Co. v. Monarch Ventilator Co. (C. C.) 84.

§ 311. Where a bill for infringement alleged that complainant had put its patent to practical use, had always been ready to supply the patented device to the public, and but for the infringement complained of would be in receipt of the profits therefrom, and also that defendant had continued to infringe after notice, it cannot be allowed, after the patent has been sustained and an accounting ordered, to claim that it never made or sold the patented article, and that therefore it had never been marked as required by Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388), and to recover profits and damages notwithstanding such want of notice.—Lorain Steel Co. v. New York Switch & Crossing Co. (C. C. A.) 301.

§ 324. In a suit in equity for infringement of different patents for the same or kindred inventions such as may be joined in one suit, where the bill is sustained as to some of the patents but dismissed as to others by an interlocutory decree, no appeal lies from that part of the decree which dismisses the bill as to some of the patents until after the final decree.—Electric Protection Co. v. American Bank Protection Co. (C. C. A.) 916.

§ 324. Where defendants are jointly sued for infringement, and the bill is dismissed as to some by an interlocutory decree which retains it as to others for a final decree and accounting, such decree is not final, and no appeal lies from that part dismissing the bill as to some of the defendants.—Electric Protection Co. v. American Bank Protection Co. (C. C. A.) 916.

§ 327. While the rule of comity, and the desirability of uniformity of decision, must incline a court to follow the decision of another court of co-ordinate jurisdiction sustaining a patent, such rule is not imperative, and does not apply where there is a substantial difference in the proofs.—Torrey v. Hancock (C. C. A.) 61.

XIII. DECISIONS ON THE VALIDITY, CONSTRUCTION, AND INFRINGEMENT OF PARTICULAR PATENTS.

ENGLAND.

1787.

1,622. Process showing how plaster may be added to the improvement of paper, cited..... 620

1853.

1,413. Fire proof paper, cited..... 620

1871.

3,108. Electrical safe protection system, cited 916

1880.

4,787. Purpose of treating slackwool, or slag, cited..... 620

1888.

3,708. Manufacture of fire-resisting material, cited..... 620

1895.

1,256. Machine to deliver a composition of fiber and cement from mixing vat, cited..... 620

1899.

18,747. Manufacture of fire-resisting material, cited..... 620

FRANCE.

293,247. Manufacture of fire-resisting material, cited..... 620

UNITED STATES.

ORIGINAL.

63,158. Electro-magnetic circuit-breaking clock, cited..... 916
109,193. Electro-magnetic apparatus for protecting safes, cited..... 916
129,913. Electro-magnetic apparatus for protecting safes, cited..... 916
130,216. Pipe-joint, cited..... 609
138,965. Electric alarm, cited..... 916
167,850. Double coupling-pipe, cited..... 609
192,654. Combined stop cock and coupling, cited 609
197,416. Electric burglar alarm, cited..... 916
208,246. Rotary disk plow, cited..... 61
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251,071. Electric alarm system, cited..... 916
264,763. Three wheeled sulky moldboard plow, cited..... 61
273,508. Three wheeled sulky moldboard plow, cited..... 61
287,775. Electric time lock, cited..... 916
296,722. Fire proof paper, cited..... 620

315,408. Electric burglar alarm, cited..... 916
322,317. Electric time lock, cited..... 916
335,822. Box fastening, cited..... 930
337,126. Pipe-connection, cited..... 609
370,439. Electric alarm system, cited..... 916
425,553. Unitary waste-pipe connection, cited 609
433,750. Pipe-joint, cited..... 609
453,183. Rotary disk cultivator, cited..... 61
458,647. Process of obtaining glycerine from soapmakers' waste, rights under license contract stated..... 463
458,648. Plant for treating soapmakers' waste to obtain glycerine, rights under license contract stated... 463
496,850. Rotary disk cultivator, cited..... 61
524,130. Process of making artificial asphalt, held not anticipated, valid and infringed..... 455
531,566. Rotary disk cultivator, cited..... 61
536,734. Railway switch structure, claim 1, held void for lack of invention; claim 6, as limited, held not infringed..... 326
539,878. Railway switch work, right to recover damage determined, 301, cited 326
540,796. Railway switch work, cited..... 326
546,560. Electric locomotive, cited..... 722
546,906. Pipe-joint, cited..... 609
549,160. Road engine, claim 1, construed, held valid and as limited not infringed 893
556,972. Rotary disk plow, held void for lack of invention..... 61
559,345. Typewriting machine, held infringed by patent No. 852,400 as to claims 17, 18 and 20, and not infringed as to claim 19..... 329
563,157. Paper-shell cartridge, held not infringed 333
570,906. Electric burglar alarm, claims 18 and 20, held void for lack of invention 916
582,137. Combination soft and hard metal pipe coupling, cited..... 609
595,181. Grab-hook, held void for incorrect specification and lack of novelty 720
595,231. Oil burner, held not infringed... 457
609,977. Electric railway motor, held valid and infringed..... 722
626,670. Electrical burglar alarm, cited... 916
626,684. Electrical safe protection system, cited 916
629,567. Fireproof and insulating material, cited..... 620
631,719. Refractory material, cited..... 620
633,672. Typewriting machine held not infringed by patent No. 852,400 329
638,540. Hose supporter, right to relief against forfeiture of licenses in equity stated..... 71
638,726. Letter or bill file, cited..... 930
652,439. Loose-leaf binder, cited..... 930
653,893. Oil burner, held not infringed... 457
657,712. Pipe-union, cited..... 609
667,123. Electric protective system, cited 916
667,662. Process of duplicating phonographic records, cited..... 75
668,562. Manufacture of fire-resisting material, cited..... 620
683,615. Method of duplicating phonographic records construed, and held not infringed..... 75
683,676. Apparatus for making duplicate phonographic records, claims 6 and 7 held void; claim 5 held not infringed..... 75
685,694. Pipe-union, cited..... 609
696,383. Pipe joint lock, cited..... 609
708,496. Electric burglar alarm, claims 1, 2, 3, 7, 8 and 10, construed, and held not infringed..... 916
736,338. Binding file, cited..... 930
746,052. Temporary binder, cited..... 930
769,078. Artificial stone plates, held not anticipated, valid, and infringed by patent No. 829,770..... 620
771,749. Burglar alarm, cited..... 916
776,298. One-piece faucet-coupling, cited.. 609
782,552. Unitary elbow-shaped coupling joint for pipes, held not anticipated, valid and infringed..... 609
794,827. Filing device, cited..... 930
806,702. Loose-leaf binder, held void for lack of patentable invention... 930
819,275. Locking device, cited..... 930
829,770. Artificial stone plates, held to infringe patent No. 12,594 (original No. 769,078)..... 620
831,668. Process of duplicating sound records, claims 3, 4, and 6 held limited and not infringed..... 75
852,400. Typewriting machine held not to infringe claim 19 and to infringe claims 17, 18, and 20 of patent No. 559,345; also held not to infringe patent No. 633,672 329
880,020. Vault lining for use in connection with an electrical alarm circuit, cited 916

REISSUED.

11,626. Electric burglar alarm, claims 18 and 20, held void for lack of invention 916
11,905. Oil burner, held not infringed... 457
12,594. Artificial stone plates, held not anticipated, valid, and infringed by patent No. 829,770..... 620
12,796. Centrifugal fan or pump, demurrer to bill for infringement overruled 84
12,797. Centrifugal fan or pump, demurrer to bill for infringement overruled 84
12,798. Centrifugal fan or pump, demurrer to bill for infringement overruled 84

PAYMENT.

Authority of attorney to receive payment for client, see Attorney and Client, § 98.

V. RECOVERY OF PAYMENTS.

Payments made by third person to defendant for use of plaintiff, see Money Received.
Payments of internal revenue taxes, see Internal Revenue, § 38.

§ 82. The rule that money voluntarily paid with knowledge of the facts cannot be recovered does not prevent a recovery of money paid on an illegal demand reluctantly in order that plaintiff might be able to get possession of his property.—The John Francis (D. C.) 746.

PENALTIES.

For taking or exacting usury, see Usury, § 137.
For violations of regulations relating to operation of railroads, see Railroads, § 254.

PENDENCY OF ACTION.

See Lis Pendens.

PERFORMANCE.

Of particular classes of duties or obligations.
Contract in general, see Contracts, § 305.
Principal contract for improvements on land as affecting right of contractor to mechanic's lien, see Mechanics' Liens, § 93.
Services by broker, see Brokers, §§ 49–54.

PERJURY.

II. PROSECUTION AND PUNISHMENT.

§ 19. Since, as before, the enactment of Rev. St. § 1025 (U. S. Comp. St 1901, p 720), providing that no indictment shall be held insufficient for defects in matter of form only, and section 5396 (U. S. Comp. St. 1901, p. 3655) relating to indictments for perjury every indictment for perjury in a federal court must contain allegations showing (a) judicial proceeding or course of justice; (b) that the defendant was sworn to give evidence therein; (c) the testimony given by him; (d) its falsity; and (e) its materiality to the issue on inquiry.—Hogue v. United States (C. C. A.) 245.

§ 26. An indictment under Rev. St. § 5392 (U. S. Comp. St. 1901, p. 3653), charging the defendant with perjury in falsely swearing that material changes were made in a certain document before he signed it is insufficient where it does not show the substance at least of the change which it is charged that he testified was made.—Hogue v. United States (C. C. A.) 245.

PERPETUATION OF TESTIMONY.

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PERSONAL INJURIES.

Causing death, see Death, § 31.

Particular causes or means of injury.
Acts or omissions of carrier, see Carriers, §§ 280–321; Shipping, § 166.
Defects in vessels or appliances, see Shipping, § 84.
Navigation of vessels, see Shipping, § 84.
Negligence in general, see Negligence.
Operation of railroads, see Railroads, §§ 275–282, 320–350, 384.

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Remedies.
See Damages.
Evidence admissible as part of res gestæ, see Evidence, § 123.

PERSONAL PROPERTY.

Annexation to real property, see Fixtures.
Mortgage, see Chattel Mortgages.
Pledge, see Pledges.
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PERSONS.

