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THE

FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 194

PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE

CIRCUIT COURTS OF APPEALS, CIRCUIT AND DISTRICT COURTS, AND COMMERCE COURT OF THE UNITED STATES

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

AND

TABLE OF STATUTES CONSTRUED

MAY, 1912

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JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS THE CIRCUIT AND DISTRICT COURTS, AND THE COMMERCE COURT

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. WILLIAM SCHOFIELD, Circuit Judge.....Malden, 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.
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SECOND CIRCUIT

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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 Haven, Conn.
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.....Brooklyn, N. Y.
Hon. GEORGE W. RAY, District Judge, N. D. New York.....Norwich, 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. JULIUS M. MAYER, 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. MAHLON PITNEY, Circuit Justice.....Washington, D. C.
Hon. WILLIAM M. LANNING, Circuit Judge[1].....Trenton, N. J.
Hon. JOHN B. McPHERSON, Circuit Judge[2].....Philadelphia, Pa.
Hon. GEORGE GRAY, Circuit Judge.....Wilmington, Del.
Hon. JOSEPH BUFFINGTON, Circuit Judge.....Pittsburg, Pa.
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[2].....Philadelphia, Pa.
Hon. JAMES B. HOLLAND, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. CHAS. B. WITMER, District Judge, M. D. Pennsylvania.....Sunbury, Pa.
Hon. JAMES S. YOUNG, District Judge, W. D. Pennsylvania.....Pittsburg, Pa.
Hon. CHARLES P. ORR, District Judge, W. D. Pennsylvania.....Pittsburg, Pa.

[1] Died February 16, 1912.
[2] Appointed Circuit Judge. Took oath of office April 8, 1912.

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[3].....Baltimore, Md.
Hon. JOHN C. ROSE, District Judge, Maryland.. ..... Baltimore, Md.
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Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
Hon. HENRY A. MIDDLETON SMITH, District Judge, E. and W. D. S. C..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. WILLIAM R. DAY, Circuit Justice.....Washington, D. C.
Hon. ARTHUR C. DENISON, Circuit Judge ..... Grand Rapids, 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.
Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
Hon. ALEXIS C. ANGELL, District Judge, E. D. Michigan[4]..... Detroit, Mich.
Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan .....Muskegon, Mich.
Hon. JOHN M. KILLITS, District Judge, N. D. Ohio ..... Toledo, Ohio.
Hon. WM. L. DAY, District Judge, N. D. Ohio.....Cleveland, 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.

[3] Died June 6, 1912.

[4] Resignation effective June 1, 1912.

SEVENTH CIRCUIT

Hon. HORACE H. LURTON, Circuit Justice.....Washington, D. C.
Hon. PETER S. GROSSCUP, Circuit Judge[5].....Chicago, Ill.
Hon. FRANCIS E. BAKER, Circuit Judge.....Goshen, Ind.
Hon. WILLIAM H. SEAMAN, Circuit Judge.....Sheboygan, Wis.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.
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 HUMPRHEY, District Judge, S. D. Illinois.....Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana.....Indianapolis, Ind.
Hon. FERDINAND E. GEIGER, District Judge, E. D. Wisconsin[6].....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.....Council Bluffs, Iowa.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....Little Rock, Ark.
Hon. F. A. YOUMANS, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
Hon. ROBERT E. LEWIS, District Judge, Colorado.....Denver, Colo.
Hon. WM. H. POPE, District Judge, New Mexico.....Santa Fé, N. M.
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.....Kansas City, 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. JAMES D. ELLIOTT, District Judge, South Dakota.....Sioux Falls, S. D.
Hon. JOHN A. MARSHALL, District Judge, Utah.....Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....Cheyenne, Wyo.

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. 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.....Spokane, Wash.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....Portland, Or.
Hon. EDWARD S. FARRINGTON, District Judge, Nevada.....Carson City, Nev.
Hon. GEO. M. BOURQUIN, District Judge, Montana.....Butte, Mont.
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[7].....Seattle, Wash.
Hon EDWARD E. CUSHMAN, District Judge, W. D. Washington[8].....Seattle, Wash.

[5] Resigned October 23, 1911.
[6] Appointed March 20, 1912.
[7] Resigned March 20, 1912.
[8] Appointed May 1, 1912.

COMMERCE COURT

Hon. MARTIN A. KNAPP, Presiding Judge.....Washington, D. C.
Hon. ROBERT W. ARCHBALD, Associate Judge.....Washington, D. C.
Hon. WILLIAM H. HUNT, Associate Judge.....Washington, D. C.
Hon. JOHN E. CARLAND, Associate Judge.....Washington, D. C.
Hon. JULIAN W. MACK, Associate Judge.....Washington, D. C

CASES REPORTED

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CASES

ARGUED AND DETERMINED

IN THE

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

TEXAS CO. v. CENTRAL FUEL OIL CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 13, 1912.)

No. 3,652.

1. VENUE (§ 7*)—LOCAL OR TRANSITORY ACTION—SUIT FOR SPECIFIC PERFORMANCE.

A suit to enforce specific performance of a contract by which defendants agreed to deliver the oil produced from wells operated by them into the pipe lines of complainant extending to such wells is personal and transitory, and may be maintained in any court having jurisdiction of the person of defendants.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 13–16; Dec. Dig. § 7.*]

2. COURTS (§ 269*)—FEDERAL COURTS—DISTRICT OF SUIT—LOCAL ACTIONS.

Where a contract gave complainant a lien to secure its performance on property of defendants, consisting of oil leases and wells, a suit to enforce such contract and lien may, under the federal judiciary act (Act March 3, 1875, c. 137, § 8, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513]), be maintained in the district in which the property is situated, regardless of the residence of the parties, provided the requisite diversity of citizenship exists.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. § 269.*

Jurisdiction of federal courts as affected by possession of subject-matter, see note to Adams v. Mercantile Trust Co., 15 C. C. A. 6.]

3. COURTS (§ 276*)—FEDERAL COURTS—DISTRICT OF SUIT—WAIVER OF OBJECTION.

The objection of a defendant that a federal court is without jurisdiction because neither complainant nor defendant is a resident of the district, where the requisite diversity of citizenship exists, is waived by the filing of a general demurrer going to the merits of the bill.

[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 note to Memphis Savings Bank v. Houchens, 52 C. C. A. 192; McPhee & McGinnity Co. v. Union Pac. R. Co., 87 C. C. A. 634.]

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

4. APPEAL AND ERROR (§ 878*)—REVIEW—ASSIGNMENT OF CROSS-ERRORS.

An appellee or defendant in error who takes no appeal or writ of error himself cannot by assigning cross-errors, or by brief or argument confer on a federal appellate court jurisdiction to consider, review or decide upon rulings against him in the court below.

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

5. UNITED STATES (§ 125*)—JURISDICTION OF FEDERAL COURTS—SUIT AGAINST INDIAN AGENT.

An agent of the Interior Department having charge of the affairs of Indian tribes under direction of the Secretary is not exempt from process of the court, and is a proper, although not indispensable, party to suit to determine rights under leases of Indian lands.

[Ed. Note.—For other cases, see United States, Cent. Dig. §§ 113, 114; Dec. Dig. § 125.*]

6. CORPORATIONS (§ 506*)—PARTIES—SUIT AGAINST CORPORATION.

To a suit in a federal court against a corporation to enforce specific performance of a contract made by it in behalf of subsidiary companies which it controls through ownership of their stock, such subsidiary companies are not indispensable nor even necessary parties.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1958–1970; Dec. Dig. § 506.*]

7. SPECIFIC PERFORMANCE (§ 5*)—JURISDICTION OF EQUITY—REMEDY AT LAW.

A remedy at law to exclude the jurisdiction of a court of equity of a suit for specific performance must be plain and adequate, and as certain, prompt, complete, and efficient to attain the ends of justice and its prompt administration as the remedy in equity.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 5–8; Dec. Dig. § 5.*]

8. SPECIFIC PERFORMANCE (§ 5*)—JURISDICTION OF EQUITY—INADEQUACY OF LEGAL REMEDY.

The insolvency of a defendant is a circumstance proper to be considered in determining whether equity has jurisdiction of a suit for specific performance of a contract on the ground that the remedy at law by an action for its breach is inadequate.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 5–8; Dec. Dig. § 5.*]

9. SPECIFIC PERFORMANCE (§ 68*)—CONTRACTS ENFORCEABLE—CONTRACTS RELATING TO PERSONAL PROPERTY.

A contract relating to personal property may be specifically enforced in equity where the property is such that it cannot be obtained in the market, or only at great expense and inconvenience, and a failure to obtain it would cause a loss to complainant which could not be adequately compensated in an action at law.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 199; Dec. Dig. § 68.*]

10. SPECIFIC PERFORMANCE (§ 75*)—GROUNDS FOR RELIEF—CONTRACT FOR SALE OF OIL PRODUCTION.

Complainant, which operated an oil pipe line in Texas and into Oklahoma and also several refineries, entered into a contract with defendant, which through subsidiary companies owned a number of leases on which it operated wells in the Bartlesville oil field in Oklahoma, by which complainant agreed to extend its pipe line to such field and to a connection with defendant's wells, and defendant agreed to run all of its oil into such line for a term of 10 years, to be paid for by complainant as provided for by the contract. At that time there was but one pipe line in such field, and defendant was compelled to accept the prices made by it without the benefit of competition while complainant needed the oil for its

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

refineries. Complainant built the extension of its pipe line at a cost of $700,000, and for a time received the oil from defendant's wells, after which defendant refused to make further deliveries. *Held*, that complainant was entitled to enforce specific performance of the contract in equity, on a bill alleging such facts; that defendant was insolvent; that without the oil contracted for its pipe line extension was comparatively valueless; and that it could not otherwise procure sufficient oil to keep its refineries in full operation.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 210; Dec. Dig. § 75.*]

11. SPECIFIC PERFORMANCE (§ 75*)—CONTRACTS ENFORCEABLE—CONTRACT FOR CONTINUOUS ACTS.

It is no objection to the specific enforcement in equity of a contract for the sale of the production of oil wells, to be delivered into the purchasers' pipe line, that the contract extends over a term of years, there being no personal services, skill, or judgment required, nor anything likely to require the supervision of the court if the contract is performed in good faith.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 210; Dec. Dig. § 75.*]

12. APPEAL AND ERROR (§ 1078*)—REVIEW—QUESTIONS NOT ARGUED.

An issue raised by the pleadings, but not argued in the appellate court, will be treated as abandoned, and not considered.

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

13. SPECIFIC PERFORMANCE (§ 16*)—CONTRACTS ENFORCEABLE—FAIRNESS.

A contract is not unconscionable in such sense that it will not be specifically enforced in equity because by reason of matters arising after it was made it has become more burdensome on one of the parties than was anticipated, nor because the cost of performance by the other party was less than anticipated.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 35, 36; Dec. Dig. § 16.*]

14. APPEAL AND ERROR (§ 870*)—REVIEW—INTERLOCUTORY ORDERS—APPEAL FROM FINAL DECREE.

While under section 7 of the act establishing Circuit Courts of Appeals (Act March 3, 1891, c. 517, 26 Stat. 828), as amended by Act Feb. 18, 1895, c. 96, 28 Stat. 666, and Act June 6, 1900, c. 803, 31 Stat. 660 (U. S. Comp. St. 1901, p. 550), and Act April 14, 1906, c. 1627, 34 Stat. 116 (U. S. Comp. St. Supp. 1909, p. 220), an appeal does not lie from an order refusing to grant a temporary injunction or to appoint a receiver, such an order is reviewable on appeal from a final decree dismissing the bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3451, 3487–3512; Dec. Dig. § 870.*

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; Central 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.]

15. SPECIFIC PERFORMANCE (§ 108*)—PRELIMINARY INJUNCTION—SUIT FOR SPECIFIC PERFORMANCE.

In a suit for specific performance of a contract, where the bill states a cause of action for such relief, complainant is entitled to a preliminary injunction to restrain violation of the contract, and such injunction may be granted if the equities require it, even if the contract is one not specifically enforceable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 353; Dec. Dig. § 108.*]

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

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

Suit in equity by the Texas Company against the Central Fuel Oil Company and others. From a decree dismissing the bill on demurrer, complainant appeals. Reversed.

The appellant, a corporation created by and having its domicile in the state of Texas, filed its bill in the court below against the defendants, seeking specific performance of a contract made by it with the defendant Central Fuel Oil Company. A temporary restraining order was granted on an ex parte hearing on the bill and affidavits filed with it. The defendants Bankers' Trust Company, Indian Territory Illuminating Oil Company, Sagamore Oil & Gas Company, Waukesha Oil Company, Wigwam Oil Company, Stevens Point Oil Company, and the Sachem Oil Company filed special pleas to the jurisdiction of the court upon the ground that neither the complainant nor these defendants were citizens or residents of the Eastern District of Oklahoma. The defendants Hugh Pitzer and Dana H. Kelsey also filed special pleas to the jurisdiction of the court, alleging that they are Indian superintendents, having charge, in behalf of the Secretary of the Interior and under his direct management and control, of the affairs of the Five Civilized Tribes of Indians, and that they were simply engaged in carrying out the policy and execution of the laws of the United States in its dealings with these Indians in their tribal property, and for that reason, although they are citizens of the state of Oklahoma and residents of the Eastern District, they are not subject to the jurisdiction of the courts.

The pleas to the jurisdiction of the defendants Bankers' Trust Company, Indian Territory Illuminating Oil Company, Hugh Pitzer, and Dana H. Kelsey were by the court sustained. The other defendants who had filed special pleas to the jurisdiction filed at a later day a general demurrer to the bill, and thereupon the special pleas were by the court overruled. At the hearing of the motion of defendants to dissolve the restraining order and that of complainant to grant a temporary injunction, the court announced its readiness to allow a temporary injunction upon certain conditions which complainant declined to accept, whereupon the temporary order was dissolved, and the application for the temporary injunction denied. The court, at the same time, also sustained the general demurrer filed by the defendants to the bill. That part of the decree reads as follows: "And the court thereupon announced that in view of the action of the plaintiff in declining to accept and consent to the conditions upon which the court proposed to grant the temporary injunction, and in view of the other holdings and findings of the court and actions of the plaintiff, the respective demurrers filed by the defendants Central Fuel Oil Company and subsidiary corporations will be sustained. Therefore be it ordered, adjudged, and decreed that the defendants' demurrers be sustained, the application of the plaintiff for a temporary injunction be denied, that the restraining order heretofore entered be dissolved, and the plaintiff's bill dismissed at the plaintiff's cost." From this decree and all interlocutory orders made by the court, by which the appellant felt aggrieved, this appeal is prosecuted.

As the final decree was rendered upon the demurrer to the sufficiency of the bill, it is advisable that the allegations in the bill, upon which it was sought to obtain specific performance of a contract, be set forth more fully than would otherwise be necessary.

The defendant the Central Fuel Oil Company, hereafter called the "Central Company," was a holding company. It held a majority of the stock of numerous corporations which had subleases of lands, some of which originally belonged to the Osage Indians, the Creek Indians, and the Cherokees, under which those companies were entitled to drill for and take oil from the land. Some of these leases were subject to restrictions, and others were free from such restrictions. The Central Company by virtue of its ownership and control of these subsidiary companies and the leases was enabled to produce large quantities of oil in the Bartlesville field, but there was only one method by which it could get this oil to the market, and that was by sale to the Prairie Oil & Gas Company, a subsidiary company of the Standard Oil Company,

that being the only company which had a pipe line in that territory. It was desirous of getting a pipe line into the Bartlesville field, so that it might transport its oil out without paying tribute to the Prairie Oil & Gas Company. The complainant, the Texas Company, was a refining company and the owner of pipe lines piping oil from Tulsa, Okl., and other regions to the Gulf of Mexico in the state of Texas, and the Central Company entered into negotiations with the Texas Company to procure an outlet for its oil.

The result of these negotiations was a contract between the two companies, the Texas Company and the Central Fuel Oil Company, made on June 13, 1910, by the terms of which it was agreed:

(1) The Central Company was to deliver to the Texas Company, and the latter agreed to receive, all crude petroleum which might be tendered by the Central Company from the property it owned or controlled by corporations, which were fully described, and also from other properties which the Central Company might then own, or thereafter acquire during the term of the contract in the Bartlesville or northern Oklahoma field, either directly or through ownership of a majority of the outstanding stock.

(2) The crude petroleum was to be of merchantable quality, and be delivered from the tanks owned or designated by the Central Company in the north Oklahoma field and subject to the customary and usual deduction in determining the quantity, and be of gravity not less than 30 degrees Beaume, but the Texas Company was not to be required to receive more than 20,000 barrels in any one day nor more than 540,000 barrels in any one month of 30 days. The Central Company also agreed that it would operate or cause to be operated all of the properties covered by the contract, and would tender all of the products realized from these properties up to the maximum stated.

(3) This paragraph provides that all the oil delivered to the Texas Company shall be carried in a separate account on the books of the company so that the quantity thereof may be readily identified. The Texas Company agreed that it would deliver to the Central Company or to its order an amount of merchantable fuel oil equal in quantity to the 50 per cent. of the crude petroleum it delivered to the Texas Company, the same to be charged against said account as 50 per cent. of the crude petroleum and for the remaining 50 per cent. the Texas Company is to pay the Central Company 89¼ cents per barrel, which price is predicated upon an arbitary basis of 42 cents per barrel for crude petroleum, which basis should continue for the first five years of the term of the contract. For the balance of the term of the contract the price to be paid by the Texas Company for said remaining 50 per cent. is to be regulated by the prevailing prices for crude petroleum in the oil field within the above limits from which said crude petroleum is taken, and be arrived at by adding to such price of 89¼ cents per barrel 1 cent for each 1 cent the prevailing price may advance above said 42 cents per barrel.

(4) Delivery points for the fuel oil shall be at Miller's Switch Station, south of Dallas, on the Houston & Central Railroad, and at Houston, Tex., on the Texas & New Orleans Railroad, the deliveries to be made free on board tank cars or in storage tanks to be furnished by the Central Company or its customers, but the Texas Company was to have the option, on emergency conditions preventing deliveries as above, of making the deliveries due at Miller's Switch Station, Tex., at Corsicana, Tex., and deliveries due at Houston, Tex., at Humble, Tex., and for all oil delivered at Houston or at Humble, Tex., the Texas Company was to be paid an additional allowance of 12½ cents per barrel.

(5) The Texas Company obligated itself to extend its pipe line system to the Central Company's oil fields as soon as possible, and not later than January 22, 1911.

(6) Settlement shall be had and payments made monthly, the Texas Company to charge the Central Company storage at the rate of 1 cent per barrel per month on all oils remaining more than 30 days. but the storage charge to apply only to balances exceeding 100,000 barrels, the Central Company to be charged and pay to the Texas Company for each month of the life of the contract the sum of $70,000.

(7) This paragraph refers to a loan of $3,000,000, which is more fully set out in another part of the contract.

(8) This paragraph makes provision for a mortgage to be executed by the Central Company to the Bankers' Trust Company for a loan of $6,000,000, a copy of which mortgage is filed as an exhibit to the bill. The paragraph also provides that the Texas Company shall have certain rights, remedies, and liens, described in section 7 of the mortgage, and that the Central Company shall also execute any other or further instrument that may be necessary to give full effect to that provision. It also provides that if the Texas Company should make any payment or incur any cost or expense in preventing or making good any defaults of the Central Company or its successors under said mortgage, or shall make any advances for the protection or benefit of the Central Company under said mortgage, the Central Company will pay to the Texas Company the amount of such payments, expenses, costs, and advances with 6 per cent. interest per annum, and to secure these payments, and also any other made for the purpose of discharging liens on the property, the Texas Company shall be entitled to all the rights, remedies, and liens granted by the mortgage to the Bankers' Trust Company.

(9) This paragraph provides that the remedies in paragraph 8 and also mentioned in the mortgage shall not be deemed exclusive, but the Texas Company shall be entitled at all times to exercise any remedy which it would be entitled to exercise if no such provision had been made in the mortgage. It is next provided that, in view of the great cost of the additional construction of pipe lines to the oil fields of the Central Company, that company agrees that it will loan or cause to be loaned to the Texas Company the sum of $3,000,000, for which the Texas Company is to execute its notes and secure them by mortgage in the form contained in a draft attached to the contract.

(10) This paragraph provides that the contract shall be for 15 years from and after January 22, 1911, but by a later contract between the parties this was modified by reducing the life of the contract to ten years from that date.

The next two paragraphs provide how many gallons shall constitute a barrel and the temperature of the crude petroleum. They also except both parties from liabilities for any damages arising from strikes or other labor disturbances, invasions, insurrections, or acts of God.

(13) This paragraph specifies that this agreement shall be deemed to have superseded and shall take the place of every and any other instrument purporting to be an agreement between the parties hereto, heretofore entered into, signed, or delivered or purporting to have been signed or delivered upon behalf of said parties or either of them.

Exhibit 10 to the contract is a copy of the mortgage to be executed by the Central Fuel Oil Company to the Bankers' Trust Company. Article 7 of that mortgage, hereinbefore referred to, provides that if default shall be made in the payment of the principal or interest upon any of the loans secured by the mortgage when the same shall become due and payable, or in the prompt performance of any of the covenants, conditions, or agreements in the mortgage or bonds, the Texas Company shall have the right, if it so elect, to make any payment or perform or cause to be performed any act as to which such default shall have occurred, and thereupon it shall succeed to and possess a lien upon all of the property and assets of the company for the amount of money expended or for the expenses or costs of making good any such default, which lien, however, shall be subject always to the priority of the lien of the holders of the bonds.

The bill then sets out the shares of stock of the subsidiary companies owned at the time by the Central Company. Of most of these subsidiary companies the Central Company owned practically all of the stock and a majority of the capital stock of all of them. The contract made between the Texas Company and the Central Company was ratified by all the subsidiary companies and adopted as their own, so far as it affected them. The $6,000,000 mortgage to the Bankers' Trust Company was duly executed dated July 15, 1910, which was after the contract made between the Texas Company and the Central Company. At the time the contract was entered into, the Texas Company owned and operated three refineries in the state of Texas, as mentioned in the contract, and was constructing a fourth refinery at West Tulsa, in the state of Oklahoma. It had a pipe line system extending from the seaboard across the state of Texas into the state of Oklahoma and to the locality of the

place where the refinery was being built, but it had no pipe line system to the Bartlesville or north Oklahoma field where the oil wells of the Central Company were, and for this reason was not a buyer of oil in said locality. Immediately after the execution of the contract, and on the faith thereof, it promptly and with all reasonable speed extended its pipe line system to said Bartlesville field and established adequate gathering stations and other facilities which would enable it to perform its obligation under said contract, completing the same prior to the 22d of January, 1911. It expended under said contract in improvements and extensions about $700,000, they being necessarily of a permanent nature, but of little value to complainant, unless this contract is carried into effect by the Central Company. During the year 1910 the oil production in the locality reached by complainant's pipe line system greatly declined, and, if it cannot obtain the oil from defendant for which it had contracted, its pipe lines and refineries must remain idle to a great extent, as oil cannot be obtained elsewhere. After the execution of this contract, on the 6th day of January, 1911, a question having arisen as to the determination of what properties were in fact owned by the Central Company and its subsidiaries, and some of the oil coming from leases which required the payment of royalties, an additional agreement was entered into between these parties, whereby it was provided that each subsidiary company within the operation of the contract should execute and file with the Texas Company at Tulsa, Okl., a certificate authorizing the Texas Company to receive the oil and pay for it as directed by the owners. It was also provided that abstracts and evidences of title were to be furnished to the Texas Company showing the ownership of the oil and upon failure to furnish such evidences of title, or, in the event of a dispute concerning the title, the Texas Company was to retain the money until satisfactory indemnity was furnished. Forms for these abstracts of titles and transfer orders were prepared and were to be executed and furnished by the Central Company to the Texas Company before payment was to be made for the oil delivered. After the first pipe line had been completed, the Texas Company, at the request of the Central Company and its subsidiaries, laid other branches and lines of pipe in said fields to reach the different wells at an expense of several thousand dollars. In several instances the Central Company has failed to furnish complainant satisfactory abstracts and other evidence of title or satisfactory indemnity except as to a portion of the land and leases embraced in the contract. Some of the abstracts and evidences of title disclosed serious defects and infirmities of title and for this reason these oils have not been paid for; but the money for this oil is kept separately for the purpose of paying for it as soon as the title is ascertained. Up to May 1, 1911, the Central Company had furnished to complainant in the state of Oklahoma from its lands 708,567.76 barrels of oil, and of this oil the complainant has delivered at the request of the Central Company at Miller's Switch Station, near Dallas, Tex., 393,366.23 barrels of fuel oil of the gravity required by the contract, and is ready to continue in the future to take the crude oil from said lands, and deliver the fuel oil in Texas as provided in the contract. The oil from some of the wells described in the bill is on Indian reservations, for which royalties must be paid. These Indian owners are under the control of the Indian superintendents who are made defendants in this cause for that reason.

The bill then sets out various amounts of money due it from the Central Company and also the $70,000 per month as provided in the contract, which sums it has credited on the amounts due from it to the Central Company; that the $3,000,000 loan was obtained by the Central Company for complainant, for which it executed its notes and a mortgage on its (complainant's) property; that these notes are in the hands of other parties, who purchased them for value, so that the indebtedness due the complainant from the Central Company cannot be set off against them but has to be paid by the complainant to the holders of the notes as they mature; that the Central Company is wholly insolvent; that all of its property is mortgaged for more than its value, and it has no property subject to execution in case of a judgment against it; that it now refuses to carry out its contract, and has informed complainant that it will disconnect its oil wells from complainant's pipe line, and that it will procure its $6,000,000 mortgage to be foreclosed and a receiver

for itself and its oil properties to be appointed; that it will probably cease to carry on its operations and leave complainant helpless; that complainant has no adequate remedy at law, and for that reason has to apply for relief to a court of equity. The prayer of the bill is that an injunction be issued enjoining the defendant the Central Company, and its subsidiaries, from disconnecting complainant's pipe lines or shutting off any wells or in any manner interfering with it in running oil from any of the lands or leases mentioned in the bill or from in any wise violating the contract or any of the provisions thereof; that a receiver be appointed to take charge of the property of the defendants, and to perform such duties as may be necessary for the preservation of the right to produce and take oil from said lands and for a full and complete performance of the contract and the protection of complainant's rights thereunder. It then prays for a discovery as to the subsidiary companies, and that upon final hearing there be a decree for the specific performance of the contract and that the lien of the Bankers' Trust Company under the mortgage be subordinated to complainant's rights.

A. L. Beaty (Jas. L. Autry and F. B. Dillard, on the brief), for appellant.

Louis Marshall and George S. Ramsey (James A. Veasey, on the brief), for appellees other than Dana H. Kelsey and Hugh Pitzer.

William J. Gregg, U. S. Atty., for appellees Dana H. Kelsey and Hugh Pitzer.

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

TRIEBER, District Judge (after stating the facts as above). [1] If the sole object of the bill of complaint is to obtain a decree for specific performance of the contract for the delivery of the oil, the proceeding would be one in personam, and such an action, in the absence of a statute conferring jurisdiction in rem, would not be local, but transitory, and could be maintained in any court having jurisdiction of the person of the defendant. Penn v. Baltimore, 1 Ves. Sr. 444; Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181; Orton v. Smith, 18 How. 263, 15 L. Ed. 393; Hart v. Sansom, 110 U. S. 151, 154, 3 Sup. Ct. 596, 28 L. Ed. 101; Pennoyer v. Neff, 95 U. S. 714, 723, 25 L. Ed. 565; Phelps v. McDonald, 99 U. S. 298, 25 L. Ed. 473; Cole v. Cunningham, 133 U. S. 107, 118, 10 Sup. Ct. 269, 33 L. Ed. 538; Arndt v. Griggs, 134 U. S. 316, 320, 10 Sup. Ct. 557, 33 L. Ed. 918; Western Union Tel. Co. v. Pittsburgh, etc., R. R. Co. (C. C.) 137 Fed. 435.

[2] But by the provisions of article 7 of the mortgage to the Bankers' Trust Company complainant is entitled to a lien on all the premises mortgaged, subject to that of the trust company, not only for any moneys it might pay to protect the property against defaults under the mortgage or by releasing any judgment or attachment liens, but also in case of any default by the Central Company in the performance of any of the obligations of the Company under the contract with the Texas Company. This, in effect, gives the Texas Company a second mortgage upon all that property with the right to enforce that mortgage in a court of equity. That such a lien may be enforced, under section 8 of the judiciary act of March 3, 1875, in the Circuit Court of the United States for the district in which the property is situated regardless of the residence of the parties, provided the proper diversity

of citizenship exists, is well settled. Greeley v. Lowe, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69; Dick v. Foraker, 155 U. S. 404, 15 Sup. Ct. 124, 39 L. Ed. 201. For these reasons, the court below erred in sustaining the special pleas of the defendants Bankers' Trust Company and Indian Territory Illuminating Oil Company.

[3] As to the defendants Sagamore Oil & Gas Company, Waukesha Oil Company, Stevens Point Oil Company, and Sachem Oil Company, by filing general demurrers to the sufficiency of the bill, they waived their privilege of not being subject to this action in a national court in the state of Oklahoma even had it existed. Western Loan Company v. Boston C. M. Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101. In that case the defendant filed its demurrer to the complaint, alleging, first, that the court had no jurisdiction of the subject of the action; second, that the court had no jurisdiction of the person of the defendant; third, that said complaint did not state facts sufficient to constitute a cause of action against the defendant; fourth, that the complaint was uncertain; fifth, that the complaint was unintelligible. Neither the plaintiff nor the defendants were at the time of the institution of the suit citizens or residents of the state of Montana (the suit having been instituted in the United States Circuit Court for the District of Montana), but it was held that as diversity of citizenship existed so that the suit was cognizable in some national court, the objections to the jurisdiction of the particular court in which the suit was brought might be waived by appearing and pleading to the merits, and interposing a demurrer going to the merits as well as to the jurisdiction of that particular court amounted to such a waiver. Other cases to the same point are In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 52 L. Ed. 904; Ingersoll v. Coram, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208; Shanberg v. Fidelity & Casualty Co., 158 Fed. 1, 85 C. C. A. 343, 19 L. R. A. (N. S.) 1206; McPhee & McGinnity Co. v. Union Pacific R. R. Co., 158 Fed. 5, 87 C. C. A. 619; Logan & Bryan v. Postal Telegraph Co. (C. C.) 157 Fed. 570.

[4] But, aside from that fact, neither of these last-named defendants have appealed from the order of the court overruling their pleas. The question whether the special pleas to the jurisdiction were erroneously overruled is therefore not presented here. In O'Neill v. Wolcott Mining Co., 174 Fed. 527, 98 C. C. A. 309, 27 L. R. A. (N. S.) 200, this court, citing numerous authorities to sustain the conclusion reached, said:

> "An appellee or defendant in error who takes no appeal or writ of error himself cannot, by assigning cross-errors or by brief or argument, confer jurisdiction upon a federal appellate court to consider, review, or decide rulings against him in the court below."

[5] The pleas of the defendants Pitzer and Kelsey to the jurisdiction were erroneously sustained. Their pleas are that they are officers of the United States, and the action against them is in effect a suit against the United States. Such officers are not exempt from the process of the court nor from its injunction in case they should undertake to do any act not authorized by law; nor is such an action one against the United States. The courts have jurisdiction to determine

whether the acts of officers in any particular case are in pursuance of authority conferred on them by the acts of Congress or the head of a department. Noble v. Union River Logging R. R. Co., 147 U. S. 172, 13 Sup. Ct. 271, 37 L. Ed. 123; Grisar v. McDowell, 6 Wall. 363, 18 L. Ed. 863; Butterworth v. United States ex rel., 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 656; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932; Garfield v. Goldsby, 211 U. S. 249, 29 Sup. Ct. 62, 53 L. Ed. 168; Western Union Telegraph Co. v. Andrews, 216 U. S. 165, 30 Sup. Ct. 286, 54 L. Ed. 430; Wadsworth v. Boysen, 148 Fed. 771, 78 C. C. A. 437.

So far as the allegations of the bill show, the duties of these defendants are only to secure and protect the rights of the Indian lessors by collecting the royalties due them. The question in issue in this cause, in so far as it affects these defendants, is not whether the court has the power to enjoin them from doing lawful acts, but whether they are proper parties in view of the interests of the Indians who are the owners of the lands leased, and for whose protection these officers are acting. Although they are not indispensable, nor even necessary, parties, they are proper parties, and the mere fact that they are employés or officers of the government does not exempt them from being made parties in an action of this nature. But, even if the special pleas of all the parties who filed them should have been sustained, it would not affect the power of the court to proceed with the cause so far as the other defendants are concerned. The rule of law is well settled that only the absence of indispensable parties will deprive a court of equity of the power to proceed against the other defendants. Proper parties, or even necessary parties, may be dispensed with, but the decree will not affect their rights. Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260; Hotel Company v. Wade, 97 U. S. 21, 24 L. Ed. 917; Carrau v. O'Calligan, 125 Fed. 657, 60 C. C. A. 347, affirmed sub nom. Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101; Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122; Cella, Adler & Tilles v. Brown (C. C.) 136 Fed. 439, affirmed 144 Fed. 472, 75 C. C. A. 608; Rogers v. Penobscott Mining Co., 154 Fed. 606, 83 C. C. A. 380.

[6] Neither of these defendants is an indispensable party to this proceeding and the subsidiary companies are not even necessary parties, for the Central Company, as the holder of the majority of their stock, has control of them, and a decree against it will grant all the relief complainant prays. Union Pacific Ry. Co. v. Chicago, etc., Ry. Co., 163 U. S. 564, 592, 16 Sup. Ct. 1173, 41 L. Ed. 265. Equity Rule 47 (29 Sup. Ct. xxxi) expressly provides for cases of this nature.

[7] Did the court err in sustaining the demurrer to the bill? On behalf of the appellee, it is urged that there is no equity in the bill for several reasons. First, it is argued that complainant has a complete and adequate remedy at law by an action for damages for breach of the contract. It is true that a court of equity will not assume jurisdiction of a cause, and especially one for specific performance, if the complainant has a complete and adequate remedy at law. But to have this effect it is not sufficient that there be a remedy at law. It must

be plain and adequate, and as certain, prompt, complete, and efficient to attain the ends of justice and its prompt administration as the remedy in equity. Boyce v. Grundy, 3 Pet. 210, 7 L. Ed. 655; Watson v. Sutherland, 5 Wall. 74, 18 L. Ed. 580; Davis v. Wakelee, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578; Walla Walla v. Walla Walla Water Works, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; Smith v. Bank, 89 Fed. 832, 32 C. C. A. 368; Castle Creek Water Co. v. Aspen, 146 Fed. 8, 76 C. C. A. 516; Farwell v. Colonial Trust Company, 147 Fed. 480, 78 C. C. A. 22.

[8] The allegations in the bill which the demurrer admits to be true show clearly that the remedy at law is entirely inadequate to grant the relief to which the complainant may be entitled. There are several aspects in which this appears. It is charged that the Central Company is insolvent, and that all of its property is now covered by a mortgage to secure an indebtedness in excess of its value. While there is high authority for holding that insolvency alone may sometimes be a cause for equitable interference, it is unnecessary to determine that question in this case, but we do hold that insolvency is a circumstance to be considered in connection with the other allegations in the bill for the purpose of determining whether there is a complete and adequate remedy at law. McNamara v. Home Land & Cattle Co. (C. C.) 105 Fed. 202. In many instances insolvency alone will justify the interposition of a court of equity otherwise cognizable only in a court of law. Injunctions are often granted against trespassers solely upon the ground of insolvency. Prof. Pomeroy, in his work on Equity Jurisprudence, says on that subject:

"The inadequacy of legal remedies ordinarily against an insolvent trespasser is obvious, and the reason for equity's intervention in such cases is clear. The number of cases in which the defendant's insolvency is made a material part of the court's reason for granting an injunction is very great. The number of cases in which the question has arisen whether insolvency alone is enough to support it is not so large, but it is sufficient to show the general recognition by the courts of the glaring insufficiency of a judgment for damages against an insolvent." 5 Pomeroy, Eq. Jur. § 497.

But, aside from the question of insolvency, an action at law for damages would not enable complainant to recover all damages it may suffer by reason of the breach of contract. The damages in this case are impossible of proof. No one can say what amount of oil the Central Company will or can produce during the life of the contract by a conscientious attempt to comply with it. It is a well-known fact, of which courts are bound to take judicial notice, that oil is fugacious, and may be drawn away by strangers through other wells. The flow of the wells decreases in the course of years, and long before the expiration of this contract these wells may become entirely dry. Any damages awarded would be wholly speculative and uncertain, and without any possibility of sufficient legal proof to sustain the judgment. Wilkinson v. Colley, 164 Pa. 43, 30 Atl. 286, 26 L. R. A. 114; McCornick v. United States Mining Co., 185 Fed. 748, 108 C. C. A. 86, and authorities there cited; Peale v. Marian Coal Co. (C. C.) 190 Fed. 376, 388.

If, as suggested, successive actions for the damages suffered may be instituted upon the expiration of certain fixed periods, when the amount of oil taken from the wells during the preceding period has been ascertained, there would necessarily have to be a multiplicity of suits, to avoid which the intervention of a court of equity is certainly proper. Bank of Kentucky v. Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180; Peale v. Marian Coal Co. (C. C.) 172 Fed. 639.

In addition to these considerations, it appears from the bill, and the contract between the parties establishes it, that one of the main inducements to this contract was to enable the complainant, by obtaining the crude oil, to utilize the three refineries it then owned and had in operation in the state of Texas and one it was then constructing in the state of Oklahoma; and to enable the Central Company, which at that time could only dispose of the oil produced from its wells through a sale to the Prairie Oil & Gas Company, to make sales of its products to other companies and obtain the benefit of competitive prices. For this purpose, it was necessary for the Central Company to have pipe lines extended to its oil fields and to be connected with lines extending to places where there was a market for its crude oils. One of the provisions of the contract was:

"The Texas Company agrees that it will promply and with all reasonable speed extend its pipe line system to Bartlesville or the north Oklahoma field, as above described, and will establish an adequate gathering system and related facilities as will enable it to perform the duties of this contract, such to be completed nor later than January 22, 1911."

The bill charges that complainant built this pipe line and erected tanks and installed pumping stations necessary to carry out the provisions of the contract at an expense of $700,000, that these improvements are of a permanent nature, and, unless the oil thus contracted for is delivered to it, this pipe line and pumping stations are of but little value, if any, and the cost thereof practically lost. These facts clearly exclude a conception that an action at law will afford a complete and adequate remedy.

In Watson v. Sutherland, supra, an injunction was sought to restrain the levy of an execution on a stock of merchandise claimed by the plaintiff to be his property, and not that of the execution debtors. Objection was made that there was a complete remedy at law by an action of trespass against the sheriff and the execution creditors. In overruling this objection the court said:

"If the appellants made the levy and prosecuted it in good faith, without circumstances of aggravation, in the honest belief that Wroth and Fullerton owned the stock of goods, and it should turn out, in an action at law instituted by Sutherland for the trespass, that the merchandise belonged exclusively to him, it is well settled that the measure of damages, if the property were not sold, could not extend beyond the injury done to it, or, if sold to the value of it, when taken, with interest from the time of the taking down to the trial. And this is an equal rule, whether the suit is against the marshal or the attaching creditors, if the proceedings are fairly conducted, and there has been no abuse of authority. Any harsher rule would interfere to prevent the assertion of rights honestly entertained, and which should be judicially investigated and settled. 'Legal compensation refers solely to the injury done to the property taken, and not to any collateral or consequential damages, resulting to the owner by the trespass.' Loss of trade, destruction of credit,

and failure of business prospects are collateral or consequential damages which, it is claimed, would result from the trespass, but for which compensation cannot be awarded in a trial at law. Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fails to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings in limine, brings the parties before it, hears their allegations and proofs, and decrees, either that the proceedings shall be unrestrained, or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the pleadings. In the case we are considering it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice require the injunction to be issued."

[9] It is also contended that specific performance is not the proper remedy to enforce a contract affecting personal property. When an action for damages is adequate, a court of equity is without jurisdiction. As hereinbefore shown, however, such an action would not afford complainant in this case adequate relief. It is now well settled that, when the chattels are such that they are not obtainable in the market, or can only be obtained at great expense and inconvenience, and the failure to obtain them causes a loss which could not be adequately compensated in an action at law, a court of equity will decree specific performance. Equitable Gaslight Co. v. Baltimore Coal Tar & Mfg. Co., 63 Md. 285; Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92, 27 N. E. 1005, 12 L. R. A. 563, 26 Am. St. Rep. 214; Offutt v. Offutt, 106 Md. 236, 67 Atl. 138, 12 L. R. A. (N. S.) 232, 124 Am. St. Rep. 491; Harris v. Perry, 215 Pa. 174, 64 Atl. 334; Richmond v. Dubuque, etc., R. R. Co., 33 Iowa, 480; Chehak v. Battles, 133 Iowa, 107, 110 N. W. 330, 8 L. R. A. (N. S.) 1130; Law v. Smith, 68 N. J. Eq. 81, 59 Atl. 327; Newton v. Wooley (C. C.) 105 Fed. 541.

[10] From the allegations in the bill it appears that crude oil cannot as a rule be purchased in the open market, but, to obtain it, the refining and pipe line companies must extend their pipes at enormous expense to the oil fields, assuming that the oil fields can be found. It is charged that in 1910 the oil production in the localities reached by complainant's pipe line system had greatly declined, and is still declining; that this was one of the vital considerations leading to the execution of the contract by the complainant; that other pipe line companies have acquired and obtained control of large acreages, if not practically of all producing and prospective oil lands and leases in those localities; and, if said contract is not specifically performed, complainant charges its pipe lines and refineries will remain idle to that extent.

In Equitable Gaslight Co. v. Baltimore Coal Tar & Mfg. Co., specific performance was decreed on a contract to sell coal tar which plaintiff needed in order to fulfill existing contracts and which it was impossible to obtain otherwise than by purchasing in distant cities and transporting the same at great expense. In Gloucester Isinglass & Glue Co. v. Russia Cement Co. specific performance was decreed of a contract to furnish fish skins to be used in the manufacture of glue. It appeared that fish skins were of very limited production; that most

of the producers were under contract; and that, unless relief were given by specific performance, it would be very difficult, if not impossible, for the complainant to carry on its business. The equities in those cases were no stronger than those in this case.

It is next urged that the bill shows that the complainant had failed to make payments for the crude oil delivered to it by the Central Company in compliance with the terms of the contract, and this failure, it is insisted, was such a breach of the contract as justifies the defendant to treat it as no longer in force, and denies complainant's entrance into a court of equity to demand specific enforcement or any other equitable relief. It is true the bill shows complainant had not paid for all the crude oil received by it from the Central Company, but it also shows that the reason therefor was the failure of the Central Company to furnish, as a condition precedent to receiving, the division orders, and the abstracts or other evidence of title to some of the lands, or execute satisfactory indemnity as required by the supplemental agreement executed on January 6, 1911, and that complainant "stands ready and willing to pay the balance due and owing by it as soon as the proper division orders are filed and good title showings are made, or it is determined said defendant has good title to the oil and is entitled to payment, or, if necessary, it will deposit the money in court or pay the same over to a receiver." As courts of equity may prescribe terms upon which temporary injunctions are granted the court below had the right to require, and as shown by the record it did require, complainant to pay the moneys for which proper abstracts had been filed before the hearing, and it did pay the same. Upon these allegations, which the demurrer admits to be true, the failure of complainant to pay the money was justified, and not a breach of the contract, and is no reason for refusing any equitable relief it may otherwise be entitled to.

[11] It is next contended that the contract in respect to which relief is sought extends over a period of 10 years, necessitating supervision for a long time in a manner which a court of equity will not undertake. The leading cases on which appellees rely to sustain this proposition are Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955; Texas & Pacific R. R. Co. v. City of Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385; Javierre v. Central Antragracia, 217 U. S. 502, 30 Sup. Ct. 598, 54 L. Ed. 858; Berliner Gramaphone Co. v. Seaman, 110 Fed. 30, 49 C. C. A. 99; Shubert v. Woodward, 167 Fed. 47, 92 C. C. A. 509; Lone Star Salt Co. v. T. S. L. Ry. Co., 99 Tex. 434, 90 S. W. 863, 3 L. R. A. (N. S.) 828; Edelen v. Samuels & Co., 126 Ky. 295, 103 S. W. 360, 31 Ky. Law Rep. 731. A careful examination of the facts and the opinions of the courts in these cases is necessary to determine to what extent they are applicable to the facts in this cause as shown by the bill.

In the Marble Company Case the contract, as stated by the court, required of the owners a perpetual supply of marble and involved "skill, personal labor and cultivated judgment." Upon these facts it was held:

"If performance be decreed the case must remain in court forever, and the court to the end of time may be called upon to determine, not only whether

the prescribed quantity of marble has been delivered, but whether every block was from the right place, whether it was sound, whether it was of suitable size, or shape, or proportions."

The contract sought to be enforced in this case runs for 10 years only, and involves no "skill, personal labor, and cultivated judgment." What it does require is easily ascertainable, and, if carried out in good faith, ought not to give rise to any disputes requiring the interposition of the court. During the time it was complied with by appellee no disputes arose, and there is no reason for anticipating any now if good faith will control the actions of both parties. That some differences may occur is true, but they are not likely to be of a nature requiring much consideration. No one will question for a moment the duty of a court of equity specifically to enforce a lease of ground for a term of ten years or even a term of 99 years because the lessee is bound by certain covenants such as paying rents, taxes, and assessments, keeping the buildings in repair or erecting buildings according to certain specifications, keeping the buildings insured and other conditions usually inserted in such contracts of lease, and which may give rise to as many or more disputes than the contract in the case at bar.

Texas Pacific Ry. Co. v. City of Marshall was in effect determined upon the ground that, under the circumstances of that case, the word "permanent" in the contract was complied with by the establishment of the terminus and the offices and shops contracted for and not mentioned at the time of removing and abandoning them at a later day, and having kept them there for eight years, until the interests of the railway company and of the public demanded their removal to some more suitable place. Another reason assigned by the court for its judgment was that the city had a complete and adequate remedy at law for damages which could be determined in one action. As to the supervision necessary, if specific performance were decreed, the opinion of the court shows clearly why a court could not undertake it in that case by saying:

"If the court had rendered a decree restoring all the offices and machinery and appurtenances of the road which had been removed from Marshall to other places, it must necessarily superintend the execution of this decree. It must be making constant inquiry as to whether every one of the subjects of the contract which has been removed has been restored. It must consider whether this has been done perfectly or in good faith or only in an evasive manner. It must be liable to perpetual calls in the future for like enforcement of the contract, and it assumes, in this way, an endless duty, inappropriate to the functions of the court which is as ill-calculated to do this as it is to supervise and enforce a contract for building a house or building a railroad, both of which have in this country been declared to be outside of its proper function, and not within its powers of specific performance."

In the Javierre Case the decree of the lower court was reversed upon two grounds, neither of which exists in this case. The court held that an action at law for damages would have granted all the relief complainant was entitled to, and also that there was a want of mutuality as no injunction could have been granted against the appellee.

In the Gramaphone Case the parties, when they executed the contract, realized that it would probably give rise to many disputes, and therefore expressly provided for the appointment of a disinterested arbiter to settle any disputes regarding the interpretation of the contract. The meaning of the articles contracted for was doubtful, and the contract itself undertook to define the phrase "gramaphone and gramaphone goods" as intended by the use of the words in the contract.

The Shubert Case was decided mainly upon two grounds: First, that there was a want of mutuality; and, second, that the terms of the contract would necessarily entail upon the court through many years the supervision and direction of a continuous series of acts, many of them requiring skill and cultivated judgment. As enumerated by the court, some of these were:

"What bookings for a theater should be approved or disapproved; how many and what persons should be employed to operate the theater; how the intricate details of the theater should be conducted; how its operation should be advertised, and many other unforeseen issues which the complicated performances contemplated cannot fail to raise."

But the court took occasion to say further:

"It is conceded that a court of equity has ample power to determine all these questions and to conduct this business by its receiver, or master, and that it will sometimes enforce the performance of contracts where the performance involves more intricate details or longer periods of time where the other equities of the complainant in the case, or the public interest are controlling."

In the Lone Star Salt Company Case the contract was one which made special provision for compensation in case of a breach, and it was held that specific performance should therefore not be decreed as there was a complete remedy at law. The court then proceeded:

"While we have thought it proper to put the decision upon the construction of the contract, which is held to be the true one, we may say that the same result will follow either construction. The injunction to the defendant to deliver the freight as it accrues finally settles nothing, amounting to nothing more than a command to carry out the contract, leaving undetermined the particular acts to be done to constitute performance. In what quantities and at what interval of time is the tonnage to be furnished as it accrues? How is the defendant's action in executing the order to be affected by the condition of plaintiff's business, existing at different times, in respect to its readiness or unreadiness to receive and promptly transport? How will the defendant at any given time be enabled to determine how much of its outgoing freight must be delivered, as it accrues, to compensate for any deficiency in percentage of incoming freight received and carried by plaintiff? These and many other questions that might be presented expose the futility of the attempt to define in advance the course of conduct the defendant must pursue in order to obey the mandate of the court. The truth is, the contract is of such a nature that, under any construction, the remedy of specific performance cannot specifically be applied to it. What would constitute a violation of the decree could only be determined by future actions of the court in further proceedings to define its scope and meaning, and to enforce it."

No such obstacles are to be surmounted in this case. Defendants contracted for all the oil, not exceeding 540,000 barrels for any one month of 30 days. It had the pipe lines to carry that amount, and there was no question of any incoming freight.

In Edelen v. Samuels & Co. the contract was of such a nature that,

if specifically enforced, it would require the court's constant attention for a period of at least five years. As stated by the court:

"In order to make the whisky contemplated by the terms of the instrument before us, the court will be forced to purchase a large quantity of grain and other material necessary to the distillation of the spirits to be delivered; also to erect a bottling works, and be prepared to bottle the whisky after it is made."

There are no such facts in this case. The court, in the same case, speaking of the distinction said to exist between contracts involving realty and that involving personal property, so far as the remedy of specific performance is concerned, said:

"The right to a decree of specific performance of a contract is based upon the equitable principle that the ordinary common-law remedy of damages for a breach will not afford defendant an adequate remedy from the injury arising from the failure to carry out its terms. It is true that generally mere damages will more uniformly be found to fail as an adequate remedy in contracts relating to realty than those relating to personalty; yet, where the specific enforcement of a contract concerning personalty is practicable, and the remedy sounding in damages is found to be inadequate, the chancellor would just as readily enter a decree for its specific performance as he would in a contract concerning real property. And, while the remedy of specific performance is generally spoken of as issuing in the discretion or grace of the chancellor, this is more a form of expression than of actual definition of the rights of the injured party as to his remedy by specific performance. In other words, while the chancellor has a discretion, it is not an arbitrary but a legal discretion."

Many other cases are cited by the learned counsel for appellees to this point. All of them have been carefully examined, and are as distinguishable upon the facts as those above cited. Some of them apply to construction contracts requiring skill and judgment. In others the parties can be compensated in an action at law; while some, sustaining appellee's contention to some extent rely upon cases determined long ago, overlooking the fact that equitable remedies have steadily been expanded by the court to meet the increased complexities of modern business relations. The leading cases in the national courts sustaining the right of having specific performance decreed in cases of this nature, although it may necessarily result in the court retaining the cause to settle questions which may arise under the contract thereafter, are Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843, affirming the decision of Judge, afterwards Mr. Justice Brewer, in Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C.) 29 Fed. 546; Union Pacific Railway Co. v. Chicago, etc., Ry. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265, affirming the decision of the Circuit Court of Appeals for this Circuit in 51 Fed. 309, 2 C. C. A. 174, which had affirmed Mr. Justice Brewer's decision in Chicago, R. I. & P. Ry. Co. v. Union Pac. Ry. Co. (C. C.) 47 Fed. 15.

In the Joy Case Mr. Justice Blatchford, who delivered the unanimous opinion of the court, in reply to a contention similar to that of the instant case, said:

"In the present case it is urged that the court will be called upon to determine from time to time what are reasonable regulations to be made by the Wabash Company for the running of its trains upon its tracks by the Colorado Company. But this is no more than a court of equity is called upon to

do whenever it takes charge of the running of a railroad by means of a receiver. Irrespective of this, the decree is complete in itself and disposes of the controversy; and it is not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances."

In Union Pacific Railway Co. v. Chicago, etc., Ry. Co., where the contract sought to be enforced was for 999 years, Mr. Chief Justice Fuller, speaking for the court sustaining a decree for specific performance, said:

"But it is objected that equity will not decree specific performance of a contract requiring continuous action involving skill, judgment, and technical knowledge, nor enforce agreements to arbitrate, and that this case occupies this attitude. We do not think so. The decree is complete in itself, is self-operating, and self-executing; and the provision for referees in certain contingencies is a mere matter of detail, and not of the essence of the contract. It must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies, 'so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated,' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrong are constantly committed.' Pomeroy, Eq. Jur. § 111."

Judge Brewer, in his opinion in the Circuit Court in Central Trust Company v. Wabash, etc., R. R. Co., said on that subject:

"It is true that such a decree cannot be executed by the performance of a single act. It is continuous in its operation. It requires the constant exercise of judgment and skill by the officers of the corporation defendant; and therefore, in a qualified sense, it may be true that the case never is ended, but remains a permanent case in the court, performance of whose decree may be the subject of repeated inquiry by proceedings in the nature of contempt. It is also true that in the changing conditions of business the details of the use may require change. The time may come when the respondents' business may demand the entire use of its tracks and the intervener's rights wholly cease. But other decrees are subject to modification and change, as in decrees for alimony. The courts are not infrequently called upon to modify them by reason of the changed condition of the parties thereto. So, when a decree passes in a case of this kind, it remains as a permanent determination of the respective rights of the parties, subject only to the further right of either party to apply for a modification upon any changed condition of affairs; and, so far as any matter of supervision of the personal skill and judgment of the officers of the respondent corporation, the contract, in terms, provides that the regulations of the running of trains shall be subject to the control of the officers of the respondent. While I concede that there is force in the objection that this must remain, in a qualified sense, a continuing case in the courts, with a constant duty of supervising the acts of the respondent, yet it seems to me that, where there is a right, there must be a remedy, and that the mere machinery of court procedure is flexible enough to adapt itself to the necessity of protecting a right. Clearly a mere action for damages would be a grossly inadequate remedy." 29 Fed. 558.

In the Rock Island Case the same learned justice said:

"I know to one who is only familiar with the narrow limits and the strict lines within and along which courts of law proceed the act of a court of equity in taking possession of a contract running for 999 years, and decreeing its specific performance through all those years seems a strange exercise

of power; but I believe most thoroughly that the powers of a court of equity are as vast and its process and procedure as elastic as all the changing emergencies of increasingly complex business relations and the protection of rights can demand." 47 Fed. 26.

While it is true, as contended by counsel for appellees, that these cases relate to contracts between railroads and therefore might have been sustained upon the ground of the interests of the public, there are other cases in no wise affected by public exigency, especially where violations of the decree could only occur infrequently and each violation would be a single complete act. Franklin Telegraph Co. v. Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776; Hackett v. Hackett, 67 N. H. 424, 40 Atl. 434; Chubb v. Peckham, 13 N. J. Eq. 207; Livesley v. Johnston, 45 Or. 30, 76 Pac. 13, 746, 65 L. R. A. 783, 106 Am. St. Rep. 647; St. Regis Paper Co. v. Santa Clara Lumber Co., 173 N. Y. 149, 65 N. E. 967.

Prof. Pomeroy, the editor of the last edition of Pomeroy's Equity Jurisprudence, in his article on the subject of specific performance, published in the Encyclopedia of Law & Procedure, after discussing this subject and referring to the authorities, says:

"But in a remarkable series of cases, beginning with the year 1890, contracts involving the operation of railroads, often of the utmost complexity and extending over a long term of years, or perpetual, have been enforced specifically. In the leading case of the series a controlling reason for the decision was that the interests of the general public would have been injuriously affected by a failure to make the decree; but this reason appears to have dropped out of sight in the cases following this precedent"—citing numerous cases sustaining this last proposition. 36 Cyc. 587.