Constitutional guaranty of personal, civil, and political rights, see Constitutional Law, § 89.
Corporation as person entitled to privilege as witness, see Witnesses, § 293.

PETITION.

See Pleading.
For removal of cause to federal court, see Removal of Causes, § 89.

PETIT JURY.

See Jury.

PILOTS.

§ 3. An American steamer making voyages between United States ports on Puget Sound and San Francisco, although she touches at the foreign way port of Victoria, taking on freight and passengers for San Francisco, is a "coastwise steam vessel" within the meaning of Rev. St. § 4444 (U. S. Comp. St. 1901, p. 3037), and cannot be subjected to the payment of pilotage fees under Pol. Code Cal. §§ 2466, 2468, by a state pilot whose services were refused on her entry to the port of San Francisco.—The Queen (D. C.) 537.

PLEA.

In civil actions, see Pleading, § 85.

PLEADING.

Adoption by federal court of practice of state court, see Courts, § 347.
Indictment or criminal information or complaint, see Indictment and Information.
Practice in equity, see Equity, §§ 132–330.

Allegations as to particular facts, acts, or transactions.
See Usury, § 111.
Injuries from operation of railroad, see Railroads, § 345.
Insolvency of corporation, see Corporations, § 557.

In actions by or against particular classes of persons.
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In particular actions or proceedings.

See Quieting Title, § 39; Trespass to Try Title, § 35.
Admiralty proceedings, see Admiralty, §§ 64, 65.
For breach of contract in general, see Contracts, § 346.
For infringement of patent, see Patents, §§ 310 311.
For injuries at railroad crossings, see Railroads, § 345.
For removal of cause, see Removal of Causes, § 89.
On municipal warrant, see Municipal Corporations, § 905.
Probate proceedings, see Wills, § 284.
Relating to usury, see Usury, § 111.
To cancel certificate of naturalization, see Aliens, § 71½.
To contest or set aside will or probate, see Wills, § 284.

Review of decisions and pleading in appellate courts.

Review of decisions as dependent on prejudicial nature of error, see Appeal and Error, § 1039.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 9. A creditor's bill against a corporation *held* to sufficiently allege insolvency.—Cincinnati Equipment Co. v. Degnan (C. C. A.) 834.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

In equity, see Equity, § 132.
Petition to remove cause from state to federal court, see Removal of Causes, § 89.

§ 48. A petition considered, and *held* to state a cause of action as against a demurrer under the liberal rule of construction required by Rev. St. Ohio 1908, § 5096, and section 5088, providing for motions to require pleadings to be made more specific and certain.—Travelers' Ins. Co. v. Great Lakes Engineering Works Co. (C. C. A.) 426.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

In action to quiet title, see Quieting Title, § 39.
Operation and effect as appearance, see Appearance, § 9.

(A) Defenses in General.

Authority of judge at chambers or out of court to extend time to plead, see Motions, § 8.
Motion to extend time to answer as general appearance, see Appearance, § 9.

§ 85. The destruction of a county courthouse and all the records of a lawsuit therein contained by fire did not continue or extend defendant's time to answer as a matter of law.—Higson v. North River Ins. Co. (C. C.) 165.

(E) Set-Off, Counterclaim, and Cross-Complaint.

In actions to quiet title, see Quieting Title, § 39.

V. DEMURRER OR EXCEPTION.

Exceptions to pleading in admiralty, see Admiralty, § 65.
Operation and effect as appearance, see Appearance, § 9.

XI. MOTIONS.

§ 359. In an action to recover usury, defendant's amended answer *held* properly stricken as sham.—Washington-Alaska Bank v. Stewart (C. C. A.) 673.

XII. ISSUES, PROOF, AND VARIANCE.

In equity, see Equity, § 324.

In particular actions or proceedings.

See Trespass to Try Title, § 35.
For breach of contract in general, see Contracts, § 346.
For infringement of patent, see Patents, § 311.
For injuries at railroad crossings, see Railroads, § 345.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AIDER BY VERDICT OR JUDGMENT.

In equity, see Equity, § 330.

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See Chattel Mortgages.
By bankrupt, see Bankruptcy, § 188.
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§ 43. A pledgee *held* entitled to possession of the pledged property, and to enforce its lien, notwithstanding a sale by the pledgor to another.—Dome City Bank v. Barnett (C. C. A.) 607.

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Interests of bankrupt in corporation or stock pool as property passing to trustee, see Bankruptcy, § 138.

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Of debtor's property pending bankruptcy proceedings, see Bankruptcy, § 114.
Of mortgaged property, necessity and sufficiency of change of possession as against mortgagor's creditors, see Chattel Mortgages, § 187.
Of property as affecting rights of trustees in bankruptcy, see Bankruptcy, § 140.

Of real property, remedies for recovery, see Trespass to Try Title.
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I. POST-OFFICE DEPARTMENT, POST OFFICES, POSTMASTERS, AND OTHER OFFICERS.

Public policy affecting validity of conditions in private contributions for location of post offices, see Contracts, § 131.

III. OFFENSES AGAINST POSTAL LAWS.

§ 49. In a prosecution for misuse of the mails, a letter claimed to have been written by accused to a post office inspector *held* inadmissible, as showing motive for sending the alleged obscene letter through the mail.—United States v. North (D. C.) 151.

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By or against receivers, see Receivers, §§ 188, 189.
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For breach of contract, see Contracts, § 346.
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For infringement of patent, see Patents, §§ 310–327.
For infringement of trade-mark or trade-name, see Trade-Marks and Trade-Names, § 97.
For injuries at railroad crossings, see Railroads, §§ 345–350.
For injuries from fires caused by operation of railroad, see Railroads, § 473.
For injuries to licensees or trespassers on railroad property in general, see Railroads, § 282.
For injuries to passengers, see Carriers, §§ 316–321.
For injuries to servants, see Master and Servant, §§ 265–291.
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To enforce attorney's lien, see Attorney and Client, § 192.
To enforce liability of stockholders, see Corporations, §§ 259–265.
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To enforce mechanic's lien, see Mechanics' Liens, §§ 245–260.
To enforce regulations in respect to interstate transportation, see Carriers, § 18.
To enforce specific performance, see Specific Performance, § 108.
To establish and enforce rights or liens against estate of bankrupt, see Bankruptcy, §§ 209–215.
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Adoption by federal courts of practice of state courts, see Courts, §§ 334–347.
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See Attorney and Client; Brokers.
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II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

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(B) Compensation and Lien of Agent.

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§ 81. Contract by plaintiff to procure contracts for the sale of trees to defendant construed with respect to plaintiff's performance and right to recover commissions.—Redwine v. Continental Realty Co. (C. C. A.) 851.

§ 89. In an action for commissions on a sale of certain coal, evidence *held* to require the granting of an instruction that, if plaintiff's employment contract had terminated prior to the making of such contract, plaintiff could not recover.—Merchants' Coal Co. of West Virginia v. Leonard (C. C. A.) 295.

§ 89. In an action on a contract, the question whether plaintiff was precluded from recovery by fraud *held*, under the evidence, one for the jury.—Redwine v. Continental Realty Co. (C. C. A.) 851.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

Brokers, see Brokers, § 94.

(A) Powers of Agent.

Authority of agents of corporations in general, see Corporations, §§ 428–432.
Authority of attorney, see Attorney and Client, §§ 95–98.

(E) Notice to Agent.

Notice to officers or agents of corporations in general, see Corporations, § 428.

PRINCIPAL AND SURETY.

Sureties on bonds in judicial proceedings.

See Bail; Injunction, § 244.
Appeal or other proceeding for review, see Criminal Law, §§ 1194–1199.

III. DISCHARGE OF SURETY.

§ 123. A condition of a bond of a building contractor requiring immediate notice to the surety of the contractor's default *held* complied with by a notice that the buildings would not be completed by the time fixed, given four days before the expiration of such time.—Empire State Surety Co. v. Hanson (C. C. A.) 58.

PRIORITIES.

Between maritime liens, see Maritime Liens, § 38.
Of claims against bankrupt's estate, see Bankruptcy, § 351.
Prior patent as anticipation. see Patents, § 65.

PRISONS.

See False Imprisonment.

PRIVILEGE.

Franchises in general, see Franchises.
Of witness as to testimony, see Witnesses, § 293.

PRIVILEGED COMMUNICATIONS.

Disclosure by witness, see Witnesses, § 196.

PROBATE.

Of will, see Wills, §§ 229–417.

PROCEDURE.

See cross-references under Practice.

PROCESS.

Removal of cause as waiver of objections to jurisdiction or service of process in state court, see Removal of Causes, § 112.

In actions against particular classes of persons.

See Corporations, § 668.
Foreign corporations, see Corporations, § 668.

In particular actions or proceedings.
For reliquidation of duties, see Customs Duties, § 81.
To recover internal revenue taxes paid, see Internal Revenue, § 38.

Particular forms of writs or other process.
See Execution; Habeas Corpus.

IV. ABUSE OF PROCESS.

False imprisonment, see False Imprisonment.

PROFITS.

Of mortgaged land, rights and liabilities of parties, see Mortgages, § 199.

PROHIBITION.

Prohibitory injunction, see Injunction.

PROMISE.

See Contracts.

PROMISSORY NOTES.

See Bills and Notes.

PROOF.

See Criminal Law, §§ 377–406; Depositions; Evidence; Witnesses.
Pleading and proof, see Equity, § 324.
Reception of evidence at trial of civil actions in general, see Trial, §§ 45–84.

PROPERTY.

Constitutional guaranty of right of property, see Constitutional Law, §§ 298–311.
Interests of bankrupt in corporation stock pool as property passing to trustee, see Bankruptcy, § 138.
Subject of commerce, see Commerce, § 27.

Of particular classes of persons.
See Indians, § 13; Railroads, § 79; Receivers, § 73.
Infants, see Guardian and Ward, §§ 42–44.

Particular species of property.
See Copyrights; Fixtures; Franchises; Patents, §§ 196–214.
Railroad right of way, see Railroads, § 79.

Remedies involving or affecting property.
See Execution; Fraudulent Conveyances; Injunction, § 52; Lis Pendens; Partition; Quieting Title; Specific Performance; Trespass to Try Title.
Bankruptcy proceedings, see Bankruptcy.
Enforcement of attorney's lien, see Attorney and Client, § 192.
Enforcement of liens against property of bankrupt, see Bankruptcy, §§ 209–215.
Enforcement of maritime liens, see Maritime Liens, § 60.
Enforcement of mechanics' liens, see Mechanics' Liens.
Setting aside execution sale, see Execution, § 256.
Setting aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 241.

Transfers and other matters affecting title.
See Adverse Possession; Assignments; Chattel Mortgages; Mortgages; Partition; Pledges.
Receivership, see Receivers, § 73.
Sale, see Sales; Vendor and Purchaser.
Sale of property of ward, see Guardian and Ward, § 42.
Taking for public use, see Eminent Domain.

PROTECTION.

Equal protection of the laws, see Constitutional Law, § 243.

PROVISIONAL REMEDIES.

See Bail; Injunction; Receivers.
Review of decisions, see Appeal and Error, §§ 101, 954.

PROXIMATE CAUSE.

Of injury in general, see Negligence, § 56.

PUBLIC AID.

To railroads, see Public Lands, § 92.

PUBLIC BUILDINGS.

Public policy affecting validity of conditions in private contribution for construction, see Contracts, § 131.

PUBLIC CORPORATIONS.

See Municipal Corporations.

PUBLIC DEBT.

See Municipal Corporations, §§ 878–905.

PUBLIC DOMAIN.

See Public Lands.

PUBLIC FRANCHISES.

See Franchises.

PUBLIC FUNDS.

See Municipal Corporations, §§ 878–905.

PUBLIC GRANTS.

See Franchises; Public Lands.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, § 350.

PUBLIC LANDS.

Indian lands, see Indians, § 13.

I. GOVERNMENT OWNERSHIP.

Indictment for unlawful inclosure, bill of particulars, see Indictment and Information, § 121.

§ 8. The boxing of trees by a settler on public land covered by an unperfected homestead entry and the extracting of crude turpentine therefrom constitutes in law a willful trespass, although the settler may have acted in good faith and without knowledge of the illegality of the act; and on relinquishment of his entry the United States is entitled to recover the value of the products manufactured from such crude material from any person into whose possession the same may have passed.—Parish v. United States (C. C. A.) 590.

§ 19. An indictment for inclosing public lands without authority *held* to sufficiently allege that the lands described were surrounded by posts and wire fences.—Simpson v. United States (C. C. A.) 817.

§ 19. In a prosecution for inclosing public lands in violation of Act Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), evidence that the Land Department had given defendant no notice to remove his obstructions in accordance with custom *held* properly excluded.—Simpson v. United States (C. C. A.) 817.

§ 19. Inclosure of public lands by joining the fences of accused to the lawful fences of others *held* a violation of Act Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524).—Simpson v. United States (C. C. A.) 817.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(E) School and University Lands.

§ 51. Idaho Admission Act July 3, 1890, c. 656, §§ 4, 5, 26 Stat. 215, 216, *held* not to vest in the state, prior to survey, the sections which when surveyed would be numbered 16 and 36 in each township for school purposes, so as to authorize the state to permit the removal of timber therefrom.—United States v. Bonners Ferry Lumber Co. (C. C.) 187.

(H) Grants in Aid of Railroads.

§ 92. A settler, acquiring public land between the time of the passage of an act of Congress granting right of way over the public lands for a proposed railroad and the date of definite location of such road, takes the same subject to the prior right of the railroad company to such right of way.—Nielsen v. Northern Pac. R. Co. (C. C. A.) 601.

(J) Patents.

§ 114. Patents for lands issued by the United States carry the presumption of verity, and can only be set aside on the most clear and convincing proof, and the rule applies, although they are attacked by the United States in defense of a suit to restrain their cancellation by the department.—La Clair v. United States (C. C.) 128.

PUBLIC LAWS.

See Statutes.

PUBLIC POLICY.

Affecting validity of deferred annuity contract, see Annuities, § 1.
Validity of contracts, see Contracts, § 131.

PUBLIC REVENUE.

See Internal Revenue.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Corporations; Railroads.
Interstate commerce laws, see Commerce.
Steamboat companies, see Shipping.

PUBLIC USE.

Taking property for public use in general, see Eminent Domain.

PUBLIC WORKS.

See Municipal Corporations, § 350.

PURCHASERS.

See Sales; Vendor and Purchaser.

QUALIFICATIONS.

Of witnesses in general, see Witnesses, § 196.

QUALITY.

Of goods sold, implied warranties, see Sales, § 271.

QUANTUM MERUIT.

See Work and Labor.

QUARANTINE.

Interstate commerce regulations, see Commerce, § 52.

QUIA TIMET.

See Quieting Title.

QUIETING TITLE.

I. RIGHT OF ACTION AND DEFENSES.

§ 4. Complainants, because of possession, being unable to maintain ejectment against defendants claiming land adversely to them, *held* entitled to maintain a bill to remove a cloud from the title.—Woods v. Woods (C. C.) 159.

§ 4. Ejectment is neither a complete nor adequate remedy, where complainants allege facts entitling them to a decree canceling conveyances made to defendants.—Woods v. Woods (C. C.) 159.

§ 12. Where complainants show an independent right to equitable relief, a prayer to quiet title will be entertained though complainants are not in possession.—Woods v. Woods (C. C.) 159.

II. PROCEEDINGS AND RELIEF.

§ 39. Cross-bill in a suit to quiet title *held* demurrable for failure to show that a prior writ of possession in ejectment between plaintiff and defendant had not been executed according to its return.—Center v. Cady (C. C. A.) 605.

RAILROADS.

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, §§ 12–38.
Regulation of, as regulation of commerce, see Commerce, §§ 27, 61, 62.

II. RAILROAD COMPANIES.

Pleading in suit to compel delivery of stock under reorganization agreement, see Equity, § 132.
Right to stock in reorganized company, see Corporations, § 575.

III. PUBLIC AID.

Grants of land in aid, see Public Lands, § 92.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

Acquisition of rights under power of eminent domain, see Eminent Domain.

§ 79. The fiscal court of a county in Kentucky granted to an electric railroad company right of way to construct its line on a pike to the limits of a city. *Held* that, whether such grant by implication included the right to build a Y at the city limits necessary to the company for the making of a terminal station at that point depended on whether the court in making the grant contemplated the reasonable possibility that such point would constitute the terminus of the road, either permanently or temporarily.—City of Shelbyville, Ky., v. Glover (C. C. A.) 234.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

§ 93. Section 768 (5) of the Kentucky Statutes (Russell's St. § 5368 [5]), which gives a railroad company power "to construct its road upon or across any * * * highway, street * * * and across any railroad or canal," relates to a complete crossing made necessary as part of a continuous road, and does not apply to a switch or Y extending merely from a track in a street to a lot adjoining the same.—City of Shelbyville, Ky., v. Glover (C. C. A.) 234.

X. OPERATION.

Carriage of passengers, see Carriers, §§ 280–321.
Injuries to employés, see Master and Servant, §§ 101, 102–291.
Injuries to employés engaged in interstate commerce, see Commerce, §§ 5, 27.

(B) Statutory, Municipal, and Official Regulations.

Automatic couplers on railroad cars, sufficiency of evidence in action for injuries to servant, see Master and Servant, § 278.

§ 229. A railroad yard engine used in interstate commerce *held* not equipped as required by Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) § 4, where there was no handhold at the side of the tender near the rear end, though there was a running board and an uncoupling lever bar across the end which might serve as a handhold.—United States v. Baltimore & O. R. Co. (D. C.) 94.

§ 229. The requirement of the safety appliance act of March 2, 1893, c. 196, § 4, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, § 1, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), that all cars shall be equipped with grab-irons or handholds in the ends and sides, applies to passenger cars, although they may be also equipped with air hose, steam hose, or other appliances which lessen the danger to employés.—United States v. Norfolk & W. Ry. Co. (D. C.) 99.

§ 229. A declaration against a railroad company for violating the safety appliance act (March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174] as amended by Act April 1, 1896, c. 87, 29 Stat. 85 and Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1909, p. 1143]) *held* not demurrable as alleging that the car containing interstate commerce transported in connection with the defective car had already reached its destination.—United States v. Western & A. R. Co. (D. C.) 336.

§ 229. Where a car equipped with a defective safety appliance is moved in a train containing interstate commerce, there is a violation of Act Cong. March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), though such car is not immediately connected with the car on the train carrying interstate commerce.—United States v. Western & A. R. Co. (D. C.) 336.

§ 249. Gen. St. Conn. 1902, §§ 3779, 3780, giving a right of action against a railroad company to recover damages for its destruction of property by fire without the contributory negligence of the owner, although in derogation of the common law, is not penal, but beneficial and remedial, and is to be construed accordingly.—Central Vt. Ry. Co. v. Robbins & Pattison (C. C. A.) 439.

§ 254. The hauling or use of each of three defective cars on the same day in the same train and at the same time *held* a separate offense under the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), for which penalty may be inflicted.—United States v. St. Louis Southwestern Ry. Co. of Texas (C. C. A.) 28.

§ 254. In view of the purpose of the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), to protect life and limb by the enforced equipment of every car, and its being made unlawful to haul or use "any car," or each car not equipped as required, it seems strained to say that the statute requires for its complete application an interval, and that the condemnation or penalty is not the same if the cars are hauled or used at the same time as when they are hauled at different times.—United States v. St. Louis Southwestern Ry. Co. of Texas (C. C. A.) 28.

§ 254. "Hauling" a defective car is not necessary to complete the offense against the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), as both "hauling" and "using" are forbidden, and it seems that such a car may be used, within the statutory meaning, otherwise than by being "hauled."—United States v. St. Louis Southwestern Ry. Co. of Texas (C. C. A.) 28.