[12] As counsel for appellees, neither in their exhaustive brief nor extended oral argument, contended that the contract is unenforceable in a court of equity upon the ground that the court cannot efficiently compel appellant to perform its obligations under the contract, this claim must be treated as abandoned, and therefore will be disregarded. Crawford v. Heysinger, 123 U. S. 589, 8 Sup. Ct. 399, 31 L. Ed. 269; Home Benefit Association v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160; Repauno Chemical Company v. Victor Hardware Co., 101 Fed. 948, 42 C. C. A. 106.

[13] Is appellant's position so unconscionable that a court of equity should withhold the relief? That specific performance is not a matter of right, but one of discretion in the court, and that it will not be decreed when the contract is unfair, one-sided, or unconscionable, nor when the granting of the decree will be harsh and oppressive, is undoubtedly true, and requires no citation of authorities to sustain it. But, on the other hand, the discretion of the court does not mean, in the language of Judge Sanborn, speaking for this court in Shubert v. Woodward, supra:

"In its arbitrary, whimsical will, but in the sound, judicial discretion, informed and directed by the established principles, rules, and practices of equity jurisprudence. Hennessey v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500. Nor are these principles and rules and this practice hard, fast, or without exception. They are rather advisory than mandatory, and the application of the rules and of the exceptions to each particular case as it arises is still intrusted to the conscience of the chancellor, for these principles and rules and this practice serve to inform the intellect and to en-

lighten the conscience and by them the judicial discretion of the court must be guided."

Applying these rules to the facts in this case, the question is, In what respect is the contract unconscionable, and will a decree work a great hardship and injustice, unforeseen when the contract was made? It is argued:

"That the agreement to pay appellant the monthly toll of $70,000 in consideration of the construction of a pipe line and related facilities by the appellant, for carrying the oil produced by the Central Company, on the representations made and the mistaken belief engendered by the appellant that to supply these transportation facilities it would incur an expense of $3,000,000, whereas the bill of complaint admits that the total amount expended was but $700,000."

But there is not a line or word in the bill nor the contract warranting this statement. All the contract contains on that subject is found in paragraph 6b, and is as follows:

"The Central Company shall be charged and shall pay to the Texas Company for each month of the life of this contract the sum of $70,000."

And the bill charges that this was to pay the cost of transportation from the oil fields to Miller's Switch Station south of Dallas, Texas, on the Houston & Central Railroad. The demurrer admits the truth of these allegations. What, if anything, is unconscionable in this charge, counsel for appellees have failed to explain, nor can we find anything in the record which would justify us in so finding. From the terms of the contract it appears that appellees at that time expected to produce at least 540,000 barrels every month, for otherwise why should the contract provide that appellant "shall not be required to receive more than 20,000 barrels in any one day nor more than 540,000 barrels in any one month of thirty days and on the same basis as to other months?"

Had the Central Company tendered the quantity the Texas Company was bound to receive and pay for, the charge for the transportation to Miller's Switch would have been not quite 13 cents per barrel. That this is not an exorbitant charge is shown by the fact that paragraph 4 of the contract provides that for all deliveries made at Houston or Humble, Tex., the appellant shall pay an additional allowance of 12½ cents per barrel. If the parties considered 12½ cents per barrel a fair remuneration for transporting the oil from Miller's Switch to Houston or Humble, the court would not be justified in finding that 13 cents per barrel from Bartlesville, Okl., to Miller's Switch, Tex., would be so unreasonable that it should be treated as unconscionable. But, even if the charge of 13 cents a barrel is a higher charge than is usually made for like services, the excess is balanced by the obligation of the Texas Company to pay for the oil a higher price than the prevailing market at that time required. True, if the production greatly diminishes, the price for the transportation rises, and it becomes a hard contract for the Central Company, but, if the production increases and the price of oil decreases, it will be a hard contract for appellant, as the contract provides for no reduction of the price to be paid by the Texas Company in such case, while it does make provision for a higher

price in case there is a rise in the market value of the oil. All contracts to be performed in the future are subject to market fluctuations, contracts for the sale of realty as much as any other. But no case can be found where a court of equity has refused to decree specific performance of a contract for the sale of real estate upon the ground that after the contract was made the value of the property had greatly increased. Had they seen proper, the parties could have guarded against such a contingency by providing for it in the contract. As held in Marble Company v. Ripley, supra:

"Nor is it any reason for rescinding the contract that it has become more burdensome in its operation upon the complainants than was anticipated."

And further on the court said:

"It is not unconscionable because Ripley obtains a larger profit from it than was at first expected, or because the other party obtained less. Those were contingencies, the possibilities of which might have been foreseen. It could not have escaped the thought of the contracting parties that the expense of quarrying might possibly increase, and that the expense of sawing and preparing for market might either increase or diminish in the progress of time. Of that they took their chances. Besides, it is by no means clear that a court of equity will refuse to decree the specific performance of a contract, fair when it was made, but which has become a hard one by the force of subsequent circumstances or changing events."

Other authorities to the same effect are Franklin Telegraph Co. v. Harrison, supra; Bradley v. Heyward (C. C.) 164 Fed. 107, affirmed 179 Fed. 325, 102 C. C. A. 509; Schmidtz v. Louisville & N. R. R. Co., 101 Ky. 441, 41 S. W. 1015, 19 Ky. Law Rep. 666, 38 L. R. A. 809; Southern Ry. Co. v. Franklin & P. Ry. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297.

The cost of the pipe lines and other facilities constructed by the Texas Company is a matter which, so far as the Central Company is concerned, is immaterial. What the Central Company was interested in, and what induced it to make the contract, was the opportunity to reach competitive markets for its oils, and thus avoid being compelled to sell all its products to the Prairie Oil & Gas Company without competition, that being the only company whose pipe lines, at that time, reached its fields. The appellant has fully complied with its part of the contract. It has built the pipe lines to the Central Company's oil fields, established adequate gathering stations and related facilities which enable it to perform all its obligations under the contract, and has been ever since, and is now, able to handle all the oil the Central Company may tender under the contract. No damage then can possibly result to the Central Company by reason of the fact that the Texas Company was able to construct these facilities at a less cost than was anticipated. The Central Company would not be benefited if the cost of furnishing these facilities had been four or ten times as much as it really was, and the converse is equally true. We can see nothing unconscionable or inequitable in this. There would be just as much merit in the contention that one who has contracted for the erection of a building or the construction of a railroad has the right to refuse to carry out his contract and pay for the same because the contractor was able to perform the contract at a much less cost than was anticipated

and therefore made a larger profit. In Franklin Telegraph Co. v. Harrison, supra, Mr. Justice Harlan, delivering the opinion of the court, after reviewing numerous authorities on that subject, said:

"In view of these principles, which we think are founded on wisdom, we are of opinion that the fact that the appellants could, at the commencement of this suit, or since, sell at an increased price the privilege for which the appellees paid by relinquishing a valuable contract and advancing a large sum of money, and which privilege they now enjoy for the stipulated price of $600 per annum, is not sufficient to justify the court in withholding the relief asked."

[14] Did the court err in refusing the temporary injunction? Section 7 of the act of March 3, 1891, as amended by the acts of February 18, 1895, June 6, 1900, and April 14, 1906 (34 Stat. 116), in force at the time this appeal was granted, did not provide for an appeal from an interlocutory order or decree dissolving or refusing to grant a temporary injunction, or refusing to appoint a receiver, and this court would therefore be without jurisdiction to review such an interlocutory decree if an appeal had been taken from that alone. But, as this is an appeal from a final decree dismissing the bill, it brings the whole case here, including all interlocutory orders made during the progress of the case. Central Trust Co. v. Seasongood, 130 U. S. 482, 9 Sup. Ct. 575, 32 L. Ed. 985; Bailey v. Williford, 131 Fed. 242, 66 C. C. A. 229. As, in our opinion, complainant, upon the face of the bill, is entitled to a decree of specific performance, it was the duty of the court to grant the injunction as prayed.

[15] An injunction against the breach of a contract is to a great extent a negative decree of specific performance. And, even if for sufficient reasons specific performance may be refused, the modern rule is that an injunction must be granted if the equities justify it. Leading English cases on this subject are Donnell v. Bennett, Law Reports, 22 Ch. Div. 835, decided in 1883 by Mr. Justice Fry, the author of Fry on Specific Performance, and Met. El. Supply Co. v. Ginder, 2 Ch. Div. 799, and this rule of granting an injunction, although specific performance may be denied, has been followed by the American courts generally. It is most frequently exercised in contracts for personal services which cannot be enforced by specific performance. A valuable collation of the American authorities on this subject is found in the note to Harrison v. Glucose Sugar Refining Co., 116 Fed. 304, 53 C. C. A. 492, 58 L. R. A. 915. Other cases in point are Western Union Tel. Co. v. Union Pacific Ry. Co. (C. C.) 3 Fed. 423; Chicago & Alton Ry. Co. v. N. Y. L. E. & W. R. R. Co. (C. C.) 24 Fed. 516; Alpers v. San Francisco (C. C.) 32 Fed. 503; Brush-Swan Co. v. Brush El. Co. (C. C.) 41 Fed. 163; Colgate v. James T. White & Co. (C. C.) 180 Fed. 882; Standard Fashion Co. v. Siegel-Cooper Co., 157 N. Y. 60, 51 N. E. 408, 43 L. R. A. 854, 68 Am. St. Rep. 749; Dwight v. Hamilton, 113 Mass. 175; American Electric Works v. Varley, etc., Co., 26 R. I. 295, 58 Atl. 977.

In Singer Sewing Machine Co. v. Union, etc., Co., Holmes, 253, Fed. Cas. No. 12,904, Judge Lowell held:

"If the case is one in which the negative remedy of injunction would do substantial justice between the parties by obligating the defendant either to

carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason or policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it."

But it is earnestly contended that whereas in fact only $900,000 has been expended by the Texas Company in the cost of the construction of the pipe line and the other facilities necessary to be provided by the Texas Company, the affidavits, read on behalf of the appellees at the hearing of the motion for the temporary injunction, established the fact that the monthly payment of $70,000 assumed by the Central Company was based solely on the estimate that the cost of the construction would amount to $3,000,000, on which sum 28 per cent. per annum was to be allowed. As all of the negotiations were conducted prior to the execution of the contract, that evidence was clearly inadmissible, as its tendency was to vary the written contract, which the law conclusively presumes includes the final agreement, reached when the minds of the parties had finally met. That a court of equity will permit the introduction of parol evidence for the purpose of correcting mistakes in written instruments, or contracts obtained by fraud, either by reforming the instrument or if necessary rescinding it, or refusing a specific enforcement, if such an issue is raised by the pleadings, is no doubt true. But there is no such issue in this case, nor any evidence to establish the fact that there was a mistake as to the amount to be paid. In fact, the contract itself negatives it.

Newton v. Wooley (C. C.) 105 Fed. 541, decided by the writer of this opinion, is among the cases relied upon by counsel for appellees, but an examination of the facts in that case will show how inapplicable it is to the issues in the case at bar. That case was determined upon proofs taken in the usual course of equity procedure, after the issues had been made up. The answer of the defendant expressly charged that the contract sought to be specifically enforced did not contain all the terms of agreement between the parties, but that the agreement on which the minds of the parties had met required the complainant to procure parties who would sell to defendant on credit, in addition to the rolling stock mentioned in the contract, the rails, bolts, and spikes for the construction of the railroad, and, if credit could not be obtained, the funds necessary to purchase them for cash would be furnished; that these provisions, except as to the rolling stock, which defendant could himself procure on credit, were omitted from the contract by the mistake of the scrivener who prepared it, and was not noticed by either of the parties until shortly before the institution of the suit; that complainant was unable to secure the rails, bolts, and spikes, and did not furnish the money necessary to purchase them. Although there was some conflict in the testimony on that point, the court found those issues in favor of the defendant, and also found as a fact that this omission in the contract was by the mistake of the stenographer who wrote it, and that the contract was signed by the parties in the absence of the attorney who had prepared and dictated it as the attorney for both parties, and without having been read over by him or the parties, both of them being under the impression at the time that the contract contained all the stipulations agreed upon.

In the instant case no such contention is made by any plea of appellees, nor do the affidavits establish such a state of facts, or a mistaken mutual assumption of an existing fact. The most that can be said to be established by the affidavits is that there was a mistaken assumption as to a matter to be performed in the future. Such mistakes will not justify reformation, rescission, or denial of specific performance. Chicago, etc., Ry. Co. v. Wilcox, 116 Fed. 913, 54 C. C. A. 147; Farwell v. Colonial Trust Co., 147 Fed. 480, 78 C. C. A. 22. The negotiations between the parties were conducted for a considerable length of time, and many changes in the propositions and counter propositions were made before the final agreement was reached. No doubt, for the purpose of avoiding such controversies as this, the parties inserted the following provision in the contract:

"(13) It is mutually acknowledged and agreed that this agreement shall be deemed to have superseded and shall take the place of every and any other instrument purporting to be an agreement between the parties heretofore entered into, or signed or delivered or purporting to have been signed or delivered upon behalf of said parties or either of them."

To review critically all the citations in the elaborate briefs of counsel would unnecessarily prolong this opinion, lengthy now, and serve no useful purpose, as a careful examination of them discloses that they are distinguishable upon the issues as well as the facts, and therefore inapplicable to the case at bar.

It may be that after the issues are made up and the proofs in complainant will not be entitled to a decree of specific performance upon the final hearing, but upon the allegations of the bill, and a careful examination of the affidavits submitted to the court below on the hearing of the application for the temporary injunction, we are of the opinion that the equities in this case are so imperative, the remedy at law so inadequate, that a court of equity should exercise its power and grant relief to complainant. The temporary injunction as prayed in the bill should be granted, and, if necessary, a receiver of the property appointed.

The decree of the court below is reversed, with directions to grant a temporary injunction, and proceed in conformity with this opinion.

UNITED STATES v. BARBER LUMBER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 19, 1912.)

No. 1,883.

1. PUBLIC LANDS (§ 138*)—CANCELLATION OF PATENTS FOR FRAUD—BONA FIDE PURCHASER.

A person desiring to purchase a large tract of timber lands of the United States, which are subject to entry under Timber and Stone Act June 3, 1878, c. 151, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545), may lawfully express such desire to another and contract with him to purchase the lands and advance money to enable the seller to acquire them from the entrymen; and he is not bound to inquire into the method by which such seller acquires title, nor chargeable with any fraud therein, which

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

would render the patents subject to cancellation, of which he has no actual knowledge.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 368; Dec. Dig. § 138.*]

2. PUBLIC LANDS (§ 120*)—SUIT FOR CANCELLATION OF PATENTS—SUFFICIENCY OF EVIDENCE.

To warrant the cancellation of a patent for land issued by the United States for fraud, the evidence must be clear, unequivocal, and convincing, and it cannot be done on a bare preponderance of evidence which leaves the issue in doubt.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. § 120.*]

3. PUBLIC LANDS (§ 120*)—SUIT FOR CANCELLATION OF PATENTS—SUFFICIENCY OF EVIDENCE.

Evidence considered, and *held* insufficient to prove the allegations of the bill in a suit by the government to cancel patents to lands on the ground that title was acquired by fraud in which defendant, which was a subsequent purchaser, participated.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. § 120.*

Bona fide purchasers of public lands, see note to United States v. Detroit Timber & Lumber Co., 67 C. C. A. 13.]

Appeal from the Circuit Court of the United States for the Central Division of the District of Idaho.

Suit in equity by the United States against the Barber Lumber Company, James T. Barber, Sumner G. Moon, William Sweet, John Kinkaid, Louis M. Pritchard, Patrick H. Downs, Albert E. Palmer, and Horace S. Rand. Decree dismissing the bill (172 Fed. 948), and complainant appeals. Affirmed.

The bill in this case alleged that the appellee, the Barber Lumber Company, and others, intending to defraud the United States, combining, confederating, and agreeing together and with Frank Steunenberg, since deceased, John I. Wells, and others, devised a plan whereby by fraud, perjury, and subornation of perjury and other unlawful methods they might unlawfully and fraudulently procure for themselves large quantities of public lands of the United States; that this was to be done by procuring persons to avail themselves of the provisions of the timber and stone act, by filing the written statements required by said act, and doing the other things necessary to obtain title, under an agreement with the appellee and others by which the appellee was to purchase the lands described in the respective statements as soon as the applicants should have secured title thereto; that in some cases the unlawful means consisted in procuring persons to enter land under said act under an agreement with the appellee and its co-conspirators, by which the latter were to furnish and supply to the applicants the money necessary to pay all expenses in connection with the filing upon and procuring title to the lands, including the sums necessary to pay for the lands; and that thereupon the applicants were to deed their lands to the appellee or to others in their behalf. The bill charges that pursuant to that agreement and conspiracy, and to effect its object, those engaged therein fraudulently and corruptly induced the applicants named in the bill, 210 in number, to apply for land under said act and to subscribe to the written statements required thereby, and to state therein that the applicants did not apply to purchase the lands for speculation, but in good faith, and to appropriate it to their own exclusive use and benefit, and that they had not directly or indirectly made any agreement or contract in any way or manner with any person by which the title to be acquired should inure in whole or in part to the benefit of any person except the applicants; that thereafter, in pursuance of the unlawful agreement, and

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

to effectuate its object, the appellee procured the entrymen to go to the land office and answer the questions promulgated by the General Land Office, pursuant to the authority vested in it by the timber and stone act; and that each of said persons, in reply to the questions, deposed that he had not sold or transferred his claim to the land for which he made application, that he had not directly or indirectly made any agreement with any person by which the title he might acquire from the government should inure in whole or in part to any person but himself, but that the entry was made in good faith and for his own exclusive use and benefit, and that he paid out of his own individual funds all his expenses connected therewith, and that he expected to pay for the land with his own money. The bill further alleged that the statements made by each of the 210 entrymen, both at the time of making their original filing and at the time of making their final proof, were false and were known to be false by the entrymen and by the appellee and its co-conspirators, and that in truth and in fact divers of the applicants had been supplied and furnished with money with which to pay for said land and the fees and expenses incident to obtaining title thereto by the appellee and its co-conspirators, and that the title to said lands was so obtained by each of the applicants with the understanding that the same should be conveyed at the request of the appellee as soon as title was obtained from the United States. The bill further alleged that the land was so conveyed, and it set up the description of the lands which had been fraudulently procured, with the names of the persons to whom patents therefor were issued.

The answer put in issue the charge of conspiracy to do unlawful acts on the part of the appellee and the other defendants in the suit. The case was tried upon the issues, and a vast amount of testimony was taken. The Circuit Court held that the allegations of the bill were not sustained by the evidence and that the bill should be dismissed. From that decree the present appeal is taken.

The lands embraced in the suit consist of three different groups which were purchased by the appellee at different dates. They are known in the proceedings in the court below as: (1) Boise basin lands, comprising townships 6, 7, and 8 in ranges 4, 5, and 6; (2) Crooked river lands, consisting of townships 6 and 7 in ranges 7 and 8; and (3) Six-Four lands, consisting of lands in township 6 in range 4. The Boise basin lands were opened to entry at different dates between August 1, 1874, and August 9, 1897. The Crooked river lands were opened to entry in March and April, 1897, and the Six-Four lands were opened to entry on September 14, 1903. On August 17, 1901, one Ruick and others organized a railway company which filed a plat of a survey of a railroad into the Boise basin. Soon thereafter Paris & Manning, locators of timber lands, residing in Minneapolis, located on Boise basin lands Patrick H. Downs, Henry Snow, and two women of Minneapolis, and they made initial entries of those lands. And in September, 1901, John I. Wells, a miner, located Jennie E. Wells, his wife, Albert Nugent, Arthur Anderson, Harvey Wells, his brother, James T. Ball, and Abel Edward Hunter on Boise basin lands, for which he received location fees from each. Those entries were subsequently canceled by the land office. About October 1, 1901, Wells and Downs formed a partnership in the location business; Wells going to Boise to solicit applicants, and Downs remaining on the lands to guide entrymen thereto. During August, September, October, November, and December, 1901, and January 1, 1902, 49 locations were made in the basin by Wells & Downs. Before any filings had been made in the Boise basin, a general order had been issued on July 13, 1901, by the Commissioner of the General Land Office, suspending action on all timber and stone entries in Idaho, and requiring all filing and final proof papers to be sent to Washington for approval before the issuance of final receipts so that upon making final proof on these entries no final receipt was issued, but temporary receipts for the purchase price were given. This fact and the general public discussion of land frauds about that time caused some of the entrymen to default upon their payments or to fail to prove up. To meet that situation, Wells made an arrangement with one William Sweet on December 25, 1901, whereby the latter was to furnish Wells with money to loan to such of the entrymen who had filed as were unable or unwilling to pay for their lands. Carrying out that arrangement,

Sweet did furnish Wells, and Wells loaned to the entrymen money aggregating about $12,000 for final payments, as security for which he took the temporary receipts issued by the Land Office.

About January 1, 1902, Wells employed John P. Kinkaid to purchase these claims for him and furnished him money for that purpose. Kinkaid, who was an attorney, advised him that he could not safely buy on the temporary receipts. About February 10, 1902, Sweet formed a partnership with Gov. Steunenberg, to buy lands. About April 1, 1902, Kinkaid returned to Sweet all the money that had been furnished him for the purpose of purchasing land. Steunenberg, soon after making his partnership with Sweet, looked about for financial assistance and procured $15,000 from A. B. Campbell, of Spokane. Campbell about that time met A. E. Palmer of Spokane who had been employed by the North Western Lumber Company of Eau Claire, Wis., a company in which Barber and Moon were actively interested, and who had been requested by the latter to report to them any good lumber proposition he might hear of in the West. Campbell told Palmer of Steunenberg's proposition and offered to turn it over to him, handing him at the same time Steunenberg's report on the timber. On February 21, 1902, Palmer sent this written report of Steunenberg's to Mr. Barber at Eau Claire, and the next day he wrote him that $30,000 worth of timber had already been bought by Steunenberg. Barber directed Palmer to have Steunenberg go to Eau Claire at his expense. On March 6, 1902, Steunenberg arrived at Eau Claire, and he represented to Barber that he and Mr. Sweet had already bought 6,400 acres of land for which they had final receipts, and that they would get deeds when patent issued; that they had kept back a part of the purchase price until the patents should issue; that many timber and stone entries had been made on which final receipts had not issued, but that he believed he could purchase said lands at a price not to exceed $5 per acre when they were on the market; that enough more land could be procured by the use of scrip to make a total of 25,000 acres; that Sweet could not furnish enough money to carry out the scheme, but was willing to sell out. An agreement was thereupon made by which Sweet's interests were to be transferred to Barber and Moon, provided Palmer, after investigation, found Steunenberg's representations to be correct. A contract was drawn up, of date March 12, 1902, was signed by Barber and Moon on that date, and was sent to Palmer with instructions to have Steunenberg sign it if he (Palmer) found things as represented. On April 2, 1902, Palmer reported adversely to the proposition on account of the inaccessibility of the Boise basin timber and recommended buying on the Payette river. Moon wired in reply that if the requisite amount of timber of proper kind could be had in the basin they preferred that to the Payette river timber. Palmer replied that he could close the deal provided it was understood that no patents had been issued, and that the title to the basin lands rested upon receipts. Moon telegraphed Palmer to close the deal if he considered the title good and everything seemed straight. On April 10, 1902, Palmer closed the deal and drew his own checks for about $40,000 to Sweet and Steunenberg, and drew on Barber and Moon for that amount. Thereupon the contract bearing date March 12. 1902, was signed by Steunenberg.

The purport of the agreement is as follows: First, there is recited the fact that there are in the Boise basin many thousands of acres of timber lands upon which is standing and growing pine and fir timber which will average at least 10,000 feet of board measure to the acre, which lands are so situate that the timber thereon may be practically handled and with great profit in logging and manufacturing the same into lumber, and that the title to said lands may be obtained within the next six months at a price not exceeding $5.50 an acre. Second, that Steunenberg, the party of the first part thereto, and one Sweet, are engaged in the enterprise and venture of exploring said lands and obtaining title thereto, and that they have perfected the title to certain of said lands, and have invested therein a large sum of money, approximately $22,000; that Steunenberg and Sweet are willing that Sweet should transfer all of his right, title, and interest in and to the enterprise and in the lands so by him acquired therein either separately or jointly with Steunenberg to Barber and Moon, parties of the second part, for the amount actually invested, together with a profit of 50 per cent. thereon. Third, in the event

that Barber and Moon accept such proposition and pay Sweet the money so invested by him and 50 per cent. in addition, that Steunenberg can and will acquire by good and perfect title, and have vested in Barber and Moon within six months from the date of the contract, 25,000 acres of land, with at least 200,000,000 feet, board measure, of merchantable pine and fir timber, for a price not to exceed $140,000. Steunenberg further agreed immediately to select and locate said lands and to cause good, perfect, and indefeasible titles thereto to be vested in Barber and Moon, and that within six months he would vest in them good title to at least 25,000 acres at a price that should not exceed $6.50 an acre. Steunenberg further covenanted and agreed that the title to all lands acquired under the agreement should be good, perfect, and indefeasible "where such title is or may be derived or obtained from any person or source other than that acquired by or through the location of government scrip." And it was further agreed that when such title was obtained a corporation should be formed to take over said lands, one-quarter of the stock whereof was to be issued for the benefit of Steunenberg but to be held as collateral security by Barber and Moon for money advanced under the agreement. There are other provisions of the agreement not necessary to be set forth.

At the date when the contract was executed, 74 applications had been made of the 92 basin entries involved in this suit, and 50 had gone to final proof. Of the 18 basin entries made after that date, 9 were cases in which the entryman paid his own location expenses and paid the government for the land without borrowing any portion of the funds necessary therefor, and each entryman testified that he had not at any time any agreement, express or implied, whereby any other person had any interest in or lien on the land. As to the other 9, there is no testimony to impugn the good faith of the entrymen. At the time when the contract was executed, no filings had been made in the Crooked river tract, and the Six-Four lands were not yet open to entry. On June 6, 1902, the general suspension order was so far vacated that the local land offices were directed to issue final receipts and certificates on all suspended entries which were not then under investigation by special agents, and final receipts were issued on the 50 suspended entries of the lands in the Boise basin. Thereafter Gov. Steunenberg entered into a contract with Kinkaid, whereby the latter was to be paid $800 for each deed and final receipt which he might procure, embracing timber lands, and upon delivery of such deeds and final receipts by Kinkaid, Steunenberg paid him therefor, and Steunenberg was reimbursed by Mr. Palmer acting for Barber and Moon. Kinkaid, in carrying out his contract with Gov. Steunenberg, employed L. M. Pritchard to make purchase of all claims offered for sale upon which final receipts had been issued. From June to December, 1902, Palmer paid Gov. Steunenberg in various sums $51,000. On June 9, 1902, Barber and Moon and others organized the Barber Lumber Company, and on July 23, 1902, that company purchased from Barber and Moon the Steunenberg contract, paying them all they had advanced under it, with interest, amounting to $68,853.99, and assuming their obligations under it.

Immediately after making their contract with Gov. Steunenberg, Barber and Moon began purchasing scrip with a view to acquiring 25,000 acres in the Boise basin, and in August of that year, the appellee herein had 6,000 acres of forest reserve lieu scrip, for which $32,100 had been paid. On September 1, 1902, Barber, who was then in Boise, directed Gov. Steunenberg to look over the Crooked river lands, with a view to purchasing timber lands with the scrip; but it was learned that one Downs had located a large number of timber and stone entrymen, covering the most desirable timber lands in that region. Negotiations were entered into for the purchase through Kinkaid of these claims, and Steunenberg finally agreed to pay Kinkaid $950 per claim, and he drew on the Barber Lumber Company for $20,000 for that purpose. Of the 92 Crooked river entries involved in this suit, all but 14 had been filed upon prior to February 11, 1903. The remaining 14 were filed upon in the spring of 1903. The Crooked river lands were purchased during the following summer; the appellee having been unable to use its scrip. On September 14, 1903, the Six-Four lands were opened to entry. The evidence is that the appellee's intention was to use its scrip to take up some of these

lands, and that Downs, knowing of this intention, in order to prevent it, began locating applicants, and located about 27 on September 11th and 12th of that year. Downs employed Kinkaid to make out all the filing papers. On all the Six-Four entries involved in the suit, final certificates were issued in the month of December, 1903. Steunenberg then made another arrangement with Kinkaid to pay him $800 for each deed and final receipt he could procure of the Six-Four lands. In December, 1903, and January and March, 1904, the appellee sent Steunenberg for that purpose $29,200. The evidence is that the appellee paid $800 each for all the claims in the Boise basin, and the Six-Four lands, and $950 each for all the Crooked river lands excepting in a few instances in which it paid more, and that Kinkaid paid from $650 to $750 for the Boise basin and Six-Four lands, and $800 for the Crooked river lands. Beginning in the year 1904, the United States issued patents to all the lands embraced in the suit. There is no evidence that, during the time of these transactions, either Barber or Moon or the appellee had any dealings or correspondence with Kinkaid, Pritchard, Wells, Downs, Sweet, or Martin.

George Wickersham, U. S. Atty. Gen., and Peyton Gordon and A. B. Jackson, Sp. Asst. Attys. Gen.

C. T. Bundy, A. A. Fraser, A. E. Macartney, J. G. Dudley, James H. Hawley, and Roy P. Wilcox, for defendants.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The court below found the facts substantially as they are set forth in the foregoing statement of the case, and upon examining the record, we find no convincing reasons for disturbing his conclusions. Before entering upon a consideration of the legal conclusions to be drawn from the facts, it will be well to take our bearings in the law applicable thereto as we find them in a series of decisions of the Supreme Court. United States v. Budd, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384; United States v. Detroit Lumber Co., 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499; United States v. Clark, 200 U. S. 601, 26 Sup. Ct. 340, 50 L. Ed. 613; Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278; United States v. Biggs, 211 U. S. 507, 29 Sup. Ct. 181, 53 L. Ed. 305. In the Budd Case the record showed that Montgomery wanted to purchase a large body of timber lands, and did purchase them.

"This," said the court, "was perfectly legitimate, and implies or suggests no wrong. The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If, when the title passes from the government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied. Montgomery might rightfully go or send into that vicinity and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the government; and any person knowing of that offer might rightfully go to the Land Office and make application and purchase a timber tract from the government."

In the Detroit Lumber Company Case, an employé of a lumber company told his employer that he knew men who would enter land under the timber and stone act if they could borrow the money to pay for it. The company agreed to loan the money for that purpose, and to take the land at a price that would yield to each entryman a profit

of $40. Entrymen were obtained under that understanding. They were poor, and were unable to pay for the land without borrowing the money. The lumber company paid their traveling expenses in going to the local land office, and loaned to each entryman money to pay for the land. Within a few days after final receipt was obtained, each entryman made a promissory note for the amount he had paid for the land, and a written agreement with the lumber company reciting that he had sold and conveyed unto the company all timber and trees upon the land and the right to enter and take them; that the company would pay him 50 cents per 1,000 feet for the lumber in the trees; that it had paid him the amount which he had borrowed; that it would pay him the balance beyond that amount and 8 per cent. interest in monthly payments as the timber was cut and removed from the land. Upon the execution of the contract, the note was canceled and surrendered. Upon the suit of the United States to avoid the patents which subsequently issued, it appeared that the rights of the mill company in most of the claims so entered had been transferred to a bona fide purchaser, but that there were 17 tracts of land, the title to which had not been so transferred. The court said:

"The evidence in this record has convinced, not that these applicants made any agreements by which the title which they might acquire should inure to the benefit of any person except themselves, but that each one of them applied to enter the lands he or she obtained on speculation for the use and benefit of the Martin Alexander Lumber Company, and not in good faith to appropriate it to his or her own exclusive benefit."

The court, accordingly, directed that a decree be entered avoiding the patents which had issued to those 17 applicants. The Supreme Court, in affirming that decision, said:

"The entire management of these entries was in the hands of an agent of the Martin-Alexander Company. It furnished the moneys both for the purchase prices and all expenses, and it is not easy to believe that it did all this on a mere expectation that after the entries had been made it could purchase the timber. It is a much more reasonable conclusion that it had an understanding with the parties making the entries respecting purchases and prices. * * * We agree with the Court of Appeals that the testimony points strongly to the fact that the entries were in pursuance of an understanding or agreement with the Martin-Alexander Company that, as it was advancing all the money, the entrymen should convey to it the standing timber at a fixed price."

In the Clark Case, notwithstanding that it appeared among other facts that Cobban, who sold timber lands to the appellee Clark, had, before taking steps to acquire a large body of the lands, begun negotiations with Clark with a view to selling them to him, and did thereafter induce a large number of entrymen to take up timber claims that they might sell the same to him and receive $100 each for so doing, and the fact that Clark, at the time when the entries were made, sent his inspector upon the lands to estimate the timber thereon and loaned large sums of money to Cobban with which to make the payments to the Land Office and to the entrymen, the Supreme Court affirmed the judgment of this court (138 Fed. 294, 70 C. C. A. 584) that upon all the evidence there was no ground to charge Clark with participation in Cobban's fraud upon the land laws, and that Clark's knowledge of

the fact that Cobban was carrying out a large and comprehensive scheme to obtain the lands, of the fact that 17 of the deeds were made on one date, 29 on another, and 22 on another, and that all were executed before patents were issued, and many within two days after the execution of the receiver's final receipt, was not sufficient to put Clark upon inquiry as to the method by which Cobban's titles had been acquired.

In the Williamson Case, it was held that, under the timber and stone act, an applicant is not required, after he has made his preliminary sworn statement concerning the bona fides of his application, and the absence of any contract or agreement in respect to the title, to swear again as to such facts on final proof; that a regulation of the Land Office exacting such additional affidavit on final hearing is invalid; and that after an applicant has in good faith made his application he may lawfully contract to convey after patent his rights in the land.

In the Biggs Case, the court reaffirmed the ruling in the Williamson Case, and said that its effect was to hold that the prohibition of the statute applied only to the period of original application, and ceased to restrain the power of the entryman to sell to another and perfect his entry for the purpose of transferring the title after the patent.

[1] The decision of the present case is ruled by the legal principles announced in the Budd Case and in the Clark Case. Those decisions are authority for the proposition that a person or corporation desiring to acquire title to a large body of timber lands of the United States under the timber and stone act may express that desire to another, and may enter into an agreement with him to buy the lands upon his obtaining title thereto, may loan him the money with which to acquire title, and may inspect and select the lands, and that such person or corporation is not bound to inquire into the method by which the other party to the contract acquires title, and is not chargeable with knowledge of any fraud upon the land laws that he may resort to, and that in taking titles based upon the issuance of final receiver's receipts to the entrymen without actual knowledge of such fraud or of facts sufficient to put one upon inquiry, such person or corporation is an innocent purchaser of the lands. The contract which was made between Steunenberg and Barber and Moon was similar to that which Clark had with Cobban in United States v. Clark, and, under the authority of that decision, we hold that it was not a conspiracy to accomplish by concerted action an unlawful purpose, as urged by the appellant herein, and that it was justifiable. That contract contemplated the acquisition by Barber and Moon of the 6,400 acres which Steunenberg represented that he had already purchased, and 5,000 acres in addition which had then been filed upon, and which he contemplated purchasing after final proofs. The contract called for 13,600 acres more, and the court below found from the evidence that that was to be obtained by the use of scrip. But assuming that it was to be obtained by entries under the timber and stone act, and that it was so obtained, there is no substantial proof that Steunenberg resorted to means not warranted by the decision of the Supreme Court above cited. He could rightfully go into the Idaho timber country and make known generally his willing-

ness to buy timber lands at a price in excess of that which it would cost to obtain it from the government, and persons knowing of that offer might rightfully go to the Land Office and make application, and purchase a timber tract for the purpose of selling it to him.

Several facts and groups of facts disclosed by the evidence are relied upon as showing that Barber and Moon must have been members of, or cognizant of, a scheme to obtain timber lands in violation of the timber and stone act. One is that Wells and Downs located substantially all of the entrymen whose claims are involved, that Kinkaid and Pritchard purchased all the claims, and took deeds in the name of Rand, Long, or Palmer, each of whom was acting for the appellee. But these facts do not necessarily tend to prove that the original entrymen or Wells and Downs were the agents of Barber and Moon or of the appellee in locating the lands, or in paying for the same, or that Kinkaid was the agent of the appellee in buying the lands from the entrymen. United States v. Clark, supra. Downs and Wells both testified that they were employed only by the entrymen, that their only interest was to obtain the location fee of $25 for each location, and that they had no dealings of any kind whatever with Kinkaid, Pritchard, Steunenberg, or Barber and Moon.

Another circumstance relied upon is that on September 12, 1903, which was three days before township 6, range 4, was opened to entry, Barber, at Eau Claire, Wis., gave to one Hosely, who was employed by the appellee to go into the basin and Crooked river country in Idaho, and report on the quality and quantity of timber on the appellee's lands and the feasibility of logging and driving the same by water, a plat book of the appellee's lands, including a plat of township 6–4, on which, it is alleged, many quarter sections were indicated by marks in red ink, showing, it is said, that Barber knew in advance the lands which Downs was to locate, and which he subsequently did locate. All this, if true, would not be sufficient to charge the appellee with fraud in obtaining title to those lands. United States v. Clark, supra. But the evidence does not show it to be true. Hosely, although he admitted when testifying that he had at some time after arriving in Idaho told the receiver of the Land Office that the red ink marks on the plat of township 6–4 were there when Barber gave him the book, and that he so believed at that time, testified that he was mistaken in so stating, and that the marks were not, and could not have been, on the book when it was given to him, but must have been put there by some one after his arrival in Idaho. His testimony appears to be corroborated by the nature of the entries in the book, for the marks in red ink on the plat of township 6, range 4, are made in a different manner and in a different shade of ink from the entries on the other township plats.

Reference is made to the letter of May 21, 1902, which Barber wrote to Palmer, saying:

> "It is our idea to push the location of the timber lands as rapidly as can be done intelligently, and, with this in view, we hope to send you another estimator in a few days."

In his testimony Barber stated, in explanation of the letter, that the locations so referred to were locations to be made by the use of scrip,

and that they were planning all the time to file lieu land scrip upon all the lands which had not been filed upon, and that, in order to place the scrip intelligently, it was necessary to cruise the land. In corroboration of this there is the letter of Barber to Palmer of May 21, 1902, stating that the scrip might be placed on single forties in different sections and townships; "the only condition being that if the scrip in question calls for 3,000 acres more or less, as the case may be, 3,000 acres must be entered at one time. The question now before us is: Are you prepared to take up 3,000 acres of government lands in the Boise basin under the conditions as stated above?" The appellant contends that the testimony to the effect that the appellee or Barber and Moon at any time intended to use scrip in the acquisition of lands in Idaho should be discredited, and the testimony of Taylor, one of their employés, which is relied upon as corroborating the evidence that there was an intention to use scrip, is pointed at as indicating the contrary, because, it is said, he was employed in October, 1902, to cruise land in the Crooked river country with a view to using scrip on the lands if they were found desirable, and he did not make his report until December 5, 1903. The inference sought to be drawn is that he was not acting in good faith, but Taylor testified that after he had been in the Crooked river country about 10 days, he found that there had been a considerable number of stone and timber entries taken which did not appear on the plats which he had, and that therefore he returned to Boise, and, on examining the records, found that practically all the lands which were valuable for timber had been entered by entrymen under the timber and stone act, and that for that reason he informed Steunenberg that it would be useless to go back. The appellant points to the evidence showing that after that date a large number of entries were made, some of which were subsequently acquired by the appellee; but we do not think that fact should be taken as disproving the testimony that the appellee did, in good faith, make an effort to acquire Crooked river lands by scrip. That the locations referred to in the letter of May 21, 1902, were to be locations by the use of scrip is corroborated by contemporaneous correspondence and by the fact that Barber and Moon had acquired a large amount of scrip. There is evidence, it is true, tending to prove that many of the entries in the Crooked river country of land which the appellee subsequently acquired may have been made in violation of the provisions of the timber and stone act, as was the case in United States v. Clark; but the decided weight of the testimony is that such illegal action, if such there were, was induced by the locators Downs and Wells for their own individual advantage, and not at the instance of Barber and Moon or the appellee or to their knowledge.

A circumstance relied upon is the refusal of L. G. Chapman to produce the books of the appellee before a certain grand jury in April, 1907. Chapman came from Wisconsin to Idaho as manager of the appellee in August, 1903. He was subpœnaed to produce before the grand jury all books of account, correspondence, and papers of the appellee, and he did so. The grand jury was investigating the proceedings whereby the Barber Lumber Company had acquired title to tim-

ber lands in Idaho. The court ordered Chapman to submit the books and papers to the grand jury. He refused on the ground that they might tend to incriminate him. The argument is that those books, papers, and correspondence, if they tended to incriminate Chapman, must also have shown evidence of fraud upon the part of the appellee in acquiring the lands, and reference is made to the letter of Barber to Chapman of April 26, 1907, in which he said:

"I want to thank you for the members of the company, and particularly for myself, for the position you took and your courage and dignity with which you carried through the consequences. It is not pleasant to be practically in jail, and I can assure you that your course is most heartily approved by all the members of the company."

But Chapman appeared as a witness in the present case, and explained why he had thought the ledger, cashbook, and journal might, if improperly used, have tended to incriminate him; but he stated that there was nothing in them which he regarded as tending to incriminate him in any offense against the United States. The complete answer to the contention is that on the trial in the court below, all the correspondence, books, and papers called for by the appellant were produced. The real question is: What is in fact shown by those books and papers —not what Chapman at one time thought might be their effect.

Another group of facts relied upon is the following: Special Agent Louis L. Sharp, who had received his appointment at the instance of United States Senator Foster of the state of Washington, had been sent to Idaho to investigate certain entries under the timber and stone act. At his request the local land office withheld receiver's final certificates on 12 claims. At that time Gov. Steunenberg desired that these suspended claims be either allowed so that he might purchase, or canceled so that he might buy with scrip. On June 28, 1902, Barber wrote Senator Spooner a letter in which, after referring to his efforts to obtain timber lands in Idaho, and stating that some time before he began the investigation of that country, a large number of miners, who were out of employment, had located claims on government land under the timber and stone act, he said:

"And of course they have selected the best timber in that locality, and we are anxious to buy them out as soon as they secure title to their land. These titles are long past due and in the Boise land office, and are held up for some reason. * * * This investigation is in the hands of one L. L. Sharp. * * * We would like to have this matter settled at once, by telegraph if possible, so that we can either scrip these claims, or buy them of the claimants, and go on with our plans, and to this end we would like to have the secretary order this man Sharp to report in Washington, D. C., or anywhere else out of the Boise district."

On July 7, 1902, Moon telegraphed to Steunenberg at Boise:

"Have taken up matter by letter with three parties in Washington."

It appears that the three parties were Sen. Spooner, Sen. Allison, and "some Minnesota man known to Mr. Macartney of St. Paul, who was the Barber Company's attorney, and a partner of Sen. Clapp of Minnesota." Two or three days later, Steunenberg telegraphed from Washington to Moon at Eau Claire:

"Situation here most satisfactory, and party recalled."

On July 9, 1902, Barber wrote to Clapp & Macartney, attorneys at St. Paul:

"It seems to me that our affairs are in a critical state when energy and prompt action may mean a good deal to us."

On July 17th he wrote to Steunenberg:

"I cannot close this letter without congratulating you upon the improved condition of matters in the land office at Boise."

On July 17, 1902, Moon wrote to Palmer at Spokane:

"We have organized as Barber Lumber Company at Eau Claire, Wis., and think you had better take the deeds from the entrymen in your name, and have them recorded. Then you in turn deed to the Barber Lumber Company. I don't think it would be advisable for us to have these deeds go on record for the present, do you?"

But Sharp was not recalled. Steunenberg, while in Washington, met A. B. Campbell, of Spokane, and stated to him his difficulties, saying that there was a man by the name of Sharp, a timber inspector, who had been giving him a good bit of trouble, and he requested Campbell to see Sen. Foster and induce him, "instead of fighting him, try to help him secure this." Campbell communicated with Sen. Foster, and the latter agreed to have Sharp call upon Campbell at Spokane "and talk this over." Steunenberg also went to see Sen. Foster at Tacoma. According to Sen. Foster, Steunenberg proposed only that the matter be placed before Sharp in such a way that he (Steunenberg) could get a fair show. "He never made any intimations that he wanted Sharp to do the wrong thing, or anything of the kind." On September 15th Steunenberg wrote to Campbell:

"I have faith that through the work of yourself and friends, we will have a solution—now, that we have a pointer on the inspector and those who are responsible for his appointment."

On October 31, 1902, Steunenberg wrote to Campbell:

"If not asking too much, wish you would ask Sen. Foster to hold Sharp off until I can meet the Senator."

In November Steunenberg went a second time to see Sen. Foster at Tacoma, and requested that he see Sharp. The Senator arranged for a meeting with Sharp, and when at that meeting Sharp said that he had made some adverse reports, and was going to make others, the Senator in reply told him that he could not report a bad entry good, being government inspector.

" 'But,' I says, 'be sure they are bad, that is all. You want to make investigations in such a way that you know what you are about.' And I told him to go and see Mr. Campbell."

He went to Campbell, and was asked what the trouble was with those claims. Campbell testified that Sharp answered that there were four or five of the entries that he was unable to approve, and that he then asked Sharp if he would not go to Gov. Steunenberg and "tell him the facts and not get him into trouble." At that time Campbell, so he testified, handed Sharp two $100 bills. But Sharp's actual expenses on account of meeting with Foster and Campbell were about

$75, and he testified that Campbell paid him but $100. Campbell was reimbursed by Steunenberg, and the latter in his account with the appellee charged the $200 as attorney's fees. Sharp returned from Spokane to Boise, but the 12 entries on which adverse reports had been made remained suspended. The receiver, Mr. Garrack, testified that after Sharp's visit to Spokane "his attitude did change, because after that he hesitated about pushing the cases. * * * I believed at that time, and I believe now, that Mr. Sharp was intimidated in a way from doing his duty, and that he said he was between the devil and the deep sea—his Senator on one side, and he didn't know whether the Commissioner would uphold him on the other." Now, the most that can be claimed for all this evidence is that Barber and Moon and Steunenberg were willing to resort to the means which the testimony indicates to remove obstacles to the allowance of certain entries of lands which Barber and Moon had bought upon the strength of temporary receiver's receipts with the understanding at the time, as they testified, that the receipts were receiver's final receipts. As matter of fact, they never did acquire the lands under the entries so suspended, and those lands are not involved in this suit. There is no evidence that Sharp found fault with any of the entries of the lands which were finally patented to the appellee.

[2] In Maxwell Land-Grant Case, 121 U. S. 325, 381, 7 Sup. Ct. 1015, 1029 (30 L. Ed. 949), the court said:

"We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof."

The doctrine of that decision has been reaffirmed in numerous subsequent cases. United States v. Stinson, 197 U. S. 200, 25 Sup. Ct. 426, 49 L. Ed. 724, and cases there cited.

[3] Measured by the standard thus established, the evidence in the present case falls short of sustaining the allegations of the bill.

The decree of the court below is affirmed.

SANBORN v. BAY.

(Circuit Court of Appeals, Eighth Circuit. December 11, 1911.)

No. 3,660.

1. EXCEPTIONS, BILL OF (§ 32*)—DISQUALIFICATION TO ACT—"DISABILITY."
Under Rev. St. § 953, as amended by Act June 5, 1900, c. 717, § 1, 31 Stat. 270 (U. S. Comp. St. 1901, p. 696), which provides that in case the judge before whom a cause is tried in a federal court is, "by reason of death, sickness or other disability," unable to hear and pass upon a motion for new trial and allow and sign a bill of exceptions, such bill may be allowed and signed by the judge who succeeds him or any other judge of the court in which the cause was tried holding such court thereafter, the appointment of the District Judge before whom a cause was tried in a Circuit Court to be a Circuit Judge to serve in the Commerce Court and his acceptance of such appointment creates a "disability," which disqualifies him while so serving from allowing a bill of exceptions in such cause, and it may properly be allowed and signed by another judge appointed or designated temporarily to preside in such court.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 32.*

For other definitions, see Words and Phrases, vol. 3, pp. 2079–2081; vol. 8, p. 7638.]

2. APPEAL AND ERROR (§ 460*)—SUPERSEDEAS—FEDERAL COURTS—TIME FOR OBTAINING.
Under Rev. St. § 1007 (U. S. Comp. St. 1901, p. 714), which provides that in cases where a writ of error may be a supersedeas a defendant may obtain such supersedeas by serving the writ of error within 60 days "after the rendering of the judgment complained of, and giving the security required by law," a judgment does not take final effect for the purposes of a writ of error, where the court entertains a motion for new trial, until such motion has been disposed of, and the writ may be served and filed and the supersedeas obtained within 60 days thereafter. Nor is such right affected by the fact that the party has not applied for a stay of execution for 42 days in which to file his motion for new trial as allowed by Rev. St. § 987 (U. S. Comp. St. 1901, p. 708), nor because his motion was not filed within that time if filed during the term at which the judgment was rendered; such section having no reference to appellate proceedings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2217–2245; Dec. Dig. § 460.*

Finality of judgments and decrees for purposes of review, see notes to Brush Electric Co. v. Electric Improvement Co. of San Jose, 2 C. C. A. 379; Central 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.]

Reed, District Judge, dissenting in part.

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

Action at law by Ella R. Bay against James S. Sanborn. Judgment for plaintiff, and defendant brings error. On motion to suppress bill of exceptions, dismiss writ of error, and vacate the supersedeas. Motions denied.

See, also, 189 Fed. 521.

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

Joe Kirby, for the motion.

C. P. Bates and E. R. Winans, opposed.

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

ADAMS, Circuit Judge. [1] This case was tried and judgment rendered on November 1, 1910, at the October term of the Circuit Court for the District of South Dakota, by Carland, then District Judge for that district. After Judge Carland's appointment as Circuit Judge and designation to serve a term in the Court of Commerce, Judge Willard, the District Judge for the District of Minnesota, was by order of the senior Circuit Judge of this circuit designated and appointed to act as District Judge for the District of South Dakota until the appointment and qualification of Judge Carland's successor. On March 24, 1911, at the instance of the plaintiff in error, Judge Willard, who was then presiding in the Circuit Court pursuant to his designation and appointment, allowed and signed a bill of exceptions in this case which both parties had agreed to as correct.

It is now claimed that Judge Willard had no power to perform those acts, and a motion is made to suppress the bill of exceptions and dismiss the writ of error.

Section 953 of the Revised Statutes provides that:

"A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause."

By an act approved June 5, 1900 (31 Stat. 270 [U. S. Comp. St. 1901, p. 696]), that section was amended by adding the following:

"And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign the bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried. * * *"

Was there any such disability on the part of Judge Carland as authorized his successor, Judge Willard, to sign and allow the bill of exceptions in question?

When Judge Carland was appointed and confirmed Circuit Judge and accepted the position, he ceased to be District Judge of the court over which he presided when this case was tried. This seems to be conceded. The only question is: Did he by becoming a Circuit Judge retain the jurisdiction which before that time he had over the case? By the act approved June 18, 1910 (chapter 309, 36 Stat. pt. 1, p. 539) the Court of Commerce was created. The President was

authorized, by and with the advice and consent of the Senate, "to appoint five additional Circuit Judges * * * who shall hold office during good behavior and who shall be from time to time designated and assigned by the Chief Justice of the United States for service in the Circuit Court for any District, or Circuit Court of Appeals for any Circuit or in the Commerce Court."

These judges were, in the first instance, to constitute the new Court of Commerce for terms from one to five years each respectively. They were not appointed to be Circuit Judges of any particular circuit. On the contrary, they were appointed to be Circuit Judges, subject to assignment from time to time by the Chief Justice for service either in some Circuit Court, some Circuit Court of Appeals, or in the Court of Commerce. It does not appear that Judge Carland has ever been assigned for service in the Circuit Court for the District of South Dakota, and certainly it does not appear that he had been so assigned prior to March 24, 1911, when Judge Willard allowed and signed the bill of exceptions in this case.

We therefore conclude he then had no power to act judicially in any matters pending or requiring consideration in the court over which he formerly presided; and inasmuch as the allowance and signing of the bill of exceptions is a judicial act (Malony v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163), he had no power to allow or sign it in this case.

The remaining question is: Did this want of power or disqualification amount to a "disability" within the meaning of the act of June 5, 1900, which enabled Judge Willard, his actual successor, to allow and sign the bill of exceptions in this case? The latter was authorized and empowered to do so only in case the judge who tried the case was "by reason of death, sickness or other disability unable to allow and sign the same." It is contended by defendant in error that the "other disability" here referred to means a disability of like character to that arising from "death or sickness" which immediately precede the words "other disability," and they cite the case of American Bonding & Trust Co. of Baltimore v. Takahashi, 49 C. C. A. 267, 111 Fed. 125, in support of their contention. This case involved the question whether the casual or temporary absence of the trial judge from his circuit authorized a judge, assigned to aid or assist him, to allow and sign a bill of exceptions in a case tried before the regular judge himself. It was held in that case that such casual absence did not amount to the "disability" contemplated by the amended act of June 5, 1900, and some expressions are found in the opinion sustaining the contention of the defendant in error in this case. While we might well agree with the conclusion reached in that particular case, we cannot think the act of 1900 was intended by Congress to limit the "disqualification" referred to, to one occasioned by physical or mental ailment. This in our opinion would be too narrow a construction. It would not seem to accomplish the legislative purpose or afford the relief which Congress intended to afford by the language actually employed. Inability to perform duty occasioned by death or sickness was obviously not the only disability

Congress had in mind. It employed a comprehensive term sufficient to cover all disqualifications, and we do not think the artificial rule noscitur a sociis invoked by counsel was ever intended to be employed to thwart an obvious purpose. Nothing in fact could create a more effective "disability" than an utter disqualification of the presiding judge to perform the act which Congress attempted to provide for. We accordingly hold that a voluntary resignation of his office (which is practically the situation in this case) by a trial judge is an effective disqualification within the meaning of the act of 1900.

[2] There is also a motion here to vacate the supersedeas claimed to have been obtained by the bond given on securing this writ of error. A judgment for $25,000 was rendered against the defendant at the October term of the court, on November 1, 1910. At no time thereafter did the defendant invoke the provisions of section 987, Rev. Stat., to secure a stay of execution for 42 days as therein provided, to enable him to file and present a petition for a new trial. On the contrary, he sought and secured a stay of execution for 60 days to enable the parties, in the language of the order, "to settle their bill of exceptions." This stay was extended from time to time for the same expressed purpose until April 1, 1911. The bill of exceptions was allowed, signed, and filed on March 24th, and on March 25th a motion for a new trial was filed, and this was overruled on April 1, 1911, prior to the expiration of the October term. On April 17, 1911, at the next or April term of the court, the writ of error was sued out and a bond in the penal sum of $30,000 given to supersede the execution of the judgment until a hearing could be had in this court. Does this bond so given operate as a supersedeas of the judgment?

Section 1007, Rev. Stat. (U. S. Comp. St. 1901, p. 714), provides that if a proper bond be given on appeal perfected or writ of error sued out and served within 60 days "after the rendering of the judgment complained of," a supersedeas may be had. Kitchen v. Randolph, 93 U. S. 86, 23 L. Ed. 810; Logan v. Goodwin, 41 C. C. A. 573, 101 Fed. 654. If, therefore, the overruling of the motion for a new trial was the "rendering of the judgment complained of" within the meaning of section 1007, then as the writ of error, accompanied with the proper security, was sued out and duly served within 60 days thereafter, the supersedeas must stand.

It is a well-settled general rule that all orders, judgments, and decrees of federal courts are under the control of the court which rendered them during the term at which they were rendered and may be at any time during that term set aside, vacated, modified, or annulled by the court. Bronson v. Schulten, 104 U. S. 410, 415, 26 L. Ed. 797. For many purposes the overruling of a motion for a new trial is the expression of the final judgment of the court in a given case, and when such a motion is entertained there is no final judgment in the case until it is disposed of.