§ 254. An action to recover penalty under the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), is a civil action.—United States v. St. Louis Southwestern Ry. Co. of Texas (C. C. A.) 28.

§ 254. Under the safety appliance act (Act March 2, 1893, c. 196, §§ 2, 4, 6, 27 Stat. 531, 532 [U. S. Comp. St. 1901, pp. 3174, 3175]), each car hauled or used by a railroad company not equipped as therein required constitutes a separate offense, for which a penalty is recoverable under section 6, although more than one may have been in the same train.—United States v. St. Louis Southwestern Ry. Co. of Texas (C. C. A.) 28.

(D) Injuries to Licensees or Trespassers in General.

§ 275. An order given by a railroad company that log scalers should do their work after the logs had been loaded on cars, and not on the ground, *held* waived.—Idaho & W. N. R. R. v. Wall (C. C. A.) 677.

§ 275. A railroad company *held* bound to exercise ordinary care toward a log scaler employed by a lumber company to scale logs which the railroad company was loading and about to transport for the lumber company.—Idaho & W. N. R. R. v. Wall (C. C. A.) 677.

§ 275. Where decedent was employed by a lumber company to scale logs as they were loaded on cars by defendant railroad company, the court properly charged in an action for decedent's death that defendant owed him practically the same duty as though he was defendant's servant.—Idaho & W. N. R. R. v. Wall (C. C. A.) 677.

§ 282. In an action for death of a log scaler while working beside railroad cars, evidence *held* to require submission to the jury of defendant's alleged negligence in permitting its appliances to become defective and in doing the work in a negligent manner.—Idaho & W. N. R. R. v. Wall (C. C. A.) 677.

§ 282. In an action against a railroad company for death of a log scaler employed by a lumber company to scale logs as they were loaded onto cars, the duty that would have devolved on defendant in case decedent was a bare licensee or trespasser *held* not in issue.—Idaho & W. N. R. R. v. Wall (C. C. A.) 677.

§ 282. In an action for death of a log scaler, a request to charge on contributory negligence *held* properly refused as eliminating defendant's negligence in permitting its appliances to get out of repair and in failing to use a safer method in loading small logs onto its cars.—Idaho & W. N. R. R. v. Wall (C. C. A.) 677.

§ 282. In an action for death of a log scaler, while the logs were being loaded onto defendant's cars, an instruction on contributory negligence *held* proper.—Idaho & W. N. R. R. v. Wall (C. C. A.) 677.

(F) Accidents at Crossings.

§ 320. As a general proposition a locomotive engineer is not chargeable with negligence for not stopping his train because he sees a foot traveler approaching the track at a crossing in the daytime.—Horan v. Boston & M. R. R. (C. C. A.) 453.

§ 324. A person killed by a railroad train while driving over a highway crossing at night *held*, on the evidence, chargeable with contributory negligence which precluded a recovery for his death.—Partridge v. Boston & M. R. Co. (C. C. A.) 211.

§ 345. Where plaintiff, in an action to recover for an injury received when she jumped or was thrown from an automobile, which was struck by a car on a railroad crossing, did not allege whether she jumped or was thrown out, she was not confined to proof that she was thrown, but was entitled to recover in either case, on proof of defendant's negligence, provided she acted as a reasonable and prudent person would under the circumstances.—Northern Pac. Ry. Co. v. Vidal (C. C. A.) 707.

§ 350. The question of the contributory negligence of a plaintiff who was struck and injured by a train on a highway crossing of defendant's railroad while she was riding in a carriage with another, who was driving, *held*, under the evidence, properly submitted to the jury.—Partridge v. Boston & M. R. Co. (C. C. A.) 211.

§ 350. Evidence considered in an action against a railroad company to recover for an injury to plaintiff, received while she was crossing defendant's tracks at a street crossing in an automobile, which was struck by cars being switched, and *held* to warrant the submission

of the case to the jury.—Northern Pac. Ry. Co. v. Vidal (C. C. A.) 707.

(G) Injuries to Persons on or near Tracks.

§ 384. In an action for death of a Pullman car cleaner by being struck by a passing engine in front of defendant's depot, decedent *held* negligent as a matter of law.—Bowman v. Atchison, T. & S. F. Ry. Co. (C. C. A.) 697.

(I) Fires.

§ 473. Under Gen. St. Conn. 1902, §§ 3779, 3780, authorizing an action against a railroad company to recover damages for loss by fire, but requiring as a condition precedent the service of a notice within 20 days, stating, inter alia, the amount claimed as damages, a plaintiff is not strictly limited in his recovery by the amount so stated in his notice.—Central Vt. Ry. Co. v. Robbins & Pattison (C. C. A.) 439.

RATE.

Transportation rates, see Carriers, §§ 12, 13, 38.
Transportation rates, interstate commerce regulations, see Commerce, §§ 7, 8, 10, 12, 62.

REAL ACTIONS.

See Trespass to Try Title.

REAL ESTATE AGENTS.

See Brokers.

REAL PARTY IN INTEREST.

See Parties, § 6.

REAL PROPERTY.

Annexation of chattels to real property, see Fixtures.
Conveyances, see Vendor and Purchaser.
Liens for improvements, see Mechanics' Liens.
Limitation of actions to recover, see Limitation of Actions, § 19.
Mortgage, see Mortgages.
Remedies involving or affecting, see Trespass to Try Title.
Restraining trespass or other injury, see Injunction, § 52.

REBATES.

From freight charges, see Carriers, § 13.

RECEIVERS.

In bankruptcy proceedings, see Bankruptcy, § 114.
In suit for dissolution of joint adventure, see Joint Adventures, § 5.
Of corporations in general, see Corporations, §§ 553–557.
Review of decisions in receivership proceedings, see Appeal and Error, § 101.

I. NATURE AND GROUNDS OF RECEIVERSHIP.

(A) Nature and Subjects of Remedy.

§ 9. A federal court of equity has no jurisdiction at the instance of a simple contract creditor, whose claim has not been reduced to judgment, to appoint a receiver for property on which he asserts no specific lien.—Maxwell v. McDaniels (C. C. A.) 311.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

Review of decisions, see Appeal and Error, § 101.

§ 29. Where property of a corporation is situated in different federal districts of a state, a federal court in one of the districts has jurisdiction to appoint a receiver for all of such property.—City of Shelbyville, Ky., v. Glover (C. C. A.) 234.

§ 29. A court of equity is without jurisdiction to appoint receivers to administer the assets of an individual on the ground of his insolvency at suit of a simple contract creditor, and such jurisdiction cannot be conferred by the consent of the debtor.—Maxwell v. McDaniels (C. C. A.) 311.

§ 56. Where, in a creditor's suit against a corporation asking the appointment of a receiver, the defendant appeared and admitted the averments of the bill, which sufficiently alleged insolvency, and no collusion is charged, an intervener coming into the case after the appointment of a receiver cannot challenge the jurisdiction of the court to make such appointment.—Cincinnati Equipment Co. v. Degnan (C. C. A.) 834.

§ 58. An affidavit *held* insufficient to justify the vacation of a receivership for a partnership, where the receivers were appointed with the approval of a majority of the creditors, to complete a contract made by the firm.—Patterson v. Patterson (C. C.) 547.

III. TITLE TO AND POSSESSION OF PROPERTY.

§ 73. A federal court which had appointed a receiver for an electric railroad company *held* to have jurisdiction on petition of the receiver to enjoin interference with his construction of terminal facilities under an order of the court.—City of Shelbyville, Ky., v. Glover (C. C. A.) 234.

§ 73. A proceeding by a receiver of a federal court to enjoin another from interfering with his possession of property, whether situated within the district or in another district of the same state, may properly be by petition in the suit in which he was appointed, although the proposed defendant is not a party to such suit, when his rights can be as fully protected in such proceeding as in a separate suit, which is a matter to be determined by the court in the exercise of its discretion.—City of Shelbyville, Ky., v. Glover (C. C. A.) 234.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

(A) Administration in General.

§ 90. Claimant *held* only entitled to losses sustained by breach of employment contract by receivers of the employer for the term they were in possession and failed to employ him, and also for such damage as he could prove he sustained by the receivers' transfer of the property of the insolvent to a purchaser.—Ely v. Van Kannel Revolving Door Co. (C. C.) 459.

V. ALLOWANCE AND PAYMENT OF CLAIMS.

§ 149. Where an employment contract is broken just before, at, or after the insolvency of the master, a servant's claim for damages should be referred to the court for liquidation so that a satisfactory measure of damage may be shown.—Ely v. Van Kannel Revolving Door Co. (C. C.) 459.

§ 154. Attorneys for complainant creditors *held* entitled to a specified allowance for services rendered in addition to taxable costs and disbursements in the action.—Ely v. Van Kannel Revolving Door Co. (C. C.) 459.

VI. ACTIONS.

§ 188. Receivers of a corporation *held* only authorized to prosecute an appeal from a judgment in favor of a claimant at the instance of the holders of bonds secured by a second mortgage alleged to have been made in fraud of claimant's rights after security had been given by such bondholders both to the claimant and to the receivers for the costs and expenses of the appeal.—Gay v. Hudson River Electric Power Co. (C. C.) 631.

§ 189. Where, after disallowance of a claim by receivers, the creditors prosecuted the same successfully before a master, their attorneys were entitled to taxable disbursements and docket fees, but not an attorney's fee.—Ely v. Van Kannel Revolving Door Co. (C. C.) 459.

VIII. FOREIGN AND ANCILLARY RECEIVERSHIPS.

§ 206. A bill for the appointment of an ancillary receiver should fully disclose the nature of the primary suit and the ground and purpose of the appointment of the receiver therein.—Bluefields S. S. Co. v. Steele (C. C. A.) 584.

§ 206. A bill filed in a federal court by a stockholder for the appointment of an ancillary receiver for a corporation *held* insufficient to warrant such appointment.—Bluefields S. S. Co. v. Steele (C. C. A.) 584.

§ 207. Where dividends payable by a federal court receiver are claimed by a receiver appointed by the state court, it is the federal court receiver's duty to deposit the dividends in a court having competent jurisdiction, unless releases of all parties can be obtained.—Ely v. Van Kannel Revolving Door Co. (C. C.) 459.