In Brockett v. Brockett, 2 How. 238, 11 L. Ed. 251, the trial court had rendered a decree against the defendants, and afterwards, dur-

ing the same term, had entertained a motion to open it up for a certain purpose. Within 10 days after the denial of this motion, but not within 10 days after the first entry of the decree, the defendant perfected his appeal to the Supreme Court and gave the required bond. Mr. Justice Story, in speaking for the court on a motion to dismiss the appeal, said:

"Now, the argument is that, as the original final decree was rendered more than one month before the appeal, it could not operate under the laws of the United States as a supersedeas, or to stay execution on the decree, because to have such an effect the appeal should be made and the bond should be given within ten days (as the law then stood) after the final decree. But the short and conclusive answer to this objection is that the final decree of the 10th of May (when it was originally entered) was suspended by the subsequent action of the court; and it did not take effect until the 9th of June (when the court acted on the motion to open up), and that the appeal was duly taken and the appeal bond given within 10 days from this last period."

Railroad Co. v. Bradley, 7 Wall. 575, 19 L. Ed. 274, was before the Supreme Court on a motion for a supersedeas. The motion was made, during the term at which a decree was rendered to rescind that decree, and this motion was entertained, heard, and denied. The Supreme Court, speaking by Chief Justice Chase, said:

"There is no doubt that, during the term, the decree was, at all times, subject to be rescinded or modified, upon motion, and could not, therefore, be regarded as absolutely final until the end of the term. It became final, in this case, when the motion to rescind had been heard and denied. This took place on the 13th of March, and on the 20th the appeal was prayed in open court, and on the 23d the bond on appeal was approved and filed. We think this was in time, and the motion for supersedeas must therefore be allowed."

In Memphis v. Brown, 94 U. S. 715, 24 L. Ed. 244, the Supreme Court, deciding a motion to vacate a supersedeas, said:

"Under the ruling in Brockett v. Brockett, 2 How. 241 [11 L. Ed. 251], the motion made during the term to set aside the judgment of March 2d suspended the operation of that judgment, so that it did not take final effect for the purposes of a writ of error until May 20th, when the motion was disposed of."

In Texas Pacific Railway Co. v. Murphy, 111 U. S. 488, 4 Sup. Ct. 497, 28 L. Ed. 492, a motion was submitted to the court to dismiss a writ of error and vacate a supersedeas because the writ of error was not sued out and served within 60 days after the first entry of the judgment; a petition for rehearing having afterwards been made, entertained, and denied by the court. The Supreme Court, speaking by Chief Justice Waite, said:

"It was expressly ruled in Brockett v. Brockett, which has been followed in many cases since, that if a petition for rehearing is presented in season and entertained by the court, the time limited for an appeal or writ of error does not begin to run until the petition is disposed of."

In Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31, 36, 14 Sup. Ct. 4, 6 (37 L. Ed. 986), the Supreme Court, speaking again on this question, said:

"The rule is that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is dis-

posed of. *Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal*"—citing cases.

See, also, to the same effect, Northern Pacific Railroad Co. v. Holmes, 155 U. S. 137, 15 Sup. Ct. 28, 39 L. Ed. 99.

In Kingman v. Western Mfg. Co., 170 U. S. 675, 678, 18 Sup. Ct. 786, 787 (42 L. Ed. 1192), the Supreme Court, speaking of the effect of a motion for a new trial in an action at law, said:

"No leave to file it was required, and as it was entertained by the court, argued by counsel without objection, and passed upon, it must be presumed that it was regularly and properly made. This being so, the case falls within the rule that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal"—citing, among others, the case of Brockett v. Brockett, supra.

From the foregoing it can safely be said that the doctrine originally announced in Brockett v. Brockett has been persistently adhered to, and that, until a petition or motion for a new trial in an action at law actually entertained by the court has been disposed of, the judgment before that time rendered does not take final effect for the purposes of a writ of error.

This would seem to be conclusive of the question before us; but it is contended that, because defendant failed to avail himself of the provisions of section 987, Rev. Stat. (U. S. Comp. St. 1901, p. 708), and secure a stay of execution for 42 days, and because he did not, within that time, file his petition for a new trial, the 60 days provided for in section 1007 within which the writ of error must be sued out and bond given in order to operate as a supersedeas was not enlarged by the filing of such a petition thereafter. This presents a new question. Section 987 is as follows:

"When a Circuit Court enters a judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. * * *"

Section 1007 is as follows:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation."

These two sections seem to be quite independent of each other and to cover separate and distinct subjects of legislation. The first, or section 987, does not in terms relate either to appeals or writs of error or to the supersedeas of the judgment, sought to be reviewed in an appellate court. It rather relates to a method of securing a deliberate reconsideration of a judgment or decree by the court which rendered it without the embarrassment which would occur if imme-

diate execution of the judgment were permitted, and yet on such conditions as secured the payment of the judgment if allowed to stand. It is well known by the profession that prior to the creation of the Circuit Courts of Appeals at a time when these sections were enacted by Congress few cases, comparatively speaking, ever found their way from the trial court to the Supreme Court of the United States, the then only available court of review. The fact that no appeal or writ of error could be prosecuted unless $5,000 or more was involved, the long distance from the places of trials to the seat of government where the Supreme Court was held, and the heavy expense attending the proceeding, were largely prohibitive of any review of the work of a trial judge. As a result his judgment in a large majority of cases was final. In view of this situation, it was quite a reasonable thing that provision should be made insuring the fullest opportunity, consistent with ample security to the judgment creditor, for the trial court to reconsider its own judgments upon petitions for a new trial. Lest the right of a suitor to invoke such reconsideration should be lost or impaired by the hasty execution of a judgment, the statute seems to have for its object and purpose the stay of such execution until such petition could be definitely and intelligently filed and considered.

In Felton v. Spiro, 24 C. C. A. 321, 78 Fed. 576, Circuit Judge Taft, speaking for the Court of Appeals for the Sixth Circuit, said:

"Section 987, Rev. St., relied on, relates only to method of staying execution pending new trial, and does not limit the time in which motions for new trial may be otherwise filed."

In Rutherford v. Penn. Mut. Life Ins. Co. (C. C.) 1 Fed. 456 (a case favorably commented upon by the Supreme Court in Kingman v. Western Mfg. Co.) Circuit Judge McCrary, speaking of this section of the statutes, said:

"This section still further provides for motions of this character (namely, to secure a reconsideration by the trial court of questions which had arisen in the course of trial), and it applies to the case where a party is not prepared at the time of trial to immediately file his motion. It provides for giving time within which that may be done. * * * This (section) provides for a case where he (the party) desires to obtain from the court an extension of the usual time within which to make his application for a new trial; and in that case * * * he must show that he has presented his petition, and that it has been allowed in accordance with the provisions of the section; but if he makes his motion for a new trial without asking for the time, then he can make it independent of section 987, and is not bound by the provisions of that section. In other words, the court had a perfect right to entertain the motion for a new trial; it did entertain it, and suspended the execution until it should be determined."

Section 1007, on the other hand, at the outset contemplates and provides for the supersedeas of a judgment on suing out of a writ of error. It deals with another subject from that involved in section 987 and is exclusively concerned with the question of securing a review of a judgment, not by the court which rendered it, but by an appellate tribunal.

As already pointed out, a judgment or decree does not become final for the purposes of a writ of error or appeal until the motion for a

rehearing which the court sees fit to entertain is disposed of. Why does not this established principle definitely dispose of the question before us? A supersedeas cannot be secured until an appeal is taken or a writ of error is sued out, and this cannot be done until a motion for a new trial, if made, is denied.

The only answer to this argument is that the motion for a new trial, in order to be effective to enlarge the time for securing a supersedeas, must be filed within the 42 days prescribed by section 987. The most obvious answer to this is that the statute does not say so. Not only so, but for reasons already stated, the two sections, 987 and 1007, serve two distinct purposes and manifestly were not intended to modify or limit each other in respect of the separate and distinct relief contemplated by them.

It is suggested that the cases of Sage v. Railroad Company, 93 U. S. 412, 23 L. Ed. 933, and Cambuston v. United States, 95 U. S. 285, 24 L. Ed. 448, are in conflict with the conclusion reached in this case; but, after a careful consideration of them in connection with the other cases cited by us, we are unable to so construe them. The first-mentioned case concerns the right of a third party and not a party to the suit. The holding was that a motion made by such third party who was permitted to intervene, only for the purpose of an appeal from a final decree, will not operate to suspend such decree. The Cambuston Case had to do only with sections 786 and 987 and involved no consideration of the rights conferred by section 1007.

It results that the motion to vacate the supersedeas must be denied.

REED, District Judge (dissenting in part). I am unable to concur in that part of the foregoing opinion which denies the motion to vacate the supersedeas.

The judgment was rendered November 1, 1910, early in the October, 1910, term of court. At the time of its rendition appellant was granted 60 days in which to settle a bill of exceptions only, and this time was subsequently enlarged by order of court. February 21, 1911, within such enlarged time, but nearly four months after the rendition of the judgment, an order was made further extending such time until April 1st, and it was then ordered:

"That the filing in this court by the defendant on or prior to March 1, 1911, of a bond that defendant will pay the judgment heretofore entered with interest and costs, if it is finally adjudged that he must pay such judgment, then the proceedings herein subsequent to such judgment shall be stayed until April 1, 1911."

No such bond was given by the defendant, and there was therefore no such stay of proceedings.

On March 24, 1911, the bill of exceptions was settled and allowed in open court. A motion for a new trial was then submitted on March 25th, and overruled April 1st following. The October term expired April 4, 1911, and on April 17th a writ of error was allowed to operate as a supersedeas and to review the judgment, and

the requisite security taken. A motion is made in this court by the defendant in error to vacate such supersedeas because not allowed within the time required by section 1007 of the Revised Statutes of the United States. That section is as follows:

"Sec. 1007. In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, 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 as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, executions shall not issue until the expiration of *the said term of sixty* (ten) days."

That this section is intended to limit, to 60 days after the final judgment, the time within which a supersedeas must be obtained admits of no doubt. Kitchen v. Randolph, 93 U. S. 87, 23 L. Ed. 810; Sage v. Railroad Co., 93 U. S. 412–417, 23 L. Ed. 933.

In the last-named case Mr. Chief Justice Waite, speaking for the court, said:

"A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with. (Citing cases.) Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard. If a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired, and of which he cannot be deprived without due process of law."

Brockett v. Brockett, 2 How. 238, 11 L. Ed. 251, is distinguished in the opinion upon grounds that do not affect the interpretation thus placed upon section 1007. The rule held in Sage v. Railroad Company has never been departed from so far as I can discover, and it was followed by this court in Logan v. Goodwin, 101 Fed. 654, 41 C. C. A. 573. See, also, Conboy v. First National Bank, 203 U. S. 141–145, 27 Sup. Ct. 50, 51 L. Ed. 128; and New England R. Co. v. Hyde, 101 Fed. 397, 41 C. C. A. 404.

The only question therefore is: When does the judgment become final for such purpose? It is said by the majority that the judgment is within the control of the court during the term at which it is rendered, and may be set aside at any time during such term for reasons satisfactory to the court, and that a motion filed more than 60 days after the rendition of the judgment and without leave of court, the term still continuing, suspends the finality of the judgment until the motion is ruled upon; and if the motion is denied, the time within which the writ of error, to operate as a supersedeas or to review the judgment, must be obtained, dates from such ruling only; and authorities are cited by the majority which it is claimed support this contention. In all of the cases so cited, save one, it affirmatively appears either that the motion for new trial or petition for rehearing was filed within the time in which the supersedeas is

required to be obtained, or it is assumed in the opinion that it was so filed.

Thus in Kingman & Co. v. Western Manfg. Co., 170 U. S. 675, 18 Sup. Ct. 786, 42 L. Ed. 1192, it affirmatively appears that judgment was entered against Kingman & Co., June 4, 1895, upon a verdict returned against them on that date, which was one of the days of the May term, 1895, of the Circuit Court. On June 6th, it being still the May term, Kingman & Co. filed their motion to vacate and set aside the judgment, and for a new trial, for various reasons therein assigned. The motion was heard and denied on December 11, 1895, at the term of court succeeding that upon which the judgment was entered. The writ of error was allowed within 60 days after the ruling upon such motion, and the requisite security taken. Held, that the filing of the motion for new trial within two days after the rendition of the judgment suspended its operation until that motion was ruled upon, and that a writ of error sued out within 60 days after such ruling was in due time.

Texas Pacific R. R. Co. v. Murphy, 111 U. S. 488, 4 Sup. Ct. 497, 28 L. Ed. 492, is a fair type of the cases in which it does not affirmatively appear that the motion was filed within the 60 days, but in which it is assumed that it was filed in due season. That was a writ of error to the Supreme Court of a state, in which court a petition for rehearing was filed, and was considered and overruled by the court some months after the entry of the original decree. It does not appear within what time the petition for rehearing was filed, but it was assumed by the United States Supreme Court that it was within the time required by the state statute, or it would not have been considered by the state Supreme Court.

Brockett v. Brockett, above, is the only apparent exception to this rule. That was a suit in equity, and the motion was to dismiss the appeal, and not to vacate the supersedeas—proceedings which are distinct and separate from each other. A motion, however, to reopen the decree for some purpose, was filed in the Circuit Court at the same term, and within 16 days after the decree was entered, and was referred by the court to a master to report thereon. Upon the coming in of the master's report 15 days later, and at the same term the motion was denied and the appeal was taken within 10 days thereafter (the time then required within which a supersedeas must be obtained), and it was held to be in time.

Section 1012 of the Revised Statutes (U. S. Comp. St. 1901, p. 716) provides, however, that:

"Appeals from the Circuit Courts and District Courts acting as Circuit Courts, * * * shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error."

Act of March 3, 1803, c. 40, 2 Stat. 244, amending sections 19–22 of the Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 73). That being true, the motion to reopen the decree in Brockett v. Brockett within 16 days after its rendition would be within the 42 days prescribed by section 987, Revised Statutes of the United States, and

might suspend the operation of the decree until such motion was ruled upon.

The rule which permits a motion for new trial to be filed at any time during the term at which the judgment is entered in law cases is that of the common law, and unless modified by some statute of the United States would obtain in the courts of the United States in law actions.

Section 17 of the Judiciary Act of 1789 (which is now section 726 of the Rev. Stats. [U. S. Comp. St. 1901, p. 584]) reads as follows:

"All of the said courts (of the United States) shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law."

This section, unless modified as above stated, would doubtless permit the filing of a motion for a new trial at any time during the term at which the judgment was rendered for the reasons stated, as at common law, and while the judgment was under the control of the court.

But section 18 of the act of 1789 (which is now section 987 of the Rev. Stats.) immediately follows section 17, and is as follows:

"When a Circuit Court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. If such petition is filed within said term of forty-two days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall, of course, be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void."

This section, it seems to me, was intended to limit the time within which motions for new trials as authorized by section 726 must be filed. It was expressly so interpreted by the Supreme Court of the United States in Cambuston v. United States, 95 U. S. 285, 24 L. Ed. 448. In that case Mr. Chief Justice Waite, delivering the unanimous opinion of the Supreme Court, after referring to Brockett v. Brockett, and quoting sections 726 and 987 of the Rev. Stats. of the United States, said at page 288 of 95 U. S. (24 L. Ed. 448):

"From this legislation it is apparent that it was not the policy of Congress to suspend the operation of a judgment so as to allow an application for a new trial in any case beyond a period of 42 days from the time of its rendition."

This decision has never been questioned by any subsequent decision of the Supreme Court, and that court is not given to overruling its deliberate judgments previously rendered without referring to them and stating in clear and specific language its reason for so doing. It has never done so with reference to the Cambuston Case, and it seems to me that that decision still stands as the deliberate judgment of the Supreme Court as to the meaning and purpose of that section. It may be that this section also enlarges the grounds upon which the motion for new trial may be granted; but that question need not be now considered.

In Conboy v. First National Bank, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. Ed. 128, there was an attempt to appeal from an order in bankruptcy allowing the claim of the bank against the bankrupt estate under section 25b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]). The order of the District Court affirming the order of the referee was affirmed by the Court of Appeals January 23, 1905. April 25, 1905, the trustee petitioned that court to recall its mandate and vacate the order therefor, which application was denied. On May 8th a petition for rehearing was filed, which was denied by the Court of Appeals May 17th, and an order to that effect entered May 24th. On the same day, May 24th, a petition was presented to a justice of the Supreme Court praying an appeal from the whole of said order of affirmance by the Circuit Court of Appeals dated January 23, 1905, and from the order of April 25, 1905, denying the motion to recall the mandate, and from the order of May 24, 1905, denying the petition for rehearing. An appeal was allowed and certificate granted May 27, 1905, under section 25b(2) of the Bankruptcy Act, and it was claimed that under the rule held in Brockett v. Brockett that order of the Court of Appeals did not become final until the petition for rehearing was denied.

Mr. Chief Justice Fuller, overruling this contention, said, at page 145 of 203 U. S., at page 52 of 27 Sup. Ct. (51 L. Ed. 128):

"The cases cited for appellant, in which it was held that an application for a rehearing, made before the time for appeal had expired, suspended the running of the period for taking an appeal, are not applicable when that period had already expired. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."

This rule is as clearly applicable to proceedings for a supersedeas as it is to the time within which an appeal or writ of error to review a judgment or decree of the court may be taken.

It affirmatively appears that the motion for new trial in the present case was not filed until nearly five months after the rendition of the judgment; and at no time prior to that were any steps taken, either under section 987 or otherwise, to suspend the finality of the judgment of November 1, 1910. The writ of error was not sued out until April 17th or but 13 days before the expiration of 6 months after the entry of the judgment. In my judgment the supersedeas in this case cannot be upheld without disregarding the decisions of the Supreme Court in Kitchen v. Randolph, Cambuston v. United States, and Conboy v. First National Bank.

For the reasons stated, I think the motion to vacate the supersedeas should be sustained.

MITCHELL v. PORTER.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1912.)

No. 1,976.

1. COURTS (§ 405*)—"FINAL ORDER"—REFUSAL TO STRIKE FROM JUDGMENT PROVISION DIRECT ARREST.

An order denying a motion to strike from a judgment a provision directing that execution issue against the person of the defendant after return of execution against his property unsatisfied was a final order within the meaning of Carter's Ann. Code Civ. Proc. Alaska, § 504, which permits a writ of error from the United States Circuit Court of Appeals, Ninth Circuit, to review a final order of a District Court of Alaska.

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

For other definitions, see Words and Phrases, vol. 3, p. 2802.

Orders, decrees, and judgments reviewable in Circuit Court of Appeals, see notes to Salmon v. Mills, 13 C. C. A. 374; Taylor v. Breeze, 90 C. C. A. 566.]

2. MOTIONS (§ 64*)—ORDER—CONCLUSIVENESS OF ADJUDICATION—INTERLOCUTORY ORDER.

An interlocutory order denying a motion to discharge the defendant in a civil action from custody, made before trial, was not res judicata on a motion to strike from the judgment rendered on an amended complaint a provision directing defendant's arrest.

[Ed. Note.—For other cases, see Motions, Cent. Dig. §§ 88, 90; Dec. Dig. § 64.*]

3. EXECUTION (§ 423*)—AGAINST PERSON—COMPLAINT—ALLEGATION OF FRAUD.

A judgment directing execution against the person of the defendant in a civil action is unauthorized where the complaint fails to charge the defendant with any fraud.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1214–1221; Dec. Dig. § 423.*]

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

Action by Frank J. Porter against Alex. Mitchell. From an order denying defendant's motion to strike from the judgment a provision directing his arrest, he brings error. Reversed.

The plaintiff in error was defendant in the court below to an action there brought by the defendant in error as plaintiff to recover the sum of $2,461.50, with costs, alleged by the complaint to be then due the plaintiff from the defendant for hauling 547 cords of wood from Alder and Cripple creeks to Ready Bullion creek, in Alaska, which wood the complaint alleged to be the property of the defendant, and which amount it alleged was the price the defendant agreed to pay the plaintiff for that service. The complaint was verified by the plaintiff on the 16th day of June, 1910, and filed in the court the next day, on which last-mentioned day, to wit, June 17, 1910, the plaintiff made and also filed an affidavit in the following words and figures: "That he, as plaintiff, has commenced an action in the above-entitled court, the object and purpose of which is to recover a judgment against the defendant, Alex. Mitchell, for the sum of two thousand four hundred and sixty-one dollars and fifty cents ($2,461.50) on a claim for services rendered by plaintiff for and on behalf of defendant between the 22d of January, 1910, and the 1st

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

day of April, 1910, whereby said defendant became indebted to the said plaintiff in the sum of $2,461.50, which amount defendant agreed to pay. That the defendant, Alex. Mitchell, is about to remove from the district of Alaska to some point or points unknown to plaintiff, without said territory of Alaska, with intent to defraud his creditors, especially this affiant, and that said defendant has disposed of all of his property in the district of Alaska, and converted the same into money, with intent to defraud his creditors, especially this affiant."

Based upon these proceedings, a writ, signed by the judge and under the seal of the court, was issued directing the marshal to arrest the defendant wherever found in the district, and to hold him to bail in the sum of $2,500, under which writ the defendant was arrested. He subsequently gave bail. Thereafter he moved the court to discharge him and exonerate his bondsmen, basing that motion upon his own affidavit and upon the deposition of one Peter Vachon.

The affidavit of the defendant, Mitchell, is as follows:

"I am the defendant above named. In January, 1910, I was the owner of a certain lot of firewood, 4-foot length, situate on Alder and Cripple creeks, and at that time I had over six hundred (600) cords of wood. I entered into an agreement with Sandstrom, Olson, Gillis & Gaidos, copartners engaged in mining on number three (3) Ready Bullion creek, Fairbanks recording district, territory of Alaska, to sell to them said wood at two and 50/100 dollars ($2.50) per cord, subject to the following conditions: That said wood was to be paid for early in May, 1910, but the title thereto should remain in me until it was paid for. Thereafter the parties to whom I agreed to sell said wood caused same to be transported by one F. J. Porter to the ground where they were carrying on mining operations; and in order to avoid any question about my title to the wood, when Sandstrom et al. failed in their mining operations, they gave me a bill of sale, and I took possession of same and sold it for the sum of eighteen hundred dollars ($1,800.00), which included the original purchase price as agreed by Sandstrom et al., and the expense I had been to in looking after said wood and obtaining a purchaser. Thereafter, I started down river on my way to my home in Greece, and was arrested and brought back to Fairbanks on the claim of F. J. Porter, who claimed I was indebted to him in the sum of twenty-four hundred sixty-one and 50/100 dollars ($2,461.50). I am not indebted to said Porter in any sum whatsoever. I never contracted with him to haul the wood, I had nothing to do with the hauling of the wood, never agreed in writing or otherwise to pay him any sum due and owing to Sandstrom et al., and am not liable for the amount of his claim, or any part or portion thereof. I am informed and believe, and so allege, that on January 22, 1910, Sandstrom, Olson, Gillis & Gaidos entered into a certain written agreement with F. J. Porter for the hauling of the wood I had sold to them, at the rate of four and 50/100 dollars ($4.50) per cord, which said agreement was in words and figures as follows, to wit:

" 'This agreement, made in duplicate this 22d day of January, A. D. 1910, between Sandstrom, Olson, Gillis & Gaidos, copartners, miners, operating 3 Ready Bullion creek, in the Fairbanks recording district, territory of Alaska, parties of the first part, and Frank J. Porter, of Fairbanks, Alaska, party of the second part, witnesseth: That the parties of the first part are to supply the said Porter with 1,000 cords of four-foot wood for transportation from Alder and Cripple creeks to the claim being operated by the parties of the first part on Ready Bullion creek. And the parties of the first part agree to pay the party of the second part for the said hauling the price of four and one-half dollars ($4.50) per cord of 128 cu. feet. Party of the second part agrees to pile the wood 8 ft. high so that the same can be accurately measured. The parties of the first part agree to supply the wood so to be hauled, up to the said amount of 1,000 cords, in such quantities as the party of the second part may desire, and the party of the second part agrees to commence the hauling of same on or before February 1st, 1910, and to continue until the same is all hauled, agreeing to have the entire quantity all delivered on Ready Bullion creek before the trails break up and the snow goes off. The parties of the first part are to pay the party of the second part, or his order, as follows: as much as possible at each clean-up after commencing sluicing and the full

amount due second party for said hauling to be paid on or before 1st July, 1910.

" 'In witness whereof the parties hereto have hereunto set their hands and seals this 22d day of January, A. D. 1910.

" '[Signed] Geo. Gaidos.
" 'D. Gillis.
" 'G. Sandstrom.
" 'F. J. Porter.

" 'Signed, sealed, and delivered in the presence of:
" 'Edw. Sandstrom.
" 'Edw. J. Higney.
" 'Sandstrom, Gillis, Gaidos & Co., Ready Bullion Creek.

" 'Please pay to the order of Vachon & Sterling, Fairbanks, all sums of money due me under above contract, as the same become due, and charge to my account. [Signed] F. J. Porter.

" 'Accepted, payable to Vachon & Sterling. Gaidos, Gillis Co.'

"Said F. J. Porter was an employé of Sandstrom et al., and not of myself, and long prior to the time the above-entitled action was instituted said Porter assigned all his claim in and to the above-entitled account to Vachon & Sterling, who were the owners of said account upon the date said suit was instituted, and said Porter had no interest whatsoever in said account, or any part thereof, and is not the real party in interest, and has no claim whatsoever against me. I never in writing or otherwise agreed to pay to Porter, or to Vachon & Sterling, for the hauling of said wood, and never obligated myself to pay said indebtedness so contracted by Sandstrom et al., founded upon said written agreement above set forth, and am not now liable for said debt and am not now indebted to the plaintiff above named, or his assigns, in any sum whatsoever. My arrest was wrongful, and I have been greatly damaged thereby, have been detained in Fairbanks against my will, and expect to return to my home in Greece. I am sixty-three (63) years of age, and do not desire to go out over the trail, but am desirous of going outside by steamboat. I had my ticket purchased clear through to Seattle, and was on my way to Seattle when arrested and brought back, on or about June 22, 1910, and have been detained here under great expense ever since said time. I am at present out on bail and am unable to leave Alaska unless the writ of arrest is discharged. Alex. Mitchell.

"Subscribed and sworn to before me this August 23, 1910.

"John A. Clark. [Seal.]
"Notary Public in and for the Territory of Alaska."

An order denying the motion was entered September 2, 1910, in these words: "Now on this day this cause came on for hearing upon the motion of the defendant for an order to discharge the writ of arrest, theretofore issued herein. McGinn & Sullivan appearing for plaintiff, McGowan & Clark for defendant, and, after argument had and the court being fully advised in the premises, denies said motion."

On the 22d of the next month the plaintiff in the action filed by leave of the court an amended complaint, stating therein the cause of action to be, in substance, that on the 22d of February, 1910, the plaintiff entered into an agreement with Gaidos, Gillis, Sandstrom & Olson as mining partners under the firm name of Sandstrom, Gaidos, Gillis & Co., whereby the plaintiff agreed to haul for that partnership 1,000 cords of 4-foot wood from Alder and Cripple creeks in the Fairbanks recording district to the claim being operated by the copartners on Ready Bullion creek for the agreed sum of $4.50 per cord of 128 cubic feet; that, pursuant to said agreement, the plaintiff so hauled about 550 cords of the wood, when it was mutually agreed between the respective parties that, on account of financial difficulties of the firm, the plaintiff need not haul any more wood under the contract, and that the copartnership was then indebted to the plaintiff for hauling the 550 cords in the sum of $2,461.50; that thereafter the plaintiff told the defendant that, if Sandstrom, Gaidos, Gillis & Co. failed to pay him the $2,461.50, he would hold the wood which was then in his possession on Ready Bullion creek under a claim of lien, "or that he would attach all of said copartners' right, title, and interest in said wood and sell the same at public sale; that the defend-

ant then informed the plaintiff that he had a claim against said wood to the amount of one thousand three hundred and seventy-five dollars ($1,375), being the price that said copartnership had agreed to pay him for said wood at the rate of two dollars and fifty cents ($2.50) per cord;" that at that time there still remained upon the claim at Ready Bullion creek about 450 cords of the wood hauled by the plaintiff, "and that the said defendant declared to said plaintiff that it was of sufficient value to pay the defendant the two dollars and fifty cents ($2.50) for each and every cord upon said claim and the four dollars and fifty cents ($4.50) per cord due plaintiff from said copartnership for hauling the same, and that the defendant then and there undertook and agreed with the plaintiff that if he, said plaintiff, would not seek to dispose of the said wood and the said property by virtue of his lien, or bring legal proceedings to enforce his claim against the same and not involve the said wood in litigation, and release the said copartnership of their indebtedness to him, that he, the said defendant, would procure a bill of sale from said copartnership, and take the title of said wood in his own name and sell and dispose of the same, and that he would pay to the plaintiff for each and every cord then remaining upon said claim and which had been hauled by said plaintiff the sum of four dollars and fifty cents ($4.50) per cord, and the said defendant at said time further agreed that he would not sell any of said wood for less than eight dollars ($8) per cord, and said defendant further stated to said plaintiff that he, said defendant, had 170 cords of wood in the hills, and that said defendant would pay to said plaintiff any balance of the said sum of two thousand four hundred sixty-one dollars and fifty cents ($2,461.50) due said plaintiff after the sale of the said wood on Ready Bullion creek, and said defendant further agreed with said plaintiff that if at any time said defendant desired to get the money coming to him from the sale of said wood from said copartnership that he would give to said plaintiff the privilege of purchasing all of said wood before offering the same to any other person for sale by paying to him, the said defendant, the amount of his claim, to wit, the sum of one thousand three hundred seventy-five dollars ($1,375), and the said plaintiff agreed with said defendant, whenever said defendant should ask it, to pay to him, said defendant, the amount of his claim to wit, the sum of one thousand three hundred and seventy-five dollars ($1,375);" that, in pursuance of that agreement, the plaintiff released the copartnership from their obligations to him, and agreed with the defendant that he would not attempt to dispose of the said wood, and that he would not institute any legal proceedings in any court involving the wood in litigation, and that thereupon the said copartnership executed to the defendant a bill of sale conveying to him all their interest in the wood, and the defendant agreed to pay to plaintiff the amount coming to him from said copartnership for hauling the wood; that thereafter, and without the knowledge or consent of the plaintiff, the defendant sold and disposed of the wood, and by reason thereof became indebted to the plaintiff in the sum of $2,461.50, which the defendant has refused and neglected to pay. The prayer of the amended complaint is for that sum of money, with costs.

The case was tried with a jury, which returned this verdict: "We, the jury duly impaneled and sworn in the above-entitled case, find in favor of the plaintiff and against the defendant, and find that the defendant is indebted to the plaintiff in the sum of two thousand four hundred sixty-one and $^{50}/_{100}$ dollars ($2,461.50), and costs of court." Subsequent to the verdict, the defendant was surrendered by his bondsmen to the marshal and his bail exonerated.

The judgment entered in the case recites the substance of the verdict, and that "within the time required by law the said defendant by his attorneys duly filed his motion for a new trial, on the ground, among other things, that said verdict was excessive, and the court having taken said matter under advisement, and having duly considered the law and the evidence in regard to the ground set up in said motion for a new trial, and the court being of the opinion that the said verdict, in view of all the evidence, was excessive, and that a new trial should be granted unless the said plaintiff was willing to remit the amount of said verdict in excess of $1,800 and the court having so announced his decision upon the 9th day of January, 1911, and the plain-

tiff then and there accepting the same and remitting to said defendant the amount of said verdict in excess of $1,800, and it therefore appearing to the court that the said plaintiff was entitled to a judgment against the said defendant Alex. Mitchell in the sum of $1,800," and proceeded to adjudge that the plaintiff have and recover of the defendant $1,800 with costs, and that execution therefor issue, concluding with these further provisions: "It further appearing to the court that the defendant, Alex. Mitchell, has been previously arrested in said action under the provisions of chapter 12 of part 4 of the Code of Civil Procedure of the district of Alaska, it is further ordered that execution may be issued against the person of the judgment debtor after the return of execution against his property unsatisfied in whole or in part."

Based upon an affidavit to the effect that the only issue submitted to the jury or by it found upon related to the question of indebtedness of the defendant to the plaintiff, a motion was subsequently made by the defendant for his discharge from custody and that the two last above quoted paragraphs of the judgment be stricken therefrom, both of which motions were denied in this order: "That the said motion of the defendant to strike certain paragraphs from the judgment of the court heretofore entered herein be, and the same is hereby, denied, and the motion of the defendant for the discharge of said defendant from arrest be, and the same is hereby, denied, without prejudice to renewal, to which ruling and order of the court defendant excepts, and exception is allowed."

Charles J. Heggerty and McGowan & Clark, for plaintiff in error.

Metson, Drew & MacKenzie and E. H. Ryan, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The motion to dismiss the writ of error is denied.

It is based upon these grounds:

"First. That said order is not a final order or judgment within the contemplation of the Alaskan Code.

"Second. That admitting, pro argumenti, that the order denying the motion to discharge from custody was final and therefore appealable, defendant had made a prior application which had been denied, and had not appealed from the decision of the court, and the order was therefore res judicata."

[1, 2] The Code referred to permits a writ of error from this court to review a final order of a District Court of Alaska. Section 504, Carter's Ann. Code Civ. Proc. Alaska; Tornanses v. Melsing, 106 Fed. 775, 45 C. C. A. 615. The prior order refusing the discharge of the defendant from custody was made before the trial of the case, and consequently before judgment, and was therefore interlocutory. The cause of action counted on in the amended complaint on which the case was tried was a different cause from that stated in the original complaint upon which the prior arrest was based.

Passing the point made as to the propriety of permitting such a change of the cause of action, it is to be observed that the amended complaint was not only without any charge of fraud, but was not supplemented by any affidavit of any character. The order sought to be reviewed by the present writ of error was entered after the rendition of the judgment in the action, and was a denial of the defendant's motion made to strike from that judgment the provision reciting his

provisional arrest and refusing to discharge him from custody, and also directing that execution issue against the person of the defendant after return of execution against his property unsatisfied in whole or in part. This was a final order. It, in effect, not only directed that he be kept a prisoner, but that execution be issued upon the judgment to enforce his imprisonment.

[3] Upon the merits, to state the case is to decide it. Even if it be conceded that the preliminary arrest of the defendant was authorized, which we are far from doing in view of the affidavit upon which it was based, the cause of action was totally changed by the amended complaint upon which the trial was had, in which amended complaint there is not a word even tending to charge the defendant with any fraud in connection with his alleged neglect and refusal to pay the amount therein alleged to be due from him to the plaintiff; and, as has been shown, was not supplemented by any affidavit of any character. "To authorize a judgment convicting the defendant of fraud," said the Supreme Court of California in Davis v. Robinson, 10 Cal. 411, "the facts upon which the charge is based must be specifically alleged in the complaint. A judgment is the determination of the rights of the parties upon the facts pleaded, and it cannot in any event exceed the relief warranted by the case stated in the complaint. Execution against the person, unlike an execution against the property of the defendant, which follows, as a matter of course, upon a money judgment, can only issue upon direction of the court to that effect, based upon the special facts found, and such facts cannot be considered by the jury unless averred in the pleadings. Side issues upon affidavits are not the issues upon which juries pass. The arrest upon affidavit is only intended to secure the presence of the defendant until final judgment; and, in order to detain and imprison his person afterwards, the fraud must be alleged in the complaint, be passed upon by the jury, and be stated in the judgment. In nearly every case in which an arrest is allowed by the statute the facts authorizing the arrest also constitute the cause of the action, and, of course, must necessarily be stated in the complaint. In the few instances where the circumstances authorizing an arrest occur subsequently to the filing of the complaint, application should be made to the court either to amend the original, or to file a supplemental complaint, so as to set forth the facts upon which execution against the person of the defendant will be asked in the enforcement of the judgment sought. By requiring the charges to be stated in the complaint, the rights of the defendant will be fully guarded. He can then meet the charges, and have a fair opportunity of defending himself by a trial before the jury. There may be some inconvenience in blending, on the same trial, a question of indebtedness and a question of fraud, but we perceive no way of avoiding this and giving full protection to the defendant. A special finding on the question of fraud should be always taken, so as to keep it as distinct as possible from the main subject of controversy." Substantially the same views were taken by the same court in the subsequent case of Payne v. Elliot, 54 Cal. 339, 342, 35 Am. Rep. 80, where it was said:

"But the judgment for fraud exceeds the relief to which the plaintiff was entitled by his complaint, for the only averments upon the subject of fraud are 'that the defendants received said shares of stock in a fiduciary capacity, as the agents of this plaintiff and not otherwise,' and 'that defendants were and are guilty of fraud in receiving and converting said stock to their own use.' It is not altogether clear how a person is chargeable with fraud by receiving shares of stock in a fiduciary capacity; for, as the term 'fiduciary' imports, the defendants must have received them rightfully to hold in trust for the plaintiff. But if the defendants, as trustees of the plaintiff, fraudulently converted the stock to their own use, the facts which constituted the imputed fraud should have been stated; for fraud is never presumed, but must be proved, and, to be proved, the facts upon which the charge is based must be specifically alleged in the complaint. Davis v. Robinson, 10 Cal. 412.

"Without any issuable averments upon the subject the court finds 'that the defendants were the agents of the plaintiff, that the plaintiff delivered the stock to them to hold as security for the payment of $409 which he owed to them, and that they received it in the course of their employment as such agents and in a fiduciary capacity.' Upon these findings the court 'adjudged the defendants guilty of having fraudulently misapplied and converted said one hundred shares of the capital stock of the Northern Belle Mill & Mining Company to their own use, and that the defendants be arrested and held in custody until they pay the amount of this judgment, or until they shall otherwise be legally discharged from custody.' The judgment in this respect is not warranted by the case stated in the complaint or the findings.

"Some time after the judgment had been rendered, the court below undertook, by an order entered upon the minutes of the court, to modify it by 'striking out the last six lines therein'; but that does not cure the error. The judgment convicting the defendants of fraud and ordering their arrest should be vacated.

"It is hardly necessary to remand the cause for a new trial for that purpose, but the court below is directed to strike from the judgment the following matter, viz.: 'And that plaintiff is entitled to an order of arrest against said defendants until the same shall be paid. * * * And it is further ordered, adjudged, and decreed that defendants were the agents of the said plaintiff, and that they received 100 shares of the capital stock of the Northern Belle Mill & Mining Company, of the value of $2,950; that they received the same as the agents of the said plaintiff, and in a fiduciary capacity, and refused to deliver the same to plaintiff on demand; and that they, the said defendants, converted the same to their own use, and against the will or consent of said plaintiff, by reason of which they are hereby adjudged guilty of fraud. And it is further ordered, adjudged, and decreed that said defendants be arrested, and held in custody until they pay the amount of this judgment, or until they otherwise legally be discharged from custody.'"

We are of the opinion that the views thus expressed in the cases cited are sound, and we therefore reverse the order in question, with direction to the court below to strike from the judgment the clauses hereinabove quoted, and to discharge the defendant from custody.

Ordered accordingly.

SEXTON MFG. CO. et al. v. SINGER SEWING MACH. CO.

(Circuit Court of Appeals, Seventh Circuit. July 27, 1911. Rehearing Denied October 4, 1911.)

No. 1,665.

1. MECHANICS' LIEN (§ 197*)—NOTICE OF CLAIM—SUFFICIENCY.
One purchasing property against which a mechanic's lien is sought may rely on claimant's failure to give notice of his claim as required by statute, though the purchaser took the property after installation of the machines for which a lien is claimed, and after claimant ineffectually attempted to claim a lien.
[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 197.*]

2. MECHANICS' LIENS (§ 131*)—NOTICE OF CLAIM—SUFFICIENCY.
Filing a bill in the federal Circuit Court to foreclose a mechanic's lien does not comply with Ill. Act 1903, p. 230 (Hurd's Rev. St. 1905, c. 82) §§ 7, 9, defeating a mechanic's lien as to purchasers, etc., unless within a specified period claimant shall "either bring suit to enforce his lien therefor or shall file with the clerk of the circuit court in the county, a claim for lien," and authorizing suit to enforce the lien to be brought "in any court of competent chancery jurisdiction" in such county.
[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 184; Dec. Dig. § 131.*]

Grosscup, Circuit Judge, dissenting.

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

Bill by the Singer Sewing Machine Company against the Sexton Manufacturing Company and another. Decree for complainant, and defendants appeal. Reversed, with directions to dismiss.

Frank Y. Gladney (Elmer H. Adams, Dwight S. Bobb, and Asa G. Adams, of counsel), for appellants.

Charles P. Wise and Clarence T. Case, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. [1, 2] On April 23, 1907, appellee filed in the United States Circuit Court at Danville, Vermilion county, Ill., a bill to foreclose an alleged mechanic's lien on real estate in Wayne county, Ill. Notice of lien (or a suit as the equivalent of notice) was never filed in Wayne county. Boggs, who was averred to be owner when the machines were furnished to occupants who had the right to improve the property, filed a disclaimer, in which he alleged that he had quitclaimed to Kreitler, who, in turn, had conveyed to appellants. Thereupon appellants appeared as parties defendant, and set forth, among other defenses, that appellee's filing of the bill herein was not a giving of notice of a claim of lien in compliance with the mechanic's lien statute of Illinois.

Appellants purchased subsequently to the installation of the machines and appellee's attempt to claim a lien. But, a mechanic's lien being purely of statutory origin, a purchaser's knowledge that the contractor had not taken the steps necessary to bind a purchaser could hardly supplant the statute. Von Tobel v. Ostrander, 158 Ill.

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

499, 42 N. E. 152; May Brick Co. v. General Eng. Co., 180 Ill. 535, 54 N. E. 638.

Section 7 of the act of 1903 (Laws 1903, p. 230 [Ill. R. S. 1905, Hurd, p. 1319]), in force when the machines were supplied and since, provides that:

"No contractor shall be allowed to enforce such lien against or to the prejudice of any other creditor or incumbrancer or purchaser, unless within four months after completion * * * he shall either bring suit to enforce his lien therefor or shall file with the clerk of the circuit court in the county in which the building, erection or other improvement is situated, a claim for lien, verified by the affidavit of himself or his agent or employé, which shall consist," etc.

One way to bind the world is to file a "claim for lien" in the office of the clerk of the circuit court in the county where the land lies. An alternative way is to "bring suit." In what county or in what court the suit shall be brought is not defined in this section. If this were all of the statute, it might be said that a suit before a justice of the peace in Sangamon county to foreclose a mechanic's lien on land in Wayne county was intended by the Legislature to be the equivalent of recording a claim for lien in the office of the clerk of the circuit court in Wayne county. But it is agreed section 9 is in pari materia, and therein the provision is that:

"Such contractor may bring suit to enforce his lien by bill or petition in any court of competent chancery jurisdiction in the county where the improvement is located."

If "in the county" defines "jurisdiction," then the bill filed in the United States Circuit Court was the equivalent of a claim of lien recorded in Wayne county; but not if "in the county" defines the "court" in which the bill or petition, as the alternative of a recorded notice, must be filed. Which construction accords with the intention of the Legislature?

In the expression, "any court of competent chancery jurisdiction in the county," the words, "of competent chancery jurisdiction," constitute an adjectival phrase that modifies "court." If for the adjectival phrase adjectives of equal value be substituted, so that the expression becomes "any competent chancery court in the county," the fact that "in the county" qualifies and limits "court" appears indisputable.

Presumptively the Illinois Legislature in using a "court" as a registration office for the filing of notice of mechanics' liens (which could have no existence save through the legislative will) meant Illinois courts, not courts that are foreign to Illinois sovereignty. Even if the Illinois Legislature had the power to use other courts as a part of the machinery for giving a required notice to creditors, incumbrancers, and purchasers, an intention to do so should not be inferred against the natural presumption, unless the language is entirely free from ambiguity. But, so far from the meaning being dubious, the proper grammatical analysis of the language leads to perfect clearness.

An harmonious, rather than an anomalous, registration system should be held to be the object of the Legislature. Respecting con-

veyances, mortgages, leases, tax sales, taxes, assessment liens, and the like, Illinois, in line with other states of our Union, has provided a general registration system by the use of which an intending purchaser of land may acquire knowledge of all interests and liens that are dependent on or derive their existence from Illinois law that may affect his purchase by examining the records in the courthouse of the county where the land lies. Was it the deliberate intention of the Legislature to provide equivalent, alternative methods of giving notice, one of which should accord with the plan adopted in all other instances, and the other of which should be a radical departure? If so, we should think that the legislators would have employed language clearly indicative of such a purpose.

Further, light is afforded by a brief review of Illinois mechanic's lien legislation. In chapter 65 of the Revised Statutes of 1845, sections 1 and 2 gave the right to claim a mechanic's lien. No recordation of a claim of lien was provided for. Notice was given by the filing of a suit (section 3) to be begun "upon bill or petition to the circuit court of the county in which the land lies." But such notice was not to be effective against creditors or incumbrancers (or purchasers, afterward added) unless the suit was instituted within six months after the last payment was due (section 24). In the expression "the circuit court of the county in which the land lies" certainly no ambiguity is lurking.

By reference to the title "Courts" (chapter 29, R. S. 1845), it will be found that the only "court of competent chancery jurisdiction in the county" was the circuit court in the county, held by a justice of the Supreme Court. When the mechanic's lien law of 1845 was revised in 1874 (chapter 82, R. S. 1874), in various counties of the state "courts of competent chancery jurisdiction in the county" had previously been established in addition to the circuit court in the county. So, while the scheme of the statute remained largely the same, identically the same in not providing for a record of a claim of lien and in requiring the only notice to be given by the filing of a bill or petition, the language was changed from "circuit court of the county in which the land lies" to "any court of record of competent jurisdiction in the county in which the land lies" (section 4), the limitation of six months continuing the same (section 28). Obviously the legislative purpose was to broaden the description of the "court in the county" so as to include all courts in the county having the same chancery powers as the circuit court in the county, and not to add United States courts having "jurisdiction in the county" by reason of the fact that the county was within the territory of a United States judicial district then established or thereafter to be established by Congress.

Thus the statute stood till 1887 (Laws 1887, p. 219). By the act of that year section 4 of the act of 1874 was amended to provide that "every contractor who wishes to avail himself of this act shall file with the clerk of the circuit court of the county in which the improvement is situated, a just and true statement," etc. And the limitation in section 28 was shortened to four months. By this act of 1887 the

exclusive method of giving notice by recording a claim of lien was substituted for the old exclusive method of giving notice by filing a bill or petition. From 1887 to 1895 there could be no doubt that an examiner of titles needed not to search for notice beyond the courthouse of the county in which the land was situated.

In 1895 the two methods of giving notice were brought together, and the contractor was given his choice (sections 7 and 9, chapter 82, Starr & Curtis' Ann. St. 1896). Respecting the question of notice, these sections are the same as sections 7 and 9 of the act of 1903, hereinbefore quoted. When to the 1887 method of giving notice to the world the Legislature added an alternative method, the very fact that the two were joined as alternatives ought to lead to a holding that they are of the same nature. And, further, no new method was created. The acts of 1895 and 1903 simply united the old 1887 method and the older 1874 method, which, as we have seen, was a necessary modification of the original provision in the statute of 1845, into which no ambiguity could be injected.

This question has, of course, never been presented to the Supreme Court of the state, for it could not arise in a case begun in any competent chancery court in the county where the improvement is located.

The decree is reversed, with the direction to dismiss the bill for want of equity.

GROSSCUP, Circuit Judge, dissents.

WASHINGTON SECURITIES CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1912.)

No. 1,988.

1. PUBLIC LANDS (§ 120*)—COAL LANDS—HOMESTEAD ENTRY.

Where the patentees who obtained patents on certain mineral land under homestead entries had been engaged in mining in the vicinity of the land, which was in the midst of a well-known coal mining region, prior to the time they attempted to enter the land as homestead, and at the time they made their applications well knew that the land was not subject to entry under the homestead law, and falsely stated in their affidavits and final proof that the land was chiefly valuable for agriculture, the patents so obtained were subject to cancellation as between the parties at the suit of the government.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. § 120.*]

2. PUBLIC LANDS (§ 120*)—COAL LANDS—HOMESTEAD ENTRY—PATENT—TRANSFER.

A grantee of certain land which the government had been induced to patent to homesteaders by false and fraudulent proof that it was chiefly valuable for agriculture *held* not a bona fide purchaser, and that the patents were therefore subject to cancellation at the suit of the United States as against them.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 120.*

Bona fide purchasers of public lands, see note to United States v. Detroit Timber & Lumber Co., 67 C. C. A. 13.]

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

3. PUBLIC LANDS (§ 35*)—COAL LANDS—"MINERAL LANDS."
Coal lands are "mineral lands" within the United States statutes with reference to the sale of the public domain, and therefore cannot be legally acquired under and by virtue of the homestead laws.
[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 35.*
For other definitions, see Words and Phrases, vol. 5, pp. 4515, 4516.]

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

Bill by the United States against the Washington Securities Company for the cancellation of patents to certain coal land patented under homestead entries and conveyed to defendant. From a decree in favor of complainant, defendant appeals. Affirmed.

By its bill filed in the court below the government sought the cancellation of four certain patents covering section 34, township 22 N., of range 7 E., of the Willamette meridian, in the Seattle land district, state of Washington, which were issued to four named individuals, for one-quarter of a section each, under and by virtue of the homestead law of the United States, the title to which subsequently passed to the appellant corporation from the patentees. The bill charges that all of the land mentioned was at all of the times therein referred to known mineral land, containing valuable deposits of coal in such quantities and of such character as rendered the land more valuable for the coal it contained than for agricultural purposes, which facts each of the patentees well knew at the time he made application to purchase a quarter section thereof under the homestead law, and at the time of final proof and the receipt of the patent, and all of which facts the appellant corporation well knew through its agents and officers at the time of its purchase, and further knew that all of the said land was known mineral land at the time the said respective patentees made application to purchase it under the homestead laws, and at the time they made their proofs under and pursuant to such applications and at the time they received the said patents. The bill makes similar allegations in respect to each of the patentees. It will be sufficient to state the substance of one of them, which is as follows: That on September 10, 1900, one Zachariah Turner filed with the proper officers of the United States Land Office at the city of Seattle, Wash., an application in writing and entered as a homestead the E. ½ of the E. ½ of section 34 of township 22 N., of range 7 E., of the Willamette meridan, and at the time of filing the same also filed his nonmineral affidavit in accordance with the duly established rules and regulations of the Land Office, in which affidavit he stated, among other things, that he was well acquainted with the character of the land applied for, and that there was not, to his knowledge, within the limits thereof, any deposit of coal; that thereafter, on the 9th day of January, 1902, the said Turner, desiring to commute his homestead entry upon the said land so applied for, made and filed in the said Land Office his final proofs, together with the nonmineral affidavit required by the rules and regulations of the Commissioner of the General Land Office, and in his testimony upon final proof in the said Land Office testified upon oath, among other things, that the said land was most valuable for agricultural purposes, and that there was not any indication of coal on it; that the affidavit so made and filed and the testimony so given were false and fraudulent, as the said Turner well knew at the time, and were made and given by him for the purpose of fraudulently obtaining from the United States the title to said land; that the land was unfit for agricultural purposes, and was of no value therefor, but did contain valuable workable deposits of coal, all of which the said Turner at the time well knew; that on the 9th day of January, 1902, the officers of the Seattle Land Office, based upon the said final proof, through mistake and inadvertence and without authority of law, issued to the said Turner a receiver's receipt for the land so applied for by him, and thereafter, to wit, November 2, 1904, a patent was issued to him by the United States

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

conveying the said land, which patent was issued through mistake and inadvertence on the part of the officers of the Land Office, and without authority of law; that on the 10th day of October, 1906, the said Turner and his wife, Mary Turner, by deed conveyed the said land to one C. J. Smith, who was at the time the agent of the defendant corporation for the purchase of the said land, and who acquired it solely for the use and benefit and in trust for the defendant to the suit, which corporation still holds the legal title thereto; that the said defendant corporation and its said agent well knew at the time of such purchase, and for a long time prior thereto, that the said land contained valuable deposits of coal and was mineral land, and was unfit for agricultural purposes and of no value therefor, and was not subject to entry under the homestead laws of the United States.

The bill contains similar allegations in respect to all of the other portions of the section in question. It contains no charge of fraud against the defendant company or its agent, nor against any of the officers of the Land Office.

The defendant company by its answer admits, among other things, that the section of land in question contained and still contains valuable and workable deposits of coal, and that the patents were issued as alleged, and that the land covered by them was thereafter conveyed by the patentees to Smith as agent of the defendant company and was subsequently conveyed by him to the company, which still holds the legal title thereto. In other respects the answer put in issue the averments of the bill.

Charles P. Spooner and H. R. Clise, for appellant.

Elmer E. Todd, U. S. Atty.

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

ROSS, Circuit Judge (after stating the facts as above). [1] There are some peculiar features about this case. The record contains undisputed evidence, and an abundance of it, to the effect that coal was discovered in and upon the land in question in the year 1882, and that shortly thereafter an association of individuals was formed for the purpose of developing the coal deposits, which efforts continued for a number of years, and in which efforts about $8,000 were expended. One of that syndicate was a man named John L. Howard, who took in his own name, but for the benefit of the Oregon Improvement Company, a corporation of which he was at the time the manager, a one-third interest in that mining venture. The evidence further shows that each of the patentees had been engaged in mining in the vicinity of the land in question, which is in the midst of a well-known coal-mining region, and the evidence leaves no room for doubt that each of the so-called homesteaders well knew, at the time he made his application for the entry of a portion of the land as a homestead, that it was not subject to entry under the homestead law, but was well-known mineral land, and that their affidavits in respect to the character of the land were false and fraudulent, as was their testimony on final proof. As against them, therefore, there could be no doubt of the right of the government to a decree canceling the patents issued to them. The only question is, Is the defendant company, appellant here, entitled to protection as an innocent purchaser?

[2] One of the peculiar features to which reference has been made is that, while the homestead applications were pending in the local land office, it seems to have been brought to the attention of its officers in some way not shown, and also in some undisclosed way to

the Commissioner of the General Land Office (as we find in one place in the record a reference to the vacation of a suspension of the homestead entries by that officer), that the land in question was claimed to be mineral land. For instance, it appears from the testimony of one of the government's witnesses, Sidney J. Williams, that shortly after the land was surveyed, and just after the filing of the homestead applications, he sought to procure a portion of it under the law governing the disposition of mineral lands, and tendered to the officers of the local land office the government price for such land, which application and tender they rejected. His testimony in part is as follows:

"Q. But did you file on that quarter section, while others were filing in conjunction with you, filing on other quarters on that section? A. When I made the filing and made the tender of the money, I filed alone at that time.

"Q. What year was that? A. I don't remember the year. It was about—

"Q. [Interrupting]: '96 or '97? A. I think it was, about; I don't know. The records show the filing. I don't remember.

"Q. It was shortly after the land was surveyed, wasn't it? A. I don't remember just exactly when it was, but the record shows. I made my filing and I made my tender of the money to the office here.

"Q. Any way you filed on it before—what was the condition, at what stage were these homesteaders in when you filed? A. They had just filed.

"Q. They had just filed? A. They had filed on it also, but hadn't made their final proof.

"Q. Did you keep your filing good? A. Yes, sir; I made a tender of the $3.200 to the Land Office.

"Q. Then you contested their filing, did you? A. No; it didn't go any further. They refused to accept my money, the Land Office here. It was more valuable for other purposes, and gave me back my money.

"Q. And what, if any, showing did you make to substantiate your filing? A. I made the same talk I have made here about the coal being there.

"Q. In what way did you make that showing? A. I had witnesses.

"Q. That was before the office here? A. Yes, sir.

"Q. And as the result of that showing they refused to accept your tender? A. Returned—

"Q. [Interrupting]: And turned down your filing? A. Yes, sir."

The witness then testified that he thereupon dropped the matter.