RECEPTION.

Of evidence at trial, see Trial, §§ 45–84.

RECOGNIZANCES.

See Bail.

On appeal or writ of error in criminal prosecutions, see Criminal Law, §§ 1194–1199.

RECORDS.

Destruction of records as affecting time for answer, see Pleading, § 85.

Of particular facts, acts, instruments, or proceedings not judicial.

Claim against property in hands of receiver, see Receivers, § 149.

Contract of conditional sale, see Sales, § 474.

Of judicial proceedings.

Judgment, see Judgment, § 270.

Petition and bond for removal of cause, see Removal of Causes, § 89.

Transcript on appeal or writ of error, see Appeal and Error, § 501.

Records as notice, and as affecting priorities.

Of lease as notice to lien claimant, see Mechanics' Liens, § 78.

REFERENCE.

See Arbitration and Award.

To master or commissioner in equity, see Equity, § 410.

II. REFEREES AND PROCEEDINGS.

In bankruptcy, see Bankruptcy, § 229.

III. REPORT AND FINDINGS.

In equity, see Equity, § 410.

REGISTERS OF WILLS.

Authority to appoint testamentary trustees, see Trusts, § 160.

REINCORPORATION.

See Corporations, § 575.

REISSUE.

Of patent, see Patents, §§ 141–144.

RELEASE.

See Payment.

From arrest, see Bail.

Of particular classes of rights and liabilities.

Liability as surety, see Principal and Surety, § 123.

Liability of carrier in respect to goods, see Carriers, § 149½.

Liability of shipowners in respect to cargo, see Shipping, § 140.

RELIQUIDATION.

Of duties on imports, see Customs Duties, § 81.

REMAND.

By federal court of cause removed from state court, see Removal of Causes, §§ 102–106.
Of cause by appellate court, see Appeal and Error, §§ 1195–1213.

REMEDIES.

See Action.

REMEDY AT LAW.

Effect on jurisdiction in equity, see Quieting Title, § 4.

REMEDY OVER.

By insurer against person causing loss, see Insurance, § 606.

REMISSION.

Of part of recovery, see Appeal and Error, § 1140.

REMITTITUR.

Of cause by appellate court, see Appeal and Error, §§ 1195–1213.

REMOVAL OF CAUSES.

I. POWER TO REMOVE AND RIGHT OF REMOVAL IN GENERAL.

§ 4. Where an action is brought in a state court within a federal district in which neither plaintiff nor defendant resides, and an attachment is levied solely to secure jurisdiction, the action is not removable to the federal Circuit Court, under Act March 3, 1875, c. 137, § 8, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), as amended by Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 3, 1888, c. 866, 25 Stat. 433.—George v. Tennessee Coal, Iron & R. Co. (C. C.) 951.

II. ORIGIN, NATURE, AND SUBJECT OF CONTROVERSY.

§ 19. An action by a widow against an interstate carrier for the wrongful death of her husband *held* not brought under employer's liability act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), and was therefore not removable to the federal court as involving a construction of the federal law.—Thompson v. Wabash R. Co. (C. C.) 554.

VI. PROCEEDINGS TO PROCURE AND EFFECT OF REMOVAL.

§ 79. Defendant's petition and bond to remove the cause to the federal court, filed in the state court after time to answer had expired, *held* too late.—Higson v. North River Ins. Co. (C. C.) 165.

§ 79. Extension of defendant's time to answer of itself extends the time to file a petition and bond to remove the cause to the federal court.—Higson v. North River Ins. Co. (C. C.) 165.

§ 89. Under Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 435 (U. S. Comp. St. 1901, p. 510), a petition and bond for the removal of a cause presented to the judge of the federal Circuit Court and an order obtained from him *held* not effective to remove the cause to the federal court, though the petition and bond were subsequently filed in the state court.—Higson v. North River Ins. Co. (C. C.) 165.

§ 89. Under Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 435 (U. S. Comp. St. 1901, p. 510), the mere filing of a removal petition and bond with the clerk of the trial court was insufficient to operate as a removal of the cause to the federal court.—Higson v. North River Ins. Co. (C. C.) 165.

VII. REMAND OR DISMISSAL OF CAUSE.

§ 102. Where a suit brought in a state court within a federal judicial district where neither plaintiff nor defendant resides, is removed, it will be remanded, unless plaintiff consents to the court's jurisdiction by appearance and pleading.—George v. Tennessee Coal, Iron & R. Co. (C. C.) 951.

§ 103. Act March 3, 1875, c. 137, § 5, 18 Stat. 472 (U. S. Comp. St. 1901, p. 511), providing for the remand of certain causes wrongfully removed to the federal court, *held* inapplicable to a case where the complaint alleges a removable controversy.—Higson v. North River Ins. Co. (C. C.) 165.

§ 106. Plaintiff who entered a special appearance *held* not to have waived his right to insist on the retirement of the case from the docket of the federal court on the sustaining of his objection to removal proceedings.—Higson v. North River Ins. Co. (C. C.) 165.

VIII. PROCEEDINGS IN CAUSE AFTER REMOVAL.

§ 112. An appearance in a state court to exercise a right of removal solely, in the absence of an express limitation, is not such a general appearance as would waive an objection to jurisdiction because of alleged insufficient service.—Murphy v. Herring-Hall-Marvin Safe Co. (C. C.) 495.

REMOVAL OF CLOUD.

See Quieting Title.

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Of judgment, see Judgment, § 256.

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Of client by attorney, see Attorney and Client, §§ 95–98.
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Of principal by agent, see Brokers, § 94.

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Of contracts, see Contracts, §§ 261–265.
Of contract of sale, see Vendor and Purchaser, § 85.

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See Domicile.
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RES JUDICATA.

Former decision as law of the case, see Appeal and Error, §§ 1097–1099, 1195.

RESPONSIVENESS.

Of answers of witnesses, see Witnesses, § 248.

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See Customs Duties; Internal Revenue.

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Of judgment or order in civil actions, see Appeal and Error, § 1175.

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See Appeal and Error; Criminal Law, §§ 1044–1199; Habeas Corpus.

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Of bankruptcy proceedings, see Bankruptcy, § 439.

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Of appointment of receiver, see Receivers, § 58.
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RIGHT OF WAY.

For railroads, in general, see Railroads, § 79.

RISKS.

Assumed by servant, see Master and Servant, §§ 205–219, 288.

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See Collision, §§ 11–17.

SAFETY APPLIANCES.

Automatic couplers on railroad cars, sufficiency of evidence in action for injuries to servant, see Master and Servant, § 278.

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See Seamen.

SALARY.

Of agents, see Principal and Agent, §§ 81–89.

SALES.

As preferences by debtor, see Bankruptcy, §§ 178–181.
Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Sales by or to particular classes of persons.

See Brokers, § 94.
Insolvent debtors, see Bankruptcy, §§ 178–181.
Trustees in bankruptcy, see Bankruptcy, §§ 258–262.

Sales of particular species of, or estates or interests in, property.

Real property in general, see Vendor and Purchaser.

Sales on judicial or other proceedings.

See Bankruptcy, §§ 258–262; Execution, § 320.

I. REQUISITES AND VALIDITY OF CONTRACT.

Application of statute of frauds in general, see Frauds, Statute of, § 90.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

To satisfy statute of frauds, see Frauds, Statute of, § 90.

VI. WARRANTIES.

§ 271. On a sale by sample, there is an implied warranty of quality.—Meyer, Wilson & Co. v. Everett Pulp & Paper Co. (C. C.) 945.

VIII. REMEDIES OF BUYER.

(D) Actions and Counterclaims for Breach of Warranty.

§ 428. Breach of an implied warranty of quality entitles the buyer to retain the goods,

and, when sued for the purchase price, to plead the breach of warranty in reduction of damages.—Meyer, Wilson & Co. v. Everett Pulp & Paper Co. (C. C.) 945.

§ 428. Defendant, having received a consignment of clay pursuant to a sale by sample, and having rejected and offered to return part of the same of defective quality, was entitled to recoup the contract price of that portion, when sued for the price of the consignment.—Meyer, Wilson & Co. v. Everett Pulp & Paper Co. (C. C.) 945.

§ 442. A buyer's measure of damages for breach of an implied warranty of quality is the difference between the actual value of the property delivered and the higher value of the warranted quality.—Meyer, Wilson & Co. v. Everett Pulp & Paper Co. (C. C.) 945.

IX. CONDITIONAL SALES.

§ 474. A conditional sale contract not evidenced by writing attested and filed as required by Rev. St. Ohio, § 4155—2, *held* void as against a receiver appointed by a federal court for the corporation purchaser in a suit to administer its assets for the benefit of all of its creditors.—Cincinnati Equipment Co. v. Degnan (C. C. A.) 834.

§ 474. The effect of the failure to comply with Rev. St. Ohio, § 4155—2, declaring conditional sale contracts void as to creditors unless evidenced by a writing filed with the county recorder, etc., is not avoided by placing a plate on the article sold stating that it is the property of the vendor.—Cincinnati Equipment Co. v. Degnan (C. C. A.) 834.

SALVAGE.

Subrogation of insurer on payment, see Insurance, § 606.

II. AMOUNT AND APPORTIONMENT.

§ 38. A salvage award of $300 made for the services of two tugs in releasing a ferryboat which grounded in a fog in New York Bay.—Howe v. City of New York (D. C.) 478.

SAMPLE.

Sale by sample, implied warranties, see Sales, § 271.

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See Payment.

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See Public Lands, § 51.

SCHOOLS AND SCHOOL DISTRICTS.

II. PUBLIC SCHOOLS.

(A) Establishment, School Lands and Funds, and Regulation in General.

Disposal of school lands in general, see Public Lands, § 51.

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Jurisdiction of consular court, see Ambassadors and Consuls, § 6.
Right of alien seaman to maintain suit in admiralty, see Admiralty, § 5.