The record contains no evidence that there was any formal contest in the Land Office between any of the mineral claimants and the homesteaders, or that any proof was introduced before those officers respecting the true character of the land. It does, however, clearly show that the defendant company's agent, in acquiring the patentees' title to the land covered by the patents, well knew that before and at the time of the filing of the homestead applications the land was claimed to be mineral land, for the record shows that he was one of the officers of the Oregon Improvement Company, succeeded Howard as manager of that company, and personally directed for several years the payment of that company's one-third part of the expenses incurred by the syndicate in developing the coal veins upon the land. The contention on the part of the appellant company that that knowledge had passed from its agent's mind at the time he negotiated on behalf of the appellant for the title to the property conveyed by the patents cannot be sustained in view of the evidence.

Mr. C. J. Smith was that agent. According to his own testimony,

from 1891 to about 1898, he was general manager of the Oregon Improvement Company, which company, in addition to its railroad and steamship business, owned and operated the Franklin and Newcastle coal mines in the vicinity of the land in question, and which company, through its former manager, Howard, had secured a one-third interest in the undertaking to acquire the section of land here in question as coal land, but which the patentees obtained by the fraudulent means already indicated. Mr. Smith, who subsequently acquired the title thus conveyed by the patents for the appellant company and transferred the land to it, was examined as a witness on behalf of the government, and then testified as follows:

"Q. Mr. Smith, at the time you purchased this land from the homesteaders, what position did you occupy with the Washington Securities Company? A. The Washington Securities Company was not formed at that time. It was just in process of being formed.

"Q. It was in process of being formed? A. Yes.

"Q. And you purchased this land for the corporation which was to be formed, did you not? A. Yes.

"Q. And with its funds? A. Yes, sir.

"Q. What position did you hold in the Washington Securities Company upon its organization? A. Vice president.

"Q. What other position—were you one of the trustees or directors? A. Yes.

"Q. Were you one of the original promoters of the company? A. Well, I subscribed to the stock at the beginning, at the formation of the company.

"Q. Did you interest the corporation in this particular piece of property? A. Well, I brought it to their attention; yes.

"Q. And you are still, and at the time you deeded the property over to the company you were, the vice president and one of the trustees? A. Yes, sir.

"Q. And you had bought it solely for the use of the corporation which was afterwards to be formed? A. Yes.

"Q. During the time you were connected with the Oregon Improvement Company did you visit the Franklin mine from time to time? A. Yes, sir.

"Q. How often would you say? A. Well, I don't remember; whenever it was necessary.

"Q. Once a month? A. Well, it was—the periods were too irregular.

"Q. The Oregon Improvement Company owned the railroad that ran up there at that time? A. Yes, sir."

Being asked on cross-examination in what way he brought the property to the attention of the appellant, and in what way it was brought to his attention, the witness answered:

"A man by the name of Braggs (afterwards given as Brooks) came to me and told me he had some coal land, wanted to know if I was interested in coal, and I asked him where the land was. He told me it was in section 34, township 22, 7, I think it was, and I told him that I was not, that I didn't believe that I cared to be interested, and he asked me if there was anybody that he could obtain as a purchaser, that he had an option on the land. I referred him to C. R. Collins, who at that time was hunting for some coal land with the expectation of getting coal that would be adaptable for gas purposes. He had some negotiations with Mr. Collins, and Mr. Collins came to me and said that he would take it if I would take an interest, which I declined to do; and Mr. Collins took it up with some people in the East, and, not obtaining the necessary funds, told Mr. Braggs that he was unable to carry out his plans, and Braggs came back to me again, and in the meantime the Washington Securities Company was about to be formed and their stock was then being subscribed, and I referred Mr. Braggs to the Securities Company. He had a talk with Mr. Clise, who expected to be the president of the company and who was promoting it, forming it, and Mr. Clise discussed

the question with me and Mr. Braggs, and I told him that—I gave him the name of an engineer—mining engineer, that would exploit the land—that is, would make examination—and that I knew nothing personally about the land myself, but would rely upon a report that this man would make; and at my suggestion the man was employed to go there and look the land over. After he had looked it over, the matter of purchase was taken up between myself and Mr. Braggs, and an option was taken for a sufficient length of time to enable us to verify the report of the engineer, and upon the verification of those reports and the abstract of title the land was purchased."

The witness, when subsequently called on behalf of the defendant company, gave substantially the same testimony as to what occurred between him and Braggs or Brooks, and further testified, on cross-examination, that as manager of the Oregon Improvement Company he paid that company's proportion of the expenses of "keeping up the coal declaratory statements" on the land, and that, when he purchased the land from the homesteaders, he had an abstract of the title made and examined by the attorney for the defendant company, who was also one of its directors. Being asked by the company's attorney what, if any, effect his prior information in respect to the character of the land had on his mind at the time Brooks approached him on the subject of purchasing the property, and whether he knew that the patented land was the same land in respect to which he had made the payments, the witness answered:

"He informed me it was section 34, located near Kanascott, and he asked whether I knew about it, and I told him no, and he went on to describe then its location with reference to other mines there beyond Franklin and within the range of Kangley and Drum and Alta and some other pieces of property that had been more or less exploited in that part of the country, and I told him, then, that I had an indistinct remembrance that that had been brought to my attention some years before, but that I had never seen any report or examination of it, I was not aware of the value of it, and I did not know whether it was coal or not, and I did not care to go any further with it, that was as to myself personally. When the company was formed, I referred it to them, and they desired first an examination. Upon that examination they made their purchase.

"Q. Was the examination made based in any way upon what you have stated existed away back in '90 and '91? A. No, sir; in fact, I did not know there were tunnels on the property.

"Q. How is that? A. In fact, I did not know whether there were any tunnels or open prospects on the property, or that there ever had been.

"Q. When did you first find that out? A. When the examination was made they took some, the expert took some men with him, and in looking over the ground they uncovered some prospect holes and dug out some tunnel that had been more or less filled with water and débris.

"Q. I wish you would state whether or not from the report that you had from the men whom you sent there and from such other knowledge you had whether or not that property, as coal property, is anything more at the present time than a prospect? A. Well, no; it is a probability. It could not be determined as a mine, and in fact I was loath, even after the report was made, to take hold of it until I had secured some additional information with reference to a rock dyke that runs fairly close to that property up there, and which, in my opinion, is the reason why one of the contiguous pieces of coal property was worthless, the rock dyke having practically coked the coal in the mine, and rendered it entirely worthless."

We are of the opinion that Smith's own testimony shows that at and before his purchase of the property from the homesteaders for the Securities Company he knew that it was the same land he had

claimed to be coal land while manager of the Oregon Improvement Company, and that his actions above indicated in respect to the land were then present to his mind. The abstract of title necessarily showed that the land was acquired from the government by the proposed sellers under and by virtue of its homestead laws. There is, therefore, nothing in the case of Harrington v. United States, 11 Wall. 356, 20 L. Ed. 167, precluding the affirmance of the judgment.

[3] That coal lands are mineral lands within the meaning of the United States statutes is well settled, and that land known at the time to be mineral land cannot be legally acquired under and by virtue of the homestead law of the United States is also too well settled to need the citation of authorities.

The appellant company not being an innocent purchaser, and the patents in question having been acquired by the gross fraud of the patentees, the decree annulling them is affirmed.

ROGERS et al. v. VICKSBURG, S. & P. R. CO.†

(Circuit Court of Appeals, Fifth Circuit. March 5, 1912.)

No. 2,265.

1. CORPORATIONS (§ 496*)—LIABILITY FOR TORTS—CONSPIRACY.

Corporations are liable in damages for torts, and in proper cases may be convicted of conspiracy.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1907; Dec. Dig. § 496.*

Liabilities of corporations for conspiracy, see note to Hindman v. First Nat. Bank, 39 C. C. A. 17.]

2. CONSPIRACY (§ 21*)—CIVIL LIABILITY ACTION—QUESTIONS FOR JURY.

In an action against a railroad for aiding in a conspiracy to commit a lynching by furnishing a special train to carry the individuals composing the mob to the place where the lynching took place, evidence examined, and *held* that it was error to direct a verdict for defendant.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 28, 29; Dec. Dig. § 21.*]

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

Action at law by Annie May Rogers and others against the Vicksburg, Shreveport & Pacific Railroad Company. Judgment for defendant, and plaintiffs bring error. Reversed.

This is a suit by the widow and minor children of Robert T. Rogers, who was taken by a mob from the parish jail at Tallulah, La., on May 28, 1906, and hanged. Rogers was accused of murdering a man by the name of Brown and was about to go free, a plea of former jeopardy having been sustained, when, on the day mentioned, the brother of Brown chartered from defendant in error a special train, which was run from Monroe, La., to Tallulah, and gathered up along the way the individuals composing the mob that broke into the jail and hanged Rogers.

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

† Rehearing denied April 2, 1912.

There are four counts to the declaration. The first is based on the theory that a conspiracy existed to take the life of Rogers, and the defendant company joined the same, and thereby became liable for all of the acts of any of the conspirators. The second count proceeds upon the theory that the defendant had or was charged with notice of the fact that the special train was chartered for an unlawful purpose, and that it was defendant's duty not to place at the disposal of the mob the means of accomplishing its purpose, which duty it violated. The third count charges negligence in not preventing the carrying out of the unlawful scheme; it being the duty of the defendant and within its power to do so. And the fourth count charges that the defendant, having delegated its franchise powers and privileges to another, cannot escape liability, but is responsible for his acts.

To this declaration the defendant pleaded the general issue, a jury was impaneled, and testimony introduced by the plaintiffs tending to show the following facts:

On May 28, 1906, Robert T. Rogers, the deceased, was being held a prisoner in the parish jail at Tallulah, La., on the charge of murdering a man by the name of Brown. A plea of former jeopardy had been interposed in his behalf, and on the 21st of the same month the plea had been sustained and the discharge of the prisoner ordered; but he was being held subject to an appeal by the state from this decision.

The man whom Rogers was accused of having killed had a brother residing in Monroe, La., and on said May 28th, one week after the order was made discharging Rogers, this brother, "Doctor" F. A. Brown, made application to the defendant company to lease or charter to him a special train to be run from Monroe to Delta Point, the eastern terminus of its road, and return; Tallulah being a station on its road between these places. The application for this train was made to M. M. Bellah, ticket agent of defendant at Monroe, about 10 o'clock in the forenoon for a train to be started from Monroe at 8:30 o'clock that night and run to Delta Point, where it was to remain about four hours and then return to Monroe. Dr. Brown stated to Bellah that he wished to carry three or four passengers and make stops at Rayville Railroad Crossing, Boeuf River, and Delhi, and that it would suit him as well to have the train leave Monroe from the switching yard as from the depot; the yard being about half a mile east of the depot. As soon as the application was made, Bellah took the matter up by wire with the superintendent at Vicksburg, and a number of telegrams passed, resulting in the chartering of the train and fixing of the price. Although there were two regular passenger trains a day each way between these points and this train was to be run at such unusual hours, no inquiry was made as to the purpose for which Dr. Brown wished to charter it. The disposition of the Rogers' case at Tallulah had aroused much interest in and about Monroe, and it was a matter of general knowledge and discussion on said day that this special train was to be run that night. One of the citizens who had heard the rumor walked down with a friend to the yard about the appointed time and observed the train standing in readiness and saw a number of men crawl from under the neighboring box cars and get on board, carrying guns, sacks, ropes, chains, and lanterns; one of the latter having a sack or gauze around it. They seemed to be in a great hurry. The lights on the coach were turned low and the window shades drawn down, and the men conversed in subdued tones, so that this witness could not hear what was being said. The point from which the train was started was about 60 yards from the Monroe yard office, where telegraphic messages are received and sent in connection with the running of trains. This train left about 8:30 p. m. and proceeded eastward, stopping first at the Boeuf River water tank, next at the Rayville railroad crossing, then at a point several miles east of Rayville, out in the woods, where there was no station nor even a switch. The next stop was at the compress at Delhi, and the next at the Delhi depot, where a red semaphore required it to stop for orders. The conductor remained for several minutes in the telegraph office at Delhi and received orders from the chief train dispatcher's office at Vicksburg. The train then proceeded to the Bayou Macon bridge, where another stop was made. At all of these points, except the Delhi station, additional armed men boarded the train. The flagman is the only mem-

ber of the train crew whose testimony was procured by plaintiffs, and he states that the lights in the coach were turned low, though he does not know who turned them down; that he noticed the guns soon after the train left Monroe and thought that "something was up," though he could not tell what; that his suspicions were aroused; that the shades at the windows were drawn down, and it was too dark in the car to recognize any one; that he saw Dr. Brown and the conductor, Mr. James (who is now dead) conversing on the back platform for a part of the way, though he did not hear what was said between them. He describes the stops that were made and the taking on of the additional men, and says that when they reached Tallulah (53 miles from Monroe) there were 40 or 50 men on board; and there the train stopped immediately in front of the courthouse, which was the nearest point to the jail that it could reach, and everybody got off except the train crew and went to the north side of the track (the side on which the jail is located). That the train then went on to Delta Point, reversed, and immediately returned to Tallulah.

No one in Tallulah, as far as the testimony shows, saw the mob leave the train; but the latter was observed to stop in front of the courthouse, and a few minutes afterwards the citizens were aroused (it being then about 10 o'clock at night or later) by hammering and pounding at the jail and the cries of Rogers pleading for his life. Entrance was finally effected through the brick wall of the jail, and the lock of the steel cage was cut off and Rogers removed in his night clothes and sock feet and taken by the mob to a point on the defendant's right of way several hundred yards west of its passenger depot and there hanged to a telegraph pole.

When the train was returning and had reached Barnes, a station four miles east of Tallulah, it was met by a freight train, the crew of which told Conductor James that the mob had hanged a man at Tallulah. The train proceeded to Tallulah and stopped in front of the courthouse, at the point where the mob had left it, but, failing to find its passengers, felt its way along to the depot, where it was temporarily stopped by the sheriff's posse, but shortly permitted to go on. From the depot platform, where he, with others, had stood and watched the hanging, Mr. J. V. Sevier pointed out to the conductor the mob on the railroad at the point where the hanging had taken place, "giving him the highball" to come on down. He "rode the engine," by the headlight of which the body could be seen hanging to the pole, stopped his train at the scene of the lynching, and took on board the perpetrators of the crime and returned them to the several points from which they had come.

The chief train dispatcher of the defendant road, whose office is at Vicksburg, testified that the orders given the crew of this train were to make stops as requested by Dr. Brown and to observe his wishes in the running of the train, as it was chartered by him.

Robert T. Rogers was a young man only 30 years of age at the time of his death, was a devoted husband, a kind and loving father, and a good provider for his family.

At the close of the plaintiffs' testimony, the defendant moved the court to exclude the same from the jury and instruct them to find a verdict for the defendant, which motion was sustained and the jury so instructed, and verdict was rendered accordingly.

From the judgment on the verdict, this writ of error was sued out.

J. C. Bryson (J. B. Dabney, J. B. Stone, and W. M. Murphy, on the brief), for plaintiffs in error.

J. Blanc Monroe and J. Hirsh (Hirsh, Dent & Landau, on the brief), for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). This suit is one to recover damages from the defendant railroad company for aiding, assisting, and participating in the unlawful conspiracy to

murder Robert T. Rogers, the husband and father of plaintiffs below, plaintiffs in error here.

Article 2315, C. C. La., provides as follows:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children or widow of the deceased or either of them, and in default of these, in favor of the surviving father and mother or either of them, and for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be."

[1] Corporations are liable in damages for torts, and in proper cases may be convicted of conspiracy.

[2] The evidence shows that a conspiracy to lynch Rogers existed, and that in pursuance thereof Rogers was lynched, and that the successful result of the conspiracy came through the aid and assistance given by the company and its agents; for it is undisputed that the company furnished the railroad train which gathered up the individuals composing the mob, carried them for miles to Tallulah, La., landed them near the jail in which Rogers was confined, and after the murder came back to the scene, gathered up the members of the lynching party, and carried them away in and to safety.

Is the railroad company liable, under the laws of Louisiana, for the unlawful act resulting in damages to Rogers' wife and children? Did the company's agents know, or ought they to have known, at any time previous to the landing of the mob at Tallulah, the object and the purposes of the gathering and the hiring of the special train?

Under the evidence, mainly recited in the foregoing statement, these questions can only be answered by a jury.

The railroad company was present throughout by its authorized agents, and, if the witnesses are to be believed, those agents knew, or ought to have known, long before the special train reached Tallulah, that the object and purposes of the trip were unlawful.

"Every person entering into a conspiracy already formed is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design.

"One to be chargeable as a co-conspirator need not have been an original contriver of the mischief, for he may become a partaker in it by joining the others while it is being executed. If he actually concurs, no proof is required of an agreement to concur.

"If there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged.

"In an action against co-conspirators, the prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy." Patch Mfg. Co. v. Protection Lodge, 77 Vt. 294, 60 Atl. 74, 107 Am. St. Rep. 765.

"Mr. Cooley on Torts (page 125), referring to a conspiracy, says: 'When the mischief is accomplished, the conspiracy becomes important, as it affects the means and measures of redress; for the party wronged may look beyond the actual participants in committing the injury, and join with them as defendants all who conspired to accomplish it. The significance of the conspiracy consists, therefore, in this: That it gives the person injured a remedy

against parties not otherwise connected with the wrong.' At page 127: 'Most wrongs may be committed either by one person or by several. When several participate, they may do so in different ways, at different times, and in very unequal proportions. One may plan, another may procure the men to execute, others may be the actual instruments in accomplishing the mischief; but the legal blame will rest upon all as joint actors.' And at page 133: 'Where several persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or doing it under circumstances which fairly charge them with intending the consequences which follow, it is a very reasonable and just rule of law which compels each to assume and bear the responsibility of the misconduct of all. To require the party injured to ascertain and point out how much injury was done by one person, and how much by another, or what share of responsibility is fairly attributable to each, as between themselves, and to leave this to be apportioned among them by the jury according to the mischief found to have been done by each, would in many cases be equivalent to a practical denial of justice. * * * While the law permits all the wrongdoers to be proceeded against jointly, it also leaves the party injured at liberty to pursue any one of them severally, or any number less than the whole, and to enforce his remedy, regardless of the participation of the others.'" Kernan v. Humble, 51 La. Ann. 389, 25 South. 431.

The judgment of the Circuit Court is reversed, and the cause is remanded with instructions to award a new trial.

H. M. PFANN & CO. v. J. C. TURNER CYPRESS LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. March 5, 1912.)

No. 2,235.

1. SALES (§ 71*)—CONTRACT TO SELL ALL LUMBER MANUFACTURED—CONSTRUCTION.

   An agreement to sell all lumber manufactured by the seller during a certain period did not import a promise to keep the seller's mill in operation until the end of such period.

   [Ed. Note.—For other cases, see Sales, Dec. Dig. § 71.*

   Contracts for sale of things to be produced or manufactured, see note to Star Brewery Co. v. Horst, 58 C. C. A. 363.]

2. SALES (§ 88*)—CONTRACT TO SELL ALL LUMBER MANUFACTURED—ACTION FOR BREACH—QUESTION FOR JURY.

   In an action for breach of the contract, it was error to submit such question to the jury.

   [Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 248–250; Dec. Dig. § 88.*]

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

Action at law by the J. C. Turner Cypress Lumber Company against H. M. Pfann & Co. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

The J. C. Turner Cypress Lumber Company brought suit against H. M. Pfann & Co. for breach of contract. The cause of action is set forth in the third count of the declaration in the following language:

"(3) Plaintiff further sues for that heretofore, to wit, in November, 1900, defendant entered into a certain contract with the plaintiff whereby defendants agreed to sell, and plaintiff agreed to buy, certain lumber then manu-

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

factured and also such lumber as might be manufactured by defendants from November 1, 1900, to November 1, 1901, all in accordance with certain terms and conditions in said contract set forth. And in pursuance thereof defendants did sell and deliver to plaintiff of said lumber then manufactured as aforesaid, to wit, 235,800 feet, and did manufacture and sell and deliver to the plaintiff in addition thereto, to wit, 1,231,812 feet. And thereafter on, to wit, the 12th day of November, 1901, defendants for a valuable consideration did agree to extend for two years ending November 1, 1903, the aforesaid contract theretofore existing between plaintiff and defendants, and defendants thereupon entered upon and continued the performance of their said last-mentioned agreements until the breach by defendants hereinafter mentioned; and plaintiff has always been ready to perform said agreement on its part and has performed the same except as it was excused from so doing by defendants' breach of said agreement hereinafter mentioned, and except as aforesaid all conditions were performed and all things happened and all times elapsed necessary to entitle the plaintiff to a performance of defendants' said agreement, and to maintain this action for the breach thereof hereinafter alleged. And on, to wit, the 1st day of April, A. D. 1903, defendants evinced an intention no longer to be bound by said contract and have since failed and neglected to perform the same, and the amount of lumber delivered by defendants to plaintiff under said contract was less than that contracted to be delivered by, to wit, 1,158,894 feet, which said lumber was of a value at the agreed time for delivery thereof exceeding the agreed price thereof by, to wit, $19,701.20."

That part of the contract mentioned, deemed material for consideration, reads as follows:

"This memorandum of agreement made this 15th day of November, 1900, by and between H. M. Pfann & Company, of Loughman, Florida, party of the first part, and the J. C. Turner Cypress Lumber Co., New York City, New York, part (party) of the second part, witnesseth: That the said party of the first part agrees to sell and the said part (party) of the second part agrees to buy all of the lumber of the grades and kinds hereinafter mentioned that has been manufactured by said party of the first part at their mill at Loughman, Florida, and put in complete piles in their yard at that place, up to November 1, 1900, and also such further lumber as may be manufactured by them from November 1, 1900, to November 1, 1901."

It appears from the record that, pursuant to the terms of the contract, Pfann & Co. delivered to the Cypress Lumber Company all lumber of the grades and kinds specified which had been piled up in their yard up to November 1, 1900, and also the lumber which they manufactured from November 1, 1900, to November 1, 1901. During the month of November, 1901, the parties by agreement extended their contract for the period of two years, as will appear by the following letter:

"Loughman, Fla., Nov. 12, 1901.

"J. C. Turner Cypress Lumber Company, New York, N. Y.—Dear Sirs: In answer to yours of the 7th in regard to extension of contract. In consideration of a loan of $6,000 made us July 6, 1901, we agree to extend for two years ending November 1, 1903, our contract made November 1, 1900.

"Truly yours, H. M. Pfann & Co."

It is conceded by the parties that the contract referred to, as made November 1, 1900, was the contract hereinbefore set out, dated November 15, 1900. Pfann & Co. continued to manufacture and deliver lumber of the grades specified in the contract until about March 31, 1903, when they sold out their plant. The amount of lumber stipulated to be sold and delivered to the Lumber Company was about 25 per cent. of the output of Pfann & Co.'s mill.

The Lumber Company asserts the right to recover of Pfann & Co. damages for their failure to deliver lumber during the period of seven months, i. e., from March 31, 1903, to November 1st following. The demurrers interposed by Pfann & Co. to the third count of the declaration, the other three counts having been eliminated, were overruled by the court. Pfann & Co. then set up several defenses in pleas duly filed. Evidence was introduced and the cause was submitted to the jury under instructions. A verdict in favor of

the Lumber Company was returned, and judgment entered thereon; and to reverse the judgment Pfann & Co. prosecute error.

Charles M. Cooper and John C. Cooper, for plaintiff in error.

H. Bisbee and George C. Bedell (W. B. Owen, on the brief), for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge (after stating the facts as above). [1, 2] The decisive and only question, which we shall consider, arises upon the face of the contract and its extension as agreed upon by the parties. Regarding the terms of the contract as ambiguous, the trial court admitted testimony to explain the situation of the parties and then submitted the construction of the contract to the determination of the jury.

In failing to construe the contract itself and referring its construction to the jury we think the court committed error. If the contract, fairly construed, imposed no liability on the plaintiffs in error, there should have been a peremptory instruction in their favor. What construction then should be placed upon the instrument? To arrive at its proper meaning resort must be had to the phraseology of the original contract, since the subsequent agreement merely provided for its extension for two years ending November 1, 1903. The important words to be considered are the following: "The party of the first part agrees to sell and the party of the second part agrees to buy all of the lumber of the grades and kinds," etc., "and also such further lumber as may be manufactured by them" from November 1, 1901, to November 1, 1903. It is contended by the lumber company that the words employed required Pfann & Co. to operate their plant for the period of two years, and upon their failure to do so a cause of action accrued to it for breach of contract. On the other hand, Pfann & Co. insist that they did not contract away their right to sell the plant and that they were obligated to deliver such lumber only as might be manufactured by them while the mill was in operation.

We think that the latter construction is the proper one to place upon the contract. The words do not import a promise to keep the mill in operation, nor to manufacture any quantity of lumber during the two years. Lumber manufactured by the mill of the grades in the contract specified, it was the duty of Pfann & Co. to sell and deliver to the Lumber Company at the contract price. But the words referred to cannot, by any reasonable rule of interpretation, be so construed as to divest Pfann & Co. of the right to dispose of their property in their own way and at any time deemed advantageous to themselves.

To construe the words so as to deprive them of the right to sell the plant, there must be interpolated in the contract language which the parties themselves have failed to employ. In other words, we would thus make a contract for the parties which they have not made for themselves. A right so important as that of one to sell his own property should not be denied him unless the language employed clearly conveys that intention.

The views expressed are not without authority in their support. The case of Wemple v. Stewart, 22 Barb. (N. Y.) 154–161, is directly in point. At page 160 will be found the following language of the court:

"But I think that the referee erred in his construction of the second clause of the contract. It seems to me that by that clause the defendants did not obligate themselves to saw at their mill any spruce plank. The obligation extended no further than to require them, in case they elected to saw merchantable spruce plank at their mill during the ensuing winter, to deliver all such plank so sawed, at the yard of Gardinier & Van Denburgh. The agreement is to deliver all the merchantable spruce plank *that they may saw*, etc. These words are not promissory in their nature, except so far as relates to the delivery of plank which they shall saw during the ensuing winter; nor do they import a promise or undertaking to saw any particular, or any, quantity of merchantable spruce plank during the ensuing winter. To construe this clause of the contract as requiring the defendants to saw all the plank they should be able to saw the next winter, etc., would be making a new contract for the parties."

In Drake v. Vorse, 52 Iowa, 417, 418, 3 N. W. 465, 466, the contract construed was as follows:

"I hereby agree to make all the school seat castings that A. S. Vorse may want during the year 1873 at six cents per pound. * * * Payment cash on delivery."

At page 419 of 52 Iowa, at page 467 of 3 N. W., it was said by the court:

"Counsel differ widely as to the obligation which it imposes upon the defendant. It binds the plaintiff to make what castings the defendant may want. It does not expressly bind the defendant to anything except to pay in cash on delivery the prices specified. But conceding that it bound him to order and take of the plaintiff all the castings he should want, it could not, we think, have the effect to preclude him from entering into a partnership, nor would it become obligatory upon the firm. It was certainly the defendant's privilege to discontinue business at any time when it should appear to him that his interest demanded it, and that, too, without becoming liable to the plaintiff in damages. He did discontinue business upon his individual account. After that he did not individually want or need any castings, and, as the firm was not bound to take any, we do not think that the defendant became liable."

See, also, McKeever v. Iron Co., 138 Pa. 184, 16 Atl. 97, 20 Atl. 938; Gwillim v. Daniell, 2 Crompton, Meeson & Roscoe, 61; Bailey v. Austrian, 19 Minn. 535 (Gil. 465).

The words used in the present contract fall short of conveying the meaning insisted upon by the defendant in error. Under the contract, as we construe it, the plaintiffs in error had the right to sell their property without incurring liability for damages to the defendant in error. It follows that the judgment awarding damages to the latter for its breach is erroneous. It is therefore reversed, and the cause is remanded to the trial court with directions to proceed, upon a further hearing of the cause, in accordance with law and the views herein expressed.

Reversed and remanded.

KAILL v. BOARD OF DIRECTORS OF ST. LANDRY PARISH, LA., et al.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1912.)

No. 2,300.

1. JUDGMENT (§ 519*)—COLLATERAL ATTACK—MANDAMUS TO ENFORCE PAYMENT.

The validity of a judgment against a parish cannot be raised by answer in a mandamus proceeding to compel its payment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 963; Dec. Dig. § 519.*]

2. COURTS (§ 344*)—EXECUTION OF JUDGMENTS OF FEDERAL COURTS—CONTROL BY STATE LAW.

The process by which the courts of the United States execute their judgments is not controlled by state law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. § 344.*]

3. MANDAMUS (§ 111*)—COMPELLING PAYMENT OF JUDGMENT AGAINST PARISH—GROUNDS FOR REFUSAL.

That funds to be collected by a parish are specially dedicated by law for educational purposes, that said funds are insufficient to carry on and maintain the schools of the parish, and that the parish had no funds carried over from previous years were not sufficient grounds for denying a writ of mandamus to compel the payment of a judgment against the parish.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 231, 232, 234; Dec. Dig. § 111.*

Mandamus to enforce payment of judgment against municipality, see note to Holt County v. National Life Ins. Co., 25 C. C. A. 475.]

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

Mandamus proceedings by Henry G. Kaill against the Board of Directors of St. Landry Parish, La., and others. Judgment for defendants, and plaintiff brings error. Reversed.

In this case Henry G. Kaill, the plaintiff in error, hereinafter called plaintiff, sued out an alternative writ of mandamus against the parish board of directors of the parish of St. Landry, the individual members thereof and its officers, defendants in error, the said parish board of directors of the parish of St. Landry being hereinafter called defendant, to compel defendant to pay a judgment which plaintiff had obtained in the court below against defendant, and which the latter refused to pay.

The petition alleged: That plaintiff had obtained in the court below, after issue joined and due hearing had, a judgment against the defendant in the full sum of $2,400, with 5 per cent. per annum interest on $800 thereof, from January 31, 1905, until paid, and with 6 per cent. per annum interest on the balance of $1,600 from January 31, 1905, until paid, and costs. That said judgment rendered in favor of plaintiff and against defendant as aforesaid had long since become final and executory, and that payment thereof had been demanded and refused. That under the laws of the state of Louisiana all the property, real and personal, belonging to defendant, was exempt from seizure and sale under execution. That there were ample funds in defendant's treasury not otherwise appropriated to pay and satisfy in full said judgment in principal, interest, and costs. That the board of school directors, the governing authority of defendant, was required by the laws of the state of Louisiana to make an annual estimate of the amount of revenue which it would receive for the year, and to make a budget of appropriation of the

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

same, and to pay out no funds intrusted to its charge except on a warrant drawn by its president and countersigned by its secretary in pursuance of an appropriation by it regularly made.

The petition then recited the names of the members of the governing authority of defendant and of its officers, gave their residences, and alleged that plaintiff had no adequate remedy to enforce payment of its said judgment except the writ of mandamus.

The petition was duly verified, and concluded by praying for an alternative writ of mandamus commanding defendant to forthwith pay plaintiffs said judgment in principal, interest, and costs, or to show cause, if any there were, in open court at Opelousas, La., on a day and hour to be named by the court, why a peremptory writ of mandamus should not issue, commanding and directing the president and superintendent and ex officio secretary and treasurer of defendant to pay said judgment in pursuance of said appropriation and in accordance with the laws of the state of Louisiana in such cases made and provided.

In due course defendant filed its return, in which, after denying all and singular the allegations in plaintiff's petition contained, it averred that he was not entitled to the relief prayed for because "his debt was contracted in violation of sections 59 and 73 of Act No. 81 of the General Assembly of the state of Louisiana for the year 1888. That, said indebtedness having been contracted in violation of this said statute, no action or execution can be allowed in aid thereof."

This return having been objected to, defendant filed an amended return, in which it averred: "That plaintiffs herein are not entitled to an execution of their said judgment by mandamus proceedings, because the funds to be hereafter collected by your respondent board are specially dedicated by law for educational purposes for the years for which said funds are collected; that said funds are insufficient to carry on and maintain the public schools of the parish of St. Landry for the period required by law; that your respondent board has no funds on hand remaining over from previous years, and your respondent board, under the law of its creation, is without right or authority to direct any of the funds which may hereafter come under its control for educational purposes to the payment of relator's judgment. Wherefore respondents pray that their original answer be amended as herein set forth, and that the writ of mandamus herein prayed for be denied, and respondents be hence dismissed."

Thereupon plaintiff again objected to defendant's return as thus amended. His objection was that the averments of said return were insufficient in law to entitle them to a discharge under the writ. But the court permitted the defendants to prove as shown by the agreed statement in the record:

"(1) Plaintiff's judgment which is sought to be enforced by the mandamus proceedings herein instituted by plaintiff is as follows:

" 'United States Circuit Court, Western District of Louisiana.

" 'Henry G. Kaill, Plaintiff, v. Parish Board of Directors of the Parish of St. Landry (Louisiana), Defendant. No. 401.

" 'This cause having been regularly called for trial, taken up, and tried in open court, and submitted for adjudication, and, the law and the evidence being in favor of plaintiff and against the defendant, it is therefore ordered, adjudged, and decreed that the plaintiff, Henry G. Kaill, do have and recover judgment in his favor and against the defendant, the parish board of directors of the parish of St. Landry (Louisiana), in the full sum of twenty-four hundred ($2,400) dollars with 5 per cent. per annum interest on eight hundred dollars ($800) thereof from and after January 31, 1905, until paid; and 6 per cent. per annum interest on sixteen hundred ($1,600) dollars thereof from and after January 31, 1905, until paid. It is further ordered, adjudged, and decreed that the defendant pay all costs of this suit. This done on the 24th day of April, A. D. 1909.

" '[Signed] Aleck Boarman, United States Judge.

" 'Filed April 24th, 1909. [Signed] Leroy B. Gulotta, Clerk.'

"(2) That demand for the payment of said judgment was made by plaintiff's attorney, and said demand was refused by the defendant board by a res-

olution adopted April 6, 1910, in the words following, to wit: 'On motion of Mr. Boudreau, it was resolved that the superintendent be instructed to inform Mr. E. B. Dubuisson, attorney of H. G. Kaill, that the school board refuses to make any provisions for the payment of the judgment of said H. G. Kaill against the parish board of school directors.'

"(3) When the writ of mandamus was served upon defendants, there were no funds in the treasury of the defendant board except special funds, the proceeds of special taxes appropriated to the special purposes for which said taxes were voted, and therefore not available for the payment of ordinary obligations of said board.

"(4) The total receipts of said board for the fiscal year ending June 30, 1910, aside from the special funds above mentioned, were eighty-one thousand one hundred and thirty-eight and 82/100 dollars ($81,138.82). These funds were sufficient to run the high school departments of the public schools of the parish of St. Landry for nine months and all other departments for eight months. The length of time during which the last-mentioned departments are operated depends upon the amount of the board's revenues. The sessions of said departments seldom reach the period of nine months during any school year. There was no balance carried over from the revenues of the fiscal year ending June 30, 1910, to the next fiscal year beginning July 1, 1910, except the special funds mentioned in paragraph 3, supra.

"(5) The defendant board has not made an annual budget appropriation for the fiscal year beginning July 1, 1910, based on the entire revenues of the board for said year, nor has it even in the past made such an appropriation. The custom of the board has been to dispose of all of its revenues by separate appropriations made for special purposes at various times during each year at its regular or special meetings.

"(6) As a result of the adoption of the amendment to the Constitution of the state of Louisiana as proposed by joint resolution No. 257 of the Acts of the General Assembly of said state for the year 1910, the revenues of the defendant board from the police jury on the basis of the present assessment will be about five thousand dollars ($5,000) more than said board has heretofore ever received per year from said source."

The case was tried without a jury as per written stipulation, and at a subsequent term of court judgment was entered in favor of defendant and against plaintiff dismissing the petition.

E. B. Dubuisson, for plaintiff in error.

Gilbert L. Dupre. (R. Lee Garland, on the brief), for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). [1] Neither the original nor amended answer was sufficient, nor do the agreed facts shown by the evidence warrant the judgment of dismissal of plaintiff's petition. All questions of the indebtedness of the defendant to the plaintiff and the validity thereof are settled by the judgment. The question was before this court on very similar facts in Mayor, etc., of City of New Orleans v. U. S. ex rel. Stewart, 49 Fed. 40, 1 C. C. A. 148, and Judge Locke, for the court, said:

"The question as to whether the debt for the collection of which a mandamus was prayed was a liability of the city of New Orleans or not has been determined by the judgment. If there could have been any defense made to the action on account of the debt having been contracted for the purposes of the year 1882, and not paid from the revenues of that year, and therefore involving the accumulation of an indebtedness such as was prohibited by the act of 1877, it should have been made at the trial of the cause in the court below"

—citing United States v. New Orleans, 98 U. S. 395, 25 L. Ed. 225, as follows:

"In the present case the indebtedness of the city of New Orleans is conclusively established by the judgments recovered. The validity of the bonds upon which they were rendered is not now open to question. Nor is the payment of the judgments restricted to any species of property or revenues or subject to any conditions. The indebtedness is absolute. If there were any question originally as to a limitation of the means by which the bonds were to be paid, it is cut off from consideration now by the judgments. If a limitation existed, it should have been insisted upon when the suits on the bonds were pending, and continued in the judgments. The fact that none is thus continued is conclusive on this application that none existed."

This is no longer an open question. See United States v. New Orleans, supra; and see 9 Rose's Notes, p. 641.

[2] This view of the case renders it unnecessary to determine whether section 73 of Act 81 of Louisiana Laws 1888 (see Session Acts 1888, p. 108) is still in force or has been repealed by Act No. 214 of 1902, a matter to which most of the argument in this case has been directed, and in regard thereto we only say that the process by which the courts of the United States execute their judgments is not controlled by state law. Hart v. City of New Orleans (C. C.) 12 Fed. 292; s. c., 118 U. S. 136, 6 Sup. Ct. 995, 30 L. Ed. 65.

In Mayor, etc., New Orleans v. U. S. ex rel. Stewart, supra, Judge Bruce said:

"I concur in the conclusion and judgment of my Brother Locke in this case. It is my opinion that it was the duty of the common council of the city to put the relator's judgment upon the budget for the year 1891; that it was an act ministerial in its character, and mandatory, under the provisions of the Act of Ex. Sess. 1870; that it was not within the discretion of the common council to postpone the relator's judgment upon the ground that all the revenues of the city for the year 1891 are required to provide for what is called the alimony of the city, or on any other ground, and that the decisions of the Supreme Court of the state cannot be held, upon a fair consideration, to have settled the law in Louisiana otherwise."

And the decree of the court was:

"We find, therefore, no error in the action of the court below, and the judgment for a peremptory writ of mandamus must be affirmed, with costs; but so much time has been occupied by the delays of this case that the budget of 1891 may no longer be available, and it is ordered that this case be remanded to the court below, with instructions that a peremptory writ of mandamus issue, commanding the respondents herein to appropriate and pay from any appropriation of 1891, of which there is any surplus remaining in the treasury after all liabilities and expenditures have been paid, as contemplated in section 5 of act No. 38 of 1879, a sum sufficient to pay said judgment and interest and costs in the court below and herein; and, if no such sum remains of any appropriation of the said budget of 1891, after all such liabilities and expenses have been paid, to proceed at their first regular meeting after service of said writ to budget and appropriate in the estimate and appropriations for the year 1892 such sum, as aforesaid; and it is so ordered."

[3] We think that case was correctly ruled, and therefore we do not find it necessary to further pass upon the following objections set forth in the second or amended return, to wit: That the funds hereafter to be collected by the defendant are specially dedicated by law for educational purposes, that the said funds are in-

sufficient to carry on and maintain the schools of the parish, and that defendants had no funds carried over from previous years than to point out, under the decisions cited and on principle, they do not with other objections alleged make a good and sufficient return in this case. See Monaghan v. City of Philadelphia, 28 Pa. 207, and Evans v. Pittsburgh, Fed. Cas. No. 4,568, commenting thereon, and Pollock v. Lawrence Co., Fed. Cas. No. 11,255.

The judgment of the Circuit Court is reversed, and the case is remanded, with instructions to grant a new trial, and thereupon enter judgment in favor of plaintiff and against defendant, commanding the defendant to pay plaintiff's judgment in principal, interest, and costs out of any money remaining in defendant's treasury from the revenues of the fiscal year ending June 30, 1911, not otherwise appropriated, and, if there be no such sum sufficient for the purpose, then that defendant be commanded to proceed at its first regular meeting to be held after the service of said writ to appropriate a sum sufficient for the purpose aforesaid out of its revenues for the fiscal year ending June 30, 1912, or, if there be no funds sufficient for that purpose remaining unappropriated out of its revenues for the year ending June 30, 1912, then to make such appropriation out of its revenues for the fiscal year ending June 30, 1913. Costs of this and the lower court to be paid by defendant and appellee.

THE TRANSFER NO. 19.

(Circuit Court of Appeals, Second Circuit. January 8, 1912.)

No. 95.

COLLISION (§ 72*)—STEAM VESSELS—VESSEL NOT UNDER CONTROL.

The master of a tug, who was at the wheel, intending to land at the end of a pier on the Long Island side of East River, reversed the engines full speed astern; but the tug struck the pier with such force that he was knocked unconscious and severely injured, and the tug continued to go astern in a semicircle, with no one in charge until she came into collision with car floats alongside a transfer coming up the river. When the transfer was 2,000 feet away, she saw the tug backing away from the pier, and blew a signal of one whistle to indicate that she would pass inside, and slowed. Receiving no answer, she blew another and stopped, then an alarm and backed. *Held* that, while the master of the tug was in fault for miscalculating her headway, the transfer was also in fault in not sooner stopping and reversing.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 102; Dec. Dig. § 72.*]

Coxe, Circuit Judge, dissenting.

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

Suit in admiralty for collision by the River & Harbor Transportation Company, as owner of the tug Gladiator, against the steam tug Transfer No. 19. Decree for respondent, and libelant appeals. Reversed.

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

Burlingham, Montgomery & Beecher (Wm. S. Montgomery and Roderick Terry, Jr., of counsel), for appellant.

James T. Kilbreth, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. April 29, 1910, at about 5:30 a. m., the master of the libelant's tug Gladiator, intending to land at the river end of the Feed Docks above the Long Island ferry slips at Long Island City, put her helm aport and reversed her engines full speed astern. He evidently miscalculated the tug's headway, because she struck the pier so hard that he was thrown down, both his jaws broken, probably by the wheel, and he lay unconscious until after the collision happened. The tug continued to go full speed astern, with nobody in charge of her navigation, in a semicircle, until just before the collision the first deck hand, when it was too late, went into the pilot house and rang up the engines full speed ahead. When the tug's stern was pointing into the docks, she was struck on her port side by the bows of two floats in tow and alongside of Transfer No. 19 coming up the East River and severely damaged. The tide was the last of the ebb, and the course of the Transfer was within 300 to 400 feet of the Long Island piers. Her master said he saw the tug backing away from the Feed Dock when 2,000 feet off, and that he blew a signal of one whistle to indicate that he would pass inside of her and slowed, which was not answered. He blew another, which was not answered, and stopped, and then he blew an alarm and went full speed astern. At the time he blew the alarm, he was within 75 or 100 feet of the tug.

The District Judge dismissed the libel, on the ground that the collision was a pure accident; nobody being at fault. We cannot concur in this view. The master of the tug was clearly at fault in miscalculating her headway, and the only other question is whether the Transfer was also at fault. The master of the Transfer must have seen that the tug was not on any definite course, but executing a maneuver which brought the situation within the rule of special circumstances. Article 29, Inland Rules of 1897;[1] The Servia, 149 U. S. 144, 13 Sup. Ct. 877, 37 L. Ed. 681; The John Englis, 176 Fed. 723, 100 C. C. A. 579. If there was anything in the navigation of the tug to indicate that she was not under control, the Transfer's duty to exercise care was of the highest order. If, on the other hand, the master of the Transfer thought the tug was being intentionally navigated so as to go astern into a lower dock, it was his duty to aid the maneuver as far as lay in his power. Upon his own statement he had 2,000 feet of space and four minutes of time in which to act, and we are satisfied that he did not take the natural step of stopping and going astern until the collision was inevitable. Both vessels were at fault.

The decree is reversed, and the court below directed to enter a decree for half damages and half the costs of the District Court and full costs of this court in favor of the libelant.

[1] U. S. Comp. St. 1901, p. 2884

COXE, Circuit Judge (dissenting). I think the sole cause of the collision was the erratic and wholly unexpected conduct of the Gladiator. The Transfer was coming up the river against a strong ebb tide, with two car floats, one on each side. She had every reason to expect that the Gladiator was intending to make a landing at the Long Island City dock. She could not foresee that the wheelsman had been knocked senseless by the Gladiator's collision with the dock. As soon as the master of the Transfer saw that the Gladiator was backing away from the dock into the river he blew one whistle and slowed down. Soon afterwards he blew a second whistle and stopped. As the Gladiator still kept on backing on a circular course it became apparent that something was wrong and the Transfer then blew an alarm and reversed her engine. What more could she do? The presumption was that the Gladiator was properly manned and was otherwise in a condition to navigate intelligently. The Transfer was justified in relying upon this presumption, at least until the contrary clearly appeared. When it became apparent that the Gladiator was not under control, the Transfer did all that could be done in the circumstances, namely, give an alarm signal and back. It must be remembered that only a brief period intervened between the time when the Transfer had reason to apprehend a collision and the time the vessels came together. It was then a question of seconds and a case of in extremis. The Transfer did all that could be done, but even if she made an error in such circumstances it cannot be imputed to her as a fault. The conduct of the Gladiator fully accounts for the collision. No one was at the wheel and she was running wild. No navigator, however capable and prudent, could anticipate such an extraordinary condition. The moment it was perceived that the Gladiator was not under control the Transfer did all in her power to avoid the collision. I think the decree should be affirmed with costs.

SMITH v. ATCHISON, T. & S. F. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. February 14, 1912.)

No. 2,933.

1. CARRIERS (§ 234*)—INJURIES TO PASSENGERS—WAIVER OF LIABILITY—WHAT LAW GOVERNS.

Whether a waiver of liability for injuries, printed on the back of a pass delivered to an employé, was valid, so as to constitute a defense to an action for injuries resulting from the carrier's ordinary negligence, depended on the law of the place of the accident, and not on the law of the place where the pass was delivered, since the rule that a contract will be interpreted according to the law of the place of its execution and delivery does not apply to actions of tort.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1263; Dec. Dig. § 234.*]

2. CARRIERS (§ 307*)—INJURIES TO PASSENGERS—STATUTES.

The Oklahoma statute (Comp. Laws 1909, § 428) providing that a carrier of persons without reward must use ordinary diligence for their safe carriage was only applicable in the absence of contract, and did not

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

apply to an employé traveling on a pass, who had signed a waiver of liability for any injuries that might occur, which waiver was valid both in Oklahoma and in the federal courts.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1252–1259, 1491; Dec. Dig. § 307.*]

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

Action by Oliver T. Smith against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Austin F. Moss (Russell G. Lowe and Martin E. Turner, on the brief), for plaintiff in error.

S. T. Bledsoe and Charles H. Woods (J. R. Cottingham, on the brief), for defendant in error.

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

AMIDON, District Judge. The plaintiff, Smith, was a brakeman in the employ of the defendant company, with his headquarters at Wellington, Kan. For the purpose of enabling him to visit relatives residing at Ferry, in the state of Oklahoma, the defendant issued to him a free round-trip pass from Wellington to that place. On the return trip the train upon which he was a passenger was derailed, in the state of Oklahoma, and the plaintiff received the injuries for which he seeks to recover in this action. As in Northern Pacific Ry. Co. v. Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513, the evidence presents a case of ordinary negligence only, and fails to show either a wanton or willful breach of duty. Upon the back of the pass was the following printed provision, which was signed by the plaintiff:

"This pass is not transferable and must be signed in ink by the holder hereof, and the person accepting it and using it hereby assumes all risks of accidents and damages to person and baggage under any circumstances, whether caused by negligence of agents or otherwise. I accept the above conditions."

At the close of the evidence the trial court directed a verdict in favor of the defendant, and that ruling presents the only error assigned in this court.

[1] Plaintiff's principal contention is that the waiver on the back of the pass was void under a statute of Kansas, as interpreted by its Supreme Court, and, as the pass was delivered in Kansas, it is urged that the validity of the waiver must be determined by the law of that state, though the injury occurred in the state of Oklahoma, under whose laws the waiver was valid. In support of this contention the plaintiff relies upon the general rule that a contract will be interpreted according to the law of the place of its execution and delivery, citing Liverpool & Great Western Steamship Co. v. Phenix Insurance Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788. That was an action upon a contract to recover damages for its breach, and

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

in such a case the rule which plaintiff invokes is generally, though not invariably, enforced. That rule, however, has never been applied in actions of tort like the present. In such cases the law of the place where the injury occurs defines the rights of the parties. The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190; Weir v. Rountree, 173 Fed. 776, 97 C. C. A. 500. The courts have uniformly held that a contract exempting a carrier from liability for negligence, valid at the place of its execution and delivery, will not avail as a defense when the injury occurs in a state by whose laws such contracts are declared to be void as against public policy. Having adopted that rule when the law of the place of the injury would impose a liability upon the carrier, can a contrary rule be adopted when such law would protect the carrier by enforcing the contract? We think not. The contract is by its terms tied to the tort, and the same law should be applied to the one as to the other. The attempt to distinguish them met with the following answer by the Supreme Court in Martin v. Pittsburg & Lake Erie R. Co., 203 U. S. 284, 294, 27 Sup. Ct. 100, 102 (51 L. Ed. 184):

"The contention that because, in the cases referred to, the operation of the state laws, which were sustained, was to augment the liability of a carrier, therefore the rulings are inapposite here, where the consequence of the application of the state statute may be to lessen the carrier's liability, rests upon a distinction without a difference."

The pass was not a contract between the plaintiff and the company. It was simply a direction to defendant's conductors to receive and transport the plaintiff upon its trains. It could have been taken up at any time, even in the course of a journey, and the plaintiff required to pay his fare. If a conductor had refused to honor the pass, that would have given no right of action against the company. It would have been simply a case for discipline between the company and its employé for disregarding its directions. It would have given no right of action, because the pass was a gratuity and imposed no legal obligation. In a similar case the Supreme Court used the following language in regard to such a pass:

"Here there was no contract of carriage, and that fact was known to Mrs. Boering. She was simply given permission to ride in the coaches of the defendant." Boering v. Chesapeake Beach Ry. Co., 193 U. S. 442, 450, 24 Sup. Ct. 515, 516 (48 L. Ed. 742).

Such being the nature of the pass, the condition on its back accompanied its use. If that condition was void by the law of the state where the injury occurred, it would be disregarded. If it was valid, it would be enforced. In that view the waiver was a complete defense to this action. N. P. Ry. Co. v. Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513.

[2] Plaintiff also seeks to rest the case upon a statute of Oklahoma, which says:

"A carrier of persons without reward must use ordinary care and diligence for their safe carriage." Comp. Laws 1909, § 428.

He insists that the evidence made out a case for the jury to determine whether the defendant used ordinary care. This statute, how-

ever, declares the law in the absence of contract. Here the plaintiff, by contract valid in Oklahoma and in the federal courts, expressly exonerated the carrier from liability for negligence. If the defendant violated the statute, it was only guilty of negligence, for whose damages the contract was a complete release.

The judgment is affirmed.

UNITED STATES v. ABRAMS et al.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1912.)

No. 3,583.

1. INDIANS (§ 31*)—ALLOTTEES—CITIZENSHIP.

An Indian allottee, having received her allotment, became a citizen of the United States, and was authorized to contract with respect to the allotment, except in so far as restrained by congressional enactment.

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

2. INDIANS (§ 16*)—INDIAN LANDS—ALLOTMENT—LEASES—CANCELLATION—NEW LEASE.

Act Cong. March 2, 1895, c. 188, 28 Stat. 907, provided that allotments to Quapaw Indians in Oklahoma should be inalienable for 25 years from and after the date of the patent; but Act June 7, 1897, c. 3, 30 Stat. 72, provided that such allottees might lease their lands for a term not exceeding 3 years for farming or grazing purposes, or 10 years for mining and business purposes. *Held* that, where an allottee had leased her allotment for 10 years for mining purposes, such act did not prevent the mutual cancellation of such lease before the expiration of the term and the making of a new one to the same parties for another term not exceeding 10 years.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45; Dec. Dig. § 16.*]

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

Action by the United States against A. W. Abrams and another. From a judgment for defendants (181 Fed. 847), complainant appeals. Affirmed.

Paul A. Ewert, Sp. Asst. Atty. Gen., for appellant.

S. C. Fullerton, for appellees.

Before SANBORN and ADAMS, Circuit Judges, and Wm. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. One Minnie Redeagle, a member of the Quapaw tribe of Indians, was, on the 26th day of September, 1895, given by the United States a certain allotment patent in and to certain lands situated in the county of Ottawa, in the then Indian Territory, now state of Oklahoma, under and pursuant to the provisions of an act of Congress approved March 2, 1895 (28 Stat. 907, c. 188). That act contained the following provision:

"Provided, that said allotment shall be inalienable for a period of twenty-five years from and after the date of said patent."

Congress subsequently, to wit, on June 7, 1897 (30 Stat. 72, c. 3), passed an act providing for and governing the leasing of lands allotted under the provisions of the before-mentioned act of March 2, 1895. The provision, so far as applicable to this case, was as follows:

"That the allottees of land within the limits of the Quapaw agency, Indian Territory, are hereby authorized to lease their lands, or any part thereof, for a term not exceeding three years, for farming or grazing purposes, or ten years for mining or business purposes, and said allottees and their lessees and tenants shall have the right to employ such assistants, laborers and help, from time to time, as they may deem necessary."

Thereafter, and on the 27th of March, 1902, said Minnie Redeagle executed and delivered to the defendant A. W. Abrams a mining lease to a portion of the lands so allotted to her for the full term of 10 years from that date. Subsequently, and on the 23d day of May, 1905, said Minnie Redeagle executed and delivered to the Iowa & Oklahoma Mining Company a mining lease for the term of 10 years from that date on the same land embraced in the before-mentioned lease to A. W. Abrams. Afterwards, and on the 26th of September, 1906, Minnie Redeagle executed and delivered to said Iowa & Oklahoma Mining Company another mining lease covering the same land for a term of 10 years from that date. All of said leases were duly filed for record in the office of the register of deeds for said Ottawa county. Afterwards, and on the 21st day of March, 1910, said A. W. Abrams and the Iowa & Oklahoma Mining Company executed and delivered to said Minnie Redeagle a cancellation and surrender of each of the three before-mentioned leases, and on the same date, and at the same time, Minnie Redeagle and her husband executed and delivered to the Iowa & Oklahoma Mining Company another mining lease for the term of 10 years, to the above-mentioned land, which was, on the 1st day of April, 1910, duly filed for record.

This action was brought upon the part of the United States to cancel and set aside all of said leases, excepting the one of date March 27, 1902, to A. W. Abrams—the contention on the part of the government being that the lease of the 27th of March, 1902, to Abrams was a valid lease, but that the subsequent leases were invalid, for the reason that they were executed and delivered within the term and lifetime of the said lease to Abrams; that, under a proper construction of the act of Congress, authorizing the leasing for a period of 10 years, when Minnie Redeagle executed the lease to Abrams, she exhausted her power and authority, and could not make any other or further contract by lease with reference to the land until the expiration of the 10-year period of that lease.

[1, 2] Minnie Redeagle, upon receiving her allotment, was a citizen of the United States, and authorized to contract with respect to said allotment, excepting in so far as she was restrained by congressional enactment. The act of Congress authorized a leasing for a term not exceeding 10 years. We perceive of no reason, and find nothing in the letter or spirit of the congressional enactment, which restrains her, after having made a lease, from entering into a valid contract with the lessee to cancel such lease before the expiration of its term, and then make a new lease to such party or parties as she might see fit for an-

other term, not exceeding 10 years. This is what she did, and all that she did. We think it clear that the last-mentioned lease, of date March 21, 1910, was a valid lease. The previous leases having been cancelled by agreement between the lessor and lessee, and such cancellation placed upon record, they furnished no foundation for a bill in equity to cancel them. There being at the time the action was brought but one lease upon the premises, and that a valid lease, the bill stated no cause of action, and a demurrer thereto was properly sustained.

We regard it as unnecessary at this time to pass upon the question raised as to whether the United States has such an interest in the land as entitles it to maintain the action; also, whether the two intermediate leases, executed while the first lease to Abrams was in force, were invalid, as they were canceled by the parties before the bringing of this action, and the question of their validity is at this time a moot question.

The judgment is affirmed.

ATLANTIC MUT. INS. CO. v. PENINSULAR & O. S. S. CO.†

(Circuit Court of Appeals, Third Circuit. December 12, 1911.)

No. 45 (1,504).

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

Suit in admiralty by the Peninsular & Occidental Steamship Company against the Atlantic Mutual Insurance Company. Decree (185 Fed. 172) for libelant, and respondent appeals. Affirmed.

Theodore M. Etting, for appellant.

Francis S. Laws (Lewis, Adler & Laws, on the brief), for appellee.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from a decree of the District Court of the United States for the Eastern District of Pennsylvania. 185 Fed. 172. The suit was a libel in admiralty by the Peninsular and Occidental Steamship Company, the appellee, against the Atlantic Mutual Insurance Company, the appellant, to recover $2,704.80, with interest and costs, as the amount alleged to be due under two policies of marine insurance upon the steamship "Florida," owned by the libelant. In its answer, the respondent denied any liability whatever under the terms of its two policies, or, if liable at all, only in the amount of one-fifth of $1,932.00.

One of the two policies in suit is stated in the libel to have been issued on the 2d day of May, 1902, by the appellant, as a policy of marine insurance for $20,000.00, against loss, inter alia, by perils of the sea, fires, enemies, etc., upon the steamship "Florida," her body, tackle, apparel, etc. The other policy in suit was a policy of the same character, issued on the 6th day of May, 1902, by the appellant, and in all respects similar to the former one. On the same 6th day of

† Rehearing denied.

May, 1902, policies of marine insurance were issued by three other companies upon the same vessel, payable to the libelant, aggregating in the amount insured, $20,000.00. In each of these policies, the vessel was valued at $50,000.00, and the total amount of insurance on the five policies taken out on the said 2d and 6th days of May, was $50,000.00. The libel also states that at these dates, there was prior insurance on the said vessel, as follows:

On the 9th day of July, 1901, the Federal Insurance Company issued to the libelant an unvalued. policy of marine insurance, insuring libelant to the extent of $40,000.00, upon the same ship "Florida," her tackle, apparel, etc., against loss by fire occurring between the 12th day of July, 1901, and the 13th day of July, 1902; that the steamship was at the date of issuance of said policy, and at the date of the loss thereinafter mentioned, of the actual value of $75,000.00. All these policies contained the so-called "American Clause," in regard to prior and subsequent insurance. The questions in regard to the liability of the respondent-appellant on this libel, are stated and disposed of by the court below. See 185 Fed. 172.

This being a clear case of double insurance, the libelant under the policies as stated was entitled to full indemnity for any loss, total or partial. As argued by the counsel for the appellee, if there had been no prior insurance, the appellant and the other simultaneous insurers would have been liable for the entire loss of $9,960, because the aggregate of their policies was $50,000 upon a valuation of that amount. There being prior insurance, however, the inquiry is made, first, did the owner have any interest in the vessel insured not covered by the prior insurers? and second, what was the amount of recovery obtained from the first insurer? Unquestionably, there was an uninsured interest, amounting to $35,000, estimated on the valuation of $75,000, and this was fully covered by the subsequent insurance, as the aggregate amount insured of $50,000 exceeded this uncovered interest under the prior policy; the aggregate valuation of $50,000 on the subsequent policies being given full force by limiting the total recovery which assured could obtain from all the policies to that amount. If the appellant's contentions were correct, it would lead to the absurd conclusion that, without prior insurance, the appellee would recover in full from the appellant and other subsequent insurers, but because it has prior insurance, it is less protected than if it were without it.

It is unnecessary to add anything to the clear statement made by the learned judge of the court below, as to the law of marine insurance applicable to the policies here in suit, which we adopt as the opinion of this court.

The decree of the court below is hereby affirmed.

GRAUWILLER et al. v. MOSES et al.

(Circuit Court of Appeals, Second Circuit. January 8, 1912.)

No. 108.

SHIPPING (§ 58*)—LIABILITY FOR INJURY TO VESSEL—NEGLIGENT DOCKING.

Evidence *held* insufficient to establish that an injury to a scow by settling on boulders, after she had been beached at high tide by the cargo owner without authority from her owners, was due to his negligence; there being evidence that she had drifted, owing to the failure of the master to properly secure her.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233–244; Dec. Dig. § 58.*]

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

Suit in admiralty by Frederick E. Grauwiller, Jr., and another, against Lionel Moses, 2d, and another. Decree for respondents, and libelants appeal. Affirmed.

Foley & Martin (William J. Martin and Frank A. Spencer, Jr., of counsel), for appellants.

Martin A. Ryan (William Rice, of counsel), for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The libelants, owners of the scow Archer, were employed by the defendant Stafford to carry a load of trap rock from Tompkins Cove, New York, to Lloyds Neck, Long Island, where the scow was to be beached on the south side of the breakwater extending in a westerly direction from Lloyds Neck. Another of the libelants' scows had been beached at this place about a month before, with a similar cargo.

The scow arrived Saturday, August 28, 1909, and made fast to a buoy outside of her destination on account of the weather. The libelants had arranged with one Bingham to beach the boat; but the defendant Stafford, by her agents, employed another company to do so. Being trespassers, they would be responsible for any damage caused by negligence in the operation or resulting from any failure to advise the master of the scow of dangers unknown to him.

There is a space of sandy beach extending southward from the breakwater, say 150 feet, where boats can be safely beached. But south of this, and a little further out to the westward, there are boulders. The boat was placed broadside on the beach about the top of high water on Monday, August 30th, at 10:30 a. m., bow to the southward, with one line run out from her port quarter at right angles to a part of the breakwater on the shore, and another leading somewhat forward from her port bow to what is called a "dead man"; that is, a piece of iron buried in the sand.

The libelants say that within an hour after the scow was beached she rested, as the tide fell, on two rocks, one near her bow and one near her stern, which damaged her greatly and caused her to leak. The respondents, on the other hand, say that the boat was not dam-

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

aged until Tuesday afternoon as the result of her being shifted by a north wind, on the second high water after she was beached, further south and west over the boulders; and they say that when the boat was beached her master was told to put out a line straight astern to the breakwater, in order to avoid this very danger, and that he refused to do so.

Either account may be true, although there are difficulties in each. The court below decided against the libelants, and we would affirm, without writing anything, but for the piece of evidence now to be mentioned. The libelants offered in evidence an undated postal card from the master of the scow to them at New York, informing them that the boat had a hole in her and was leaking. This card was postmarked as received at the Huntington office, August 31st, at 8 a. m., and the evidence is that it must have been mailed at Lloyds Neck on Monday afternoon, if the postmark is correct. If so, the scow must have been damaged on the falling tide of Monday morning, and the master's testimony is true, and the respondents' testimony is false.

This consideration has caused us much hesitation; but in view of the great preponderance of the oral testimony in favor of the respondents, and of the fact that the trial judge saw all the witnesses, we will not disturb his finding, though it is against the presumption that the postmaster at Huntington correctly stamped the postal card.

Decree affirmed, but without costs of this court.

ASSETS REALIZATION CO. v. WELLINGTON et al.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1912. Rehearing Denied March 5, 1912.)

No. 2,229.

EVIDENCE (§ 553*)—EXAMINATION OF EXPERTS—HYPOTHETICAL QUESTIONS.

The propounding of hypothetical questions to witnesses testifying as experts, based on the view of the facts taken by counsel for the party in behalf of whom the testimony is introduced, is not objectionable, where the facts are in dispute; it being the privilege of the adverse party to propound questions based on different facts in cross-examination.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369–2374; Dec. Dig. § 553.*]

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

Action at law by J. F. Wellington, Jr., and others, against the Assets Realization Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Samuel B. Dabney, for plaintiff in error.

R. W. Flournoy, for defendants in error.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

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

PER CURIAM. The plaintiff below in his original petition states a case which, if proved, entitles him to recover. The answers and amended answers allege no facts, and deny all plaintiff's allegations.

At the time the hypothetical questions objected to were propounded, there were no undisputed facts to be embodied therein. The question propounded by counsel for plaintiff below seems to be based upon his view of the facts of the case. Under these circumstances, if the question was objectionable, because it did not embody the facts in the case as claimed by the defendants, it was the privilege of the defendants to frame proper questions in cross-interrogatories. We find no reversible error in the rulings in respect to the hypothetical questions allowed by the trial judge.

The ruling as to qualification of experts is in accordance with the views of this court in St. Louis Ry. Co. v. Bradley, 54 Fed. 630, 632, 4 C. C. A. 528.

Under the evidence offered and admitted, the case was necessarily submitted to the jury, and we all agree that the record shows no reversible error.

Judgment affirmed.

O'SULLIVAN v. FELIX et al.

(Circuit Court of Appeals, Fifth Circuit. January 30, 1912. Rehearing Denied March 5, 1912.)

No. 2,255.

ACTION (§ 19*)—COURTS (§ 375*)—STATUTE APPLICABLE—NATURE OF ACTION.

An action under Rev. St. § 1980 (U. S. Comp. St. 1901, p. 1262), for an assault committed in attempting to prevent plaintiff from voting, in violation of the civil rights act, is one for damages, and not for a penalty, and is governed as to limitation by the statutes of the state where brought.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 105, 106; Dec. Dig. § 19;* Courts, Cent. Dig. § 983; Dec. Dig. § 375.*]

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

Action at law by E. A. O'Sullivan against Paul Felix and others. Judgment for defendants and plaintiff brings error. Affirmed.

W. S. Parkerson, for plaintiff in error.

Alfred Billings, R. B. Montgomery, and Chas. S. Rice, for defendants in error.

Before McCORMICK and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. We are of the opinion that this is an action for damages, and not for a penalty. The statute of limitation of five years against suits for penalties or forfeitures (R. S. § 1047 [U. S. Comp. St. 1901, p. 727]) is therefore not applicable. We find no federal statute of limitations applicable to the case. It follows that the state

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

statute, which prescribes the action in one year, must be applied. Civil Code of Louisiana, arts. 3536, 3537. We are constrained, therefore, to hold that the trial court correctly ruled that the action is barred.

Affirmed.

In re WARD.

(Circuit Court of Appeals, Third Circuit. February 19, 1912.)

No. 1,506.

EVIDENCE (§ 574*)—EXPERTS—WEIGHT.

On an issue of the insanity of an alleged bankrupt, the evidence of his acts, speech, demeanor, changed habits, and the testimony of physicians who had had him under treatment was of greater weight than the hypothetical testimony of alienists.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2400; Dec. Dig. § 574.*]

Appeal from the District Court of the United States for the District of New Jersey.

In the matter of bankruptcy proceedings of William R. Ward. From a decree dismissing an involuntary bankruptcy petition (194 Fed. 174), the creditors appeal. Affirmed.

See, also, 161 Fed. 755; 194 Fed. 179.

Robert R. Howard, for appellants.

Vredenburgh, Wall & Carey, for guardians of Wm. R. Ward.

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

BUFFINGTON, Circuit Judge. In the court below, an involuntary petition in bankruptcy was filed against William R. Ward. Subsequently, Mr. Duffy, who had thereafter been appointed by said court guardian ad litem for Mr. Ward and a committee of persons who had been appointed guardians of Ward's person and property in a lunacy proceeding thereafter instituted in the orphans' court of Essex county, N. J., made answer to such petition in bankruptcy. By this answer, inter alia, the insanity of Ward when the acts of bankruptcy were committed was alleged, and the alleged acts of bankruptcy and the insolvency denied. The case turns on the insanity of Ward.

Trial by jury having been demanded and waived, the parties stipulated the issues should be tried by the court, which trial would be under section 18d of the bankrupt law (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]). In pursuance thereof, witnesses were sworn and heard by the court; Judge Lanning presiding for several days. He then entered an order referring the matter to a special master, "to consider said petition, answer, and replication, and to hear such further testimony as may be produced by the parties hereto, and forthwith certify such testimony to this court for such action thereon as to this court may seem just and proper."

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

Subsequently, and after many witnesses had been examined under this order, the court made a further and ex parte order:

"That said matter and all testimony heretofore taken herein be referred to Edwin G. Adams, special master, for his consideration, and to take such further testimony as may be offered, to the end that he may report the same in its entirety, with his recommendations thereon, to this court."

On the special master's reporting this latter order to the parties, this protest was recorded:

"The guardians of the alleged bankrupt object to the jurisdiction of the master to try and determine the issues in this cause at this time under the circumstances of this trial; it appearing that trial by jury was waived and that Judge Lanning should try the case."

This objection was overruled by the master, who proceeded to hear testimony and thereafter to make findings of fact and conclusions of law and file a report wherein he found Ward's insanity was not established, that he was insolvent, and had committed the acts of bankruptcy charged. To this report the guardians, still insisting on their protest, filed exceptions. The court, after hearing, delivered an opinion in which the testimony was exhaustively discussed and later entered a decree dismissing the petition in bankruptcy. While the assignments of error are directed to the action of the court in sustaining the exceptions to the master's report, there is none assigning for error the court's action in decreeing the dismissal of the bill. The status of the case now being a decree, unappealed from, dismissing the bill, it would seem to follow that a discussion of any questions preceding such decree is academic. In view, however, of the expense of preparing the record, and at the request of counsel, we pass to a consideration of the case on the merits.

Counsel on both sides have very ably presented their views and authorities on the effect of a master's report, both before the lower and this court and the conclusive effect of the state decree in lunacy. Without entering into a study of these interesting legal questions, we have, in view of the questionable scope of the powers conferred on the master, the fact that a number of the witnesses were not examined before him, and of the protest against the exercise of any judicial power by him, reviewed the testimony ourselves, aided by the master's report and the opinion of the court below. That examination irresistibly leads us to the conclusion that at the time of the commission of the alleged act of bankruptcy Ward was insane. Whatever may be the rival contention of alienists—and in that respect we find the to be looked for difference—the lay mind is very apt to rely on the testimony of witnesses who prove the conduct, actions, and speech of a man. In this case, Ward's conduct, his acts, his speech, his demeanor, his changed habits are proved by the uncontradicted evidence of the large number of witnesses who observed him in his daily walk and conversation and who saw the change coming over him. The affirmative and united testimony of those who thus frequently saw him, and whose interest was challenged by neighborly intercourse, is more persuasive than the somewhat negative and isolated observation of those whose intercourse with him was confined to a single transaction in

which no aberration was apparent. While both sets of witnesses are equally sincere and truthful, the comparative weight of their testimony is as different as were their fields of observation. As witnesses whose testimony is of the general character noted, we may refer to that of his two family physicians, Bingham and Fewsmith; his counsel, Duffy; his clergyman, Hunter; his wife, daughter and brother; his neighbors, Miller, Osmund, and Reeve; his business acquaintances, Baldwin, Atha, Roe, Lent, and McBride; his sanitarium physicians, Prout and Gordon; and his coachman, Baker. These different witnesses covered a wide range of observation, and the facts to which they testified leave no uncertain conviction in this court's mind that no error was committed by the court below. Moreover, the clear weight of the alienists' and physicians' testimony is to the same effect. Of the alienists called by the respondent, two of them, as well as both the general medical practitioners, had Ward under treatment, and their testimony has therefore correspondingly greater weight than the hypothetical testimony produced by the petitioners.

Finding no error below, the decree is affirmed.

GREENWOOD et al. v. DOVER et al.†

(Circuit Court of Appeals, First Circuit. December 12, 1911.)

No. 880.

1. PATENTS (§ 114*)—SUIT IN EQUITY TO OBTAIN PATENT—BURDEN AND MEASURE OF PROOF.

The rule applied that in a suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), as amended, to obtain a patent which was awarded to the defendant by the Court of Appeals of the District of Columbia in interference proceedings, such decision must be given weight in the nature of a departmental decision, and, to overcome it, the evidence must be of such character, and sufficient at least to require a clear conviction that it was erroneous.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 166; Dec. Dig. § 114.*]

2. PATENTS (§ 114*)—SUIT IN EQUITY TO OBTAIN PATENT—EVIDENCE CONSIDERED.

Evidence considered in a suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), as amended, to obtain the issuance of a patent to complainant, and *held* insufficient to overcome the presumption in favor of the decision of the Court of Appeals of the District of Columbia on an appeal in interference proceedings which awarded priority of invention to the defendant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 166; Dec. Dig. § 114.*]

Appeal from the Circuit Court of the United States for the District of Rhode Island.

Suit in equity by George W. Dover and others against Thomas F. Greenwood and others. Decree for complainants and defendants appeal. Reversed.

For opinion below, see 177 Fed. 946.

See, also, 23 App. D. C. 251.

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

† Rehearing denied January 10, 1912.

Wilmarth H. Thurston, for appellants.

Alexander P. Browne (Horatio E. Bellows, on the brief), for appellees.

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

PUTNAM, Circuit Judge. This is a proceeding under section 4915 of the Revised Statutes (U. S. Comp. St. 1901, p. 3392), amended as hereinafter set out. The section has been so fully stated or abstracted in the decisions to which we will refer that we do not deem it necessary to recite it here. We will describe the parties as Greenwood and Dover. The patent issued to Greenwood, and Dover filed a bill in equity under section 4915 in the Circuit Court, and there prevailed, and Greenwood appealed to us. Dover claims that the proceeding in the Circuit Court was in no way in the nature of an appeal, but an independent suit in equity, as to which proposition there is no doubt.

[1] This is the first proceeding properly on plea and proof as known where the common law prevails, which has occurred with reference to the patent in issue. The proposition is too plain to require discussion that there is no peculiarity as between this and any other independent suit in equity. By the very nature of the suit the proceeding is according to the usual and ordinary course of equity. Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657, which will be referred to further, was based on the same section 4915, before it was amended, and is full of expressions to this effect. Although, by agreement of the parties, Morgan v. Daniels was submitted to the Circuit Court in part on the testimony used in the proceedings in the Patent Office, yet the opinion says that the suit there was "in the nature of a suit to set aside a judgment." Again it says:

"It is an application to the court to set aside the action of one of the executive departments of the government."

The opinion concludes at page 129 of 153 U. S., at page 775 of 14 Sup. Ct. (38 L. Ed. 657), as follows:

"There is other testimony on both sides of this controversy. It is unnecessary to notice it in detail. It is enough to say that the testimony as a whole is not of a character or sufficient to produce a clear conviction that the Patent Office made a mistake in awarding priority of the invention to the defendant; and because of that fact, and because of the rule that controls suits of this kind in the courts, * * * we remand the case with instructions to dismiss the bill."

Therefore any suggestion that any proceeding of the kind now before us, whether it includes the testimony used in the Patent Office or not, and whether it includes it with or without other testimony or not, is differentiated from an ordinary suit in equity, is immaterial.

The patent in controversy was issued on June 28, 1904, to Thomas F. Greenwood, assignor, on an application filed on February 1, 1902. There are several claims. The only ones to which we need refer to are 1, 2, and 3, reading as follows:

"1. A pin-tongue having one end bent over, said bent end being provided with a substantially cylindrical bore or aperture, and a pivot-pin secured in said bore or aperture by pressure.

"2. A pin-tongue having one end provided with a bend, and a pivot-pin secured in said bend solely by pressure.

"3. A pin-tongue having one end provided with a bend, and a pivot-pin secured in said bend by spring-pressure."

The apparent differences are that claim 1 ends with the words "by pressure," claim 2 with the words "solely by pressure," and claim 3, "by spring pressure." In either case the pin-tongue revolves through a part of a circle with what is called the pivot-pin, to which it is firmly secured by pressure, described in Claim 3 as "spring-pressure." The main purpose seems to have been to accomplish a simple and inexpensive contrivance, and the pith of the invention to secure the end of the pivot-pin around the pivot, or pindle, so that the pin and pindle would turn together, and so that the pin would be held in place by its resiliency alone, or what is called in the patent "spring-pressure."

Dover filed an application for the same invention on September 11, 1901, thus preceding by several months the date of Greenwood's application. On April 15, 1902, an interference was declared between Greenwood and Dover; and the Examiner of Interferences found in favor of Greenwood. On appeal to the board of examiners this was reversed, and its decision was sustained by the commissioner, who awarded priority to Dover. Thereupon an appeal was taken to the Court of Appeals of the District of Columbia, according to the following statutes:

Section 780 of the Revised Statutes of the District of Columbia, approved June 22, 1874, reads as follows:

"Sec. 780. The Supreme Court, sitting in banc, shall have jurisdiction of and shall hear and determine all appeals from the decisions of the Commissioner of Patents, in accordance with the provisions of sections forty-nine hundred and eleven to section forty-nine hundred and fifteen, inclusive, of chapter one, Title LX, of the Revised Statutes, 'Patents, Trade-Marks and Copy-Rights.'"

Section 9 of the act approved February 9, 1893 (chapter 74, 27 Stat. 434), reads as follows:

"Sec. 9. That the determination of appeals from the decision of the Commissioner of Patents, now vested in the general term of the Supreme Court of the District of Columbia, in pursuance of the provisions of section seven hundred and eighty of the Revised Statutes of the United States, relating to the District of Columbia, shall hereafter be and the same is hereby vested in the Court of Appeals created by this act; and in addition, any party aggrieved by a decision of the Commissioner of Patents in any interference case may appeal therefrom to said Court of Appeals." U. S. Comp. St. 1901, p. 3391.

The Revised Statutes of 1874 excluded from the jurisdiction of the Supreme Court of the District of Columbia the decisions of the commissioner in interference cases; but this jurisdiction was given to the Court of Appeals by the act of February 9, 1893, which we have just quoted. It never has been disputed that the proceeding as under section 4915 applies to interference cases which come up to the Court of Appeals of the District of Columbia equally with those pro-

ceedings which came up under the Revised Statutes of 1874 to the Supreme Court, from which interference cases were excluded. This must be conceded by Dover in the present case. Otherwise Dover would have been without remedy under that section, and the patent issued to Greenwood could not be disturbed on the present proceeding. This result is clearly involved in Re Hien, Petitioner, 166 U. S. 432, 439, 17 Sup. Ct. 624, 41 L. Ed. 1066, decided in April, 1897. It was evidently also involved in Prindle v. Brown, 155 Fed. 531, 84 C. C. A. 45, decided by us on August 2, 1907.

The opinion in the Court of Appeals for the District of Columbia is found in 23 App. D. C., at page 251, decided March 1, 1904. With reference to the effect of this decision, and with reference to the question of introducing any part of the record in the Patent Office to which it related, and with reference to all questions of that character, the views of the Circuit Court were clearly correct, and we need not go over them. Nevertheless, it will be permissible for us to refer to some expressions of the Court of Appeals, and also to the proceedings in the Patent Office, for the purpose of illustrating propositions which we may find it desirable to state.

It is to be regretted that Congress has not provided that decisions like that in the Court of Appeals in Greenwood v. Dover should be conclusive, in the same way in which any decisions of the superior courts of federal or state jurisdiction are ordinarily held to be effectual. While the proceedings in the Patent Office out of which this decision arose were not strictly in accordance with the practice either at law or in equity in the jurisdictions where the common law prevails, yet they have all the elements of the fundamental principles of the "law of the land," and might well have been pronounced by Congress to end the litigation accordingly, and thus to avoid the opportunity of further holding up of patents, and of leaving the rights of both the public and the patentee indecisive for another series of years. The entire proceeding contains the great elements required by the "law of the land," namely, opportunity for both parties to be heard, and finally a decision by a court of high authority, endowed with all the machinery of superior courts of judicature. As it is, however, we are compelled to accept in this single particular the view claimed by Dover, that the judgment of the Court of Appeals stands akin to a departmental decision, although no court could avoid the impression that in a certain sense and to a certain extent it is of greater weight. It is sufficient for us, however, to apply to this case the rule of Morgan v. Daniels, that there must be a clear conviction on this record that the conclusion of the Court of Appeals was erroneous. In saying this we need not trouble ourselves about the varying expressions of various courts with regard to analogous cases, some of which would even require Dover to maintain his position by proofs beyond a reasonable doubt. We are satisfied to reduce all such expressions to the one used in Morgan v. Daniels, to the extent that the record in this case should establish by a clear conviction that Dover is entitled to maintain his bill.

The conclusion in Morgan v. Daniels was not a peculiar outgrowth of the patent system. It was simply a phase of the general rules with reference to the determinations of the executive departments, where the statutes authorize them to investigate and decide questions of fact preliminary to a grant on which private rights are to rest. We need cite in this particular only the Maxwell Land Grant Case, 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. Ed. 949, and United States v. Bell Telephone Company, 167 U. S. 224, 17 Sup. Ct. 809, 42 L. Ed. 144. The rule laid down in cases of the general class to which Morgan v. Daniels must be assigned is of so broad, far-reaching, and fundamental a character that none of the refined distinctions brought to our attention by Dover requires any particular further consideration. So that all that is left for us is to apply the general rule to the case in hand. Two or three decisons of the Supreme Court and of this court will guide us therein sufficiently.

[2] To meet the presumptions pro and con Dover has put in no new evidence except as follows: It appears that in the proceedings in the Patent Office he dated back his invention to July, 1901, or August 15, 1901. He explains that, according to Patent Office practice, he was bound by those dates, and equally so bound in the Court of Appeals for the District of Columbia; but that on the present proceeding he can go back to the earliest period which he can maintain on a reinvestigation of the facts, or otherwise, provided he brings himself within the general rules of law. This proposition we do not contest. He undertakes now to go back to March 15, 1901; and he has elaborated this date by calling George H. Tilford, who was examined at great length. He also called Arthur C. Brown, who went back to June 29, 1901. As to March 15, 1901, Dover testified to an interview with Tilford, and produced in court an envelope, which he and Tilford both identified as having been present there. This envelope was a printed circular, apparently in the nature of an advertisement from a patent solicitor at Washington. The date of the postmark is confused, so that it is impossible to decipher it accurately, although it seems to have been 1900. All which the witnesses Tilford and Dover relied on relating to it was some pencilling of a dislocated and obscure character. Part of it is claimed to represent the invention at issue here, but it is impossible on an inspection to clearly recognize it as such. Brown's testimony was not particularly supported. Dover also put in evidence his application, which, as we have said, antedates Greenwood's; but this has no new effect, because it was, of course, in evidence through all the departmental proceedings and in the Court of Appeals. On the other hand, the adverse party failed or was unable to call Greenwood. We cannot determine which was the fact, but it is not important that we should. They, however, called his wife and daughter, who fixed a date with reference to other important transactions as early as January, 1900, when, as they testified, Greenwood pinned the shirtwaists of both Mrs. Greenwood and Miss Greenwood with pins clearly containing the essential element of the invention in issue. This is proven by evidence as direct as a fact 10 years old can be proven by mere parol, which is, of course, subject

to question in various ways, some of which are pointed out by the learned judge of the Circuit Court; but all such testimony, whether of the witnesses Tilford and Dover on one side, and of Mrs. Greenwood and Miss Greenwood on the other side, are necessarily subject to infirmities and possible fraud, and therefore are to be cautiously received. A marked illustration of that fact appears in the present case, where Dover's testimony produced before us as to the interview to which the envelope described refers, in March, 1901, was given in almost the same order and the same language as the interview in August, 1901, between Dover and Greenwood as told by Dover, in accordance with the opinion of the Court of Appeals, already referred to. Changing the date, and changing Tilford for Greenwood, the two interviews were, as given, almost exactly the same, even to a general description of the pencil drawings on the paper involved in each. This, of course, is not in evidence in the present case; but we may properly refer to it as an illustration of the uncertainty of this class of proof, by whomsoever produced, as against an earlier departmental grant awarded after full investigation.

In like manner, we may refer, in further illustration, to the evidence of Greenwood now missing. If the respondent here was unable to produce Greenwood after the lapse of several years, it only leads to the importance of adhering to the rule of Morgan v. Daniels, ubi supra, because especially of the possible loss of important testimony during the lapse of a period extending over several years.

The general rule given as to this class of testimony is stated in Morgan v. Daniels, at page 129 of 153 U. S., at page 772 of 14 Sup. Ct. (38 L. Ed. 657), where an attempt was made to fix a time by reference to a particular conversation, and to rough sketches, with a comment by the court that it is not probable that, in the absence of some special reason therefor, the memory would carry for eight or nine years details of a plan or idea suggested in conversations and illustrated by sketches such as the court described. The opinion adds that such testimony is not of a character to carry great weight.

In Brooks v. Sacks, opinion passed down by us on June 10, 1897, 81 Fed. 403, 26 C. C. A. 456, the classes of new evidence produced on this bill pro and con, with reference to satisfying the demand for a clear conviction as against a departmental adjudication such as we have here, are carefully analyzed and valued. In that case there were two patents for the same invention, and the issue was simply one of priority as between them. As to one patent there was an admission of a date of invention earlier than the date of the application; and, of course, the presumption in favor of that patent went back to the admitted date, and to anticipate that date required the same weight of evidence as it would to anticipate the date of the application. Therefore, although the circumstances are different, the conclusions there are a guide for us here. There, there were certain drawings, as at bar, and also some testimony fixing the date as claimed by the contesting patentee. It was admitted that the illustrations might well have included the device in controversy, and there were some other suggestions tending to strengthen the case of the contestant. Our conclu-

sion is given on page 407 of 81 Fed., on page 459 of 26 C. C. A., as follows:

"On the whole, we must apply to this case the practical safeguards against the frequently mistaken memory of witnesses as to events of this character long since happening, which the courts are always insisting on with reference to the issue of anticipation. Doing this, it seems plain that the complainant below has come far short of proving his prior right as satisfactorily as required by the authorities and by the reason of the case. Indeed, in view of the absolute lack of illustrations, book entries, purchasers, bills, patterns, or castings of the early date in dispute, we are safe in saying that the preponderance of probabilities is against him."

Westinghouse Company v. Stanley, decided by us on December 9, 1904, 133 Fed. 167, 179, 68 C. C. A. 523, was peculiar. On first sight it might be considered as contravening Brooks v. Sacks, but Brooks v. Sacks was cited and approved. The distinction grew out of the fact that the crucial date was fixed by the record of the solicitor, who had been continuously employed during the entire controversy; so that, inasmuch as he had a continuous interest in the device from the beginning, and a continuous record in reference thereto, his testimony was accepted.

Applying, therefore, the rules which we have cited, in accordance with the light which we receive with regard to their practical application from these decisions, it is plain that Dover has failed to meet the presumption against him arising from the decision of the Court of Appeals of the District of Columbia; and, indeed, it might be said that this record as an independent record is more against him than for him.

The decree of the Circuit Court is reversed; and the case is remanded to that court with directions to dismiss the bill, with costs for the respondents in that court and on appeal.

ALDRICH, District Judge. I fully concur in the result of the foregoing opinion, but should prefer to see the decision in this case based distinctly upon the theory that the remedy by bill in equity provided by section 4915, when sought in a situation involving intervention rights, and a decision by the Court of Appeals of the District of Columbia, a court having appellate jurisdiction over certain intervention patent rights and proceedings, should be administered according to the due and ordinary course of equity practice and procedure; and upon the idea, where questions of fact have been determined and established by such a court of competent jurisdiction, in an inter partes case, that the results of the decision will not be overthrown except upon such grounds as relief is granted from judgments at law and decrees in equity, under the broad sense in which equity and common-law jurisdictions are understood in this country and in England.

While it was doubtless intended to provide an independent proceeding in equity, under the well-understood historical view and the thousands of judicial interpretations which accept the law and equity terms in the Constitution, the judiciary act, and other enactments of Congress with reference to law and equity proceedings as meaning

the usual course of law and equity as administered in this country and in England, it cannot be possible that Congress intended to enlarge the general rules governing equitable remedy, to the end that relief should result, in a trial de novo, whenever a different court under another view as to the measure of proofs, or upon another view as to the weight of evidence, or upon a little more evidence, shall reach a different conclusion as to facts already judicially established by a court of competent jurisdiction in an inter partes case, rather than from the usual grounds upon which equitable relief is afforded when former judicial determinations are involved.

On the contrary, Congress in providing remedy in patent cases by bill in equity on notice to adverse parties and upon "other due proceedings" must have intended proceedings in the ordinary course of equity, and that would mean, when applied to a case like this, that final results once reached by a court of competent jurisdiction over subject-matter and parties will not be disturbed in an equity proceeding between the same parties, except upon a bill which states a case for equitable relief and a case so clear upon the evidence as to show that the results were promoted by fraud, accident, or mistake. Such a construction of section 4915 would place an inventor's rights in respect to equitable relief from judicial determinations upon the same basis as general property rights which general rules of equity safeguard only against fraud, accident, or mistake.

The strong language of Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657, had reference to a decision of the Patent Office, an executive branch of the government, having limited authority to pass upon special facts, and not to the more solemn decision of a court having full jurisdiction on appeal over facts in controversy.

I think, however, that the result of the logic and reasoning of Morgan v. Daniels, though having reference to a decision of the Patent Office, in an executive branch of the government, rather than to a judicial determination, when applied to a case of judicial determination like the one by the Court of Appeals for the District of Columbia, would mean the rule which I have stated, because in the closing paragraph of Mr. Justice Brewer's opinion it is stated that the testimony was not sufficient to produce a clear conviction that the Patent Office made a mistake.

GENERAL KNIT FABRIC CO. et al. v. STEBER MACH. CO. et al.

(Circuit Court of Appeals, Second Circuit. January 16, 1912.)

No. 126.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—KNITTED FABRIC.
The Scott patent, No. 899,439, claims 2 and 4, for a knitted fabric and method of producing the same, discloses patentable novelty and invention; also *held* infringed.

2. PATENTS (§ 53*)—ANTICIPATION—FABRIC.
Anticipation of a patent for a new and useful fabric is not shown by evidence that prior to its invention a machine was in existence which by a few changes in adjustment was capable of producing the fabric.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 71; Dec. Dig. § 53.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—KNITTING MACHINE
The Scott patent, No. 925,393, for a knitting machine for producing a ribbed fabric, *held* not infringed, if conceded invention.

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

Suit in equity by the General Knit Fabric Company, Robert W. Scott, and L. N. D. Williams against the Steber Machine Company and Bernard T. Steber. Decree for complainants, and defendants appeal. Reversed in part.

See, also, 190 Fed. 47.

Edgar M. Kitchin and Lewis, Watkins & Titus, for appellants.

Charles Neave and Howson & Howson, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. [1] The two patents in controversy cover, respectively, a fabric and a machine for making the fabric. The fabric patent was granted September 22, 1908, upon an application filed July 7, 1908. The patentee says in the specification:

"The object of my invention is to provide a ribbed fabric of uniform character and possessing the quality of elasticity characteristic of a ribbed fabric but having a closer disposition of the wales and a heavier or firmer texture than a ribbed knitted fabric produced in the usual way, my invention also providing a ready means for producing vertical stripes or other ornamental effects in the web."

The drawings contain three figures, which show in 1 and 3, respectively, a face view, without and with a welt formation thereon, and in figure 2 a sectional piece of the fabric, all on an exaggerated scale. Figure 4 is a diagrammatic representation of the needles of a circular knitting machine adapted for the production of the patented fabric. The claims involved are as follows:

"2. A knitted fabric comprising two ribbed webs with crossed sinker wales, the ribs of one web being disposed in the spaces between the ribs of the other web."

"4. The mode herein described of producing a knitted fabric, said mode consisting in feeding one yarn to one set of needles drawing stitches first in one direction and then in the opposite direction, to produce a ribbed web,

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

and feeding another yarn to an alternating set of needles likewise drawing stitches first in one direction and then in the other direction and between the stitches drawn by the needles of the first set."

The defenses are want of novelty and invention and non-infringement. The refusal of the court to sustain these defenses is assigned as error.

We agree with the judge of the Circuit Court in thinking that no useful purpose will be accomplished by an attempt to describe in detail the fabric in question or the method of its production. To do this intelligently, without the use of diagrams and models, would be difficult, if not impossible. Those skilled in the art will understand our conclusions without such an attempt and they are probably the only persons who will be sufficiently interested to read what is said.

The fabric consists of two interlocked ribbed webs with crossed sinker wales, the ribs of each face of one web being disposed in the spaces between the ribs of the corresponding face of the other web. By providing different colored yarns for the needles of the respective sets vertical stripes and patterns can be produced. The fabric is uniform throughout and elastic, and is illustrated by various embodiments thereof, both in models and drawings. It is new, useful and ornate. It is used principally for underwear, and presents a soft, velvety surface to the skin, adding additional warmth without increasing materially the weight of the fabric. It has become increasingly popular with the knit goods trade and the public. The reason for this popularity is neither fanciful nor visionary. Unquestionably the patented fabric is more elastic than prior fabrics intended for winter wear, while equally smooth to the touch, both sides being alike in so far as the smooth, velvety feel is concerned. These advantages seem to be admitted. The defendant, Bernard T. Steber, was asked on cross-examination as follows:

"Q. The Scott interlock fabric is distinguishable in underwear from the ordinary ribbed underwear by 'feel,' is it not? A. There is a difference in the feel of ordinary one-and-one ribbed underwear and that made on the Scott machine. The samples which I have felt of the Scott fabric appear to have a softer feel than ordinary ribbed fabric made of the same material."

The prior art does not show the Scott fabric, the nearest approach being the Howard and Tripp patents issued on the same date—May 31, 1881. The object of these inventors was to provide knitting machines having alternate sections thereof formed of two threads of different color, producing a fabric having a face side formed in vertical stripes composed of one or more stitches, and the back being formed of "overshot" work. Scott expressly disclaims the fabric of these patents, saying:

"My invention relates wholly to a ribbed web, and the advantages of my invention are attained only in connection with such a web."

He also disclaims the fabric of the Leighton patent of February 18, 1902, which does not show the essential features of the Scott invention. Nor is any machine of the prior art shown which is capable without material changes of producing the Scott fabric. But,

even though such a machine were shown, it would not anticipate a claim for a fabric or for the method of producing the fabric in the absence of proof that such a fabric had in fact been produced.

[2] A block of marble is, in a similar sense, capable of producing the Venus of Milo, but proof that such a block existed prior to the statue could hardly be said to anticipate that incomparable production. It seems unnecessary to spend time in support of the proposition that a method of making a new and useful fabric is not anticipated by testimony that prior to the invention of this fabric a machine was in existence which, by a few changes in adjustment, was capable of producing the fabric had some one known enough to make them. Few patents could survive such a test as this.

The defendants' exhibit, "Yellow and Black Striped Baby Blanket Goods," is, as we understand, intended to illustrate the product of a machine made and used by George A. Leighton in 1887 or 1888, 23 or 24 years ago. The exhibit may have been made on this machine. The product of the machine, whatever it was, certainly was not popular, and the machine soon went out of the business of manufacturing commercial fabrics, and was used for experimental purposes, necessitating a change of parts. Though in existence to-day, it is incapable of making the Baby Blanket material. We think there is too much uncertainty regarding the genesis of the Baby Blanket to warrant us in holding that its existence prior to Scott's invention is established beyond a reasonable doubt. Assuming, however, that it were so established, it does not anticipate, but, on the contrary, it furnishes an excellent illustration of what Scott added to the existing art. It shows very clearly the pronounced ribs with equally pronounced grooves between them, presenting rough feeling to the touch and the appearance of a harrowed field to the eye. When these ridges and valleys are filled up, we have the Scott fabric. It is the difference between a field marked by furrows and a close-clipped velvety lawn.

The defendants are not in a position to deny that the Scott patent discloses both novelty and invention in view of the fact that the defendant Steber, in March, 1910, received a patent for a knitted fabric which contains all the prominent features of the complainants' fabric, and differs only in details which do not alter its usefulness or its appearance. In other words, one who receives a patent for the Steber fabric in 1910 is hardly in a position to deny patentability to the Scott fabric of 1908.

The remaining question is one of infringement—does "Fabric A" infringe? The fabric is described in the Steber patent just alluded to, No. 951,033, and is illustrated by Figures 3 and 4. This patent was applied for June 18, 1909, nine months after the Scott patent had issued. Mr. Steber was shown the Scott fabric "about the winter of 1908 or 1909." The infringing fabric is described at length in the Steber patent and illustrated by the drawings. To present here a description without resort to models or drawings would serve no useful purpose if, indeed, it were possible to do so. If the same colored yarn be used throughout, the two fabrics are in front identical so far

as outward appearance is concerned. If different colored yarns be used it is made more apparent that the back of the defendants' fabric differs from the front, the back presenting a zigzag and the front a striped appearance. But it must be remembered that this is not a design patent and the appearance the fabric presents to the eye is not an element of the claims. In other words, a fabric made of white yarn which infringes cannot be made a noninfringing fabric by the introduction of a colored yarn.

We cannot avoid the conclusion that the defendants are attempting to appropriate the advantages of the Scott fabric and seek to avoid infringement by the introduction of an unimportant additional feature. The two fabrics are substantially alike in texture, weight, feel, elasticity and appearance. An expert might detect a difference but to the ordinary wearer they are the same. Perhaps the most concise statement of the distinction between the two, as pointed out in the Steber patent, is the difference between *interlocked* and *interknit* webs. Even if it be conceded that the interknit web is an improvement, it does not justify the appropriation of the fundamental advance by Scott. As we understand the alleged Steber improvement, it consists in giving more permanent elasticity, a finer mesh and more body to the fabric between the ribs than in the Scott fabric; and these results, it is asserted, are obtained by the interknitting of the webs. We are not satisfied that the improvements above suggested are in fact produced. So far as can be judged from the various samples introduced, the two fabrics are practically alike. Of course we do not pretend to possess expert knowledge upon a subject so complicated and only speak after making such crude and general tests and examinations as laymen may make, with the assistance of the opposing views of the expert witnesses.

[3] The machine patent was granted June 15, 1909, upon an application filed September 21, 1908. The patentee says that his object is to provide a knitting machine which can produce a ribbed fabric having a closer disposition of the wales and a heavier or a firmer texture than fabrics produced in the usual way. Figure 5 of the drawings, showing an enlarged section of a piece of the fabric produced on the machine, is a reproduction of Figure 2 of the fabric patent. The claims in controversy are as follows:

"1. The combination in a knitting machine for producing a ribbed fabric, of two needle carriers each having two sets of needles, needle operating mechanism and a yarn supply co-operating with the needles of one set in each carrier to produce one ribbed fabric, and needle operating mechanism and a yarn supply co-operating with the needles of the other set in each carrier to produce another ribbed fabric interlocked with the first."

"4. The combination in a knitting machine for producing a ribbed fabric, of a cylinder and dial, each having two sets of needles, needle operating mechanism and a yarn supply co-operating with one set of needles of the cylinder and dial to produce one ribbed fabric and needle operating mechanism and a yarn supply co-operating with the other set of needles of the cylinder and dial to produce another ribbed fabric interlocked with the first."

The elements of the first claim are: In a knitting machine for producing a ribbed fabric:

First. Two needle carriers each having two sets of needles.

Second. Needle operating mechanism and a yarn supply co-operating with the needles of one set in each carrier to produce one ribbed fabric.

Third. Needle operating mechanism and similar yarn supply co-operating with the needles of the other set in each carrier to produce another ribbed fabric interlocked with the first.

The two claims are alike except that claim 4 is more specific, substituting "cylinder and dial" for "two needle carriers" of claim 1. We have, then, involved in this controversy, claims for a fabric, for the mode of producing the fabric and for a machine for knitting the fabric.

It is difficult to understand why a decree holding the claims of the machine patent valid and infringed is necessary for the complainants' protection. If the product and process claims of No. 899,439 are held to be valid and infringed, the defendants cannot make the fabric on any machine and, of course, cannot make it on the machine now used by them. Indeed, if the fabric could be knit by hand they could not produce it in that way either. No one can make the fabric of the Scott patent without infringing claims 2 and 4 of that patent.

If the manufacture of the fabric is enjoined in the future and the defendants account for profits and damages in the past, we do not see what additional remedy is needed, especially in view of the fact that the defendants' machine is susceptible of a perfectly innocent use. For instance, it can make Fabric B, concededly not an infringement, and, with slight alterations, other noninfringing fabrics. The claims both contain as elements two needle carriers, each having two sets of needles and a yarn supply co-operating with the needles of one set in each carrier to produce one ribbed web.

It is said that there is no such element or an equivalent therefor in the defendants' machine for the reason that they do not use two sets of needles, one in each carrier, to produce one ribbed web. Indeed, we understand the complainants' expert to admit that the defendants' machine is incapable of producing without alterations and omissions of some of its features of construction, a product comprising two distinct ribbed webs connected only by crossing sinker wales. This would seem to indicate that in his opinion the claim is not infringed by defendants' machine unless broadened in a manner not justified by the proof.

Moreover, we are not at all satisfied that the construction of the Scott machine required an exercise of the inventive faculties. It seemed to be taken for granted at the argument that if the fabric showed inventive genius the same conclusion must follow as to the machine. But we cannot assent to this proposition. A structure showing the highest type of invention may be made on the simplest machine and, on the other hand, the simplest product may be produced from a complicated machine showing the greatest ingenuity in its construction.

The Scott fabric shows a distinct advance in the art and very clearly presents points of superiority over prior ribbed knitted webs. But given the fabric and given the prior knitting machines, we see nothing

to convince us that the work of adapting these machines to knit the improved fabric was not that of the skilled workman. The complainants' expert says:

"The machines shown in these patents to Roscher, Bieger and Johnstone therefore contain or disclose constructions wherein needles in two beds, so arranged as to be capable of co-operating to knit rib fabric, may be operated in pretty much any possible relation to one another according to the character and collocation of the stitches desired to be produced in the fabric, and if one were given the fabric of the Scott fabric patent to be produced by such machine, the proper collocation or operative relation of the several needles in the two beds could probably be made to enable such machines to produce such fabric course by course in the continued operation of the machine."

Did Scott in adopting the old machines to knit the new fabric do anything which called into being "the intuitive faculty of the mind," known as invention? He had conceived the idea of a knit fabric having marked advantages over the old knit wear; he probably illustrated his invention by drawings, diagrams and models. With the old machine before him, showing the operation of the needles in similar environment, he had little to do but make them knit the pattern he desired. As Mr. Livermore says:

"The proper collocation or operative relation of the several needles in the two beds would probably be made to enable such machines to produce such fabric."

We must be satisfied that patentability and infringement have been established and if there be substantial doubt on these questions we should resolve it in favor of the defendants, and especially so in a case where the complainants can obtain all the relief to which they are entitled without a ruling sustaining propositions so doubtful.

The decree is affirmed as to claims 2 and 4 of the fabric patent and reversed as to claims 1 and 4 of the machine patent without costs in this court, and the cause is remanded to the Circuit Court with instructions to dismiss the bill as to the machine patent without costs to either party in that court.

WESTERN TELEPHONE MFG. CO. et al. v. SWEDISH-AMERICAN TELEPHONE CO.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1910. Rehearing Denied July 27, 1911.)

No. 1,685.

PATENTS (§ 328*)—INFRINGEMENT—TELEPHONE SWITCHBOARD.

The Fisk patent, No. 521,461, for a combined annunciator and spring-jack for use in telephone switchboards, covers an invention of novelty and merit, and is entitled to a range of equivalents which will fully protect it, but it is limited by its terms to a device having two elements, and is not infringed by a device having the old three-element structure.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the Western Telephone Manufacturing Company and others against the Swedish-American Telephone Company. De-

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

cree (163 Fed. 308) for defendant, and complainants appeal. Affirmed.

R. S. Taylor and Josiah McRoberts, for appellants.

W. Clyde Jones, Keene H. Addington, Robert Lewis Ames, and Arthur B. Seibold, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Appeal is taken from a decree adjudging that appellee's device is not an infringement of patent No. 521,461, June 19, 1894, to Fisk, assignor, for a combined annunciator and spring-jack for use in telephone switchboards.

Fisk's specification and claims are recited in Western Telephone Mfg. Co. v. American Electric Telephone Co., 131 Fed. 75, 65 C. C. A. 313. For present purposes it is enough, beyond referring to that case, to set forth claim 2 as adequately describing the invention:

"The combination in a switchboard of an annunciator-drop adapted to hang in front of the jack and be lifted by the operator's plug as it is thrust into the jack, and a trigger or arm for catching it when so raised, and an electro magnet and its armature and connections whereby the support is drawn from engagement with the drop when the magnet is energized, as set forth."

In the decision above cited this court held that:

"Fisk was the originator of the principle of restoring the drop by the contact therewith of the plug as it enters the associated jack."

This record confirms us in the judgment that Fisk was the first and true inventor of the contactual principle of restoration.

Appellants correctly say that:

"Fisk's invention did not consist in bringing the drop and plug into juxtaposition, nor in restoring the drop by contact with the plug, but in both those things in combination."

Before Fisk's time the drop and the jack into which the plug is inserted had been combined in one structure which could be used as a unit in a switchboard. In Rein's patent, No. 240,182, April 12, 1881, the drop and the jack were combined in a unitary device wherein the drop and its releasing magnet were placed above the jack and as close to it as could be done on account of the intermediate mechanism through which the plug by its thrust into the jack-opening mechanically restored the drop to its latched position. Fisk placed his releasing magnet behind the jack, with the armature reaching over the jack to the drop hanging in front of the jack. By these means, Fisk not only attained a greater degree of compactness than had thitherto been known (and possibly the acme of compactness), with resulting benefits in the assemblage of a switchboard, but he brought the drop and the jack opening into such a relation that the plug contactually, and not mediately, restored the drop. Rein's structure did not contain a germ of the thought that the inthrust of the plug could be used as the direct, the immediate, the contactual means of restoring the drop. Rein's mechanical restoration required veritably, not colorably, the coaction of three elements—the plug, the intermediate mechanism, and

the drop. Fisk cut out all intermediate mechanism and accomplished his mechanical restoration by the coaction of two elements—the plug and the drop. This involved an idea wholly novel, and created a new point of departure for the art.

In disposing of the prior art, this court in the former case held that no exhibition or disclosure of earlier endeavors was either an anticipation of the Fisk claims or a limitation of them to less than their face value. The record now before us makes no stronger show, and we remain of the conviction that Fisk, being at the head of a new class, is entitled to a range of equivalency that will fully protect his actual invention.

But it was and is found that the prior art failed to limit Fisk's claims to less than their face value because Fisk, to avoid the prior art, properly limited his claims to the principle of contactual restoration—the principle of eliminating one of three elements and obtaining the result by the immediate interaction of the other two.

As in this suit, so in the former case the question of infringement is found to turn on the defendant's employment or nonemployment of the principle of contactual restoration. There the defendant raised the drop a little way above the jack-opening, so that the ordinary plug would not strike the ordinary drop; but made his plug thicker than the ordinary plug by putting a collar thereon and his drop thicker than the ordinary drop by putting a cam-shaped projection on its outer face. We said that it is "immaterial whether the contact is effected through having the plug reach up or the drop reach down or both." Neither projection had any function beyond serving as a defense in a lawsuit. The device, so far as obtaining mechanical restoration was concerned, was still a two-elements device. If a door is to be closed by manual contact, the order is obeyed whether a bare hand is pushed against a bare door or a padded glove upon the hand is pushed against the knob or other projection on the door.

At the hearing of an application for a temporary injunction in this suit, two forms of appellee's device were exhibited and counted on as infringements. In the first form, within the jack-part of the structure, two levers are pivoted. The plug on entering the jack-opening contacts with and moves the first lever, which thereupon contacts with and moves the second lever, which thereupon contacts with and moves the drop to its latched position. In the second form, within the jack-part of the structure, the rear end of a spring lever is secured to the magnet frame. At an intermediate point of the under side of the lever a roller is attached. The front end of the spring lever reaches to a point near the drop. The plug on entering the jack-opening contacts with and raises the roller. This movement of the roller flexes the spring lever, and thereupon the front end of the spring lever contacts with and moves the drop to its latched position. At the final hearing, and on this appeal, only the second form was relied upon as an infringement.

In the case of the adjudicated infringement, it was held that a thing reaching down from the drop so as to be "in front of the jack" and in the path of the plug was a colorable evasion of Fisk's claims covering his two-elements method of restoration. And, if the defendant

in that case had split his thickened drop into two layers, infringement would not have been avoided. True, the outer layer would constitute in a sense a lever interposed between the drop and the plug—a lever of the class wherein the power is applied between the fulcrum and the load. But the inner layer would itself be a lever of the same kind, and would be struck by the plug if the outer layer were removed and the haft of the plug enlarged to the extent of the thickness of the outer layer. In short, such outer layer, as an independent intermediate mechanism, would perform no mechanical function. The two layers might as well be put back into an integral drop. The device would still be a two-elements device.

Because Fisk invented the two-elements method of restoration is no reason why his assignees should attempt to reach back and monopolize the prior method of mechanical restoration by means of the veritable mechanical coaction of three elements. In appellee's devices, the two levers of the first form, and the spring lever and roller of the second form, are not either integrally or separably a part of either the plug or the drop. They are a fixed part of the jack construction. If they were to be made a fixed part of either the plug or the drop, the device would be inoperative. In both forms appellee employs Rein's team association of jack and magnet, and therefore fails to secure the degree of compactness due to Fisk's tandem association of jack and magnet. This, of course, would not escape infringement if appellee nevertheless availed itself of Fisk's "principle of restoring the drop by the contact therewith of the plug as it enters the associated jack." It furnishes at most only a sidelight on the origin of appellee's combined drop and jack. In appellee's first form the two levers are unmistakably the independent intermediate mechanism of the Rein patent. In the second form appellee has improved upon the Rein patent by making the spring lever with its attached roller do exactly the work, all the work, and only the work, that was performed by the two levers in effecting the mechanical restoration of the drop. That is, in both forms restoration is accomplished by the tip end of a lever striking the drop, as a lever, midway between its fulcrum and outer extremity, and then by pushing against the drop, and by sliding along the drop while pushing. If the tip end of the lever were not permitted to slide along the drop, if the lever were by soldering or otherwise made a part of the drop, the whole mechanism would be worthless. That is, in neither form is the drop "adapted to hang in front of the jack and be lifted by the operator's plug as it is thrust into the jack."

In certain forms of cars, the doors are shut by means of the conductor's or motorman's operation of a wheel or a lever. The door is not touched by the hand, but is moved by independent intermediate mechanism that is actuated by the hand. We should hardly call this a closing of the door by the contact therewith of the hand.

The decree is affirmed.

COLUMBIA WIRE CO. v. KOKOMO STEEL & WIRE CO.

(Circuit Court of Appeals, Seventh Circuit. July 27, 1911. Rehearing Denied October 4, 1911.)

No. 1,712.

PATENTS (§ 318*)—INFRINGEMENT—PROFITS RECOVERABLE.

The measure of the profits recoverable from an infringer of a patent for a machine is the advantage he gained by the use of the patented machine, as compared with other machines which were open to him at the time of the unlawful appropriation, and not with such as were open at the date of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. § 318.*

Accounting by infringer for profits, see note to Brickill v. Mayor, etc., of City of New York, 50 C. C. A. 8.]

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

Suit in equity by the Columbia Wire Company against the Kokomo Steel & Wire Company. From a decree awarding nominal profits only for infringement, complainant appeals. Affirmed.

Charles MacVeagh and Charles C. Linthicum (William O. Belt and Walter M. Fuller, of counsel), for appellant.

Thomas A. Banning (C. C. Shirley, of counsel), for appellee.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. In Columbia Wire Co. v. Kokomo Steel & Wire Co., 143 Fed. 116, 74 C. C. A. 310, we held that certain claims of patent No. 365,723, June 28, 1887, to Bates, for "improvements in wire-barbing machines," were valid and infringed, and ordered an accounting. From a decree awarding appellant only nominal damages, this appeal was taken.

For the purposes of this decision we will assume that appellant is right in saying that the claims in suit covered an improved machine, rather than improvements in a machine, and that appellee would therefore be liable for all advantages gained from using the machine as an integer.