§ 29. A libel in a suit to recover damages for an injury to libelant, caused by the bursting of a boiler tube on respondent's vessel, which alleges that the boiler was in "an unsafe, dangerous, and defective condition," is sufficiently specific.—Maritime Inv. Co. v. Hanos (C. C. A.) 596.

§ 29. The findings of an admiralty court that the explosion of a boiler tube on respondent's steam schooner, by which libelant was injured, was caused by overheating due to the accumulation of scale or other substance therein which obstructed the flow of water, and that the officers of the vessel were negligent in failing to inspect or repair the tube, affirmed.—Maritime Inv. Co. v. Hanos (C. C. A.) 596.

SECRETARY OF THE TREASURY.

Judicial notice of internal revenue regulations, see Evidence, § 47.

SECURITY.

See Bail; Chattel Mortgages; Mortgages; Principal and Surety.
Collateral security in general, see Pledges.
In proceedings for injunction, see Injunction, § 244.
On appeal or writ of error, see Appeal and Error, § 395; Criminal Law, §§ 1194–1199.

SERVANTS.

See Master and Servant.

SERVICES.

See Master and Servant; Work and Labor.
Liens on real property for services rendered, see Mechanics' Liens.
Of brokers, sufficiency to entitle to compensation, see Brokers, §§ 49–54.
Removal of cause as waiver of objections to jurisdiction or service of process of state court, see Removal of Causes, § 112.
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SET-OFF AND COUNTERCLAIM.

Damages for breach of warranty against claim for price of goods sold, see Sales, § 428.

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Decree in equity, see Equity, § 430.
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Submission to arbitration, see Arbitration and Award, § 16.

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In pleading, see Pleading, § 359.

SHERIFFS AND CONSTABLES.

Sheriff's deed, see Execution, § 320.

III. POWERS, DUTIES, AND LIABILITIES.

Liability for false imprisonment, see False Imprisonment, §§ 2–7.

SHIPPING.

See Admiralty; Collision; Maritime Liens; Pilots; Salvage; Seamen; Towage.
Marine insurance, see Insurance, § 478.

IV. MASTER.

§ 63. Sober persons alone should be placed in charge, or allowed to navigate or take part in the navigation, of vessels plying on the seas.—The Lauretta Speddin (C. C. A.) 283.

V. LIABILITIES OF VESSELS AND OWNERS IN GENERAL.

§ 84. Under a time charter which required the vessel to furnish to the charterer the use of her steam winches for loading and discharging and to provide men to work the same, a seaman furnished by the vessel to operate a winch for stevedores employed by the charterer to load the vessel remained a servant of the vessel, which was liable for an act of negligence on his part by which an employé of the stevedores was injured.—The Strathallan (D. C.) 474.

VII. CARRIAGE OF GOODS.

§ 120. Shipowners *held* liable for the negligence of the employés of a warehouse company, engaged to load a barge with libelant's flour, in failing to exercise ordinary care to preserve the flour while in its custody for transportation.—California Navigation & Improvement Co. v. Stockton Milling Co. (C. C. A.) 369.

§ 121. Insurers of cargo who paid salvage incurred on account of the unseaworthiness of the vessel *held* entitled to recover the same from the charterer.—British & Foreign Marine Ins. Co. v. Kilgour S. S. Co. (D. C.) 174.

§ 123. The rule that a ship and its owners are not liable for damages resulting from bad stowage by the owner's stevedores does not apply to loss caused by a failure to safeguard a cargo after it had been stowed.—California Navigation & Improvement Co. v. Stockton Milling Co. (C. C. A.) 369.

§ 126. A consignee of cargo has a reasonable time within which to remove the merchandise from the wharf on which it is unloaded, and during the interim the carrier is bound to exercise reasonable care to protect it from injury from exposure to rain or water; the degree of care depending on the character of the goods.—The Italia (D. C.) 366.

§ 132. Evidence *held* insufficient to sustain the burden of proof resting on a vessel to show that damage to a cargo of grain from the leaking of a feed pipe was caused by a danger of navigation, within an exception in the bill of lading, rather than from a defect in the pipe, which rendered her unseaworthy at the beginning of the voyage.—The Rappahannock (C. C. A.) 291.

§ 132. The burden rests upon a lake carrier, who, having agreed to deliver in good condition, "the dangers of navigation excepted," delivers cargo water-damaged, to show that the damage was caused by a danger of navigation.—The Rappahannock (C. C. A.) 291.

§ 132. Evidence considered, and *held* to show that the unseaworthiness of a steamer under charter in sailing on a voyage with cargo with insufficient coal was due to the fault of the master who concealed the fact from the charterer, for which fault the owner was responsible and liable over to the charterer for the amount recovered against it by the cargo owners and their insurers for losses resulting fom such unseaworthiness.—British & Foreign Marine Ins. Co. v. Kilgour S. S. Co. (D. C.) 174.

§ 132. A vessel has the burden of proof to show that damage to her cargo from sea water was caused by perils of the sea, and within the exceptions in the bills of lading.—The Italia (D. C.) 366.

§ 140. Provision of a shipping contract that the cargo might be carried in open barges at libelant's risk *held* not to relieve respondent from liability for loss and injury to the cargo by its negligent failure to safeguard the same after discovering that the barge on which it was being loaded was in a sinking condition.—California Navigation & Improvement Co. v. Stockton Milling Co. (C. C. A.) 369.

VIII. CARRIAGE OF PASSENGERS.

§ 166. Instructions in an action by a passenger for an injury received from slipping and falling on the deck of a steamship, as to the degree of care required of defendant, considered and approved.—Pratt v. North German Lloyd S. S. Co. (C. C. A.) 303.

IX. DEMURRAGE.

§ 177. Where a master, being unable to deliver to the consignee, unloaded the cargo on a wharf and remained in custody thereof, he did not thereby acquire a right to charge demurrage after the cargo was unloaded, but was entitled to one-half of his board bill and for the cost of cablegrams and protest fees.—The John Francis (D. C.) 746.

X. GENERAL AVERAGE.

§ 194. Compensation of an interpreter employed by the master of a vessel at the port of discharge to facilitate delivery *held* chargeable in equal moieties against the ship and cargo.—The John Francis (D. C.) 746.

SHIPWRECKS.

See Collision.
Marine insurance, see Insurance, § 478.

SIGNATURES.

To memorandum of contract within statute of frauds, see Frauds, Statute of, § 115.

SIMULATION.

Conveyances and transactions in fraud of creditors, see Fraudulent Conveyances.

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Of grantor as affecting validity of conveyance as to creditors or subsequent purchasers, see Fraudulent Conveyances, § 62.

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§ 108. Preliminary injunctions *held* properly granted in a suit for specific performance.—Rice v. H. L. Doherty & Co. (C. C. A.) 878.

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VI. CONSTRUCTION AND OPERATION.

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(A) General Rules of Construction.

§ 219. A practice of the Internal Revenue Department construing a doubtful statute for a long time will be accepted by the court as a proper construction.—United States v. S. Twitchell Co. (D. C.) 525.

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Of receiver, see Receivers, § 73.
Of trustee in bankruptcy to property of bankrupt, see Bankruptcy, §§ 136–156.
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Sale of personal property in general, see Sales.

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See Patents, §§ 196–214.

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Liability of master for injuries to servant from defects in or failure to furnish tools, see Master and Servant, §§ 101, 102–125.

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Liabilities of particular classes of persons.

See Carriers, §§ 149½, 280–321; Railroads, §§ 275–282, 320–350, 384, 473.

Employers, for injuries to employés, see Master and Servant, §§ 101, 102–291.

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Liabilities respecting particular species of property or instrumentalities.

See Railroads, §§ 275–282, 320–350, 384, 473.

Carrier's premises, see Carriers, § 286.

Tools, machinery, appliances, and places for work, see Master and Servant, §§ 101, 102–125.

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Particular torts.

See False Imprisonment, §§ 2–7.

Causing death, see Death, § 31.

Injuries from negligence, see Negligence.

Injuries from operation of railroads, see Railroads, §§ 275–282, 320–350, 384, 473.

Injuries to passengers, see Carriers, §§ 280–321; Shipping, § 166.

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Loss of or injury to goods by carrier, see Carriers, § 149½; Shipping, §§ 120–140.

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Maritime torts, see Collision; Shipping, §§ 84, 166; Towage, § 11.

Remedies for torts.

See Damages.

TOWAGE.

Collisions with tugs and vessels in tow, see Collision, § 61.

§ 4. A towing boat is not an insurer of the safety of the tow, nor has she imposed on her the obligations of a common carrier, but those charged with her management are required to exercise reasonable or ordinary care, caution, and maritime skill in the performance of the service undertaken, and, if these are omitted and disaster occurs, the towing boat is responsible.—Southern Towing Co. v. Egan (C. C. A.) 275.

§ 11. A tug which left her tow at a pier where she was at the time, and for some hours thereafter, entirely safe, *held* not liable for her subsequent injury due to a change in the direction of the wind.—The Willie (C. C. A.) 279.

§ 19. The owner of a tug *held* liable for the death of the master and mate of a barge in tow which foundered in Chesapeake Bay, in a storm, on the ground that the master was negligent and reckless in not going into a port of anchorage in view of the approaching storm.—Southern Towing Co. v. Egan (C. C. A.) 275.

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IV. INFRINGEMENT AND UNFAIR COMPETITION.

(C) Actions.

§ 97. The terms of an injunction to protect a complainant in the use of his trade-mark considered.—R. Guastavino Co. v. Comerma (C. C.) 549.

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See Carriers; Railroads.

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See False Imprisonment.

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TRESPASS TO TRY TITLE.

II. PROCEEDINGS.

§ 35. The issues determined under the pleadings in an action of trespass to try title under the Texas statute.—Campbell v. Adair (C. C. A.) 193.

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Trial of actions by or against particular classes of persons.

See Carriers, §§ 320, 321; Master and Servant, §§ 286–291; Railroads, §§ 282, 350.

Trial of particular civil actions or proceedings.

See Partition, § 70.
For compensation of agent, see Principal and Agent, § 89.
For injuries at railroad crossings, see Railroads, § 350.
For injuries to licensees or trespassers, see Railroads, § 282.
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I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

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IV. RECEPTION OF EVIDENCE.