As a standard for comparison appellant took the Stover machine, proved that it was the best that was open to public use before Bates invented the machine of the patent, and introduced testimony from which the pecuniary advantages gained by appellee through its infringement might definitely be reckoned. Findings of fact by the master included these: First. Appellee, after a period of infringement, changed its machines to a noninfringing type that produced at no greater expense as large a quantity and as good a quality of barbed wire as did the Bates machine. Second. When appellee appropriated the Bates invention, other machines that would have made a more favorable comparison with the Bates machine than did the Stover were open to appellee's use. A reading of the testimony has not convinced us that these findings, approved by the court, are not fairly sus-

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

tainable. Applying to these findings a rule that an infringer is only to pay for the advantages of the patented machine over machines that were open to his use at the time of the unlawful appropriation, and not to pay for the advantages of the patented machine over machines that were open at the date of the patent, the master and the court held that there was no basis for a recovery of more than nominal damages.

Appellant asserts (and justly it would seem) that to base the decree on the first finding would violate the rule of law adopted by the master. To what extent, if at all, the law will permit an infringer to avail himself of developments in the art subsequent to his unlawful appropriation, as a defense or mitigation in an accounting, is a query to which we need not essay a definitive answer if the master's rule is correct; for that rule applies to the second finding, and denies the contention on which appellant chose to rest its case, namely, that the only lawful standard is a comparison of the patented machine with the best that was available before the issuance of the patent.

In determining the law applicable to the facts of this case, we attempt no distinction, if any is possible, between machines that are available because they are not under patents and patented machines that are available because they are freely sold in the market by the patentee. Here the controversy narrows to a question of time as an element in the proper standard of comparison.

In support of their respective views the parties cite many cases.[1] Some of the citations from the Federal Reporter may support the respective contentions for which they are adduced. Expressions are found in opinions of the Supreme Court, concerning the meaning of which and their applicability to the facts of this case the parties debate. No Supreme Court decision is known to us in which the recorded facts show that machines, devised since the patent and comparing with the patented machine more favorably than did the machines of the prior art, were open to public use at the time the defendant began the infringement, and in which such facts were held to be irrelevant. Nor are we aware that the Supreme Court has ever propounded and answered, by way of argument or illustration, the precise question that is before us for decision. In the absence of con-

[1] Appellant: Mowry v. Whitney, 14 Wall. 620, 20 L. Ed. 860; McCreary v. Pennsylvania Canal Co., 141 U. S. 459, 12 Sup. Ct. 40, 35 L. Ed. 817; Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; Turrill v. Ill. Cent. R. Co. (C. C.) 20 Fed. 912; Lawther v. Hamilton (C. C.) 64 Fed. 221; Fullerton Ass'n v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 C. C. A. 295; Robinson on Patents, vol 3, pp. 513, 514; Walker on Patents (4th Ed.) § 725.

Appellee: Mowry v. Whitney, 14 Wall. 620, 20 L. Ed. 860; Mfg. Co. v. Cowing, 105 U. S. 255, 26 L. Ed. 987; Thomson v. Wooster, 114 U. S. 116, 5 Sup. Ct. 788, 29 L. Ed. 105; Tilghman v. Proctor, 125 U. S. 146, 8 Sup. Ct. 894, 31 L. Ed. 664; Keystone v. Adams, 151 U. S. 148, 14 Sup. Ct. 295, 38 L. Ed. 103; Black v. Thorne, 1 Ban. & A. 156, Fed. Cas. No. 1,466; Munson v. City of New York (C. C.) 16 Fed. 563; National Car Brake Shoe Co. v. Terre Haute Car Co. (C. C.) 19 Fed. 518; Shannon v. Bruner (C. C.) 33 Fed. 873; Mosher v. Joyce (C. C.) 45 Fed. 206, and 51 Fed. 441, 2 C. C A. 322; Rose v. Hirsh (C. C.) 91 Fed. 150; Hohorst v. Hamburg-American Packet Co., 91 Fed. 660, 34 C. C. A. 39; Wales v. Waterbury Mfg. Co., 101 Fed. 126, 41 C. C. A. 250.

trolling precedents, it is incumbent upon us to express the judgment at which we have independently arrived.

A manufacturer who devises a machine that he honestly believes he has a right to use, and who in an injunction suit ultimately is found to be an infringer, as was the case with appellee, is not to be mulcted in punitive damages. Equity is satisfied if he accounts for all the pecuniary benefits he derived from the use of the infringing machine. If there were no other way of obtaining the result, he might rightly be held for all the profits he made from the output of his establishment. But if, as here, other machines for doing the same work, though less effectively, were available at the date of the patent, the whole advantage would lie in the increase of efficiency. As to an infringer who at that stage of the art appropriated the invention, the standard of comparison is clear. He has taken to himself all the advantages that belonged exclusively to the patentee in the field of competition. Fifteen years later, when the art has advanced to include other noninfringing machines, available to manufacturers and more effective than those of the prior art, the patentee cannot avoid their competitive effect. At this stage the only actual advantage of the patented machine is its superiority, if any, over these later machines that are not dominated by the patent. If at this stage one should choose to enter upon the manufacture of barbed wire, he could take the later machines without giving the patentee any cause of action. If, however, he should adopt a machine that finally was adjudged to be an infringement, all that he would actually gain by the infringement would be the excess in effectiveness of the infringing machine over the later, available, competitive machines. To hold him accountable for more, to make him pay for the advantages of the invention over the prior art, would attribute to the patent a virtue it did not really have at the later period, would penalize the infringer simply because he was an infringer, and would mulct him in vindictive damages to the extent of the difference in effectiveness between the open prior art and the open current art.

This leads to a rejection of appellant's proposition; and the decree of the Circuit Court is accordingly affirmed.

CAMPBELL v. MANGLE et al.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1912.)

No. 1,978.

PATENTS (§ 328*)—INVENTION—FLUME GATE.

The Campbell patent, No. 704,971, for a flume gate, *held* void for lack of patentable invention in view of the prior art.

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

Suit in equity by Ephraim Campbell against Calvin M. Mangle,

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

Jacob E. Tischer, Robert E. Norris, and Charles W. Lehr. Decree for defendants, and complainant appeals. Affirmed.

The appellant brought a suit against the appellees to enjoin infringement of letters patent No. 704,971, of date July 15, 1902, issued to Ephraim Campbell, for a new and useful improvement in flume gates to be used in irrigation. The object of the invention is to provide a simple flume gate which will permit a perfect closure of the outlet when desired, by means of a sliding gate held against the tube from which the water issues, and so constructed, and arranged that the operation of the gate will not be interfered with by sand and other materials which may come against the gate, either from the water or from other sources. The claims which are said to have been infringed are the following:

"(2) A plate having inbent edges and a perforation between said edges, a tube inserted through the perforation and fastened to the plate, and terminating in a plane near the plane in which the inbent edges lie, and being beyond the plate, and a sliding gate fitting between said tube end and said inbent edges."

"(4) A flume gate comprising a tube to extend through a flume wall, and a gate holder fastened to the tube at a distance from the end thereof, and extending beyond the end of said tube, and terminating in two edges which lie in a plane that extends near the plane of the end of the tube, and a gate fitting against the end of the tube on the one side and against said edges on the other side."

John H. Miller and William K. White, for appellant.

Frederick S. Lyon, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The court below held that the patent was void for want of invention, the said device covered thereby having been anticipated by devices of the prior art. The evidence as to the prior art shows the use of two forms of gate, both manufactured of galvanized iron, as is the gate in controversy. One of the prior gates differs from that of the patent only in the fact that the plate edges which hold the slide against the projecting edge of the tube were bent and flattened, instead of being inbent, and curved so as to present a resilient pressure against the slide. This gate, known in the record as the "Ford gate," had been in use very extensively for many years prior to and since the date of the appellant's patent. It was a gate that was satisfactory on the whole, although inferior to the appellant's gate; but it was cheaper, and its use had not been supplanted by the appellant's device.

If the Ford gate embodied all of the prior art, we should be disposed to say that the appellant's device was patentable, as showing invention and improvement on the prior art, because there is no doubt that the curved inbent edges of the gate holder bring the pressure to bear on the slide nearly opposite the edge of the projecting tube, and secure a closer contact of the slide to the tube, so as to prevent leakage, and by their resiliency hold the gate tightly against the projecting tube, and dispense with obstruction to the movement of the gate, and prevent the accumulation of sand or other material in the slides. But there is in the record ample proof of the use of slide holders in flume gates, identical with those of the appellant, for several years prior to his patent. Those slide holders were not, except in

one or two instances, attached to the tubes. The tube was fastened in the flume, and it passed through an aperture in the plate of the slide holder, and the latter was nailed against the wooden flume. But, aside from the single feature that the slide holders were not attached to the tubes, the gates so used were identical with the appellant's device. Now, what the appellant has done is to take the best features of those two forms of gates in prior use and combine them in one. We agree with the court below that that is not invention.

Counsel for the appellant, in view of the fact that the Ford gate and the other gates of the prior art were in common use side by side for more than ten years before the date of the appellant's invention, inquires why, if the step taken by the appellant was an obvious one, it was not taken by some mechanic during all that long period of time. The answer seems to be that the Ford gate was reasonably satisfactory. According to the testimony, it is still satisfactory. It is displaced by the appellant's gate only in cases where the purchaser desires to secure a better made gate, and perhaps a better gate, at a higher price than the Ford gate.

The decree is affirmed.

LAVIGNE MFG. CO. et al. v. JOHN F. McCANNA CO.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1911. Rehearing Denied July 27, 1911.)

No. 1,711.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FORCE-FEED LUBRICATOR.

The McCanna patent, No. 822,900, for a force-feed lubricator, especially adapted to automobile purposes, is for a combination of old elements, but the combination was not anticipated and discloses invention; also, *held* infringed.

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

Suit in equity by the John F. McCanna Company against the Lavigne Manufacturing Company and Brandenburg Company. Decree for complainant, and defendants appeal. Affirmed.

For opinion below, see 177 Fed. 709.

Dyrenforth, Lee, Chritton & Wiles (John H. Lee and P. C. Dyrenforth, of counsel), for appellants.

Josiah McRoberts, for appellee.

Before GROSSCUP and BAKER, Circuit Judges, and HUMPHREY, District Judge.

BAKER, Circuit Judge. The decree appealed from sustained the validity and found infringement of claims 2, 3, and 5 of patent No. 822,900, June 5, 1906, to McCanna for a force-feed lubricator. The claims and sufficient of the prior art to show the nature of the defense of want of invention are contained in the opinion of the Circuit Court. 177 Fed. 709.

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

From the oral arguments and from a study of the record and briefs we are satisfied that the decree is right; and our decision may well be rested on the opinion of the Circuit Judge. The situation is the oft-recurring one, where none of the prior devices anticipates the patent, but where, taking one element here and another there, all the elements of the patented combination may be found in the prior art, and where, by recasting prior structures in the light of the patented structure, something like it may be produced. McCanna's oiler is especially designed for use on the dashboards of automobiles. It is compact and self-contained. The entire pump mechanism is inside of the oil reservoir. The stroke of the piston is adjustable, through a lost-motion device, by varying the position of the associated adjusting stem. The cover of the reservoir and the adjusting stem which projects therethrough coact as a regulating gauge to enable the operator to set the stem at any predetermined height with respect to the cover so as to throw a corresponding amount of oil, and at the same time coact as a visual indicating gauge to show that the pump is acting and how it is acting. The unified results and capabilities of the McCanna oiler are not mere aggregations of separate old devices having separate old results, but come from an integral, mechanically-true combination. This oiler has proven to be a mechanical and commercial success, and we agree with the Circuit Court that the appellants have appropriated the combinations of the claims in suit.

A point is suggested in appellants' brief, without any foundation having been laid in the Circuit Court, and without assignment of error here, that appellant, Lavigne Manufacturing Company, was not properly before the Circuit Court. On examination we find that there was sufficient proof of infringement by said appellant within the district and division.

The decree is:

Affirmed.

SARFERT CO. v. CHIPMAN et al.

(Circuit Court of Appeals, Third Circuit. January 23, 1912.)

No. 1,503.

1. PATENTS (§ 328*)—ANTICIPATION—PROCESS AND MACHINE FOR SINGEING HOSIERY.

   The Sarfert patents, No. 667,142, for a process of singeing hosiery after it has been distended on a stocking board, and No. 758,937, for a singeing machine, are both void for anticipation by prior use.

2. PATENTS (§ 328*)—INVENTION—PROCESS OF TREATING HOSIERY.

   The Sarfert patent No. 667,140, for a process of singeing hosiery "in the green," or after it has been saturated with an oxidizing solution, is void for lack of invention.

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

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

Suit in equity by the Sarfert Company against Frank L. Chipman and others. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 181 Fed. 518.

E. Hayward Fairbanks and Hector T. Fenton, for appellant.

Henry N. Paul, Jr., and Joseph C. Fraley, for appellees.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

LANNING, Circuit Judge. On March 10, 1900, Max Sarfert filed his application for a patent upon a machine for singeing the outer surfaces of hosiery for the purpose of giving it a smooth or lisle-thread finish, and on March 13, 1900, he filed another application for a patent for processes and products relating to the singeing art. The first of these applications resulted in the issue on May 3, 1904, of patent No. 758,937 for a singeing machine. The second of them was subsequently divided, and resulted in the issue on January 29, 1901, of patent No. 667,140, for a process of singeing hosiery after it has been saturated with an oxidizing solution, and patent No. 667,-141, for a stocking having its outer surface singed, and patent No. 667,142, for a process of singeing hosiery after it has been distended on a stocking board. Of these four patents the defendants are in the present suit charged with infringing three of them, No. 758,937, No. 667,140, and No. 667,142. The Circuit Court decided that claims 10, 11, 14, 15, 17, and 19 of patent No. 758,937, and patent No. 667,142, are null and void because of prior use, and that patent No. 667,140 is null and void for lack of novelty. Consequently the bill of complaint was dismissed.

[1] The numerous claims involved in the suit may be seen by reference to the opinion of the Circuit Court in 181 Fed. 518. We shall not quote them here. Nor shall we give any extended review of the proofs contained in the large record. The case has had our careful consideration, and we are of the opinion that it was properly decided in the court below. The art of singeing laces, hosiery, and other fabrics for the purpose of giving them a finer or glossier finish was no new thing in 1900. As far back as November 3, 1817, an English patent was issued to J. S. Hall for a "method of improving every kind of lace or net, or any description of manufactured goods whose fabric is composed of holes or interstices made from thread or yarn, as usually manufactured, of every description, whether fabricated from flax, cotton, wool, silk, or any other vegetable, animal or other substance whatsoever." After stating, in his specification, that the object of his invention was to remove from fabrics of the kind above mentioned the loose ends of fibers which are not twisted into the thread or yarn of the fabric so as to form a part of the solid body thereof, and which gives the fabrics a furry or woolly appearance, he said:

"My method of improving lace or net, or such other goods as aforesaid, is by passing them through, or at a very small distance over, a body of flame or fire, produced by the combustion of inflammable gas, while the said flame, or the intense heat thereof, is urged upwards, so as to pass through

the holes or meshes of the lace or net, or such other goods as aforesaid, by means of a current of air which is produced by a chimney over a flame immediately above the lace or net, or such other goods as aforesaid. The action of the flame is to burn, singe, and destroy as much of the said superfluous fibers or fur as may be removed without injury to the lace or net, or such other goods as aforesaid."

This patent was before the King's Bench for adjudication in 1822. In the report of it, contained in Webster's Patent Cases, page 100, it is said that as cotton lace, which had come to be largely manufactured in Great Britain, "had the disadvantage of being covered with a species of wool" which gave it a "fogginess in its general appearance to the great diminution of its value," it occurred to some that "this defect might be removed by the action of heat, which had been already applied to removing the same kind of unevenness from muslin, by passing it over rollers of hot iron, *and from mitts and stockings by singeing.*" The report further states that witnesses for the defense had proved that the flame of charcoal, paper, shavings, etc., had been used for many years "to singe the fibers from silk, cotton, or lace sleeves," and that the articles for this purpose "had been placed on a wooden leg or a sleeve board."

Hall's patent and the report of the adjudication upon it are alone sufficient to show that the singeing of a stocking for the purpose of removing the loose ends of the fibers that project from the body of the yarn of which the stocking is made, and thereby giving to the stocking a finer finish, was an art well known in 1822. The report also shows that it was then common to singe the fibers from lace sleeves while distended on a board.

Another English patent, No. 4,779, was issued to Hall in October, 1823, for an improvement upon the one of November 3, 1817, in which he refers to the singeing of stockings as well as other articles. Certainly there could have been no invention, after 1823, in singeing stockings while distended by means of an interior support. The counsel for the appellants in a very able brief contend that the Hall patents disclose only the art of singeing goods in an unstretched condition, and that up to 1897 the art of singeing stockings, while stretched or distended by means of an interior support, was never practiced in this country. But, conceding for the purpose of the argument that this contention is sound, we have before us, not only the disclosures of the Hall patents, but those of the report of the litigation in which the first Hall patent was involved. The disclosures of the two patents supplemented by those of the report were accessible to all interested persons in this country, and they told those skilled in the art of singeing stockings everything that process patent No. 667,142 tells them. Consequently, we find that patent anticipated by prior use.

If the machine patent No. 758,937 is the embodiment of inventive genius, it is not of Sarfert's genius. Sarfert was anticipated by Morgan & Menzies. It is not claimed that Sarfert's machine was constructed before March, 1898, and it was not until March 10, 1900, that his application was filed. The application was bitterly opposed by Robert Meyer in two interference proceedings, and, as already stated,

the patent was not granted until May 3, 1904. Those contests, however, have no bearing upon the present question, since Morgan & Menzies were not parties to either of them. We are satisfied that tubular articles, such as sleeves and stockings, had been singed while distended on boards in England for 75 years when the Sarfert application was filed. The art in this country prior to the Sarfert application shows various machines used for singeing purposes. Previous to December, 1896, Morgan & Menzies had had their stockings dyed and finished by Thomas West. West's method of finishing was by rumbling, a process which produced a fine finish, but which it is not necessary now to describe. It was an expensive process because it frequently resulted in great damage to the goods. West, unwilling to assume longer the risks of the business, notified Morgan & Menzies that he would no longer finish their goods. This was probably in the month of December, 1896, and thereupon Morgan & Menzies began the construction of their first singeing machine, which they put into use certainly not later than January, 1897. They improved it by the addition of a second burner as early as April, 1897, and they used it for singeing stockings, distended on boards, from April, 1897, until the construction of a new double-burner machine in 1899. The new machine was then used until its destruction by fire in 1900. It is true that the witnesses for the defendants differ as to the number of rollers in this new machine, but that it and the machine preceding it each had two burners, that they each singed stockings distended on boards, and that they were used by Morgan & Menzies, the first from April, 1897, to the early part of 1899, and the second from 1899 until it was destroyed by fire in 1900, is established by the weight of the testimony on the subject. The appellant company is quite right in its contention that the defense of prior use, to be valid, must be clear, convincing, satisfactory, and free from reasonable doubt. The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154. But here the rule of evidence in that regard has been fully complied with. In speaking of the nature of the evidence adduced by the defendants on the question of anticipation of the process patent No. 667,142, and the machine patent No. 758,937, the learned judge of the Circuit court, in language which we quote as expressive of our own views, said:

"In the present controversy, I think, the testimony measures up to the full requirements (of the legal rules in reference to the defense of anticipation); it is clear; it is detailed and specific; it comes from credible and disinterested witnesses; it is of ample volume; and it is corroborated in important particulars. Moreover, taken as a whole—and this, I think, is a matter of great value—it produces the irresistible effect of truthfulness."

We agree with him that the machine patent is void because of prior use.

[2] The process patent, No. 667,140, is for singeing hosiery "in the green." In carrying out the process the goods are saturated in a solution known as "aniline black solution," then dried, then placed on a former or board, and then singed by being passed through a singeing machine. "The particular solution to which I have above referred," says the patentee in his specification, "is an oxidizing or

mordanting solution, and after the goods are dried, after being saturated therein, they are in a state of oxidation, and in drying the goods turn to a greenish hue." This step in the manufacture of hosiery, however, was not new. Mr. William Secher, an expert witness for the complainant, on cross-examination, testified as follows:

"Q. First, about patent 667,140. It is true, is it not, that the so-called oxidizing solution is the ordinary aniline black solution which is commonly used in the dyeing art as the first step in the process of dyeing goods a fast black? A. It is true.

"Q. Do you find that this patent 667,140 anywhere tells you this? A. On line 52, of page 1, of the printed specification of patent No. 667,140, the statement is made that the oxidizing solution is known as aniline black solution.

"Q. Please tell me whether this statement is substantially correct. Stockings, after they are knit and before they are dyed, are said to be 'in the gray.' As the first step to dye them aniline black they are subjected to a mordanting solution, called aniline black solution, as a result of which they turn to a greenish hue. They are then said to be 'in the green.' As the final step of the dyeing process they are subjected to another solution as the result of which the goods are given their final fast black color. And Sarfert's patent, No. 667,140, claims as a process the singeing of stockings while they are in the green in order to give them a so-called lisle finish? A. That statement is substantially correct, according to the description and claims of this Sarfert patent."

Saturating the goods in an aniline black solution was one of the well-known steps in dyeing a fast black. To subject the goods after this step had been taken to a flame for the purpose of singeing them involved no invention whatever.

The decree of the Circuit Court will be affirmed, with costs.

AMERICAN STEEL & WIRE CO. OF NEW JERSEY v. DENNING WIRE & FENCE CO.

(Circuit Court of Appeals, Eighth Circuit. January 12, 1912.)

No. 3,510.

1. PATENTS (§ 235*)—INFRINGEMENT—MODE OF OPERATION—EQUIVALENCY OF MACHINES.

While it may not be said as matter of law that a machine which operates continuously cannot be the equivalent of one which operates intermittently, when the machines are complex, the difference in the mode of operation is very strong evidence that there is such a difference in them as will avoid infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 371; Dec. Dig. § 235.*]

2. PATENTS (§ 328*)—INFRINGEMENT—WIRE FENCE MACHINE.

The Bates patent, No. 577,639, for a wire fence machine, covers a combination of four mechanisms, each of which performs a separate part in the production of the fence and works intermittently, the first two simultaneously, followed by the third and fourth working successively. Such patent *held* not infringed by a machine in which all the mechanisms operate continuously and simultaneously.

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

Suit in equity by the American Steel & Wire Company of New

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

Jersey against the Denning Wire & Fence Company. Decree for defendant, and complainant appeals. Affirmed.

See, also, 176 Fed. 564.

Charles C. Linthicum (Charles MacVeagh and Linthicum, Belt & Fuller, on the brief), for appellant.

Thomas A. Banning (Samuel W. Banning and Walker Banning, on the brief), for appellee.

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

AMIDON, District Judge. This is a suit for the infringement of letters patent No. 577,639, issued to Albert J. Bates, February 23, 1897. The patent has been before the courts of this circuit in former litigation between the same parties. (C. C.) 160 Fed. 108, and 169 Fed. 793, 95 C. C. A. 259. It was there sustained, and defendant's machine involved in that suit was held to infringe. After that litigation was closed, defendant devised and put into commercial use four new machines which form the subject of the present suit. The trial court found no infringement and dismissed the bill. Complainant appeals.

The structure of plaintiff's machine, and the scope of its patent, are described and defined in the opinion in the first suit. The novelty of the invention over the prior art consists in applying a plurality of stay wires in straight line sequence across the strand wires of a fence, and intercoiling the ends of these stay wires with each other and about the strand wires. The object attained had been sought by manufacturers of wire fence for half a century. It had been approached by slow stages. See patents cited in the former litigation. [C. C.] 160 Fed. 108; [C. C.] 160 Fed. 125. The Edenborn patent, No. 558,787, came near the Bates invention. He used substantially the same mechanisms, but did not combine them in the requisite plurality to give his stays a straight line sequence across the strand wires. His stays were staggered, alternating between the different strands. The result was a feeble support. The Bates invention took the step which avoided this defect. It cannot, however, be spoken of with propriety as a pioneer patent.

In the first suit defendant charged that the claims of the Bates patent were so general as to cover the functions of his machine instead of the machine itself and its mechanical equivalents. The claims standing alone give color to that defense. They run:

"In a wire fence machine the combination of (1) mechanism for intermittently feeding a plurality of longitudinal strand wires. (2) Mechanism for intermittently feeding a plurality of stay wires simultaneously and transversely of the strand wires. (3) Mechanism for cutting off suitable lengths of the stay wires to span the space between the strand wires. And (4) mechanism for simultaneously coiling the adjacent ends of the stay wires around the strand wires."

This language is broad enough to cover every possible mechanism which would construct the kind of fence produced by the Bates machine. We upheld the patent by applying the familiar rule which

requires claims to be read in connection with specifications. The patent was thus confined to the invention, and limited to the machine described in the specifications and its mechanical equivalents. All the elements are old not only in the general field of industry, but in the form adapted for use in fence making. Bates' combination is his invention.

The patent is for a combination of four groups of mechanisms, each of which performs a separate part in the production of a wire fence. First, there are two mechanisms which simultaneously feed out a plurality of strand wires, and transversely to these a plurality of stay wires. When this function is performed, these mechanisms stop. Then a cutting mechanism which has been stationary, starts up, severs the several sections of the stay wires, and stops. Next the coiling mechanism which has been stationary starts up, engages the ends of the stay sections, and intercoils them with each other, and about the strand wires. Then the coilers stop. This completes a section of the fence. Thereupon the structure is moved forward, and at the same time the feeding mechanisms start up, and repeat their function. The distinctive feature of the Bates machine, both in its structure and its principle of operation, will thus be seen to be a succession of complete stops and starts. This intermittency is expressly claimed in most of the claims of the patent, and must be read into the others from the specifications, in order to sustain such claims. It is in this machine that the Bates invention lies, and not in the product. In determining the question of infringement, attention must be directed to the structure of this machine and its principle of operation.

The distinctive feature of defendant's machines 3, 4, and 6 is continuousness of action in every part. The moment the feeding of the wires begins, the entire machine starts, and continues in action so long as the process of manufacture is carried on. The several mechanisms that do the feeding, the cutting, and the coiling all synchronize together so as to continually produce the complex result of a completed fence fabric. These machines are fundamentally different from the Bates machine, both in their structure and in their principle of operation, and they also possess in the quality of continuousness of action a distinct mechanical advantage over the wear and jar and wasted energy arising from the rapid succession of starts and stops of the Bates machine. For these reasons, we think they do not infringe.

[1] Counsel urges that it cannot be declared as a matter of law that a machine which operates continuously cannot be the equivalent of one that operates intermittently, and we are not disposed to question that statement. Much would depend upon the structure of the particular machine. If it was simple, the change from intermittent to continuous action might be produced by the mere substitution of a well-known mechanical equivalent, or a slight mechanical adjustment. But the likelihood of the result being thus produced decreases as the complexity of the machine increases; and, when mechanisms attain the complexity of those involved in the present suit, the difference in the mode of operation is very strong evidence, indeed, that

there is such a difference in the machines as will avoid the charge of infringement. The two capital criteria by which to determine the question of infringement are structure and mode of operation. Where both of these are substantially the same in two machines, their identity for purposes of the patent law is established; but, when either is absent, the requisite identity to constitute infringement is as a rule wanting. It can hardly be questioned that continuous action constitutes a radical difference from intermittent action in the mode of operation, and also implies a corresponding difference in structure. In the machines here involved this implication is fully sustained by an inspection of the machines themselves. Dryfoos v. Wiese (C. C.) 19 Fed. 315, affirmed 124 U. S. 32, 8 Sup. Ct. 354, 31 L. Ed. 362, tends strongly to show that a machine which is continuous in its operation does not infringe one which is intermittent.

[2] It is true, as counsel says, that we did not sustain the Bates patent in the former suit because of its intermittency of action. That property was old. As the opinion clearly shows, our decision is based on the fact that the Bates machine combined the old elements for feeding, cutting, and coiling in the requisite plurality and simultaneity of action, to produce the stay in straight-line sequence across all the strands, thus producing a new and useful result. Defendant's machines produce the same result, and employ a like plurality of parts operating simultaneously, but they differ from plaintiff's machine in the feature as to which that machine was at one with the prior art, namely, by substituting continuous for intermittent action. Even if it were true (as it is not) that defendant's machines were identical with plaintiff's in every feature which distinguished plaintiff's machine from the prior art, there would be no inconsistency between our present and former opinions, if defendant's machines differ from plaintiff's in the feature of intermittency as to which it was at one with the prior art. Infringement would be avoided if to substitute continuous for intermittent action required a machine new in structure and mode of operation. All would depend on the importance of this change.

Much of the brief for appellant is devoted to pointing out likeness in details between the elements of the patented machine and defendant's machine. The force of these arguments is greatly weakened, if not wholly destroyed, by the conceded fact that the elements of these machines are old in the art of fence making. All that Bates did was to combine them in the requisite plurality and particularly the mechanism for feeding the plurality of stay wires simultaneously and transversely of the strand wires in straight line sequence. The modifications which he made in the old elements in order to combine them in this plurality certainly required, when compared with the prior art, no greater exercise of inventive talent than was used by defendant in making the modifications necessary to substitute continuous for intermittent action. Both used the same old elements and hence it is an easy matter to point out likenesses.

Counsel for appellant attempts to meet the apparently fundamental distinction between its machine and respondent's which we have pointed out, by three arguments:

(1) He says, first, that defendant's machines do not continuously feed the stay wires. He bases this argument upon the fact that in the Denning machines the stay wires are not fed immediately against the strand wires, but are fed in at a distance of several inches from them, and there appropriate sections are cut off, and then these sections are pushed across to the strand wires, moving in a line at right angles to the feed of the stay wires. The mechanism which performs this operation pushes the stay sections across, and then returns to the place from which it started, ready to receive the next section. Notwithstanding the feeding mechanism, and this machine which pushes across the stay sections, are in constant motion, counsel says that the intermittency in presenting the stay wires to the strand wires is the same as the intermittency of the Bates machine. In our judgment this argument forsakes the action of the machine, and looks to the movement of the stay wires as elements of the fence structure. The form of the fence forbids that the stay wires should be continuously applied to the strand wires. They are separated from each other by several inches, according to the size of the mesh desired, and this necessitates a corresponding succession in their application. But the feed of defendant's machines is continuous both as to the movement of the stay wire and the stay sections, and the mechanism which produces those movements. There is a succession of stay wires, but no intermittency in the machine.

(2) Defendant says that both in the Bates machine and in the defendant's machines, now under consideration, there is a time when the strand wires and the stay wires are in transverse movement with respect to each other, and that this is succeeded by a stage when the strand wires and the stay wires are held firmly together, and are relatively to each other motionless; and he urges that this succession of relative movement and rest, as between the strand wires and the stay wires, constitutes the real intermittency of the Bates invention. Again, we answer that this argument diverts attention from the Bates machine, where his invention lies, to the movement of parts of the fence fabric in the process of manufacture. Because the strand wires in both machines are at one time in motion relative to each other, and at another time stationary, in no way impairs the basic fact that the Bates machine in producing this result along with the other results of the process, operates by a succession of stops and starts, whereas the defendant's machines proceed in a continuous motion.

(3) It is urged that the feed of the stay wires in defendant's machines is in fact not continuous because the knives which sever the sections move in a plane transverse to the movement of the wires; hence, it is urged, there must be a brief instant while the knife is passing across the wire when the wire is stationary, and that the succession of stops and movements thus produced creates in the defendant's machines the intermittency of action which is found in the Bates machine. This contention is made notwithstanding the manifest fact that the mechanism which feeds the wire forward is in continuous action. The argument seems to us purely fanciful. It substitutes a metaphysical intermittency for a mechanical one.

We also think that in defendant's machine No. 6, the "automatic hand" by which the stay sections are transferred from the cutting machine to the strand wires, is not the mechanical equivalent of the tubes which guide the stay wires against the strand wires in the Bates machine.

Defendant's machine No. 5, referred to in the evidence as the "Hopper Machine," has the same intermittency of action as the Bates machine. It is distinguished from that machine by wholly omitting the cutting mechanism. Stay sections are cut in the various lengths needed for different kinds of fence, in a stock machine, built expressly for the purpose, and which was sold and used for many years before the date of the Bates patent. These sections are deposited in quantity in separate hoppers, one hopper for each space between the strand wires, and pass by gravity down a chute into notches in the upper edges of horizontal bars which carry them sidewise against the strand wires into position for coiling. The charge of infringement is, of course, avoided, if the cutting mechanism of the Bates combination is wholly omitted, and not supplied by a mechanical equivalent. Counsel for appellant urges that the device by which the stay wires are separated from the mass in the hopper, and transferred to the strand wires, is really the mechanical equivalent of the Bates cutting mechanism, and ingeniously suggests that the "cutting out" of the stay wires from the quantity in the hopper is the mechanical equivalent of the cutting off of the sections of the stay wire in the Bates machine. Without in any way questioning the good faith of counsel for appellant, this seems to us a far-fetched argument. No one but a patent expert in extremis would ever think of applying the term "cut" to the operation by which the individual stay wires are separated from the mass in the hopper. To find such a use of the term reference is made to the figurative language of the cowboy who speaks of "cutting out" a steer from the herd; and it is urged that this is the same cutting as the severing of the sections of the stay wires in the Bates machine. When words are thus paltered with in a double sense, there is an end of all profitable reasoning. We use the same word, but we mean different things. There is hardly a common word in our English speech which does not range through a vast variety of meanings. But in the exact science of mechanics, when we use such a term in describing the operation of machines, we select one of its meanings and adhere to it. Any other practice can lead only to confusion. In the Bates machine there are knives and elaborate mechanism for their operation in cutting off the stay sections from the stay wires. This mechanism is clearly claimed as an element of the Bates combination. It thus becomes a part of his invention, and any machine which wholly omits it escapes the charge of infringement. It seems to us too plain for argument that defendant's hopper machine does this.

Appellant complains because after the decision in the former case respondent deliberately set about devising, with the aid of patent experts, a machine which would produce the Bates fence, without infringing the Bates patent. It is sufficient to answer that complaint

in the language of Mr. Justice Grier in Burr v. Duryee, 1 Wall. 531, 574, 17 L. Ed. 650: "Every man has a right to evade a patent, provided he does not invade the rights of the patentee."

The decree is affirmed.

WINSTON v. CROTON FALLS CONST. CO.

(Circuit Court of Appeals, Second Circuit. January 8, 1912.)

No. 96.

PATENTS (§ 328*)—INVENTION—APPARATUS FOR MAKING CONCRETE BLOCKS. The Winston patent, No. 849,824, for an apparatus for making concrete blocks, comprising a platform movable along a trackway and a plurality of molds between the rails and on either side of such trackway into which concrete may be shoveled from the platform, all the parts of such apparatus being old, does not disclose patentable invention.

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

Suit in equity by James O. Winston against the Croton Falls Construction Company. Decree for defendant, and complainant appeals. Affirmed.

This cause comes here upon appeal from a decree of the Circuit Court, dismissing a bill in equity for infringement of a patent. The patent is No. 849,824, April 9, 1907, to complainant for "apparatus for making concrete blocks."

John K. Macdonald and Eugene S. Macdonald, for appellant.

O'Brien, Boardman & Platt (Frank H. Platt and Livingston Platt, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The specification recites that in the construction of viaducts, dams, etc., it has become the practice to employ blocks of concrete or artificial stone, which blocks are molded or formed in the locality where the work is in progress, the ingredients being suitably mixed and the composition prepared in bulk and then distributed to the various molds; that experience had shown the work of making these blocks to be slow, tedious, and expensive; that many thousands of large blocks would sometimes be required, each block being so large as to require the use of derricks to handle it after it had been made. In the drawings and specifications the patentee sets forth one form of his improvement.

In the yard where these blocks are to be made there are two trackways, *A* and *B*, on which run trucks which support a traveling platform upon which is placed a mass of the concrete material from which the blocks are to be formed. There is a loading device, such as a derrick, for depositing the concrete upon the flat surface of the top of the platform; such platform being preferably formed by placing

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

a sheet of metal on it for facilitating the operation of shoveling. The patentee says:

"The tracks *A*, *B*, are preferably placed apart a suitable distance to permit the concrete molds *G* to be placed there between the truck platform, being of such a height above the ground line as to pass over the tops of the molds *G*. Outside of and on either side of the track *I* arrange rows of molds *H*. It will thus be seen that extending lengthwise of the trackway and between such tracks are rows of molds *G*, while rows of similar molds *H* extend lengthwise the track outside the rail. The mass of material is dumped upon the platform, and the operators standing thereon may shovel or otherwise deposit and distribute the material into the molds between the tracks and those alongside the tracks; the truck (platform) in its progress being moved along, thus enabling the line of molds, which may extend any suitable distance—for instance, 200 yards—to be filled successively. When the material in the mold has settled and hardened, so that a complete block is formed, the molds may then be knocked down or moved, and the block or blocks conveyed to the place of use by any suitable means."

The claims are:

"1. An apparatus for manufacturing molded blocks, comprising a platform movable along a trackway, a plurality of molds arranged between the rails of the trackway, and a plurality of molds arranged alongside and outside of the trackway, the construction being such that the material may be distributed from the platform to the molds between the rails and to the molds outside the trackway."

"2. An apparatus for manufacturing molded blocks, comprising a trackway, a plurality of molds arranged in the space between the rails of the trackway, a plurality of molds arranged alongside of and outside of the trackway, a platform movable along the trackway and upon which the material is deposited in bulk and from which said material is distributed to the molds between the rails and to the molds outside the trackway as the platform is moved from place to place on the trackway, such platform being of sufficient height to pass over the molds between the rails."

All the elements enumerated in the claims are old. There were trackways on which moved receptacles which contained mixed-up concrete and from which such concrete was passed into molds. These moving receptacles sometimes passed over the top of the molds as they moved from place to place. There could be no invention in making the receptacle stronger and mounting it on heavier trucks with a broader wheel base, if it was to pass over several molds at the same time. The only novel feature about the entire arrangement is the location of the molds—"a plurality in the space between the tracks" and "a plurality alongside and outside of the trackway." By this arrangement more molds can be filled at the same time. But a mere improvement in the method of doing the work does not necessarily lie within the boundaries of patentable invention. In the opinion of Judge Hough, who heard this cause at circuit, is found the following:

"The complainant has apparently devised an organization for a concrete block yard showing skill in economics and marked executive ability, yet he has utilized the old materials and old tools, not in a patentable combination, but only in economical sequence. What he uses he does not utilize in combination to produce a new mechanical or material result; but he arranges the order of work so as to minimize both labor and transportation, and this, in my judgment, is not patentable."

This is in accord with the views expressed by this court in Dodge Coal Co. v. N. Y. C. & H. R. R. R. Co., 150 Fed. 738, 80 C. C. A.

404, for improvements in storage apparatus. In that case the idea of the patentees was the removal and conveyance of material from one pile or fixed point to another pile or fixed point, thus making "a large area tributary to a single central point." We said:

"The would-be inventor or designer of novel mechanism for accomplishing these objects, therefore, is presumed to have before him the whole field of the art of engineering construction applicable to the collection and removal, the elevation and conveyance of such materials from one point to another. And the question here presented is not what these particular patentees may actually have invented, but whether the state of the art in such engineering field was such that it would require invention to construct such apparatus, or *to adapt the constructions known in the art of the exigencies of a particular situation*, or the requirements of a certain class of materials."

See, also, our opinion in Dunbar v. Eastern Elevator Co., 81 Fed. 201, 26 C. C. A. 330, where the patent was for an improvement in grain elevators, consisting of a combination whereby a portable elevator tower was arranged to be moved along so as to reach the different hatches of a vessel, and so that two elevator legs may be simultaneously used. We held that what Dunbar did was to adapt well-known devices to the special purpose for which he contemplated their application. To the same effect is our opinion in Fowler v. City of New York, 121 Fed. 747, 58 C. C. A. 113, where the patent was for "a new plan for handling the large number of passengers who patronize the public vehicles provided for rapid transit in large cities," consisting of a succession of "island stations" of tracks with loops and arrangements for crossing at different levels and a regulation of the movements of express and local trains. We held that to plan all these details would undoubtedly require ability of a high order, but not inventive genius. Reference may also be had to Richards v. Chase Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991.

The case at bar is within the principles enunciated in these decisions. Winston's contribution to the art was simply due to the evolution of the business. If the blocks were to be used in building a small culvert or railroad farm crossing, all that would be necessary would be a few molds placed conveniently to a roadway and a wagon loaded with concrete and drawn by a horse alongside of the molds. When the work increased in size, the roadway would naturally be replaced by rails forming a track, and the wagon by a flat car or similar platform running on the tracks and moved, perhaps, by steam power, with rows of molds on each side of the track to receive the concrete. When the work grew to still larger proportions, the question would naturally present itself how the molds and the concrete-bearing moving platform might be arranged relatively to each other to insure the greatest economy of time, space, and labor. But that would be purely an engineering problem, and its solution would not come within the field of patentable invention.

Decree affirmed, with costs.

UNION PAPER BAG MACH. CO. et al. v. ADVANCE BAG CO.

(Circuit Court of Appeals, Sixth Circuit. January 3, 1912.)

No. 2,141.

PATENTS (§ 328*)—INFRINGEMENT—PAPER BAG MACHINE.

The Dulin patent, No. 578,550, for a paper bag machine, covers an invention the essential feature of which, as stated by the patentee, is "the rotating and coacting device for distending the blank to the diamond form," an essential element of such device as shown and described on each claim being a lower central gripper, and the patent is not infringed by the device of the Bartholomew patent, No. 736,673, which employs no lower central gripper and no mechanism which is an equivalent therefor.

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

Suit in equity by the Union Paper Bag Machine Company and the Union Bag & Paper Company against the Advance Bag Company. Decree for defendant, and complainants appeal. Affirmed.

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

Dulin's patent, No. 578,550, issued March 9, 1897, relates particularly to machinery to make what is known as the "square satchel-bottom bag," or bag made from a bellows-folded tube with a satchel bottom formed upon its end. The object of his invention is particularly to provide machinery whereby such a bag may be made with greater speed than had theretofore been practicable and to simplify the machinery employed in the manufacture of such bags. His invention, he declares, is entirely concerned with that portion of the paper bag machine by which a bellows-folded tube has its end spread out into the form known as the "diamond fold," which invention may be used with any convenient mechanism for forming the tubes or in folding the diamond in order to close the bottom of the bag. These declarations of his acquire importance in considering his specification and claims of combination.

The bag planks passing from the feed rolls *A* and *A'* shown in his drawings are delivered between the rolls *B* and *B'*. As they advance toward the latter rolls, the lower central gripper *c* closes down and engages the tab U^2, being the lower edge of the blank. About that time the lifter *D* is made to rise, lifting the blank so that the upper edge or tab U^3 will lie beneath the end of the gripper *C*, that it may be thereby more certainly caught by such gripper. As the rolls revolve, *C* is made to close down, and thus secures the upper edge of the blank. As *B* and *B'* continue their rotation, the upper and lower edges of the blank being held by the grippers *C* and *c*, respectively, the mouth or the bellows-folded blank opens, and, shortly before the rolls have reached approximately the position shown at Fig. 8, the side grippers *E E* and *e e* engage the corners of the blank and grip them upon the resilient plates B^5 B^5, shown on the rolls *B* and *B'*. The side grippers are held in this closed position upon the blank until their rotation fully distends the bellows fold and brings it to a substantially straight line, as indicated at U^{10} in Fig. 18. The upper grippers *E E* are then rapidly withdrawn. The lower grippers are released later, as appears from Fig. 19. The central grippers, which hold the upper and lower edges of the blank respectively, release their hold as *B* and *B'* revolve. The upper part of the partially distended diamond is then held in place by a plate *K* and the wing folders *M*. These wing folders move in while the blank is distended, and engage the sides of the distended diamond before the side grippers release, and then rapidly close down, pressing the blank against *B* and *B'* and the plates

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

N N. The lower central gripper *c* and the lower side grippers *e e* retain their hold upon the bag until it has been engaged between the rolls *B'* and *L*. The blank is then drawn down from between the rolls *B* and *B'* passing through the rolls *O O'* and *P P'* between the wing folders *M M* and the plates *N N*. These rolls or pressing devices break down the final lines of the diamond fold, and deliver the diamond folded blank to a bottom forming mechanism. The transverse creaser *I J* engages and creases the blank as it is engaged by the side grippers. Of the creasing mechanism the patent recites:

"While it is convenient to place this transverse creasing device upon the rolls *B B'*, the essential feature of its use is that some creasing device should be provided which will form the transverse crease at the point referred to some time in advance of the distension of the tube in the formation of the diamond fold, and any creasing device may be used for this purpose."

The patentee states that the flattened faces B^2 B^3 on *B* and *B'* may be dispensed with. In that event, the grippers would work in connection with the rounded surface of the roll. He does not limit himself to a construction which necessarily retains the rolls *B* and *B'* as appears from the following:

"While I have shown and above described the central and side grippers, as well as the transverse creaser, as secured to the rolls *B* and *B'*, it is obvious that these rolls, besides serving as supports for the grippers and creaser, serve merely as feed rolls; and it is also obvious that by providing any other convenient feeding apparatus the use of the rolls *B B'* as such could be dispensed with, the essential feature of my invention being the rotating and coacting device for distending the blank to the diamond form in the manner above described, and, as already stated, it is not essential that the transverse creaser should revolve on the same or approximately the same center or centers with the grippers, or, indeed, that it should be a revolving device at all."

The right reserved to dispense with the rolls *B B'* is in one respect hazily expressed. It makes a difference whether the words "as such" refer to rolls as the feeding apparatus, mentioned in the same sentence, as their antecedent, or to rolls as supports for the grippers and creaser and as serving as feeding devices, as stated in the preceding sentence. In view, however, of the conclusion reached, it is not necessary to determine the question thus suggested.

The claims alleged to be infringed are 1, 2, 3, 4, 5, and 7. They are all combination claims. The elements entering into the first are as follows:

(1) Rotating central upper gripper *C*, arranged to seize the top ply of the bag blank.

(2) Rotating lower central gripper *c*. This is arranged to seize the lower ply of the bag blank. These two grippers also operate to spread open the end of the blank.

(3) Rotating upper side grippers *E E*, which are so disposed as to enter the bellows fold of the blank and engage its upper ply.

(4) Rotating lower side grippers *e e*, which are so arranged as to enter the bellows fold of the blank and engage its lower ply. These four rotating side grippers spread out the blank in the plane of the bottom to be formed thereon.

(5) Mechanism for engaging and disengaging the grippers and the blank described.

(6) Mechanism for drawing the diamond-folded blank from the path of the grippers after they have released it.

The second claim adds to the first, "a transverse creaser arranged to crease the blank on the line about which the diamond is spread open and at a time prior to the distension of the diamond fold."

Claim 3 differs from the second only in that it provides that the transverse creaser shall be rotating.

The elements of claim 4 are as follows:

(1) Roll *B*, the upper diamond-forming roll.
(2) Roll *B'*, the lower diamond-forming roll.
(3) The central gripper *C* on upper roll *B*.
(4) Central gripper *c* on lower roll *B'*.
(5) Side grippers *E E* on roll *B*.
(6) Side grippers *e e* on roll *B'*.
(7) Mechanism for operating the grippers.

Claim 5 adds to claim 4 "a creaser, arranged to crease the blank transversely on the line about which the diamond fold is opened, at a time prior to the distension of the diamond."

Claim 7 adds to claim 4 the element of the lifter *D* arranged to lift "the blank as it enters between the rolls so as to bring its upper ply to position to be engaged by the upper gripper."

The above statements as to the elements of the several claims of combination accord with the evidence offered by both parties.

The operation of respondent's machine is sufficiently stated as follows:

As the bellows-folded paper tube advances over the former *53*, *54*, the upper ply is punched by the notch cutter. It is then slitted above and beneath by a rotary slitter. It next passes between two feeding and creasing rolls, *6*, *10*, the creases made extending inwardly from both outer edges of the ply toward the middle. The feeding and cutting rolls *16*, *24*, sever both plies of the blank to near the outer edge of such plies from the extremes of the curved transverse notch first made in the upper ply, leaving, however, the marginal edges unsevered, and also the lower ply unsevered for a short distance at its middle. The side tucks of the partially severed tube are slightly spread by stationary side plates *63*, whose purpose is to facilitate the operation of rotary cutters *41*, *47*, which completely sever the tucked edges of the blank. The tube is now wholly severed except a narrow portion or tang at the middle of the lower ply. Upturning flanges *57* on the former *55* separate the leading end of the plies in such a way that the upper ply is lifted against the upper diamond-forming roll to permit the entrance of the upper duplex central grippers. These flanges open and hold open the advanced end of the bag tube in a position for the upper side to be caught by the grippers on the upper folds of the gripping cylinder. As the diamond-forming rolls advance, the upper grippers, which are in the form of jaws or pincers, operating in slots within rollers, close upon the tab or end of the upper ply and hold it, while the roll rotates, until they are released by the operation of mechanism within the roll. As the rolls revolve, the end of the blank distends by the upper edge of the blank being pulled forward by the grippers and the lower edge being pulled downward by the unsevered portion or tang of the under ply. At the proper time, as the tube is distended, upper and lower side grippers or clamps distend the interior triangles of the diamond fold, and, when the diamond is completed, they are mechanically retracted. As the diamond is drawn down, its upper half is folded, as it descends, against the body of the bag blank. The upper central gripper, as it revolves, carries the upper end of the diamond in the rear of a plate *162*, which sustains such upper end after it has been released from the gripper. The vibrating side-folding wings, *220*, *220*, after the diamond has been distended and disposed properly by the gripper and lower drawing roll, press inward against and flatten down the outer folds of the diamond to enable it better to retain its form. Movable wire fingers, *208*, enter the opening end of the bag blank and spread out quickly against the wrinkled sides of the paper to assist in disposing the paper for the vertical side edges of the diamond. When they retract, the diamond slides downwardly past them. The bottom of the bag is carried down and passes between the feeding and cutting cylinders, *236*, *242*, by which the unsevered strip or tang between preceding and successive bags is severed, wholly detaching the preceding bag, which is then ready for the end-folding and pasting devices.

The respondent's device is constructed under the Bartholomew patent, No. 736,673, issued August 18, 1903. The individual bag is not severed from the succeeding portion of the bag tube until after the diamond-fold is made. In the Dulin method, the severing occurs before the bag reaches the feeding rolls *B* and *B'*.

About the time Dulin's patent issued he built one of his machines. The complainants subsequently acquired it. They removed from it the Dulin opening devices and substituted therefor those of the Stilwell machine, because some three or four old bag makers in complainant's factory "were eternally finding some little complaint about it," and it was therefore deemed "advisable, in the interest of the factory, to change back to the Stilwell opening device and let them run it." This machine, in a period of 10 years,

was in use two-thirds of the time. The complainants have manufactured but one machine with reference to the Dulin patent. To simplify it, to make it less liable to give out, and greatly to improve it over his original machine, modifications of the device described in his patent were introduced. It was subjected to a test run extending through quite a period. It developed a greater speed capacity than any previously patented paper bag machine, but its frequent stoppage was necessary on account of breaks and consequent repairs resulting therefrom. These are the only machines that have been constructed with reference to his patent. His device is mechanically operative, but whether in an entirely successful way, if constructed in accordance with his specification, is not clearly shown. Modified, as hereinbefore stated, it has been put to commercial use, but not extensively so. It has supplanted no previous machine. It did not constitute such an advance in the art of bag making that complainants deemed it advisable to discard their old machines to use Dulin's. On the contrary, in complainant's factory, of 156 machines 43 are of the Lorenz & Honiss type and 68 are of the Stilwell type. A patentee may, if he chooses, reserve his invention to his private use or even suppress it. That it has not gone into practical use does not prejudice his rights, but the fact that it has not gone into actual service may be used in construing and interpreting his patent. National Malleable Castings Co. v. Buckeye M. I. & C. Co., 171 Fed. 853, 862, 96 C. C. A. 515. There is no evidence that the Dulin machine has been preferably used when machine service has been required. His device, principally in a modified form, has been in actual, but not extensive, service. In view of the greater speed and other excellencies claimed for it, which, if they exist, would make its operation commercially more profitable than that of other machines, after making due allowance for the cost of discarding such other machines to be displaced by those made under the Dulin patent and for the natural reluctance of a manufacturer to suffer such loss, the want of a more extended use of it by those who control and own it and who are largely engaged in making bags is not without significance. The contention that Dulin's invention has made no appreciable impression on the practical art is not wholly without color.

In the reported cases of Union Paper Bag Machine Co. v. Waterbury (C. C.) 39 Fed. 389, decided in 1889, and New York Paper Bag Machine Co. v. Hollingsworth (C. C.) 48 Fed. 562, decided in 1891, the fact was recognized that paper bags were then produced with great cheapness in vast quantities, and were a universally known article, and that the art of paper bag making had commercially been well developed. The development in paper bag machinery, according to both experts and as shown by the prior art, has been toward rotary construction. The rotary idea found expression in the patents of Lorenz & Honiss, No. 333,647, issued January 5, 1886, and of Appel, No. 387,573, issued August 7, 1888. Stilwell's patent, No. 417,346, issued December 17, 1889, shows both a rotary and a reciprocating movement. In Eastern Paper Bag Co. v. Continental Paper Bag Co. (C. C.) 142 Fed. 491, which involved the validity and construction of the Liddell patent, No. 558,969, issued April 28, 1896, it was said: "Aside from the cylinder and forming plate oscillating about its rear edge, everything in these claims (those there in question) is necessarily old in the arts. The cylinder also is found in patent No. 333,647, issued January 5, 1886, to Lorenz & Honiss, the central feature of which was said to be the continuously-rotating cylinder, but in lieu of a forming-plate, oscillating on its rear edge, the means used for making the 'diamond' fold were the blades of one or more pairs of box-folding mechanism."

But in that case it was found that prior to Liddell's patent the problem of a rotating cylinder with a mechanism which folds the paper bag of the kind in question had not been satisfactorily solved. The very pith of Liddell's invention was held to be in the combination of a rotary cylinder with means for operating the forming-plate in connection therewith, limited, however, to means which caused the plate to oscillate about its edge on the surface thereof. When the case reached the Supreme Court (210 U. S. 416, 28 Sup. Ct. 748, 52 L. Ed. 1122), Mr. Justice McKenna said that the Liddell patent was the first to show an "operative combination of a rotary cylinder and forming-plate oscillating thereon." The conclusion to be drawn from that

case is that Liddell, the issuance of whose patent antedates that of Dulin more than ten months, satisfactorily wrought out the problem of a rotating cylinder with mechanism for folding the paper bag—a problem which others had solved, but not in a satisfactory way.

A comparison of the Liddell and Dulin devices is instructive. Liddell's patent shows two sets of side grippers and one roll or cylinder, on which are fastened two lower grippers. Dulin's shows two rotating rolls, each bearing a set of grippers. Liddell's upper central gripper *E'* is not affixed to a roll, as is Dulin's upper central gripper *C*, but to plate *E*, which oscillates instead of rotating. Liddell, however, did not limit himself to the device as shown in his specifications for controlling the movement of plate *E* relative to his cylinder, but says that the plate may be moved or operated by any other suitable means, and the return movement of the plate *E* is unimportant so long as it is secured in time to receive a new bag tube or section thereof. He thus provided for the substitution of an equivalent. May that equivalent be a roll? If plate *E* be mounted on a cylinder, would it not thereby be given a return movement by passing entirely around the circle instead of oscillating over an arc of it? The language of Liddell's specification suggests queries of this character, and the evidence of complainant's expert given in the Eastern Bag Company Case, as developed by his cross-examination in this case, points to their answer in the affirmative. Such answer would seem to be consonant with reason. In any event, a substitution of an equivalent would involve a change of mechanism, just as would the use of a substitute for the rolls *B* and *B'* in Dulin's device. The bag is opened up in the Liddell device by *c* and *E'*, much the same as by *C* and *c* in the Dulin patent. As the bag opens Liddell's side grippers play into the folds of the bag, and, when the bottom is completely formed, the bag is carried downward between rolls. All this is done also in the Dulin device. Liddell provides for two grippers on his roll, but explains that by reducing the size of the roll one of the grippers may be dispensed with. The mechanism of the two inventions which puts the bag-bottom forming device into operation differs, and the devices themselves operate consequently in a somewhat different manner.

Dulin was not the first to employ, for opening the mouth of the blank and forming the diamond fold, a central upper gripper and upper side grippers operating on the upper ply of the bellows-folded blank, in co-operation with a lower central gripper and lower side grippers for operating on the lower ply of the blank. He was the first to place two sets of grippers on rotary rolls, but Liddell in his above-mentioned patent and also in his patent No. 564,288 issued July 21, 1896, had shown a set of grippers on a rotating roll adapted to carry them, and with them the lower ply of the bag, downward in combination with a corresponding set of grippers mounted on an upward swinging element above the rolls adapted to carry them, and with them the upper ply, and, as above stated, had suggested that an equivalent might be used to effect the return of his plate *E* to receive a new section of the bag tube. The conjoint action of the grippers in the one device, as in the other, operates to open the mouth of the blank and form the diamond fold. Liddell materially advanced the rotary idea, and made a marked contribution to the art of paper bag making. But for him greater credit would have fallen to Dulin. Both owe much to the prior art. Even if prior inventors had not satisfactorily solved the problem, stated by Judge Putnam, of combining a rotating cylinder with mechanism which folds the peculiar bag here in question, their predecessors in the art, Stilwell and Lorenz & Honiss, had so far solved it, had so far covered the field of invention, that their machines, at the time of the taking of the evidence herein, still remained the practically operative means for supplying the demand excepting a small percentage for such bags. Dulin's machine, through the use of the upper roll *B*, carries the rotary idea somewhat further than Liddell's, as distinctly described in his specification, but on the record Liddell, not only as regards the intellectual origin of his mechanism, but also as to the issuing of his patent, is entitled to seniority. He so materially narrowed the field of invention, as regards the rotary idea, as to limit substantially the breadth of construction to be given to Dulin's patent.

The use of grippers long preceded the advent of Liddell and Dulin as inventors, but they each made an improvement as to their use. The Lorenz & Honiss patent, No. 337,966, March 16, 1886, shows a roller and an upper gripper, and four outer edge or tucker grippers. Stilwell's patent, No. 417,346, provides for but one central gripper and two side grippers, which latter are carried by a roller. Appel's device, No. 387,573, calls for two gripper cylinders with a gripper on each roll. It discloses means for spreading the plies of the bag tube, but no side grippers. Other instances might be cited, but a further review of the prior art will not be attempted. In the Eastern Paper Bag Company Case it was held that there were but two new elements in the Liddell patent—the cylinder and the forming-plate oscillating about its rear edge. The essential feature of Dulin's invention is the rotating and coacting device for distending the blank to the diamond form in the manner described in his specification. The similarity of purpose of the two inventors is apparent. As regards the application of the rotary idea, their inventions differ in degree and in the mechanism employed, but both obtained substantially the same result. Dulin's position, however, is not so favorable as that of Liddell because the latter preceded him in and occupied so much of the same particular field of invention.

In each of the claims in question Dulin has designated by letters of reference the grippers, described in his specification, which open and form the diamond fold. The only operation described in the patent, in so far as the grippers are concerned, involves the conjoint use of them all, and requires their form and construction to be that specifically shown by the descriptive parts of the patent. Each gripper is made a distinct element in each of his claims and therefore becomes material, and a court may not say, when a patentee has thus limited his claims, that any element is not material. When an invention is of a pioneer character, highly meritorious in its conception and usefulness, the mere use of letters will not operate to limit the inventor to the exact form of device shown. He is in such case entitled to a broad construction of his patent in view of the advance made by him in the art. But if the field of the invention was limited, and if he has made an improvement of a narrow character, just sufficient to constitute a patentable invention, he will be allowed nothing more than the specific description shown. Dulin's improvement is within a narrow scope, and by accurately and specifically describing by means of letters just what he has invented he limited himself to the advance which he in fact made. McCormick v. Aultman, 69 Fed. 371, 16 C. C. A. 259; Muller v. Lodge & Davis, 77 Fed. 621, 23 C. C. A. 357; Ross-Moyer Co. v. Randall, 104 Fed. 355, 359, 43 C. C. A. 578; Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122.

Dulin's device involved invention. Considering the prior art, and especially as evidenced by the Liddell patents the slight practical use made of Dulin's invention, suggestive, as it is, of slight commercial value and of slight influence on the art, and the limitations imposed on its mode of operation by his specification and reference by letter in his claims of combination to certain of their elements, it cannot be regarded as a pioneer or as entitled to the liberality of treatment accorded to that comparatively rare class of inventions. Dulin never intended to dispense with any of his grippers, or that they should operate otherwise than set forth, and he should, therefore, be limited to the exact form of device shown in his patent, subject to such modifications as may result from the substitution for rolls *B* and *B'* of other mechanism producing rotary movement. His specification contains no intimation that such modification shall in any manner alter the operation or form of his bag-opening grippers. These, with the rotary movement, are the very pith of his invention. He preserves both, but the grippers which retain the bag and open it and shape its diamond fold are to remain unchanged, whatever may be the means of producing rotary motion.

Counsel have with ability and zeal discussed the differences in mechanism of the Dulin and Bartholomew patents, contending on the one hand that those differences are such as to warrant the issuing of Bartholomew's patent, and, on the other hand, that, as found in his device, they are mere attempts at evasion of the Dulin patent, and are at best but mere equivalents. There is

nothing in the record to indicate that Dulin's patent was cited by the patent office examiner as anticipating Bartholomew's. I do not think error was committed in granting Bartholomew's application. An extended discussion of the above-mentioned differences will not be profitable. But one of them will be noticed—a difference which constitutes an insurmountable barrier to the success of the complainants in this case.

In Dulin's machine, the diamond-forming rolls *B* and *B'* are also feed rolls. In respondent's machine they are not such. In Dulin's machine the middle portion of the advanced end of the bag tube is held against the descending surface of the lower roll by central gripper *c*, which gripper is an element of each of the claims alleged to be infringed. The respondent's machine has no such gripper, but in its operation the middle of the blank ply end remains connected with the rear end of the preceding blank. The drawing rolls engaging such preceding blank pull on the tang and thus draw forward and downward the blank on which the diamond fold is being made, the first bag blank, however, being guided downward by hand on its passage to the drawing rolls. A tang thus connecting bags in process of manufacture is shown in the Stilwell patent, No. 165,381, issued July 6, 1875, and Liddell's two patents, No. 197,870, issued December 4, 1877, and No. 558,969, issued April 28, 1896. In the last-named patent, the inventor, after suggesting that an unsevered portion of the bag tube may be utilized as a substitute for the nippers or grippers for the pulling of the tube in its onward course in the manufacturing process, expressly reserves the right to modify or change his mechanism for securing the several movements of its different parts, and does not confine himself to the details of construction shown in his specification. Dulin made no such reservation. The use of a paper tang to draw the bag tube through his mechanism was never within his contemplation. His specification and claims repel the idea of the abandonment of any one of either the central or side grippers. The lower central gripper *c* is retained as a characteristic feature of his invention and as a distinct element in each of his claims excepting 11 and 12, and they relate to portions of the mechanism other than the central grippers or either of them. The gripper *c* is a necessary part of his machine. If it were omitted, the machine would not be operative, because the blanks are severed before they reach the diamond-forming rolls and their retention by some device on the lower roll is requisite. They are fed forward by the rolls *B* and *B'*, or by some substituted device, if such rolls may be dispensed with. There is no hint within the folds of the letters patent that the gripper *c*, or that any of the grippers, may be eliminated along with the rolls. The respondent's machine does not have any mechanical device as a substitute for such gripper, or any of the devices used by complainants to put it in operation. Its machine omits not only the gripper *c*, but the gripper-bar *c'*, against which it clamps the bag blank, the rock shaft c^2 which carries the gripper, the spring c^3 surrounding such shaft, the crank c^4 c^5 fastened to the shaft and carrying the antifriction roller c^6 and also the cam *3*, which co-operates with such roller to operate the rock shaft and gripper, and it adds nothing to supply the place of any of such omitted parts. The position of complainants, as stated by their counsel, is that the equivalent of the gripper *c* is present in the organization of the respondent's machine, "because some part of the machine does actually hold the same part of the lower ply of the blank in the same place on the lower roll that it is held by the gripper, and does actually carry that part of the blank through the same path and in the same relation to the other coacting devices which is true of the lower central gripper of the Dulin machine." But the part of the machine which holds the lower part of the blank in the correspondingly same place on the lower roll as it is held in complainant's machine by the gripper *c* would not so hold it, were it not for the unsevered tang, nor would it without such tang carry that part of the blank through the same path and in the same relation to the other coacting devices as is effected by the gripper *c* of the Dulin machine. The tang is not a mechanism. It is a part of the material, of the bag tube, which the respondent's machine so manipulates as to hold the bag blank in proper position for treatment, and pulls it and the bag tube forward and downward.

The tang which connects the blanks in the respondent's machine does not constitute a part of the machine itself so as to become an element in the combination covered by the patent. In American Tobacco Co. v. Streat, 83 Fed. 700, 28 C. C. A. 18, decided by the Fourth Circuit Court of Appeals, a rolling apron was one of the elements of combination claimed by the plaintiff for his patented device. The defendant did not use such apron in his device, but instead thereof a leaf of tobacco, which was used as a binder in the manufacture of cigars on his machine, which leaf performed the same office as the apron in plaintiff's device. In speaking of such a state of facts the court said: "It follows, therefore, that, unless the machine used by the defendant employed a rolling apron or its mechanical equivalent in the manufacture of cigars or cheroots, there has been no infringement of the patent granted the complainant below. The evidence plainly shows that the defendant did not use an apron on any of the machines employed by it in its factory, that the machines used by it are without aprons, and are not used for making completed cheroots or cigars, but solely for the purpose of making 'bunches.' This is, in fact, admitted by the appellee; but it is claimed for him that the second wrapper used by the appellant is the mechanical equivalent of the apron described in the Streat patent, or, in fact, is the apron itself. In our opinion, the leaf of tobacco called the 'second binder' is not the mechanical equivalent of the rolling apron described in the Streat patent, which was evidently intended by the patentee to be a strip of strong paper—shown by the evidence to be, in practice, a strip of enameled cloth of sufficient strength to stand the strain of constant use—permanently fastened to the table, intended for continuous use, of greater strength than the tobacco leaf, the inherent weakness of which it was designed to obviate. But the second binder cannot be considered an element of the machine itself, as it is a part of the material used on the machine in the manufacture of the product offered for sale. We do not think that an article manufactured in a machine in the manner and for the purposes contemplated when the machine itself was made can be held to be a part of the machine which so produces it."

The same point was under consideration by the Supreme Court in Morgan Envelope Co. v. Albany Paper Co., 152 U. S. 425, 431, 14 Sup. Ct. 627, 630 (38 L. Ed. 500), and, while the court did not express an opinion upon it, the following language employed by Mr. Justice Brown is significant: "The first defense raises the question whether, when a machine is designed to manufacture, distribute, or serve out to users a certain article, the article so dealt with can be said to be a part of the combination of which the machine itself is another part. If this be so, then it would seem to follow that the log which is sawn in the mill; the wheat which is ground by the rollers; the pin which is produced by the patented machine; the paper which is folded and delivered by the printing press—may be claimed as an element of a combination of which the mechanism doing the work is another element. The motion of the hand necessary to turn the roll and withdraw the paper is analogous to the motive power which operates the machinery in the other instances."

It is a well-known rule that, if any one of the parts of a claim of a combination is formally omitted and is supplied by a mechanical equivalent performing the same office and producing the same result, the patent is infringed. It is equally well settled that the claim of a combination is not infringed, if any of the material parts of the combination are omitted and wholly dispensed with, without substituting therefor an equivalent for the omitted portion. Any inventor has a right to use any of the parts of another's combination if he does not use the whole of it. If he uses all the parts but one, and for that substitutes another mechanical structure substantially different in its construction and operation, but serving the same purpose, he is not guilty of infringement. The respondent having omitted one of the elements of the complainants' combination, and having substituted no mechanical equivalent for it, infringement does not exist. Cases illustrating the point under consideration are Ott v. Barth (C. C.) 32 Fed. 89; American School Furniture Co. v. Sauder Co. (C. C.) 113 Fed. 576; Levy v. Harris (C. C.) 124 Fed. 69, affirmed on appeal in 130 Fed. 711, 65 C. C. A. 113; Wicke v. Ostrum, 103 U. S. 461, 26 L. Ed. 409; Derby v. Thompson, 146 U. S. 476,

13 Sup. Ct. 181, 36 L. Ed. 1051. Walker on Patents, § 349, announces the rule thus: "Omission of one ingredient of a combination covered by any claim of a patent averts any charge of infringement based on that claim. A combination is an entirety. If one of its elements is omitted, the thing claimed disappears. Every part of the combination claimed is conclusively presumed to be material to the combination, and no evidence to the contrary is admissible in any case of alleged infringement. The patentee makes all the parts of a combination material, when he claims them in combination, and not separately."

Dulin may have been unfortunate in not seeing that he might dispense with the lower gripper *c* and use in lieu thereof the material on which his machine operated. The prior art told him that he might do this, if he saw fit, but he elected to take his patent with the lower gripper feature of his device as an essential element of his structure. Section 4888, R. S. (U. S. Comp. St. 1901, p. 3383), required that he file in the Patent Office a written description of his machine, and of the manner and process of constructing and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains or with which it is most nearly connected, to construct and use the same, and to explain not only its principles, but the best mode in which he has contemplated applying those principles, so as to distinguish it from other inventions and to particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. The best and only mode as contemplated by him of applying the principles of his machine was by the use of lower gripper *c*. Whether gripper *c* is of the essence of the real invention or not is immaterial. The court is not at liberty by construction to expand the claim beyond the fair meaning of its terms or to contract it so as to eliminate any of its elements. The claim speaks for itself, and the court must take it as it finds it. The purpose of the section of the patent law above quoted is to relieve the courts of the duty of ascertaining the exact invention of the patentee by inference and conjecture derived from a laborious examination of previous inventions and a comparison of them with that claimed by the inventor. What Dulin patented was the particular means devised by him by which a particular result is attained. He left it open to any other inventor to accomplish the same result by other means. To constitute identity of invention, and therefore infringement by the respondent or its assignor, not only must the result attained be the same, but the elements combined in both Dulin's and the respondent's machines must be the same, and must be combined in the same way, so that each element shall perform the same function, provided, always, however, that differences alleged are not merely colorable according to the rule forbidding the use of known equivalents. The principles above stated find support in Pittsburgh Meter Co. v. Supply Co., 109 Fed. 644, 652, 48 C. C. A. 580; Keystone Co. v. Phœnix Iron Co., 95 U. S 274, 24 L. Ed. 344; Robinson on Patents, § 457; Kinzel v. Brick Co., 67 Fed. 926, 15 C. C. A. 82; Fay v. Cordesman, 109 U. S. 408, 420, 3 Sup. Ct. 236, 27 L. Ed. 979; Cimiotti Co. v. Fur Refining Co., 198 U. S. 399, 415, 25 Sup. Ct. 697, 49 L. Ed. 1100; Eames v. Godfrey, 1 Wall. 78, 17 L. Ed. 547; Water Meter Co. v. Desper, 101 U. S. 332, 25 L. Ed. 1024; Electric Signal Co. v. Hall Signal Co., 114 U. S. 87, 5 Sup. Ct. 1069, 29 L. Ed. 96; Brown v. Davis, 116 U. S. 237, 6 Sup. Ct. 379, 29 L. Ed. 659; Walker on Patents, §§ 186, 340, 349; Yale Lock Co. v. Sargent, 117 U. S. 373, 6 Sup. Ct. 931, 29 L. Ed. 950. Were Dulin's a pioneer invention, the mere fact that a device substituted for an omitted element in his claim of combination performs the same function as such omitted element, is not sufficient to establish infringement. Westinghouse v. Boyden, 170 U. S. 569, 18 Sup. Ct. 707, 42 L. Ed. 1136. Mr. Justice Brown in that case said: "But, after all, even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result. He must have reached it by substituting the same or similar means, or the rule that the function of a machine cannot be patented is of no practical value. To say that the patentee of a pioneer invention for a new mechanism is entitled to every mechanical device which produces the same result is to hold in other language that he is entitled to patent his function."

The conclusion is that the respondent's machine does not infringe. The bill is dismissed.

Francis T. Chambers (Arthur Stem and J. E. Hubbell, on the brief), for appellants.

Edward Rector, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. The issues in this suit are those usually found in a controversy touching the infringement of a patent. Admittedly the patent in suit is for a combination invention comprising appliances which are each old in the art of forming, through mechanism, the well-known diamond fold on the ends of bellows-folded paper bag blanks; each claim in suit being properly a combination claim. One of the defenses urged is that the alleged infringing machine entirely omits and dispenses with one of the essential elements of the patent in suit, without employing a mechanical equivalent for the omitted element. There is no dispute as to the omission, but an issue is sharply drawn as to substitution of a mechanical equivalent. The necessity of passing upon further issues made in the case will depend upon how this issue must be determined.

April 4, 1896, Charles E. Dulin made application for the grant of letters patent for the invention in suit, and on March 9, 1897, letters patent of the United States, No. 578,550, were issued. Through assignments, the Union Paper Bag Machine Company, one of the appellants, became the owner of the patent, and thereupon granted the Union Bag & Paper Company an exclusive right and license under the letters patent to use, manufacture, and sell paper bags made in accordance with the patent. The alleged infringing machine was constructed in substantial accordance with the Bartholomew patent granted August 18, 1903, under letters patent No. 736,673.

As regards the patent in suit, after stating in the specification that the invention relates to machinery for manufacturing paper bags and particularly the "square satchel-bottom bag," and that the object of the invention is to secure greater speed and simplicity in the manufacture of these bags, Dulin says that his description and drawings—

"* * * show that portion of a paper bag machine by which a bellows-folded tube has its end spread out into the form known as the 'diamond fold,' and I will here say that my present invention is entirely concerned with this part of the machine, which may be used with any convenient mechanism for forming the tubes and for folding the diamond in order to close the bottom of the bags."

He then proceeds with much detail and particularity to describe the machinery designed to accomplish his declared object, and then states:

"The features above referred to comprise those which embody the essential novelties of my invention."

This is followed by a description of devices which as he states do not differ essentially from those in common use with other machinery, although somewhat modified and changed to adapt them for use in

connection with his device. Thereupon he describes the operation of the machine as a whole. These descriptions refer by letters and numerals to drawings consisting of Fig. 1 to Fig. 20. The claims set out in the letters patent are 16 in number, and those in suit are claims 1, 2, 3, 4, 5, and 7. Claim 1 is:

"1. In a paper bag machine mechanism for spreading out the diamond fold on the end of a bellows-folded tube comprising rotating central grippers *C c* arranged to seize the top and bottom plies of the bellows-folded blank and spread it open at its end, rotating side grippers *E e* arranged to pass between the bellows folds of the bag, engage its corners and spread out the blank in the plane of the bottom to be formed thereon, mechanism for engaging and disengaging the grippers and the blank as described and mechanism for drawing the diamond-folded blanks from the path of the grippers after they have released it."

Claim 2 comprises the elements of claim 1, with the addition of 'a transverse creaser arranged to crease the blank on the line about which the diamond is spread open and at a time prior to the distention of the diamond fold." Claim 3 corresponds with claim 2, except that it describes the creaser as a "*rotating* transverse creaser arranged," etc. Claim 4 introduces rolls as among the devices forming the diamond:

"4. In a paper bag machine, mechanism for spreading out its diamond fold on the end of a bellows-folded tube consisting of rolls as *B* and *B'*, between which the bellows-folded blanks are fed in combination with central grippers *C* and *c*, one secured to each roll and arranged to seize the top and bottom plies of the blank as it enters between said rolls, side grippers as *E E* and *e e*, one pair attached to and rotating with each roll, said grippers being adapted to move in between the rolls and between the bellows folds of the blank and to clamp the blank to the faces of the rolls at its corners and mechanism for operating the grippers to cause them to engage and disengage the blank at proper times."

Claim 5 corresponds with claim 4 with the addition of "a creaser arranged to crease the blank transversely on the line about which the diamond fold is opened at a time prior to the distention of the diamond." Claim 7 is like claim 4, except that it introduces "a lifter as *D* arranged to lift the blank as it enters between the rolls so as to bring its upper ply to position to be engaged by the upper gripper." It is stated in the specification in substance that a dual object is accomplished by the rolls *B* and *B'* in that they serve as supports for the grippers and creaser and also as feed rolls, and that other convenient feeding apparatus might be provided in their stead; but it is stated, further, that:

"The essential feature of my invention being the rotating and coacting device for distending the blank to the diamond form in the manner above described."

As it seems to us, no study of the specification and claims in connection with the drawings contained in the letters patent in suit can fail to reveal the distinctive character and the importance to the Dulin machine of the lower central gripper *c*. It forms part of each of the six claims in suit, not to speak of the number of times it is mentioned and made to appear in the specification and drawings; and, further, special mechanism is obviously necessary, and it is both de-

scribed and displayed, for operating the lower central gripper. The experts seem to be in harmony as to the necessity of both central grippers, the lower as well as the upper. They are part of the group constituting the "rotating and coacting device for distending the blank to the diamond form;" and this, as we have seen, is declared by the inventor to be "the essential feature" of his invention.

The lower central gripper is used for the further purpose of drawing the blank downward until the diamond fold is gripped between rolls B' and L, when the blank is released from the gripper and carried thence to the pairs of rolls O and O' and P and P', which lie lower down in the machine. True, complainant's expert testified that the grippers could be replaced by other (undescribed) devices; but we cannot discover that Dulin ever intended to dispense with any of the grippers or to have them operated except in accordance with his painstaking description. Indeed, to do so would be inconsistent with the very scheme of his invention. If rolls B and B' were dispensed with, as suggested by Dulin, still some other means for operating his rotating and coacting device for distending the blank to the diamond form would, so far as appears, have to be devised and equipped with the grippers, the lower as well as the upper; for otherwise his device would not produce the desired diamond form.

The necessity to employ the lower central gripper in the Dulin machine to effect the downward movement of the blank arises from the fact that each blank is severed from the one in advance of it prior to the formation of the diamond fold. This severance of the blanks marks the point of departure between the two machines in dispute. The defendant does not sever the blanks, and, on the contrary, preserves them in series by central tab connections, called tangs, at their ends, until later in the process of manufacture; and so does not need or use the lower central gripper to effect the downward movement mentioned, nor to hold the lower ply against the face of the roll during the distention. It is true that in the cross-examination of one of defendant's experts it was conceded that the blanks pass along the same path over the lower rollers of the respective machines in question; but he thereupon stated:

"In the Dulin machine each blank is carried forward (after the diamond fold is formed upon it) by the drawing rolls. In defendant's machine each blank is carried forward (after the diamond fold is formed upon it) by the drawing rolls. In the use of the Dulin machine each blank is severed from the one in advance of it before the formation of its diamond fold, and it is therefore necessary to mount a central gripper on the lower roll for the purpose of drawing downward the center of the edge of the lower ply of the blank; the drawing rolls being unable to perform that function. In the operation of defendant's machine the tab-connection method is followed, and each blank drawn forward by the drawing rolls serves to draw downward the center of the edge of the lower ply of the succeeding blank. There is therefore no lower central gripper in this machine, nor is there anything substituted for it."

The learned judge of the court below considered this difference as amounting, under the authorities, to a distinction sufficient to relieve the defendant from the charge of infringement. Counsel disclaim having said that the connecting tang uniting the blanks was an equiva-

lent for the central gripper of the lower roll in the Dulin machine. Their contention is that the mechanism in defendant's machine, which, acting through the tang, holds the center of the blank on the lower roll, just as does the central gripper of the patent in suit and with the same results on the work of the combination, is not only an equivalent, but a well-known equivalent, for the central gripper.

This argument seems to us to overlook the real constitution of the elements "central grippers," which, of course, include lower central gripper *c*, as disclosed by the claims. These elements are named in substantially the same language in each of the claims in suit, and in each claim they must be the same thing. We find, however, that some of the claims calling for these elements also call for another additional element: "Mechanism for drawing the diamond-folded blanks from the path of the grippers after they have released it." This mechanism, the feeding or drawing rolls, pulls the completed fold away from the point of release from lower central gripper *c* and passes it on through the machine. The mechanism in defendant's machine, which is claimed to be an equivalent of the lower central gripper, is the same group of feeding and drawing rolls which draws the completed fold away. These two elements, being separately called for in the claims, cannot be the same thing, and the drawing rolls in defendant's machine being in practically the same form as in the patented machine cannot be both the central lower gripper and the mechanism for drawing a fold away from it. It follows that the connected series of blanks passing through defendant's machine is the only substitute there to be found for the lower central gripper and its operating devices in the Dulin machine. The Dulin machine could not form the diamond fold, but for the lower central gripper; nor could defendant's machine, but for the tab-connections preserved in its machine until the blanks reach the drawing rolls *236* and *242*. Thus, an element of the patent in suit is not only omitted from the alleged infringing machine, but no *mechanism* is put in its place. The most that can be said is that rolls *236* and *242* fairly correspond with rolls of the Dulin machine; but this only accentuates the lack of substitution of mechanism for the omitted mechanism.

It is settled that a claim for a combination is not infringed if any one of the elements is omitted without substitution of an equivalent. As Mr. Justice Day said in Cimiotti Unhairing Co. v. Am. Fur. Ref. Co., 198 U. S. 399, 410, 25 Sup. Ct. 697, 702 (49 L. Ed. 1100):

"In making his claim the inventor is at liberty to choose his own form of expression, and, while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim. And it is equally true that as the inventor is required to enumerate the elements of his claim, no one is an infringer of a combination claim unless he uses all the elements thereof."

See, also, Duncan v. Cincinnati Butchers' Supply Co., 171 Fed. 656, 665, 96 C. C. A. 400 (C. C. A. 6th Cir.); Ott v. Barth (C. C.) 32 Fed. 89, 91; Pittsburgh Meter Co. v. Pittsburgh Supply Co., 109 Fed. 644, 651, 48 C. C. A. 580 (C. C. A. 3d Cir.); Rowell v. Lindsay, 113 U. S. 97, 102, 5 Sup. Ct. 507, 28 L. Ed. 906; Levy v. Harris, 130 Fed. 711, 715, 65 C. C. A. 113 (C. C. A. 3d Cir.).

Counsel for complainant rightly concede that the use of the tang in question in place of the lower central gripper does not amount to the substitution of a mechanical equivalent; for that would be to treat the paper made into diamond folds by the machine, as an element of the patent. See Morgan Envelope Co. v. Albany Paper Co., 152 U. S. 425, and language of Justice Brown at page 431, 14 Sup. Ct. 627, 38 L. Ed. 500, although obiter; American Tobacco Co. v. Streat, 83 Fed. 700, 705, 28 C. C. A. 18 (C. C. A. 4th Cir.).

In the view we have taken of the case, it is plainly unnecessary to consider either the patentability of the Dulin machine or the degree of breadth that should be accorded to it; for, conceding without deciding the question of invention, even if the patent could be said to be a pioneer (and it is in vain to insist that it is), the charge of infringement could not, in our judgment, be sustained. As Justice Brown said in Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 569, 18 Sup. Ct. 707, 723 (42 L. Ed. 1136):

"But, after all, even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means, or the rule that the function of a machine cannot be patented is of no practical value."

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

WILLIAM B. SCAIFE & SONS CO. v. FALLS CITY WOOLEN MILLS.

(District Court, W. D. Kentucky. January 18, 1912.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WATER-PURIFYING APPARATUS.

The Greth patent, No. 775,901, for a water-purifying apparatus, is void for anticipation or for lack of patentable invention in view of the prior art which disclosed all of the elements of the combination in practically similar combination, requiring no more than mechanical skill to make the improvements claimed; also, *held* not infringed, if conceded validity.

2. PATENTS (§ 246*)—INFRINGEMENT—IMPROVEMENT PATENTS.

A patent for an improved combination of old elements is limited to the very combination shown, and is not infringed by a new combination in which any one of its elements is omitted and no mechanical equivalent substituted; and in such case the range of equivalents is narrow.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 387; Dec. Dig. § 246.*

Patentability of combination of old element as dependent on results attained, see note to National Tube Co. v. Aiken, 91 C. C. A. 123.]

In Equity. Suit by the William B. Scaife & Sons Company against the Falls City Woolen Mills. On final hearing. Decree for defendant.

F. W. H. Clay and H. D. Newcomb, for complainant.
Arthur M. Hood and John B. Baskin, for defendant.

EVANS, District Judge. This action is based upon an alleged infringement of letters patent No. 775,901 applied for on February 12, 1904, and granted on November 22d of that year to John C. W.

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

Greth, assignor to W. B. Scaife & Sons Company. Twelve claims are made in the patent, but at the hearing the complainant distinctly disclaimed all demands for relief except those based upon claims Nos. 10 and 11, and rather insisted upon relief under the latter only. However, we do not feel at liberty to dismiss claim 10 from consideration, although we do so as to all the claims of the patent except 10 and 11. The complainant at the hearing also disavowed any claim to any form of relief except an injunction against further infringement.

The defendant in its answer, after denying all charges of infringement, set up several defenses, statutory and otherwise, which, so far as the testimony made them important, may be shortly stated as follows: (1) That Greth was not the original and first inventor or discoverer of any material part of the thing patented; (2) that, in view of the state of the art at the time the patent was applied for, the patent discloses no patentable invention, and is therefore void; (3) that the alleged improvements constituting the subject-matter of the patent did not amount to invention, but were the result of ordinary mechanical skill; and (4) that prior to Greth's invention and the improvements covered by the patent the same, in all patentable respects, had been anticipated by other patents and publications in the United States.

Other subordinate and incidental questions arise upon the testimony, but those we have indicated are fundamental.

Coincidentally with the examination of many authorities the court has industriously read and has carefully considered the pleadings, the testimony (which is made up largely of the instructive observations of the expert witnesses accompanied by the usual conflict among them), and the able and interesting arguments of counsel. The court will not, however, undertake to state its views with any degree of elaboration, but will confine itself, for the most part, to a statement of its conclusions, and, very briefly, the grounds therefor.

The Patent.

[1] In his petition for a grant of letters patent Greth says that he has—

"invented certain new and useful improvements in water-purifying apparatus, of which the following is a specification:

"My invention relates to water purification by means of chemicals, and the treatment of waters such as hard water which requires softening by removing certain elements such as bicarbonates and certain impurities to be precipitated preparatory to filtering the same, the invention being particularly designed to provide a compact and efficient means for mixing a softening chemical such as milk of lime, and then treating with a chemical such as soda for precipitation of the impurities and settling the water and then filtering the same, all in a continuous flow system. The objects of the invention are to provide a convenient apparatus for continuous treatment of water for softening, and precipitating impurities before filtration; to provide a superior form of vessels for thoroughly mixing milk of lime with water, and for mixing such chemicals as soda with the water after lime treatment; to regulate the soda treatment; to provide a compact and convenient apparatus in which the operations are continuous and rendered more efficient, and to generally improve the structure and operation of water-purifying apparatus. These objects, and other advantages which will hereinafter appear, I attain by means

of the apparatus illustrated in preferred form in the accompanying drawings. * * * Having thus described my invention and illustrated its use, what I claim as new, and desire to secure by letters patent, is the following: * * *

"10. In water-purifying apparatus the combination in a single tank 8 of the various compartments for lime treatment and soda treatment and water settling, the settling tank being fed directly from the treatment tank and having an inclined bottom therein below the opening from the treatment tank, and having a filter at the top of the settling tank fed by overflow from said tank, substantially as described.

"11. In continuous flow water-purifying apparatus, the combination with a single tank containing the chemical reacting compartment, and an upward-flow settling compartment, of a series of independent gravity filters carried on the top of the tank, fed by overflow from the settling compartment, and each having means for washing the filter and a valve to close communication with the settling compartment, whereby any one of said filters may be isolated and washed, while the flow continues through the others from said supporting tank."

It will be observed that claim 10 specifies a single tank 8 meant, we suppose, to be known as the "treatment tank," in which are combined various compartments for lime treatment, soda treatment, and water settling, and then a second tank, called a "settling tank," which is to be fed from the treatment tank, the former having a filter at its top. Here two tanks, several compartments, and one filter apparently are called for.

It will also be observed that claim 11 specifies only a single tank containing the chemical reacting compartment and an upward-flow settling compartment and a series of gravity filters carried at the top of the tank, the filters to be fed by the overflow from the settling compartments, and each of which filters can be separately washed by means of an arrangement of valves. Here we have one tank with various compartments in it, and a series of filters are specified to be placed at the top of the tank.

The structure shown by the drawings accompanying the patent is somewhat elaborate, showing various boxes, weirs, and pipes indicating the mechanical arrangement of the structure which the patent calls for.

These claims may be even more briefly analyzed as follows, namely:

Claim 10 is for a combination made up of the following elements: In a tank *8*: A lime treatment compartment; a soda treatment compartment; a water settling tank fed directly from the treatment tank and having an inclined bottom therein below the opening from the treatment tank; and a filter at the top of the settling tank fed by overflow from said tank.

Claim 11 is made up of the following elements: A single tank containing the chemical reacting compartment and an upward-flow settling compartment; a series of independent gravity filters carried on the top of the tank, fed by overflow from the settling compartment and each having means for washing the filter and a valve to close communication with the settling compartment, whereby any one of said filters may be isolated and washed, while the flow continues through the others from said supporting tank. This claim does not recite the separate lime treatment and soda treatment compartments, specifying only "the chemical reacting compartment."

Literally there would appear to be some difference in the two claims as to the number of tanks as distinguished from other devices in the apparatus—claim 10 naming two and claim 11 only one—but we think the difference is in form rather than in substance. As claim 11 is complainant's chief reliance, and, as it unmistakably calls for a single tank, we shall adopt that view in further considering the case, and regard the apparatus as containing a single "tank," embracing several "compartments," "boxes," "weirs," etc. The patent does not, of course, by any means cover a pioneer invention in water-purifying apparatus. Manifestly it is not a process patent. Clearly the patent was granted for what were claimed to be improvements, and upon new combinations of old and well-known elements or devices. Neither a tank with compartments through which water (controlled and diverted as desired by weirs, pipes, etc.) may pass from one to the other—nor the use for purifying purposes of lime and soda, nor weirs, nor boxes, nor valves, arranged to control the flow and current of water, nor sand filters wherever located or whether singly or in series, can of themselves be regarded as at all novel in water-purifying apparatus. We apprehend that the utmost that can be successfully claimed for complainant's patent is that those old devices are arranged and combined in a new, useful, and inventive manner.

Saying that the complainant's apparatus is for a continuous water-purifying apparatus, the view of the subject expressed by complainant's expert, Handy, is that Greth's patent constituted an improvement over the prior art in respect to compactness of apparatus and thoroughness of the water-softening operation for which it provided. (1) Compactness of the apparatus; (2) its convenient arrangement; (3) its being supported on one foundation; (4) the accurate means it affords for proportioning chemical treatment and securing a thorough mixture of the chemicals and the water; and (5) its capacity for absolutely continuous operation by means of a number of independent gravity filters are what Mr. Handy regards as the great advantages of Greth's invention. He also says that Greth, by providing a number of filters which can be properly cleansed one at a time without interfering with the operation of the others, has made his apparatus really capable of continuous operation and the production of properly clarified and softened water. He says, however, that:

"Greth does not claim multiple filters separately cleanable, except such as are of special construction and used in combination with other features of a continuous water softener."

He further says:

"Greth's invention lies in the combination of certain well-known principles or devices in a truly continuous and self-contained water-softening apparatus. It therefore seems of little consequence that witness Curtis should at length point out as not new those ideas or devices, which neither Greth nor any one else claimed to be new."

And, furthermore, he says:

"In the apparatus shown by Greth's patent 775,901, I consider as his special devices, first, the method of introducing and mixing the lime water with the hard water in a single-tank apparatus by the use of baffles arranged as shown and described, and further by the method of introducing and mixing

the soda solution after mixing with the lime solution. I consider, however, that the most important device introduced by Greth was that of placing his sand filters in or attached to the top of the tank and made in series so that they could be separately cleaned. * * * The special construction of the Greth filters lies chiefly in their arrangement in connection with the single-tank apparatus. They are supported by the top of the tank, and are readily accessible from the top. The arrangement of sand and of piping is what is usual in filters which are to be cleaned by reverse flow."

Further along he was asked:

"X Q. 43. And that arrangement of the sand and piping was usual at the time of the Greth invention, was it not? A. Generally speaking; yes."

What the witness Handy has said in commendation of Greth's patent is probably all that could be said in its praise, though it is not quite clear that he was always consistent in what he regards as its best features. It is certain, however, that some of the things he mentions might somewhat expand claims 10 and 11 of the patent, especially the former. Perhaps it is fair to conclude that he regards the chief merits of Greth's patent to be (1) that it provides a better contrivance for the work of the chemicals; and (2) that a better way is provided by the multiplication of gravity filters of a "special construction," placed at the top of the tank, for a continuous operation of the apparatus without having to stop it when one of the filters gets in bad condition. He explains, as we have just seen, that this "special construction" lies chiefly in the "arrangement" of the filters in connection with the single-tank apparatus.

The water to be purified after it comes in at the top of a compartment in one side of the tank is, as it descends towards the bottom, mixed with chemicals, in succession the one after the other, in two different but connecting parts of that compartment, the flow being retarded by baffles, by which mixture much of the undesirable substances the water contains are deposited, and afterwards the purified water, by the operation of natural laws, is forced upward in a compartment in the other side of the tank to a point at or slightly below the level of the place of its entrance, where it finds an exit through which it may flow on to the filters. These filters are made independent of each other by multiplication and simple mechanical arrangement. According to witness Handy in one statement, Greth does not claim multiple filters except those of a "special construction" and used in combination with other features. In another statement, as we have seen, he says the most important device introduced by Greth was placing his sand filters at the top of the tank. In short, the location of the filters at the top of the tank, and their being separate and independent of each other and being of a special but somewhat undefined construction, appear to be the substance of the merits claimed as constituting invention as distinguished from mechanical skill.

In the old art of devising water-purifying apparatus there always must be used chemicals of which lime and soda appear now to be regarded as among the most efficient. They must be applied to the water while it is passing through the apparatus. If the flow of the water is not retarded at certain points by means of some device, the chemicals cannot perform their perfect work. To regulate the flow

of the water or to detain it at some point, no novel device is found in the patent, however much old devices may have been fixed at new locations without, however, performing any particularly novel function. In several forms of apparatus there had been suggested and used an inclined bottom which furnished a good location for the reception of the substances deposited after the application of the chemicals, and from which point the purified water, being free from those substances, is forced upward to filters which complete the work. Probably there must be found in all water-purifying apparatus both treatment and settling tanks or compartments, and, where great quantities of water are to be treated, there must, of necessity, be either one very large filter or a series of smaller ones; the advantages of the latter being many and obvious, both in respect to repairing and cleansing. A multiplied series of filters unquestionably can easily be achieved by such devices as division walls, pipes, valves, stop-cocks, etc., which cannot be regarded as works of much difficulty to a skilled and intelligent mechanic. Besides, it is certain that in other apparatus based on earlier patents a plurality of sand filters had been located at the top, but whether or not they were attached in the same way as Greth did it does not appear to be very material.

There may in some respects be a decided improvement upon other water-purifying devices in Greth's device, but is that improvement so distinct an advance in the art as to be patentable, or should we not rather be governed by the ruling in cases like Morris v. McMillin, 112 U. S. 244, 5 Sup. Ct. 218, 28 L. Ed. 702, Roberts v. Ryder, 91 U. S. 150, 23 L. Ed. 267, Hotchkiss v. Greenwood, 11 How. 248, 13 L. Ed. 683, Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438, and Richards v. Chase Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991, which seem clearly to indicate that we should hold that Greth's production was the result of mere mechanical skill exerted after a study of the prior art? In a most industrious effort we have not been able to find in Greth's patent anything which we conceive, under the guidance of the cases cited, to be invention in the sense of the patent laws.

Anticipation.

Preliminarily we may observe that Greth's claim that he conceived (though he did not perfect) his invention in 1902 and 1903 is entitled to little weight. While he repeatedly says that he showed his drawings to one H. C. Blackwell in 1903, and talked them over with him, Blackwell was not called as a witness, nor was any explanation made of the omission. Greth in testifying was somewhat pressed by the disclosures of the Paterson British patent and the date of its filing in the Patent Office, viz., June 16, 1903, and we have not been convinced by his testimony in reference to the time he conceived the things actually patented. In this connection what was said in Eck v. Kutz (C. C.) 132 Fed. 758, 763, and Thayer v. Hart (C. C.) 20 Fed. 693, may be very pertinent. Furthermore, and especially as some of Greth's claims were rejected in the Patent Office, we think the date of his invention must be confined to a time after January 1,

1904. In strictness February 12, 1904, might be the proper date, as the application was then filed, but we may concede a few weeks for the preparation of drawings and papers. We are led to this conclusion by the ruling in cases like Automatic, etc., Company v. Pneumatic Scale, etc., Corporation, 166 Fed. 288, 92 C. C. A. 206, inasmuch as if the invention was very long before January 1, 1904, due diligence was not used to adapt it.

Whatever may have been the value of Greth's earlier drawings and conceptions, and whether or not they may have been precursors of the conceptions actually covered by his patent, we think, in dealing with the question of anticipation, we must assume that they were of a date later than January 1, 1904, and in connection with a careful analysis of claims 10 and 11 we have considered the previous patents, and the publications in this country prior to that date; also we have considered the testimony of defendant's expert, Curtis, and have concluded that in all patentable respects the invention of Greth had been anticipated by various other patents or had been disclosed in previous publications in the United States. Of course, all the arrangements found in Greth's patent have not been found or collected in precisely the same form in any previous patent, but there does not appear to be any separate feature of it which had not been anticipated and in a general way so combined as to be practically capable of accomplishing the same results in an efficient manner. At all events, we think the anticipations were such as to negative the claim that Greth was the original and first inventor of the improvements in water-purifying apparatus described in the patent in suit or that there was any patentable invention covered by it. We think there was no particular novelty and no invention—nothing more than ordinary mechanical skill—in his aggregation and relocation of contrivances which expert witness Handy truly says were all old.

Presumption of Validity.

The Patent Office being charged by law with the duty and being given the power to pass upon all applications for patents, the courts always prima facie presume that its action in granting a patent is correct. But this presumption has not been treated by the courts as conclusive, and the reports are full of cases in which the presumption was overcome and the patents held invalid. It is by no means certain that this has not been the result in a majority of the cases which have reached the Supreme Court. The reason must be that in many essential respects the hearing in the Patent Office is to a degree ex parte, and there must be a natural and altogether proper disposition there to give the applicant the benefit of all serious doubts.

In this case some of the most significant patents in the Patent Office apparently were not cited or referred to in the consideration of the petition for the patent in suit. This circumstance alone goes far to overcome the presumption of validity. Westinghouse, etc., Co. v. Toledo, etc., Co., 172 Fed. 392, 393, 97 C. C. A. 69 (C. C. A., Sixth Circuit).

We have reached the conclusion that the presumption has been overcome in this instance.

Infringement.

The issue as to infringement has been emphasized. The complainant's expert, Handy, testifies to the conviction that "the novel filter arrangement invented by Greth has been exactly reproduced by the defendant's apparatus." This very broadly stated conclusion is combatted by the other side. In considering the issue, we must, of course, bear in mind (1) that several claims asserted by Greth in his specifications were rejected in the Patent Office; and (2) that the invention he claims was asked for as an improvement upon other forms of combination of old devices. It results that his patent must be construed in connection with what took place in the Patent Office.

[2] Furthermore, it is a general rule that the improved combination for which a patent is granted must be limited by the elements therein specified. If the old elements were combined in a substantially different way, or if the purifying result be accomplished by a different combination in defendant's apparatus, there might be no infringement. In other words, patents for improved combinations must be construed strictly, there being no legal right to a monopoly in cases where there is a mere improved combination except in respect to what is substantially that very combination, the law leaving it open to all others to make any other combination of old things which is not substantially the same as the one described in the patent. We think this plainly results from the decisions in many cases, and, furthermore, we think the rule is particularly applicable to cases like this. After we had written to this point, there came from the clerk, in due course, a copy of the opinion of the Circuit Court of Appeals of this circuit in the case of the Union Paper Bag, etc., Company v. Advance Bag Company, 194 Fed. 126, decided January 3, 1912, in which the court, speaking through Judge Warrington, said:

"It is settled that a claim for a combination is not infringed if any one of the elements is omitted without substitution of an equivalent."

This proposition was based upon what the Supreme Court in an opinion by Mr. Justice Day had said in Cimiotti Unhairing Co. v. Am. Fur Refining Co., 198 U. S. 410, 25 Sup. Ct. 702, 49 L. Ed. 1100, as follows:

"In making his claim the inventor is at liberty to choose his own form of expression; and, while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim. And it is equally true that, as the inventor is required to enumerate the elements of his claim, no one is an infringer of a combination claim unless he uses all the elements thereof. Shepard v. Carrigan, 116 U. S. 593, 597 [6 Sup. Ct. 493, 29 L. Ed. 723]; Sutter v. Robinson, 119 U. S. 530, 541 [7 Sup. Ct. 376, 30 L. Ed. 492]; McClain v. Ortmayer, 141 U. S. 419, 425 [12 Sup. Ct. 76, 35 L. Ed. 800]; Wright v. Yuengling, 155 U. S. 47 [15 Sup. Ct. 1, 39 L. Ed. 64]; Black Diamond Co. v. Excelsior Co., 156 U. S. 611 [15 Sup. Ct. 482, 39 L. Ed. 553]; Walker on Patents, § 349."

It may also be remarked that in such cases the range of equivalents is narrow.

The testimony is not so full nor so frank as we could wish respecting defendant's structure, but the onus of showing infringement rested upon the complainant who charged it, and it follows that the defend-

ant may demand that the complainant shall meet that burden. When the patent in suit is subjected to the limitations and tests fixed in the authoritative decisions of the courts, the testimony does not show that it has been infringed either in respect to claim 10 or in respect to claim 11. While this phase of the discussion is not very material, inasmuch as we have concluded that the patent is invalid, nevertheless it may be well to recall in this connection that complainant proved by the witness Handy, in substance, that Greth's special devices are (1) the method of introducing and mixing the lime water with the hard water in one chamber in a single-tank apparatus by the use of baffles; (2) the method of introducing and mixing the soda solution after mixing with the lime solution (another chamber or part of the tank doubtless being required for this); and (3) the most important device introduced by Greth was that of placing his sand filters in or attached to the top of the tank in series so as to permit separate cleansing. The two first of these devices or elements which operate separately and in succession and apparently in different chambers or parts of the tank, do not appear in defendant's structure at all, as in it the lime and soda treatments are given at the same time and by an altogether different device. This was open to the defendant in its combination of old devices, and there was no infringement under the ruling in the two cases last referred to. The question as to the third of the important devices just pointed out thus becomes immaterial, though it may be added that the testimony does not satisfactorily show that even this device was used by the defendant in an infringing sense. We have already seen that there was no invention in the filters from the standpoint of the patent laws.

Objections to Testimony.

Several parts of the testimony offered by the complainant consist of statements made in writing or otherwise by persons not parties to the action who were neither sworn as witnesses nor put in a position where they could be cross-examined, although, so far as the record discloses, they were within easy reach. We think that testimony can hardly be competent in this case under any principle of the law of evidence with which we are familiar. However, we have considered it, and have given such weight to it as it could have had, if competent.

It results that the bill must be dismissed with costs, and a decree accordingly will be entered.

GAMEWELL FIRE ALARM TELEGRAPH CO. v. MAYOR AND COUNCIL OF CITY OF BAYONNE, N. J.

(District Court, D. New Jersey. January 25, 1912.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FIRE ALARM SIGNAL BOX. The Ruddick patent, No. 553,873, for a noninterference signal apparatus designed to prevent a confusion of signals where two or more fire alarm signal-boxes are pulled at the same time, and which covers a combination of elements for sending successive signals by which when a box is pulled, the signal is withheld from transmission during the period when

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

the line circuit is not clear, but is automatically started and transmitted as soon as the line is clear, was not anticipated and discloses patentable novelty and invention; also *held* infringed.

2. PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — FIRE ALARM SIGNAL BOXES.

The Cole patent, No. 553,839, for improvements in noninterference signal apparatus, being for mechanical improvements in the apparatus of the Ruddick patent, No. 553,873, *held* valid and infringed.

In Equity. Suit by the Gamewell Fire Alarm Telegraph Company against the Mayor and Council of the City of Bayonne, N. J. On final hearing. Decree for complainant.

Samuel Owen Edmonds and Dean S. Edmonds, for complainant.
Charles K. Offield and Charles J. Schmidt, for defendant.

CROSS, District Judge. Two patents belonging to the complainant are alleged in the bill of complaint to have been infringed by the defendant. The answer denies infringement, and alleges the invalidity of both patents. They were issued February 4, 1896, one, No. 553,873, to John J. Ruddick, the other, No. 553,839, to Frederick W. Cole. The mayor and council of the city of Bayonne is only a nominal defendant; the signal boxes in its use, it is stipulated, having been made and sold to it by the Star Electric Company subsequent to the acquisition by the complainant of the patents in suit, but prior to the verification of its bill of complaint.

[1] Both patents are for a "noninterference signal apparatus"; in other words, for fire alarm signal boxes, such as are in use in almost every large city. In practical use they are more often operated by persons unskilled than skilled, and are designed when operated to transmit to a central station the number of the box at which the alarm is given. The signals are transmitted electrically over a single circuit to which there may be, and not infrequently are, a large number of boxes attached. When the lever or hook of a given box is "pulled," the circuit is opened and closed a definite number of times, with definite time intervals between to represent the number of the box. The receiver at the central station may be so arranged as to indicate the number of such box in different ways, as by marks upon paper, striking a bell, or blowing a whistle. It is obvious that, when two or more boxes located upon a single circuit are pulled simultaneously, the signals, unless in some way prevented, would intermingle and be confused and unintelligible at the central station; thus causing what is known in the art as "interference." Speaking very generally, noninterference is accomplished by the presence in the circuit of an electro-magnet, which, with added means, controls and withholds the transmission of the signal, if the line is not in a condition successfully to transmit it at the time when the box is pulled. The elimination of interference was a problem which seems to have engaged the attention and perplexed the minds of inventors for many years. One of the complainant's experts has shown, and his position is justified by the record, that the development of the art might, with propriety, be separated into four divisions—the first, being that in which

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

no noninterference devices were used; the second, that in which a noninterference magnet was used; the third, that in which a time element, as well as a noninterference magnet was used; and the fourth, that in which perfect noninterference was accomplished so that no signal once given would be lost or confused. He also mentions the various patents, which in his judgment represented the first period, which in point of time extended to about 1870. He pursued the same course with reference to the second and third periods, the former of which extended to 1880 and the latter to the time of the patents in suit; while the fourth period was made to embrace the time since then. He also considers somewhat in detail the numerous patents representing the different stages of the art, as above mentioned. It is unnecessary, however, to separately consider them, if for no other reason than that they, for the most part, were not relied upon by the defendant at the argument. It is sufficient to say that in the first period no apparent attempt was made to overcome interference. In the second, the best of what was accomplished was undoubtedly represented by the Gamewell and Crane signal box, a construction which combined in part the claims of two patents. A physical exhibit of this box appears in the case, of which the same expert says:

"With this box, while it was a great step in the art over what had previously been done, there were still serious defects, for it is evident that a second box could easily be started at any of the closures of the circuit of another box in sending its signal. It is also evident that, if the pulls of two boxes were operated before the circuit was opened by either, then there would also be confusion and loss of both signals. It is also evident that, if a box was pulled while the circuit was accidently or otherwise momentarily opened, then the signal would not be sent and would be lost. It was also evident that if a second box was pulled while the circuit was being used by another box in sending its signal one signal would always be lost, and that if the second box was pulled on the closures, as above beforementioned, both the signals would have become lost, unless one box had already sent one round of its signal before the second one was pulled, or unless the first one had got finished before the second one had sent all its rounds."

That most of the objections to the Gamewell and Crane boxes just outlined in fact existed is not seriously controverted by the defendant. At all events, it is certain that interference was not thereby entirely eliminated. It still existed both as a possibility and a probability. Interference was bound to occur if a box of that type were pulled during the closed-circuit period of a box in operation. The probability of interference was, however, greatly minimized by having the signal-wheel so constructed that the circuit was held closed for short intervals and open for long intervals during the operation of the box. The Gardiner patent of 1880 may, in turn, be said to disclose a typical box in the third stage of the development of the art. It came into general use, and supplanted the Gamewell and Crane box. This box was so constructed that, when one box on the circuit was pulled, other boxes on the same circuit were cut out by time mechanism during what is called a test period; that is, for a period longer than the closure due to any closed circuit interval in the transmission of the signal of any box on the circuit. It should be understood that the circuit is normally held closed, and that a box when in operation closes the circuits for short intervals; hence it is possible

to determine when a box in a circuit is in operation by ascertaining whether or not the circuit remains closed for a longer period of time than the longest closed circuit period during the transmission of the signal of any box. The Gardiner patent to some extent applied this principle. His box reduced the probability of interference, but did not succeed in eliminating it. It still remained true that, if two boxes were pulled simultaneously, their signals would be confused, and that, if one box were pulled while another was transmitting its signal, the second signal would be lost.

On June 4, 1889, patent No. 404,438 was granted to Ruddick, the patentee of the patent in suit, for a noninterference fire alarm signal box, and it is this box, more than any other, which the defendant strenuously insists discloses, in substance, the essential features of the patent in suit, or which, if it does not fully anticipate that patent, nevertheless requires its claims to be strictly construed and limited to the precise mechanism thereby shown, in which case the defendant does not infringe it. Ruddick's first patent and the defendant's insistment in relation thereto will be considered later. As to the Ruddick patent in suit, it is what is known as a "successive noninterference box." It has previously been intimated that a noninterference box is designed to prevent a confusion of signals where two or more boxes upon the same circuit line are pulled at the same time. By the term "successive" is meant the inclusion of means whereby, when a box is pulled, the signal is withheld from transmission during the period when the line circuit is not clear or in a condition to successfully transmit it, but which, as soon as the line is in such a condition will automatically start, continue and complete the transmission of such signal. In order to show the object and character of the invention, it seems both proper and necessary to include herein, notwithstanding its prolixity, the explanation thereof given by Ruddick in the specification of his patent, and this mainly for the reason that it is set forth therein in reasonably clear and general terms and without specific reference to the complicated drawings of the patent. The extract referred to is as follows:

"This invention has for its object to construct a successive noninterference signal box, yet by the elimination of some features a noninterference signal box is produced which is not successive, but which possesses many points of merit.

"The signal-transmitting mechanism which is commonly referred to as the 'signal-box' comprises a motor mechanism and a box-number circuit-wheel adapted to be driven by it to operate an electric circuit to transmit a signal.

"In signal boxes previously constructed many different forms of motor mechanisms have been employed, and, so far as my present invention is concerned, I may employ any well-known or suitable form.

"A controlling-lever is provided which is adapted to control the transmission of the signal, and said controlling-lever is governed by a noninterference magnet which is operated by or under the control of the signaling-circuit, so that the said controlling-lever is therefore under the control of the circuit.

"The box is so arranged that whenever started, or whenever its signal has been 'set,' the controlling-lever will be placed under the control of the signaling-circuit for a predetermined length of time before the said circuit is operated or broken for its first time, by the said set signal, and if during such predetermined length of time the normal condition of said signaling-circuit shall be changed, regardless of the cause, the said controlling-lever

will at once assume its abnormal position or operate to delay or it may be to prevent the transmission of the signal, according as to whether the box is arranged as a successive noninterference box, or simply as a noninterference box.

"When a signal is being transmitted from any box the circuit is opened and closed repeatedly, and when the line remains closed a longer time than the longest closure in any signal, it is evident that no signal is being transmitted, and hence the predetermined length of time during which I desire to place the controlling lever solely under the control of the circuit is longer than the longest closure in any signal.