Examination of witnesses, see Witnesses, §§ 248–293.

(A) Introduction, Offer, and Admission of Evidence in General.

§ 45. In an action by a steamship passenger to recover for an injury received by slipping and falling on the deck which it was alleged was not kept in proper condition, where plaintiff testified to having made other voyages, the exclusion of a general offer to show "what she noticed as to the decks of the vessels of these lines" was not error.—Pratt v. North German Lloyd S. S. Co. (C. C. A.) 303.

(C) Objections, Motions to Strike Out, and Exceptions.

In criminal prosecutions, see Criminal Law, § 695.

§ 89. Where the testimony of a plaintiff was taken by deposition, the refusal of the court on the trial to strike out a portion of her answers to a question on cross-examination which was not responsive, but was material to plaintiff's case, and which could not then have been supplied, *held* not reversible error.—Partridge v. Boston & M. R. Co. (C. C. A.) 211.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

As to particular facts, issues, or subjects.

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In particular civil actions or proceedings.

See Partition, § 70.
For injuries at railroad crossings, see Railroads, § 350.
For injuries to licensees or trespassers, see Railroads, § 282.
For injuries to passengers, see Carriers, § 320.
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For injuries to licensees or trespassers, see Railroads, § 282.
For injuries to passengers, see Carriers, § 321.
For injuries to servants, see Master and Servant, § 291.

(D) Applicability to Pleadings and Evidence.

§ 253. In an action to recover certain personal property, which defendant claimed both as purchaser and pledgee, an instruction *held* erroneous, as pretermitting defendant's rights as pledgee.—Dome City Bank v. Barnett (C. C. A.) 607.

(E) Requests or Prayers.

§ 260. It is not error to refuse a request to charge covered by instructions given.—Idaho & W. N. R. R. v. Wall (C. C. A.) 677.

(F) Objections and Exceptions.

Necessity of exception for purpose of review, see Appeal and Error, § 263.

(G) Construction and Operation.

§ 296. In an action for injuries, defendant *held* not prejudiced by the court's charge that it did not recall any testimony to show that deceased ever had tuberculosis or syphilis.—Wabash Screen Door Co. v. Lewis (C. C. A.) 260.

IX. VERDICT.

Conformity of judgment to verdict and findings, see Judgment, § 256.
Review of sufficiency of evidence, see Appeal and Error, § 1005.

(A) General Verdict.

§ 342. Where a motion to direct a verdict is sustained, a verdict should be actually entered as directed.—Bowman v. Atchison, T. & S. F. Ry. Co. (C. C. A.) 697.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

Review in appellate court as dependent on prejudicial nature of error, see Appeal and Error, §§ 1039–1056.
Review in appellate court as dependent on presentation of questions in lower court, see Appeal and Error, §§ 171–274.

TRIAL DE NOVO.

On appeal in Chinese deportation proceedings, see Aliens, § 32.

TRIBUNALS.

See Courts.

TRUST DEEDS.

See Chattel Mortgages; Mortgages.

TRUSTEES.

See Trusts.

TRUSTS.

Particular fiduciary relations, see Brokers; Guardian and Ward; Principal and Agent.
Trust deeds, see Chattel Mortgages; Mortgages.

III. APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.

§ 160. Under Act Pa. June 14, 1836 (P. L. 632) § 15, and Act Pa. April 22, 1846 (P. L. 483) § 1, a register of wills had no authority to appoint testamentary trustees for the estate of minors, and trustees so appointed had no power to bind the estate by any contract.—Bagnell v. Ives (C. C.) 466.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

§ 217. Under Const. Pa. art. 3, § 22, which prohibits any law authorizing trustees to invest the trust funds in the stocks of any private corporation, the act of a trustee for the estate of minors in purchasing stock of such a corporation of another state for the estate, or accepting it in payment of a debt, was illegal and did not bind the estate as a stockholder.—Bagnell v. Ives (C. C.) 466.

§ 219. Where defendant converted complainant's money to his own use, the fact that he received no profit for the use of the money did not relieve him from liability to plaintiff for simple interest.—Primeau v. Granfield (C. C.) 480.

§ 239. Where two joint trustees were appointed for the estate of minors, one acting alone had no authority to purchase stock in a corporation so as to bind the estate as a stockholder.—Bagnell v. Ives (C. C.) 466.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(B) Right to Follow Trust Property or Proceeds Thereof.

§ 350. Where a trustee makes a wrongful separate investment of trust funds, the beneficiary may follow the money into the res, or claim a lien or charge thereon.—Primeau v. Granfield (C. C.) 480.

§ 350. Where a trustee wrongfully mixes his beneficiary's money with his own, and invests the same in certain property, the beneficiary may still follow the res and claim a part of the property and profits or a charge thereon at his election.—Primeau v. Granfield (C. C.) 480.

§ 354. Where a trustee wrongfully invested certain of the trust funds in a mining lease, and then sold a one-eighth interest in the lease, the beneficiary's share in the proceeds was the same proportion to which he was entitled in equity in the whole mine.—Primeau v. Granfield (C. C.) 480.

§ 354. Where a trustee uses his beneficiary's money to pay a mortgage on his house, and thereafter invests the proceeds of a new mortgage in a mine, the beneficiary though entitled to subrogation pro tanto as between himself and the trustee to the equity of redemption of the first mortgage, and to a lien on the proceeds of the second, cannot become a co-owner of the property in which the proceeds of the second mortgage are invested.—Primeau v. Granfield (C. C.) 480.

§ 354. Where a trustee wrongfully used his beneficiary's money to develop a mine on which the trustee had a lease, the beneficiary on an accounting was entitled to that proportion of the value of the ore in place as was represented by the beneficiary's contribution to the total expense, plus rentals and royalties, together with interest from the date of the misappropriation.—Primeau v. Granfield (C. C.) 480.

TUGS.

See Towage.
Collision between tugs or tows and other vessels, see Collision, § 61.
Compensation for salvage services, see Salvage.

TUTORS.

See Guardian and Ward.

TWENTY-EIGHT HOUR LAW.

Transportation of live stock, see Carriers, §§ 38, 211.

ULTRA VIRES.

Effect of ultra vires acts and contracts of corporations in general, see Corporations, §§ 370–393.
Effect of ultra vires acts and contracts of municipal corporations, see Municipal Corporations, §§ 350, 878.

UNDERTAKINGS.

See Bail.
In proceedings for injunction, see Injunction, § 244.
On appeal or writ of error, see Criminal Law, §§ 1194–1199.

UNDERWRITERS.

See Insurance.

UNITED STATES.

Courts, see Courts, §§ 276–433; Removal of Causes.
Customs duties, see Customs Duties.
Indians, see Indians.
Laches affecting suit in equity, see Equity, § 85.
Limitations in action to which government is party, see Limitation of Actions, § 11.
Post office, see Post Office.
Power to regulate commerce, see Commerce, §§ 5–10.
Public lands, see Public Lands, §§ 8–19, 51–114.

I. GOVERNMENT AND OFFICERS.

Ambassadors and consuls, see Ambassadors and Consuls.
Authority as to interstate commerce regulations, see Commerce, § 52.
Court commissioners, see United States Commissioners.
Courts, see Courts, § 508.
Judicial notice of internal revenue regulations, see Evidence, § 47.

§ 52. An indictment against a clerk in a United States land office *held* to sufficiently show that defendant was an official or clerk of the government.—United States v. Long (D. C.) 184.

§ 52. An indictment against a clerk in the government land office for agreeing to receive compensation for services in assisting an entryman to obtain certain land *held* to sufficiently allege that the land sought was the property of the United States.—United States v. Long (D. C.) 184.

§ 52. An agreement by a clerk in a local government land office to receive compensation for informing another that certain public land would be open for entry, and for assisting him in obtaining title under the timber and stone act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]), *held* a violation of Rev. St. § 1782 (U. S. Comp. St. 1901, p. 1212).—United States v. Long (D. C.) 184.

II. PROPERTY, CONTRACTS, AND LIABILITIES.

§ 75. The United States *held* entitled to recover from a contractor for the building of bridges, and the sureties on his bond, the damages caused by the refusal of the contractor to perform the work, in consequence of which the government was compelled to relet the contract at a higher price.—United States v. Grosjean (C. C. A.) 593.

UNITED STATES COMMISSIONERS.

§ 5. Under Rev. St. § 627, now superseded by Act Cong. May 28, 1896, c. 252, § 19, 29 Stat. 184 (U. S. Comp. St. 1901, p. 499), and Rev. St. §§ 990, 991 (U. S. Comp. St. 1901, p. 709), a United States commissioner has jurisdiction of proceedings for the arrest and discharge of a judgment debtor on mesne process issued out of the Circuit Court of the United States, and was therefore required to entertain and determine the same.—Hayes v. Canada, A. & P. S. S. Co. (C. C. A.) 821.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(B) Rights and Remedies of Parties.

Joinder of causes of action to recover usury paid, see Courts, § 433.
Striking out pleading, see Pleading, § 359.

§ 111. A complaint to recover usury *held* to sufficiently allege that it was knowingly collected.—Washington-Alaska Bank v. Stewart (C. C. A.) 673.

(C) Rights and Remedies of Third Persons.

§ 133. A debtor's assignee for the benefit of creditors *held* properly joined with him as a party plaintiff, in an action to recover usury.—Washington-Alaska Bank v. Stewart (C. C. A.) 673.

II. PENALTIES AND FORFEITURES.

§ 137. Under Civ. Code Alaska, § 256, it is not necessary, to recover double the amount of usury received, that it shall have been knowingly received.—Washington-Alaska Bank v. Stewart (C. C. A.) 673.

VACATION.

Of decree in equity, see Equity, § 430.
Of sale under execution, see Execution, § 256.

VALUE.

Limits of jurisdiction, see Courts, § 328.
Of property of carriers affecting right to regulate rates, see Carriers, § 18.

VARIANCE.

Between judgment and process, pleadings, proofs, verdict, or findings, see Judgment, § 256.

VENDOR AND PURCHASER.

Compensation of broker procuring conveyance, see Brokers, §§ 49–54.
Execution sales, see Execution, § 320.
Fixtures as between vendor and purchaser, see Fixtures, § 21.
Sales of personal property in general, see Sales.
Specific performance of contract, see Specific Performance.
Validity of sales as to creditors or subsequent purchasers, see Fraudulent Conveyances.

II. CONSTRUCTION AND OPERATION OF CONTRACT.

§ 54. Under the law of Pennsylvania, an executory contract for the sale of real estate on which the purchaser has made a payment vests him with an equitable estate in the land to the extent of the payment made.—Kenyon v. Mulert (C. C. A.) 825.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) By Agreement of Parties.

§ 85. A conveyance of a purchaser's equity to the vendor who still retains the legal title, and his acceptance of the same, operates as a rescission of the contract, and the vendor cannot recover the remainder of the purchase money from the vendee.—Kenyon v. Mulert (C. C. A.) 825.

VERDICT.

Conformity of judgment to verdict, see Judgment, § 256.
In civil actions in general, see Trial, § 342.
Review in civil cases, see Appeal and Error, § 1005.

VESSELS.

See Admiralty; Collision; Maritime Liens; Pilots; Salvage; Seamen; Shipping; Towage.

VILLAGES.

See Municipal Corporations.

WAIVER.

See Estoppel.

Of objections to particular acts, instruments, or proceedings.

Irregularities and errors at trial in general, see Criminal Law, § 901.
Jurisdiction of bankruptcy court, see Bankruptcy, § 293.
Jurisdiction of courts in general, see Courts, § 37.
Jurisdiction of federal court, see Courts, § 276.
Performance of contracts, see Contracts, § 305.
Pleadings in equity, see Equity, § 330.

Of rights or remedies.

Appeal or other proceeding for review, see Appeal and Error, § 395.
Requirement as to time to sue on insurance policy, see Insurance, § 623.
Right to remand cause to federal court, see Removal of Causes, § 106.

WARDS.

See Guardian and Ward.

WAREHOUSEMEN.

Interpleader in action for conversion, see Interpleader, § 11.

WARNING.

Precautions against injuries to servants, see Master and Servant, §§ 150–153.

WARRANT.

Municipal warrants, see Municipal Corporations, § 905.

WARRANTY.

On sale of goods, see Sales, § 271.

WATER.

Duty of carrier to water live stock, see Carriers, § 211.

WILLS.

Authority of register of wills to appoint testamentary trustee, see Trusts, § 160.
Validity, construction, and execution of trusts in general, see Trusts.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(B) Actions to Establish or Determine Validity in General.

§ 229. Where, pending a suit by an heir to set aside the probate of a will under Illinois Statute of Wills, § 7, as amended by Act July 1, 1903 (Laws 1903, p. 355), the heir died, her heirs had no sufficient interest to entitle them to continue the suit in equity.—Selden v. Illinois Trust & Savings Bank (C. C. A.) 872.

(G) Petitions, Objections, and Pleadings.

§ 284. A demurrer to a bill to set aside the probate of a will under Illinois Statute of Wills, § 7, as amended by Act July 1, 1903 (Laws 1903, p. 355), *held* not to admit charges of testamentary incapacity, or fraud, or undue influence, but only to put forward that the probate was an adjudication to the contrary unless and until the will was set aside.—Selden v. Illinois Trust & Savings Bank (C. C. A.) 872.

(M) Operation and Effect.

§ 417. Under Illinois Statute of Wills, § 7, as amended by Act July 1, 1903 (Laws 1903, p. 355), a will, having been admitted to probate, is a valid will, unless and until it is successfully contested and set aside, either according to the statute or by other proceedings in a court of competent jurisdiction.—Selden v. Illinois Trust & Savings Bank (C. C. A.) 872.

VI. CONSTRUCTION.

(A) General Rules.

Authority of register of wills to appoint testamentary trustee, see Trusts, § 160.

(H) Estates in Trust and Powers.

Management and disposal of trust property in general, see Trusts, §§ 217–239.

WITHDRAWAL.

Of instructions, see Trial, § 296.

WITNESSES.

See Depositions; Evidence; Perjury.

Attendance and examination before grand jury, see Grand Jury, § 36.

Examination in bankruptcy proceedings, see Bankruptcy, § 242.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.

Subpœna duces tecum for appearance before grand jury, see Grand Jury, § 36.

II. COMPETENCY.

(D) Confidential Relations and Privileged Communications.

Bankruptcy proceedings, see Bankruptcy, § 242.

§ 196. A witness' objection to answering questions on an inquiry in bankruptcy *held* unsustainable.—In re Lathrop, Haskins & Co. (D. C.) 534.

III. EXAMINATION.

Of bankrupt or others in bankruptcy proceedings, see Bankruptcy, § 242.

Review of rulings, see Appeal and Error, § 1048.

(A) Taking Testimony in General.

§ 248. An answer to a question asked plaintiff on cross-examination *held* not so responsive as to require the denial of a motion to strike under the rule that one may not object to a question which he has himself called forth.—Kyner v. Portland Gold Mining Co. (C. C. A.) 43.

(B) Cross-Examination and Re-Examination.

§ 275. The court in its discretion may permit a party to an action to be cross-examined with reference to matters not strictly within the scope of his direct examination.—California Fruit Canners' Ass'n v. Lilly (C. C. A.) 570.

§ 275. The court was authorized to permit defendant in an action on an account stated to prove by plaintiff's vice president that certain of the goods charged in the account had not been delivered so as to pass title, though such proof was not within the scope of his direct examination.—California Fruit Canners' Ass'n v. Lilly (C. C. A.) 570.

(C) Privilege of Witness.

§ 293. A corporation is not a "person" within Const. U. S. Amend. 5.—In re Bornn Hat Co. (C. C.) 506.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(D) Inconsistent Statements by Witness.

§ 389. Witness having stated on cross-examination that he did not remember having sworn to the contrary on defendant's preliminary examination, the witness' prior conflicting statements were admissible to impeach him.—Searway v. United States (C. C. A.) 716.

WORDS AND PHRASES.

"Action on policy."—Fellman v. Royal Ins. Co. (C. C. A.) 577.

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"Apothecaries."—United States v. S. Twitchell Co. (D. C.) 525; United States v. Hance (D. C.) 528; United States v. Smith, Kline & French Co. (D. C.) 532.

"Arbitration."—Toledo S. S. Co. v. Zenith Transp. Co. (C. C. A.) 391.

"Award."—Toledo S. S. Co. v. Zenith Transp. Co. (C. C. A.) 391.

"Burnt."—Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co. (D. C.) 947.

"Car."—United States v. Norfolk & W. Ry. Co. (D. C.) 99.

"Coastwise steam vessel."—The Queen (D. C.) 537.

"Comity."—Torrey v. Hancock (C. C. A.) 61.

"Connection therewith."—United States v. Western & A. R. Co. (D. C.) 336.

"Constant pressure engine."—Columbia Motor Car Co. v. C. A. Duerr & Co. (C. C. A.) 893.

"Constant volume engine."—Columbia Motor Car Co. v. C. A. Duerr & Co. (C. C. A.) 893.

"Damaged."—Idaho & W. N. R. R. v. Nagle (C. C. A.) 598.

"Debt."—In re Chandler (C. C. A.) 887.

"Engaged in rectifying, purifying, and refining distilled spirits."—United States v. Smith, Kline & French Co. (D. C.) 532.

"False imprisonment."—Polonsky v. Pennsylvania R. Co. (C. C.) 558.
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"Fixture."—In re Beeg (D. C.) 522.
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"Illegally procured."—United States v. Luria (D. C.) 643.
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"Nonexplosion."—Columbia Motor Car Co. v. C. A. Duerr & Co. (C. C. A.) 893.
"On fire."—Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co. (D. C.) 947.
"Particular average."—Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co. (D. C.) 947.
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"Person interested."—Selden v. Illinois Trust & Savings Bank (C. C. A.) 872.
"Property."—In re Lathrop, Haskins & Co. (D. C.) 534.
"Rectifying, purifying, and refining."—United States v. S. Twitchell Co. (D. C.) 525.
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"Slow combustion."—Columbia Motor Car Co. v C. A. Duerr & Co. (C. C. A.) 893.
"Subrogation."—Travelers' Ins. Co. v. Great Lakes Engineering Works Co. (C. C. A.) 426.
"Trustee."—American Trust Co. v. Canevin (C. C. A.) 657.
"Ultra vires."—Wykes v. City Water Co. of Santa Cruz (C. C.) 752.
"Value or classification."—United States v. Calhoun (D. C.) 499.
"Verification."—Tygart Valley Brewing Co. v. Vilter Mfg. Co. (C. C. A.) 845.

WORK AND LABOR.

See Master and Servant; Seamen.
Liens on real property for work and materials, see Mechanics' Liens.
Salvage services, see Salvage.

§ 14. When there is an express contract for services, and for a stipulated amount and mode of compensation, the plaintiff cannot abandon the contract, and resort to an action for a quantum meruit on an implied assumpsit; nor can he take all advantages of the contract, and at the same time claim for services clearly within its scope.—James Stewart & Co. v. Fulton (C. C. A.) 719.

§ 14. The rule that where a party without excuse refuses complete performance which as a whole is a condition precedent, he cannot sue on a quantum meruit, does not apply where the performance is not a condition precedent to the express obligation arising under the contract.—Susswein v. Pennsylvania Steel Co. (C. C.) 102.

WRITING.

Necessity and sufficiency under statute of frauds, see Frauds, Statute of.
Parol or other extrinsic evidence affecting writings, see Evidence, § 459.
Requisites and sufficiency to satisfy statute of frauds, see Frauds, Statute of, § 115.

WRITS.

See Habeas Corpus.
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Requisites and sufficiency to satisfy statute of frauds, see Frauds, Statute of, § 115.

Particular classes of instruments.

See Chattel Mortgages; Indictment and Information; Insurance; Mortgages; Wills.
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