"In signal boxes of the so-called 'open-wheel' variety the closures are all of the same duration or nearly so, being quite short, while in signal boxes of the so-called 'closed-wheel' variety some closures are of longer duration than the others. For instance, if but a single round is transmitted the longest closure will be between the groups of impulses, or what are commonly termed the 'number groups,' but if several rounds are transmitted the longest closure is usually between the successive rounds.

"The controlling-lever which controls the transmission of the signal, together with the noninterference magnet and its armature, I denominate a 'determining device' which determines whether or not the signal once set shall be transmitted promptly or delayed, as will be described.

"The means or mechanism employed for placing the controlling-lever solely under the control of the circuit for a longer time than the longest closure in any signal after the said signal has been set and before its first impulse has been transmitted is herein denominated a 'retarded operative device' because the operation of the circuit is delayed after the signal has been set.

"The locking or releasing lever for the train is herein shown as one having two distinct movements, one of which is controlled or operated manually, as by a pull or starting-lever, and the other of which is controlled or operated by the train in running, the first movement of said lever effecting the release of the train or permitting it to operate, and the second movement of said lever, as herein shown, governing the action of the controlling-lever which controls the transmission of the signal.

"Suitable means are provided for holding the controlling-lever whenever the circuit is opened at the home box, and for releasing said lever one or more or all of the times that the circuit is closed at the home box during a round of the alarm, the home box being understood as the particular box in circuit with others, which is being operated and described, if, however, the controlling-lever is allowed to assume its abnormal position, as it will be if the normal condition of the circuit is changed during any interval of time that the controlling-lever is released or unlocked, and is therefore held only by the attractive force of the magnet, the signal will not be transmitted, or if the box is designed particularly as a successive box the said signal will be retained to be thereafter transmitted, as will be described. In either event, however, means must be provided for restoring the controlling-lever, or permitting it to be restored, only at a certain time, as at the completion of a round or of a succession of rounds, so that if a set signal has been retained it will be let off or released only at the beginning of a round, in order that a correct signal may be transmitted.

"The devices employed for holding the controlling-lever whenever the circuit is opened at the home box, and releasing it (the last three words are inserted by stipulation) at certain times or every time, if desired, that the circuit is closed at the home box, that it may be moved into or allowed to assume its abnormal position if the line is in use and which allows said lever, when once thrown out, to resume its normal position only at the beginning of a succeeding round of the box number, constitute a trap for the controlling-lever.

"When the controlling-lever is restored, which, as before stated, is only at or before the beginning of a round of the box number, if the box is arranged as a successive box, the said lever is again placed under the control of the circuit for a longer time than the longest closure in any signal by means of the retarded operative device before the first impulse of the round is transmitted, so that if said controlling-lever is once thrown out it will require

a closure of the circuit which is longer than the longest closure in any signal before said lever will permit or effect the transmission of the retained signal: but if the box is arranged simply as a noninterference signal box the said controlling-lever will simply be restored just as or before the box stops running.

"In the box herein shown, the trap is arranged to carry out the function ascribed to it during the first round of the signal, and if the signal which is being transmitted is not interfered with, the co-operation of said trap with the controlling-lever will cease; but if the signal is interfered with the trap will continue its co-operation with the controlling-lever until such time as a correct and uninterrupted round is transmitted; but while such feature has certain special advantages, it is unnecessary to provide means especially designed for so discontinuing the co-operation of the trap and controlling-lever."

No attempt will be made to explain this complicated device in detail, as to do so intelligibly would necessarily involve a complete reproduction of all of the drawings and specification of the patent, together with no inconsiderable portion of the explanations thereof given by the several experts who have testified in the case. The patent contains 59 claims, of which Nos. 2, 3, 4, 5, 6, 7, 8, 9, 11, 13, 15, 16, 17, 18, 21, 23, 24, 27, 54, 55, 57, and 58 are in issue. The claims in issue have been properly classified by counsel into three groups as follows: In the first group Nos. 11, 13, 15, 16, 17, 54, 55, 57, and 58; in the second, Nos. 2, 3, 4, 5, 6, 7, 8, and 9; and the third Nos. 18, 21, 23, 24, and 27. Claim No. 11, it is admitted, represents the first group; No. 4, the second; and No. 18, the third. The three claims just referred to follow in the order named.

"11. In a noninterference signal box, a motor, means for operating it, a retarded operative device consisting of a signal-wheel moved by the train to operate the circuit for its first time after the train has run a longer time than the longest closure in any signal, and a determining device comprising a noninterference magnet, its armature, and a controlling-lever, governed by said magnet, which acts during said lapse of time to prevent an interfering signal being sent substantially as described."

"4. In a successive noninterference signal box, a signaling-train, a controlling-lever which controls the transmission of the signal, a noninterference magnet and its armature, combined with a trap coextensive with a round of the box number which positively holds the controlling-lever at each and every time the circuit is opened at the home box and releases said controlling-lever at each and every time that the circuit is closed at the home box, to enable said lever to assume its abnormal position if the circuit is open at another point, and which allows said lever to resume its normal position when once thrown out only at the beginning of a round of the box number, substantially as described."

"18. In a signal box, a signaling-train, a circuit-controller, a noninterference magnet and its armature, combined with a controlling-lever governed by said armature which controls the transmission of the signal, and an arm which vibrates to correspond with the makes and breaks of the circuit-wheel which engages said controlling-lever on the breaks and releases the same on the makes, substantially as described."

With the aid of physical exhibits, a very clear exposition of the subject-matter of the patent, and of the claims in issue, was made at the argument by the respective counsel. Claim 11 includes among other elements in combination the "retarded operative device" and "determining device," the purpose and character of which fully appear in the above extract from the specification. The first of said devices is furthermore, in that claim, said to consist of a "signal-wheel

moved by the train to operate the circuit for its first time after the train has run a longer time than the longest closure in any signal," and the other of said devices is characterized as comprising a non-interference magnet, its armature, and a controlling-lever governed by said magnet, which acts during said lapse of time to prevent an interfering signal from being sent. This is the broadest claim of the first group. The other claims introduce additional elements. Claim 16, for instance, introduces means for producing succession whereby after four ineffective turns of the signal-wheel the train, instead of being stopped, will continue to operate, the retarded operative device again come into operation, and the signal-wheel make four additional rounds.

The group of which claim 4 is a type provides a "trap" which is fully described therein as follows:

It "positively holds the controlling-lever at each and every time the circuit is opened at the home box and releases said controlling-lever at each and every time that the circuit is closed at the home box, to enable said lever to assume its abnormal position if the circuit is opened at another point and which allows said lever to resume its normal position when once thrown out only at the beginning of a round of the box number."

Its function is to prevent interference between two boxes when pulled simultaneously. The trap provides, among other things, means for holding the controlling-lever whenever the circuit is opened at the box pulled, and for releasing the lever whenever, and at such times as the circuit is closed at that box during a round of the alarm.

The claims of the third group also relate to the trap, but call for a vibrating arm; that is to say, an arm which vibrates to correspond with the makes and breaks of the circuit-wheel which engages the controlling-lever on the breaks and releases it on the makes. There is testimony in the case which with reason styles the Ruddick box of the patent in suit as:

"The first practical successive and noninterference box of any kind, it was the first box which produced succession within itself; that is, without the use of independent circuits or the use of independent instruments at central, * * * and this box of the Ruddick patent in issue was the first that combined the essentials that would send signals without confusion or loss. Ruddick in applying this invention used only the signaling-train itself as a timing or operating mechanism, and had no independent timing mechanism in the box or associated with it to be depended upon for the carrying out of this function of noninterference, and the principles disclosed by Ruddick are the ones, and the only ones in use to-day in producing all these desired results."

This testimony is not, however, permitted to pass unchallenged, otherwise, at least one of the alleged defenses to this suit could not have been interposed with any probability of success. It is not surprising, therefore, to find that, according to the claim of the defendant, everything that Ruddick did by the patent in suit had been done before or so disclosed as to make it common knowledge in the art. In the attempt to establish this position, the defense has introduced into the case, and its expert has analyzed and discussed numerous patents which however, need not be considered at length, since whatever of weight there is in the defendant's contention resides for the most part in the disclosures of the previous patent to Ruddick. Un-

less anticipation is found there, it cannot be found in the case. That patent fundamentally comes closer to the one under consideration than any other.

Ruddick's application for his earlier patent was filed December 14, 1887, and that of the later June 28, 1890. The file wrappers of both are in evidence. The specification of the later patent as originally filed stated that:

"The present invention constitutes an improvement on prior mechanism of this general character and especially upon the apparatus set forth and claimed in my patent No. 404,438, June 14, 1889."

The foregoing language does not, however, appear in the specification as finally issued, which was introduced in due course by way of amendment to the original specification. It is claimed in behalf of the defendant that the substituted specification is broader than the invention shown in the original; that, however, was not the view of the examiner, nor does it seem justified. The original specification, although much amplified by the substitute, contained the essential features of the patent as issued. Again, while the application was pending in the Patent Office, the examiner, speaking of certain proposed claims, said "that a trap broadly in noninterference boxes is old," citing Ruddick's earlier patent, and that "a device to positively hold the armature of a magnet whenever the circuit is broken at the home box, and to release said armature whenever the circuit is made at the home box, is old," citing Herzog, 1883. He nevertheless allowed the first 11 claims, holding that a combination of the two devices was patentable, and in doing so said:

"Not only is the combination clearly patentable, but the structure of the device described in the application is so exceedingly complicated and ingenious that a claim for the combination should be given the broadest possible construction and the broadest field of equivalency. The first inventor of the combination should be allowed to cover both the hypnotic and positive form of trap."

The claims of the patent in suit were all allowed with Ruddick's earlier patent in open view, and the patent itself was only issued after a strenuous interference contest in which the various issues in interference were closely examined and considered, and the examiner at the conclusion of his opinion says:

"The fact that the patent has been subjected to the closest scrutiny without developing any direct and positive statements setting forth the various elements of the interfering issues conclusively proves that those issues were not disclosed in the patent. The present application is therefore allowed."

Nor did the earlier patent purport to accomplish all that is claimed for the patent in suit. Indeed, it is admitted in the specification of the earlier patent that in repeating the signal four times conditions might exist under which the signal the first time it was given would be confused. Thus it says:

"Supposing that the two boxes break the circuit at the same instant (and not one before the other, as in the case just cited), both boxes will sound the gong, and, if one mechanism rotates a little faster than the other there may be momentary confusion in regard to the first numeral, but as soon as the second notch is reached one or the other of them must hold the circuit,

and there can be no further trouble. In any case three correct signals will be sent, leaving no possibility of mistake in the reading of the alarm. Of course, the wheel in every box is notched to correspond to the number of that box, as represented by the number and arrangement of the pins on the number wheel. There being no two numbers alike in any fire alarm telegraph system, it is evident that no two wheels will be notched alike, and therefore that no two signals can be confused for longer than while the first box number is being signaled once."

Confusion in fire alarm signals of any character or to any extent is naturally productive of delay and increased hazard. It were better to have the signal correctly given but once than to have it given four times, one of which, and that seemingly the most important, incorrectly given. That Ruddick's earlier patent in view of his admission was not perfect needs no argument. Nor is it conceivable that the improvements which he embodied in his second patent, and which seem to have made it perfect and commercially valuable, were, as claimed on behalf of the defendant, purely mechanical and obvious to one skilled in the art. Were this true, it would reasonably follow that they would have occurred to Ruddick and been embodied in his earlier patent.

The two patents have been examined with care, without, however, finding that the earlier discloses the later, certainly not with that degree of clarity and definiteness which the law demands of that which may properly be adjudged an anticipation. The defendant, it may be said in this connection, largely relies to show anticipation by the earlier patent upon the arrangement in one of the drawings of certain pins upon the "number wheel"; but, admitting that the pins are so arranged as to afford plausibility to the argument, still, in the absence of any support therefor, either in the specification or claims of that patent, it cannot be held to be such a disclosure as in law would constitute an anticipation of the patent in suit, and this was likewise the conclusion of the examiner.

In his earlier patent Ruddick sought means to prevent interference in the signals of two simultaneously operated boxes, but his effort, like that of all who had preceded him, admittedly failed.

The defects in his first patent were, however, undoubtedly remedied in the second, which discloses novelty and invention. It not only carries with it a presumption of validity, but that presumption is materially strengthened by the contest which it successfully withstood in the Patent Office, and, even if it were admitted that the enthusiasm of the examiner was not entirely justified, still his opinion as an expert in a complicated patent of this character is entitled to great weight, far greater indeed, than it would have been had the patent passed under his supervision in due course without argument, or discussion and without his attention having been particularly directed to the disclosures of the prior art and particularly to those of the earlier Ruddick patent. The conclusion of the examiner is confirmed, moreover, by the opinions of two expert witnesses with which the court is entirely in accord. The Ruddick patent in suit is therefore held to be valid.

Upon the question of infringement, it should be said at the outset that the defendant's box is also a successive noninterference box.

The defendant, however, attempts to distinguish it from the complainant's in various particulars, for instance, in the first group of claims in issue, the question of infringement is made to depend largely upon the meaning of the word "signal" as found therein. In the defendant's box the retarded operative device performs its function not only at the first round of the signal, as does the complainant's, but also at the second, third, and fourth rounds, so that at the beginning of each round there is a long closure of the circuit. This is caused by the fact that the signal-wheel has one tooth longer than any of its other teeth, which hold the contact lever in a raised position for closing the circuit at the beginning of each of the rounds.

This difference, however, is not important since the defendant plainly uses an equivalent of the retarded device of the patent in suit. Upon the question of the meaning of the word "signal" above alluded to, it is insisted on behalf of the defendant that it includes not only the signal as first given, but three repetitions of it, while the complainant contends that it is complete when once given. I think the complainant's contention is right. There is only one signal and it is that which is repeated three times. These repetitions cannot be tacked to the signal so as to form, or be said to form, a part of it; they cannot be otherwise than what they are, repetitions. Moreover, the prior art taught that a signal was completed in one round, the examiner in the Patent Office apparently held the same view, and the patent itself also shows that one round of the signal-wheel gives the signal. I conclude, therefore, that the first group of claims are infringed. Infringement of the second group does not seem to be seriously questioned. At all events, they may be read directly upon the defendant's device, and are infringed by it. The third and last group in issue have as an element what is called a vibrating arm which serves to hold the controlling lever each time the circuit is opened at the box and releases it each time the circuit is closed at the box. It releases the noninterference device on the closure of the circuit, and holds it upon the break of the circuit. It vibrates according to the makes and breaks in the circuit, and thereby locks and unlocks the controlling-lever. The defendant's illustrative drawing of its box shows a pin which is driven in and fixedly attached to the controlling-lever which performs the same function as the vibrating arm of Ruddick. It serves to lock and unlock the controlling-lever upon the makes and breaks of the circuit. However called, it is the equivalent of the vibrating arm of the patent in suit. My conclusion, therefore, is that the claims calling for that element are also infringed.

[2] The complainant does not claim that the Cole patent, the second in suit, does more than disclose mechanical improvements upon Ruddick's device; that patent contains 23 claims, of which Nos. 11, 21, 22, and 23 are in issue. The claims in controversy point to a mechanical construction for the performance of some of the functions of a signal box employing the retarded operative device and the determining device of Ruddick's patent. Thus claim 11 calls, in addition to other elements, for means controlled by the train in running which holds the signal-key with its circuit contacts closed during the

test period, during which time the signal controller is free to act to mechanically lock the signal-key with its circuit contacts closed. Claim 21, among other elements, calls for a noninterference magnet and its armature which whenever retracted mechanically locks the signaling-key with its circuit contacts closed. Claim 22 specifies additionally that the signal-key whenever operated to open the circuit mechanically locks the armature in its attracted position, and claim 23 provides, with other elements, for a signal-controller governed by the armature which is free to retract on closures of the circuit at the home box, and whenever it retracts locks the signaling-key with its circuit contacts closed. The improvements called for by the claims in issue of the Cole patent appear, because of their simplicity and effectiveness, to have been adopted and largely used in putting Ruddick's invention on the market. Defendant's expert admits that the "Cole patent appears to be a practical embodiment of the theoretical and evidently impractical mechanism of the Ruddick patent in suit. It provides a test period extending one complete round of the circuit wheel, and provides for locking the key contacts during such periods."

I think that the claims in issue are valid, and have been infringed by the defendant.

That claim 11 is infringed is clearly shown by the testimony of one of complainant's experts, who, after mentioning certain specific elements common to the boxes of Cole and the defendant, says:

"There is also required means controlled by the train in running which holds the signal-key with its circuit contacts closed for predetermined length of time just before the beginning of a round of the box-number. This element corresponds to the retarded operative device which is operated by the train in running, and in this Cole patent it is the holder *e*, which rotates when the train is operated, and is so related to the other parts in the signaling-train that it engages with the projection *e* of the three-armed lever after the box has been pulled for the preliminary run indicated. In defendant's box the long tooth upon the signal-wheel when moved by the train in running, after the box is pulled, co-operating with the projection from underneath the signal-key *3*, performs the same function. The claim further requires that during the preliminary run for the predetermined length of time the signal-controller shall be free to act to mechanically lock the signal-key with its contacts closed. In the Cole patent, the signal-controller, as shown in my sketch Fig. 6, is free to assume its abnormal position, under the influence of the retractile spring, at any time during the preliminary run, and if it should do so, the pin *b5*, falling behind the shouldered end *d'* of the three-armed lever, will lock the signal-key with its contacts closed mechanically. In defendant's box, the controlling lever *9*, or signal-controller, is in the position indicated in my Fig. 10 during this preliminary run, and it is free to assume its abnormal position as indicated in my Fig. 12, in which position it mechanically locks the signal-key with its contacts closed. I, therefore, find that defendant's box embodies the combination recited in claim 11 of the Cole patent."

Claim 21 requires that the armature whenever retracted mechanically shall lock the signal-key with its circuit contacts closed. This element appears in the defendant's box. Defendant's counsel claim, however, that its structure does not infringe because there are times when the armature can be retracted at will without influencing the circuit contacts and without mechanically locking them closed. They

are nevertheless locked at the critical time, and by means equivalent to those specified in the claim in question.

Claim 22 requires additionally that, whenever the signal-key is operated to open the circuit, it shall mechanically lock the armature in its attracted position. Cole does this by means of a shoulder on one of the ends of a three-armed lever, which is rotated when the circuit is opened; the shoulder referred to thereby passing under a pin, and locking the armature in its attracted position. The defendant's device does the same thing, although not by precisely the same mechanical means, but which, nevertheless, perform the same function in the same way, and come within the terms of the claim.

Claim 23 requires that the signal-controller shall be free to retract on closure of the circuit at the home box, and that, whenever it retracts, it shall lock the signal-key with its circuit contacts closed. When, therefore, in the Cole box the circuit is closed at the home box, the controlling-lever can assume its abnormal position, the armature being in a retracted position, and when it does this, the pin above referred to locks the signal-key with the circuit contacts closed. The defendant's box is also provided with means whereby when the circuit is closed at the home box the controlling lever is free to retract to an abnormal position and thereby lock the signal-key so that the contacts are closed.

A decree in favor of the complainant and against the defendant with costs will accordingly be entered upon the claims in controversy of both patents.

It is understood from complainant's brief that the complainant has no desire to interfere with the operation of the fire alarm system of the defendant, consequently no injunction will be issued against it, at least without giving it full opportunity to be heard, and then only in case it shall be made clearly to appear that the city can be amply protected in the premises.

LOGGIE v. PUGET SOUND MILLS & TIMBER CO.

(District Court, W. D. Washington, N. D. January 15, 1912.)

No. 1,640.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SAWMILL APPARATUS.

The Loggie patent, No. 837,087, for a receiving trip and conveyer used in the manufacture of weather boards, claims 6, 7, and 8, are valid as limited to a two-part guide constructed according to the specification, in combination with a planing machine and a transverse conveyer. Claims 1, 2, 3, 4, and 5, which omit the first section of such guide, are void for lack of utility. Claims 6, 7, and 8 *held* infringed by one form of apparatus used by defendant, but not infringed by a modified form of construction.

In Equity. Suit by George W. Loggie against the Puget Sound Mills & Timber Company for infringement of patent. On final hearing. Decree for complainant granting an injunction and awarding nominal damages.

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

J. W. Kindall, S. M. Bruce, and Dorr & Hadley (Delbert H. Decker, on the brief), for complainant.

Kerr & McCord, for defendant.

HANFORD, District Judge. This is a patent infringement case, founded upon United States letters patent No. 837,087, issued to the complainant for a combination of sawmill apparatus styled "Receiving-Trip and Conveyer." The specifications of the patent describe an assemblage of machinery with conveyers, guides, bins, and tables conveniently arranged in the interior of a factory for making weather boards for covering the exterior walls of houses.

The aggregation comprises two or more planing-machines, set parallel to each other; guides, adapted to clamp the pieces of timber, on which the planers operate, after they pass the cutters to hold them flat, straight and level until the entire length of the pieces have passed from the discharge ends of said machines and then drop them transversely upon a series of carrier belts, which, actuated by pulleys, carry the pieces laterally in a direction at right angles to the line on which they have traveled through the planing-machines; a bin or platform, into or upon which the pieces are deposited by said lateral carrier; a re-saw, which divides the thickness of the planed pieces making of each two bevel-shaped weather boards, which is set in a position parallel to the planing-machines; a trimmer table, upon which the boards are deposited after passing the re-saw, which is also set parallel to the other machines and has suspended on hangers above it two trimmer saws; a longitudinal traveling belt, on which the boards are carried longitudinally from the trimmer table to a sorting table, from which the boards may be taken as required to be stacked or loaded into cars or wagons. The entire apparatus is designed to operate upon pieces of lumber of the required width and double the thickness of weather boards, and of varying lengths, to surface, divide, and trim them in a continuous movement. The guides and lateral carrier act automatically, in delivering the planed pieces from the planing-machines to the bin or platform, with ends, nearest the re-saw, registering.

It is unnecessary to describe in detail all of the minor equipments described in the specifications of the patent. The guides, however, must be particularly described. They are in two parts, the first of which consists of two boards or pieces of scantling forming the sides of a chute set horizontally upon, or into, the bed-plate of each planer, spaced to form a channel between the two, wide enough to accommodate the passage of the planed pieces as they travel flatwise through and from the planers; one of the said side-strips being movable so as to change the width of the channel if required to accommodate wider or narrower boards. The other side-strip is fixed rigidly and has annexed to it a bottom piece forming an under-support for the planed boards which is less than one-half as wide as the boards which are shoved upon it as they pass through and from the planer. There is also annexed to said rigid side-strip, a top board jutting over the under-support which acts as a down-presser, holding the boards down

upon the ledge or shelf constituting the under-support; said rigid side-strip, the under-support, and the down-presser constituting a side groove through and along which one edge of the planed boards travel through and from the planer, holding the board flat and level until it has passed beyond the bed-plate at the discharge end of the machine. The second part of the guide is an extension of the side-strips and the under-support extending longitudinally across and above the lateral carrier, held in position by hangers attached to overhead beams and abutting end-on to the side-strips and under-support of the first section. The side-strip of the extension to which the under-support is annexed is rigid like the one of which it is an extension, and the other is supported by a swinging hanger hinged to the overhead beam which permits movement to change the width of the channel. Between the edge of the under-support and the adjustable side-strip there is an open space through which the planed boards drop upon the lateral carrier after they have passed beyond the end of the side groove above described. There being no top piece upon the second section of the guide to prevent the boards from tipping, they drop by gravity through said open space, and, as they all drop as soon as they have passed out of the side groove, the ends nearest to the machines register, regardless of their lengths. They may be taken at once to the re-saw or allowed to accumulate in the bin or upon the platform above described.

The re-saw has capacity equal to that of two or more planers. The bin or platform contains fenders to prevent an accumulation of boards from chafing the carrier belts. In operation, pieces of timber of the required breadth and double the thickness of weather boards are passed through the planers and guides and dropped upon the lateral carrier and by it deposited automatically in the bin or upon the platform, with ends uniformly near to the re-saw, from which they are taken by hand and passed, in a direction reverse to the course through the planers, through the re-saw and thence to the trimmer table, where an operator trims the ends, if necessary, or cuts out knots or defective parts, and they are then passed to the longitudinal carrier by which they are conveyed to the sorting table. The several operations of surfacing, re-sawing, trimming, and sorting may be, but do not necessarily have to be, in a continuous movement. One or more of the planing-machines may be in operation while the others constituting the battery may be idle, or all may be in operation simultaneously, and the planing-machines may all be idle while the re-saw performs its function. The guides, lateral conveyer, bin or platform, re-saw, trimmer table, longitudinal conveyer, and sorting table are placed at different elevations so that gravity assists in the general operation.

The merit of novelty and invention is claimed for the entire arrangement of machines; the advantages being economy of space, reduction of the number of persons required to carry on the work, and rapidity. The feature of the combination which is new consists of the two-part guide above described. In the title, specifications, and claims of the patent, the word "trip" is used to denominate this important part of the combination. There is manifest originality in this

application of that word. I do not find in the dictionary definitions of that word, any authority for its use as a noun descriptive of any particular device or thing. By his testimony in this case, the inventor seems to have an indefinite idea of its meaning. In the first five claims of the patent the word "trip" appears to be applicable, only, to the second section or longitudinal extension of the guide, and each of the other claims refer to it as a "receiving-trip comprising a top guide attached to one of said planer-bed side guides and extending over said channel bottom." This "top guide" is the part of the guide which in this opinion I have denominated the "down-presser," as its function is to prevent the planed lumber from tipping before it has advanced to the proper place for tipping. Therefore I must assume that the word "trip" in claims 6, 7, and 8 is applicable to so much of the guide as includes the down-presser and the second section or longitudinal extension thereof.

The claims of the patent are of the following tenor:

"1. The combination of a battery of planers or similar wood-finishing machines; a receiving-trip extending longitudinally from the rear of each of said planers, said trips so constructed and placed that they will retain the stuff as it comes from the planers, in substantially the same plane as it passed through the said planers, until it has passed entirely out of the same; and a lateral conveyer at the rear of said battery of planers and beneath said trips.

"2. The combination of a battery of planers or similar woodworking-machines; a receiving-trip extending longitudinally from the rear of each machine, said trips so constructed and placed that they may retain the stuff as it comes from the planers in substantially the same plane as it passes through said machines until it has passed entirely out of the same; a lateral conveyer at the rear of said battery of machines and beneath said trips; and a receptacle at the delivery end of said conveyer.

"3. The combination of a battery of planers or similar woodworking-machines; a receiving-trip extending longitudinally from the rear of each of said machines; a lateral conveyer located at the rear of said machines and beneath said trips; a receptacle at the delivery end of said conveyer; and a machine to complete the second stage in the process of manufacture, said machine located near one end of said receptacle, and preferably in file line with said battery of planers.

"4. The combination of a battery of planers or similar woodworking-machines; a receiving-trip extending longitudinally from the rear of each of said machines; a lateral conveyer located at the rear of said machines and beneath said trip; a receptacle at the delivery end of said conveyer; a machine, or machines, to complete the second stage in the process of manufacture, located near one end of said receptacle, and preferably in file line with said battery of planers; and a machine, or machines, to complete the third stage in the process of manufacture located by the side of the last-mentioned machines, and in file line with said battery of planers.

"5. The combination of a battery of planers or similar woodworking-machines; a receiving-trip extending longitudinally from the rear of each of said machines; a lateral conveyer located at the rear of said machines and beneath said trip; a receptacle at the delivery end of said conveyer; a machine, or machines, to complete the second stage in the process of manufacture located near one end of said receptacle and in file line with said battery of planers; a machine, or machines, to complete the third stage in the process of manufacture located by the side of said last-named machines and in file line with said battery of planers; and a longitudinal conveyer the receiving end of which is located alongside of and below said last-mentioned machine, or between said last-mentioned machines, and the delivery end of which is located above a table.

"6. The combination with a planer of a receiving-trip, which is designed to receive the stuff as it comes from a wood-planer, the bed of which planer has a channel composed of a bottom and side guides; the receiving-trip comprising a top guide attached to one of said planer-bed, side guides and extending over said channel-bottom; two deep, side guides registering with the side guides on said planer-bed; and a narrow bottom guide or ledge attached to one of said deep, side guides and registering with said channel-bottom.

"7. The combination with a planer of a receiving-trip, which is designed to receive the stuff as it comes from a wood-planer, the bed of which planer has a channel composed of a bottom and two side guides; the receiving-trip comprising a top guide attached to one of said planer-bed, side guides and extending over said channel-bottom; two deep, side guides registering with the side guides on said planer-bed; a narrow bottom guide or ledge attached to one of said side guides and registering with said channel-bottom; slotted spreaders attached to said deep, side guides; and supporting-hangers also attached to said deep, side guides.

"8. The combination with a planer of a receiving-trip, which is designed to receive the stuff as it comes from a wood-planer, the bed of which planer has a channel composed of a bottom and two side guides; the receiving trip comprising a top guide attached to one of said planer-bed, side guides and extending over said channel-bottom; two deep, side guides registering with the side guides on said planer-bed; a narrow bottom guide or ledge attached to one of said side guides and registering with said channel-bottom; slotted spreaders attached to said deep, side guides; and supporting-hangers also attached to said deep side guides, one set of said hangers is attached overhead in a hinge-joint parallel with said guides and the other set is rigidly attached overhead."

For convenience, and to make this opinion lucid, I will restate these claims using my own descriptive words in lieu of the terms of the patent:

The first claim of the patent is for a combination, the elements of which are:

(a) A battery of planing-machines; that is to say, several planing-machines set parallel to each other.

(b) The second section or longitudinal extension of the two-part guide above described.

(c) The lateral carrier above described.

Claim 2 is for a combination, the elements of which are the same as claim 1, and the addition of a receptacle which I have heretofore referred to as a bin or platform. It may be a mere vacant space into which the planed lumber may be deposited by the lateral carrier.

Claim 3 is for a combination, the elements of which are the same as in claim 2, with the addition of the re-saw for dividing the thickness of the boards which is the second stage of manufacture.

Claim 4 is for a combination, the elements of which are the same as in claim 3, with the addition of apparatus for trimming, constituting the third stage in the process of manufacturing weather boards.

Claim 5 is for a combination, the elements of which are the same as in claim 4, with the addition of a longitudinal conveyer conveniently located to carry the finished boards from the trimming table to the sorting table.

Claim 6 is for a combination, the elements of which are:

(d) A single planing-machine the bed of which has a channel composed of a bottom and two side guides.

(e) The down-presser above described.

(f) The two side pieces of the second section or longitudinal extension of the two-part guide placed in line with and ends abutting against ends of the side-strips of the channel on the bed-plate.

(g) A narrow under-support annexed to one of said side pieces in line with and abutting the outward end of the bottom piece of the side-groove upon the planer-bed heretofore described.

Claim 7 is for a combination, the elements of which are the same as in claim 6, with the additional elements of slotted spreaders adapted to space the side pieces of the second section or longitudinal extension of the two-part guide, and the supporting hangers attached to overhead beams and to said side pieces.

Claim 8 is for a combination, the elements of which are the same as in claim 7, with a more detailed description of attachments to the supporting hangers and guide constituting the means for spacing them as required.

One of the defenses pleaded in the answer is anticipation, and there have been introduced in evidence several patents antedating the complainant's patent, the most important of which is United States patent No. 299,832, dated June 3, 1884, to W. H. Moore for a machine for making bed slats. This patent is for an invention relating to the manufacture of bed slats where a bolt of timber having double the thickness required for slats, after being planed on both sides and both edges moulded, is afterwards divided to make two slats. The patent states that the object of the invention is to take the bolt as it comes from the planer and automatically split it into two slats with a splitting saw, and plane off the saw-scarf thus formed, and deliver the finished slats at the end of the machine. This result to be accomplished by a process of operation described as follows:

The bolt, as it comes from the planer, falls across two traveling belts, which carry it off at right angles and deposit it on edge in an open trough, the bottom of which is formed by an endless belt which with the aid of grooved friction-rollers carries it through the operation which divides it into two slats. That apparatus is designed and well adapted to do for bed slats, all that, and more than, the complainant's apparatus can do for weather boards, and the work of manufacturing bed slats is similar to the operation of making weather boards.

The substantial difference between the apparatus described in the Moore patent and that described in the complainant's patent is in the adaptability of the latter for delivering, automatically, boards that are long and limber, which the Moore patent lacks. The structure designed by the complainant and described in his patent embodies the general idea of the Moore patent with the additions required for handling automatically material suitable for making weather boards. Therefore it is an improvement in woodworking machinery, but not a pioneer invention, entitling the patentee to a broad construction of the claims of his patent, including the right to substitute equivalents for the particular parts of the structures described therein. Chutes for guiding lumber, when shoved endwise, have been in general use for many years, and all that appears to be original in

the complainant's apparatus is a chute constructed with a side groove along part of its length and an opening in its floor on its opposite side along the remainder of its length, placed in a horizontal position so that lumber shoved through it will be retained flat, straight, and level while one edge is clamped in the groove and then dropped horizontally through the floor opening. It is the decision of the court that the monopoly entitled to protection under the complainant's patent is limited to cover, only, the two-part guide constructed according to the specifications of his patent, in combination with a planing-machine and a transverse conveyer.

I hold that the first five claims of the complainant's patent are void for lack of utility, because, without the first section of the guide including the down-presser, which is omitted from said claims, the apparatus is inefficient and impractical. Claims 3, 4, and 5 are also void, because they cover only aggregations of machines operating successively and independently of each other and do not embody patentable combinations. I hold claims 6, 7, and 8 to be valid to the extent above indicated.

By a preponderance of the evidence it has been proved that the defendant adopted and put into use in its mill apparatus for manufacturing weather boards, including the two-part guide described in the complainant's patent; but either because of defective construction by reason of which the apparatus did not work satisfactorily, or to avoid infringement, a different form of down-presser was added. The defendant's down-presser is an adaptation of the lever and fulcrum principle. In form it resembles a human foot attached by a pivot pin at the ankle joint to a stanchion, with the heel part toward the planing-machine and elevated so as to permit the boards to pass under it; the toe part acting as the down-presser. The power of the lever is effectuated by a suspended weight attached to the heel by a cord looped over an overhead pulley to raise the heel so that the weight presses the toe down and the inclined position of the foot permits the boards to pass under it and, when shoved beyond the toe, to tip and fall from the under-support through the open space between it and the side wall of the chute, down upon the lateral carrier. This form of down-presser is not an exact equivalent for the flat top piece of the guide described in the complainant's patent, because it does not exert continuous pressure upon the traveling boards as they pass through the planing-machine and is not so well adapted for use in operating upon short pieces, and without requiring special adjustment it will act upon boards of varying thickness. The evidence proves that, after adding the new down-presser to the apparatus in the defendant's mill, the flat top-piece of the guide was removed, it being superfluous; and it is the opinion of the court that, when that was done, the apparatus was so changed as to avoid infringement of complainant's patent.

By the decree to be entered the defendant will be enjoined from again infringing claims 6, 7, and 8 of the complainant's patent by the construction or use of sawmill apparatus including the two-part guide, and a judgment for nominal damages for past infringement is awarded,

with costs. The evidence submitted does not afford a basis for estimating damages. Therefore only nominal damages can be awarded. City of Seattle v. McNamara, 81 Fed. 863, 26 C. C. A. 652.

NOTE.—Subsequently to the rendition of this opinion the court granted a motion by plaintiff to refer the case to a master to receive evidence and compute the profits to defendant from its use of apparatus infringing claims 6, 7, and 8 of the patent.

IMPERIAL BRASS MFG. CO. v. NELSON.

(Circuit Court, N. D. Illinois, E. D. January 8, 1912.)

No. 29,415.

1. PATENTS (§ 51*)—ANTICIPATION—PRIOR KNOWLEDGE BY OTHERS.
   Knowledge by others of a device before its alleged invention by an applicant for a patent in a form adapted to practical use constitutes an anticipation, and renders it unpatentable under Rev. St. § 4886 (U. S. Comp. St. 1901, p. 3382), although it was not used, and such knowledge need not have been more than two years before the date of the application.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 66–74; Dec. Dig. § 51.*]

2. PATENTS (§ 328*)—ANTICIPATION—PIPE COUPLING.
   The Burgess patent, No. 906,099, for a pipe coupling is void for anticipation because of prior knowledge of the device by others than the patentee.

In Equity. Suit by the Imperial Brass Manufacturing Company against Alexander Nelson, doing business under the name and style of the A. Nelson Manufacturing Company. On final hearing. Decree for defendant.

George E. Waldo, for complainant.
Arthur F. Durand, for defendant.

SANBORN, District Judge. This is a suit in equity for an injunction and an accounting brought by the complainant, the Imperial Brass Manufacturing Company, against the defendant, Alexander Nelson, for infringement of United States letters patent No. 906,099, dated December, 1908, for a compression coupling. The patent in suit was issued to Walter S. Burgess, and was by him assigned to complainant on December 24, 1908.

The subject-matter of the patent in suit, and which is here in controversy, is a form of coupling or fitting for connecting sections of pipe or tubing end to end; said couplings being known as "compression couplings."

The following claims, only, are sued upon:

"3. In combination, a pair of tubular coupling-members threaded one into the other, the inner end of the inner coupling-member being annularly recessed and shouldered to receive the end of the member to be coupled, and a hard-metal sleeve inclosed within the coupling-members and tapered longitudinally to a bendable annular edge, the larger end of this sleeve abutting against the outer coupling-member and the thin tapered edge entering the

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

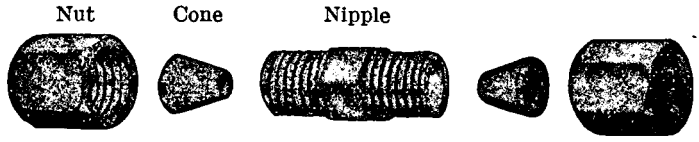
recessed entrance end of the other member and having contact only with the inner annular corner thereof, for the purpose set forth.

"4. In combination, a pair of tubular couplings and means for adjustably connecting them, one of the couplings being provided with an internal shoulder against which the coupled member abuts and with a flaring entrance end, and a hard-metal sleeve tapered forwardly to a thin bendable edge the larger end of this sleeve having abutment against one of the coupling-members and its tapered end extending into the flared mouth of the other member and having an annular contact near its tapered end with the flared entrance end aforesaid, whereby when the coupling-members are drawn hard together the said thin bendable edge of the sleeve will be swaged inwardly to form an inwardly extending annular head and a similarly shaped groove in the coupled member."

The accompanying cuts illustrate the complainant's and the defendant's device:

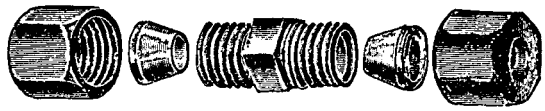
Complainant's.

CUT No. 1.



Defendant's.

CUT No. 2.



The defenses relied on are that the invention in question was anticipated by the prior art, was "known or used by others in this country" before the application for the patent in suit, and was "in public use or on sale for more than two years prior to the application" under the provisions of section 4886, Revised Statutes (U. S. Comp. St. 1901, p. 3382).

The patent in suit was applied for January 13, 1908, and the evidence does not show any earlier time as the date of invention. It is shown in the proofs that the defendant made compression joints something like the patent device several years before date of application, but the proof of their use and of their exact construction is not entirely satisfactory. It appears, however, that in the spring and summer of 1907 the McCanna Manufacturing Company caused to be made blue prints of various parts of a compression joint identical in appearance with the complainant's device, and on June 20th they quoted prices to the Nelson Company on various coupling parts, in which also 10,000 of the compression cone shown in the cut, or one substantially like it in appearance, were included. Under various dates in September, 1907, the record shows receipts of payments of considerable numbers of these parts, including the cones referred to. Prior knowledge by others than the patentee of a device in appear-

ance similar to the patented coupling is therefore fully shown by the record. In addition to this, an attempt was made to show use of the patented device more than two years prior to the date of application, but on this point the proof is not clear enough to warrant a conclusion of a prior use.

[1] If, therefore, the record shows knowledge without use of a device identical with the patented coupling, it is not necessary to prove actual use. If the device known to others was competent and capable of producing the same results as that of the patent, there is sufficient anticipation. Stitt v. Eastern R. Co. (C. C.) 22 Fed. 649; Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821; Buser v. Novelty Co., 151 Fed. 478, 81 C. C. A. 16. The prior knowledge need not be more than two years before the patent date. Brush v. Condit, 132 U. S. 48, 10 Sup. Ct. 1, 33 L. Ed. 251; Mast Foos Co. v. Stover, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856; Wilson v. Townley, 125 Fed. 491, 60 C. C. A. 327; Bates v. Coe, 98 U. S. 46, 25 L. Ed. 68; Eastman v. Mayor, 134 Fed. 844, 69 C. C. A. 628. As to the effect of a sale, or sample, as showing knowledge to negative novelty, see Consolidated Fruit Jar Co. v. Wright, 94 U. S. 92, 24 L. Ed. 68; Egbert v. Lippmann, 104 U. S. 333, 26 L. Ed. 755; Dalby v. Lynes (C. C.) 64 Fed. 376.

[2] The only question, therefore, is whether the device previously known to the defendant and the McCanna Company was substantially identical with the patented coupling, as well as capable of practical use. If there is a reasonable doubt on either of these matters, no anticipation should be found.

The drawings referred to, made in the summer of 1907, are quite similar to the patented device. By reference to the accompanying cuts, it will be noticed that the nipple or center member in each cut is an externally threaded cylinder, into which the cones shown on each side are designed to be forced by the nut shown at each end of the cuts. In the patent device, as well as in the alleged infringing construction, the flaring mouth of the nipple has a different and more obtuse bevel than that of the cone, so that the latter, when inserted, will strike first at its extreme smaller end, and, when the nut is screwed up, and a pipe or rod inserted through all of these members, the thin edge of the small end of the cone is forced or swaged around the pipe or rod, making a perfectly tight connection without solder or braising. Now it is evident that, in order to produce this result, the cone bevel must be made at a more acute angle than that of the nipple. If the bevel angles are the same, the force of the nut will be applied against the body of the cone, and not to its edge, and the desired result will not follow.

It is claimed by counsel for complainant that this is just what is shown in these blue prints, as well as by certain exhibit couplings offered in evidence. He says:

"In the coupling of the patent in suit, the mouth of the nipple is flared in such manner that it engages the tapered surface of the cone closely adjacent to its thin edge, so that, when the nut is tightened in forming a pipe connection, the thin, bendable edge of said cone, where it contacts with the mouth of the nipple, will be swaged or compressed inwardly into the pipe so as to

form an interlocking bead and groove in said cone and pipe, respectively, which will positively connect said cone to said pipe and will form a tight joint without soldering the cone to the pipe—distortion or compression of said cone and pipe being confined to the thin, bendable edge of said cone in contact with the mouth of said nipple. But in defendant's exhibit couplings under consideration the nipple has a long straight-sided beveled mouth into which cone fits, the angles of said beveled mouth and cone being practically the same, in this respect resembling the old style solder couplings, in which the cones are soldered to the pipes and form in practical effect integral parts thereof, much more nearly than they do the couplings of the Burgess patent in suit. Counsel for defendant contends that the angles of the beveled mouth of the nipple and of the cone of defendant's exhibit couplings under consideration are different, and that pipe connections having interlocking beads and grooves will be formed if the nuts of said exhibit couplings are tightened or set up so as to force the cones into the beveled mouths of the nipples. Complainant asserts, however, that the angles of the beveled mouth of the nipple and of the cone in defendant's said exhibit couplings are to all practical purposes the same, or that any slight initial difference which may exist is immaterial for the reason that the operation of forcing said cone bodily into the beveled mouth of the nipple would almost immediately cause said cone to exactly conform to the beveled mouth of said nipple, long before said cone was forced a sufficient distance into the mouth of said nipple to form an interlocking bead and groove which would connect said cone to the pipe. And this conformation of the cone to the beveled mouth of the nipple will be expedited by the stretch or expansion of the large end of the cone under the pressure of the nut when tightened. Thus, with defendant's said exhibit couplings, the formation of an interlocking bead and groove in the cone and pipe, respectively, will involve, not merely the compression or distortion of the thin, bendable edge of the cone and of the pipe directly beneath the same, but will also require compression or distortion of the cone throughout the entire length of the beveled mouth of the nipple. And this, owing to the increased thickness of said cone back from its thin edge, will very greatly increase the force necessary for making said coupling; that is, for forming said interlocking bead and groove, as compared with the force required for forming said interlocking bead and groove, using couplings of the patent in suit, in which the distortion is confined to the thin, bendable edge of the cone."

I have read all the evidence, and carefully examined the blue prints and all of the numerous exhibit couplings in proof. The blue prints of the cone and nipple show that the bevel of the cone is sharper than that of the nipple, but not very much. But the physical exhibits, the earliest one being more than two years older than the patent application, almost invariably show that the cone will not fit into the flaring mouth of the nipple, but first strikes on or near its small end. This is true of the two spark-plug Exhibits 48 and 50, the cone Exhibit 8, the nipple Exhibit 11, and the oiler Exhibits 44 and 49. As to these exhibits, the testimony as a whole is quite satisfactory and convincing, and there is a good deal of it. It clearly shows that the patent device was known to others before the application, and in a form adapted to practical use. Such use also clearly appears, but not more than two years before such application was filed. Even within the strict rule of the Circuit Court of Appeals of this circuit, as held in H. Mueller Mfg. Co. v. Glauber, 184 Fed. 609, 106 C. C. A. 613, prior use is shown within the two-year period. Prior knowledge by others than the inventor also appears within the rule of Stitt v. Eastern Ry. (C. C.) 22 Fed. 649, and Buser v. Novelty Tufting Machine Co., 151 Fed. 478, 81 C. C. A. 16.

The bill should be dismissed, with costs.

LUTEN v. RHOADS & KNISELY et al.

(Circuit Court, M. D. Pennsylvania. January 20, 1912.)

1. PATENTS (§§ 282, 325*)—SUITS FOR INFRINGEMENT—GROUNDS OF SUIT.
A patentee may maintain a suit in equity to enjoin infringement of his patent by a contractor for the building of a structure which, if built in accordance with the plans and specifications attached to the contract, will infringe, and is entitled to recover costs, although the plans are afterward so modified as to avoid infringement.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 440, 443, 607–612; Dec. Dig. §§ 282, 325.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CONCRETE ARCH.
The Luten patent, No. 852,970, for improvements in concrete arches, claim 46, *held* valid and infringed.

In Equity. Suit by Daniel B. Luten against Rhoads & Knisely, George Rhoads, and John Knisely. On final hearing. Decree for complainant.

W. Clyde Jones and F. H. Drury, for complainant.
J. S. Black and David J. Davis, for defendants.

WITMER, District Judge. This is a suit by bill in equity brought to restrain infringement of United States letters patent No. 818,386, dated April 17, 1906, and No. 852,970, dated May 7, 1907, granted to and owned by the complainant, relating to certain new and useful improvements in concrete arch structures. The bill recites that in violation of the complainant's rights, secured to him by said letters patent, the defendants knowingly and willfully contracted and agreed in writing to erect two concrete arch structures for the county commissioners of Centre county, Pa., one over Spring creek and the other over Bush Hollow creek, said county, in accordance with plans and specifications, attached and made part of said agreement, embodying the patented inventions and improvements of the complainant, "showing that when said arch structures are erected the complainant fears they will be in accordance with and containing the improvements and inventions claimed and described in said letters patent Nos. 818,386 and 852,970, and recited in claims thereof." The complainant furthermore states that the defendants "have received and enjoyed large gains, profits, and advantages from the unlawful use of said inventions and improvements set forth in said letters patent, which might otherwise and would have been obtained by him," and for relief prays for an injunction and accounting. The defendants in their answer question the validity of the patents, denying infringement and the general allegations of the bill.

That the improvements which are the subject-matter of these Luten patents are of patentable novelty is not seriously controverted, and for the purpose of this case it is assumed that the patents covering the same are valid, in view of the presumption favoring such grants, which in this case has not been overcome by proof, nor has it been attempted. Although the bill fails to set forth the particular claim

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

in either of the patents said to be infringed, notwithstanding such may have embarrassed the defendants, it is now too late to complain. The complainant in his testimony confines the infringement to claims 1 and 7 in patent No. 818,386, and to claims 44, 45, and 46 in No. 852,970.

The former cover bars, in certain positions, imbedded in an arch, not visible after completion of the work, and read as follows:

1. An arch having imbedded therein a plurality of tension members passing alternately across the rib, said members being low at the crown and high at the haunches, and each of said members passing across the rib at different longitudinal points from the others, substantially as described.

7. An arch having imbedded therein rods, bars or other tension members in two or more series, following one face of the arch rib, thence across and following the other face of the rib; the points of crossing for the different series being angularly or laterally displaced with respect to each other, substantially as described.

Reference to the "plan of bridge over Spring creek," which is said to be similar to the plan of bridge over Bush Hollow creek, comparing favorably with pencil sketches of same in evidence, discloses continuous reinforcing rods placed low at the crown and high at the haunches and passing alternately across the ribs, as shown at the points marked B in said pencil sketch. It readily appears that these continuous reinforcing rods comprise the plurality of tension members named in these claims, and that the structures shown in this plan and pencil sketches are clearly covered by the terms of these claims, as may be seen by comparison of them with the claims and the drawings of the patent.

The latter claims cover a footing provided with an upper surface upwardly stepped in a direction away from the span, as follows:

44. A bridge or arch of concrete or similar material having a footing upwardly inclined away from the span.

45. A bridge or arch of concrete or similar material having a footing provided with a roughened upper surface upwardly inclined away from the span.

46. A bridge or arch of concrete or similar material having a footing provided with an upper surface upwardly stepped in a direction away from the span.

An inspection of the plans and drawings of the proposed structures shows the footing upwardly stepped away from the span, as indicated at the point E, Complainant's Exhibit, Pencil Sketch of Spring Creek Bridge, which is in this particular a true copy of the official plan of bridge over said creek, and thus falling precisely within the terms of claim 46. It has, however, not been shown that claims 44 and 45 have been covered by the drawings or plans of the proposed bridges, and to consider or presume such to have been done is not our province.

It is true the complainant has testified that by reference to the pencil sketches, which were represented to him as being like the official blue prints attached to the agreements, in his opinion the prints or plans call for bridges infringing his patents. Notwithstanding all that has been said by him favoring such conclusion, we have before us the plan of bridge over Spring creek, which is said to be like the plan of bridge over Bush Hollow creek, and, on comparing the same

with the pencil sketches offered by the complainant, we find the latter four copies of the former showing with considerable accuracy the attempted infringement of claims 1 and 7 of patent No. 818,386 and claim 46 of patent No. 852,970.

[1] By contract in writing the defendants, at and before this suit was instituted, had agreed, and in fact were bound, to infringe certain claims of the complainant's patent, having undertaken to build and construct certain concrete arch structures in accordance with plans embodying the invention and improvements of his patents. To prevent an invasion of the rights alone enjoyed and secured to the complainant by grant of his patents, he very properly sought relief by injunction, which would, no doubt, have been granted, had he then persisted. The bridges having been completed, there is now no need of an injunction.

Notwithstanding the provisions of the defendants' contract, they now come and deny to an extent that the bridges which they had undertaken to build were afterwards so constructed as not to infringe the patent right of the complainant. It is true that viewers were appointed on completion, who inspected the same and pronounced them built in conformity to the respective contracts. Such inspections are usually, and in this case of necessity were, no doubt, very perfunctory, so that their report adds but very little weight to the presumption that the defendants did what they had undertaken, and in manner as stipulated.

[2] What was done by way of construction we have from the defendants without denial. Both defendants testified that the bars imbedded in the concrete of these structures were put in lengthwise of the arch, following the bow of the arch, and that they were not tied together or linked in any manner by iron or steel, that the bars are straight across the bow of the arch, and that there was no dip or deflection in it whatever. This testimony, being uncontradicted and unanswered, leaves no possible doubt concerning the actual noninfringement of claims 1 and 7. Though threatened when the suit was instituted, the bridge was constructed by direction and consent of the commissioners' engineer in charge so as to avoid infringement in this particular. They furthermore agree that in every other respect, excepting certain immaterial matters, the bridges were built in accordance with the plans and specifications on file. That the changes advised by the engineer, and followed, related only to the placing of metal reinforcements, leaves the infringement of claim 46 undenied. Resting on inference drawn from defendants' own testimony, and on the presumption that the plans adopted and made part of the contract were to this extent executed, leads us to conclude that this claim was infringed. As was said in North American Iron Works v. Fiske (C. C.) 30 Fed. 623:

"The infringement appears but slight, yet the extent of it is not now so important as the fact that there was some, and more to be apprehended at the commencement of the suit, to furnish grounds for it."

After suit was brought, the defendants in their answer questioned the validity of the patents, and resisted the claims of the complainant

all the way through, thereby compelling him to prosecute this suit to establish his right. There must, therefore, upon these considerations, be a decree establishing the validity of the patent and for damages, which are hereby fixed at $250, with costs.

Let a decree be entered accordingly.

MONARCH VACUUM CLEANER CO. v. VACUUM CLEANER CO.

(District Court, S. D. New York. February 15, 1912.)

1. EQUITY (§ 316*)—ANSWER—EXCEPTIONS—OATH—WAIVER.
In a suit against a corporation, the sufficiency of its answer is not affected by a waiver of answer under oath in the bill, since a corporation need not answer under oath.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 618; Dec. Dig. § 316.*]

2. EQUITY (§§ 188, 189*)—LIABILITY OF CORPORATION.
Though a corporation need not answer a bill under oath, it is subject to discovery, and must make the discovery under seal.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 431, 432; Dec. Dig. §§ 188, 189.*]

3. EQUITY (§ 182*)—ANSWER—SUFFICIENCY.
Where defendant in equity elects to answer the bill, it must answer the charges in the bill in full.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 413, 418–421; Dec. Dig. § 182.*]

4. EQUITY (§ 188*)—PLEADING—NEGATIVE PLEA—ANSWER.
Under equity rule 39 (29 Sup. Ct. xxviii), where defendant incorporates the contents of a negative plea in the answer, he may obtain the effect of such negative plea to avoid discovery.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 431; Dec. Dig. § 188.*]

5. EQUITY (§ 188*)—PLEA—BARRING DISCOVERY.
Where an answer in equity contains an affirmative plea, good in substance, or a valid negative plea, complainant's right to discovery is barred under the thirty-ninth equity rule, at least as to evidence not tending to controvert the plea or material to the issue.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 431; Dec. Dig. § 188.*]

6. EQUITY (§ 189*)—PLEADING—ANSWER.
Under the thirty-ninth equity rule, authorizing a defendant to avail himself of matters of defense previously pleadable in bar by alleging the same in the answer, defendant should take issue with one of the stating parts of the bill, and then answer fully any charges of evidence in support thereof, and decline to make further discovery; but, not having done this, and having undertaken to make apparently full discovery, but failed as to one particular, its answer was subject to exception, since such rule did not abrogate the prior rule that he who submits himself to answer in equity must answer fully.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 432; Dec. Dig. § 189.*]

In Equity. Bill by the Monarch Vacuum Cleaner Company against the Vacuum Cleaner Company. On exceptions for insufficiency to

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

the answer of a corporation in a cause in which the bill had waived answer under oath. Exceptions sustained.

Robert L. Hoguet, for complainant.
George H. Gilman, for defendant.

HAND, District Judge. [1, 2] I cannot see what possible difference the waiver of the oath makes, because a corporation need not answer under oath anyway. Colgate v. Compagnie Francaise du Telegraphe de Paris (C. C.) 23 Fed. 82; Gamewell Fire Alarm Tel. Co. v. Mayor (C. C.) 31 Fed. 312. Still we all know that a corporation is subject to discovery, and must make it under its seal. Hence the very vexed and confused question is not open as to the effect upon the extent of discovery of a waiver of the oath.

[3] The first exception is good, because the answer is not full, and the defendant could not have protected itself from discovery as to that by a negative plea, without an answer in support which would give a full discovery upon that part of the charges of testimony in the bill.

[4, 5] The second exception is more difficult, because as to the discovery there asked for the defendant by negative plea and adequate answer in support thereof could have prevented discovery as to the untruth of the allegations. Now, under the thirty-ninth equity rule the effect of such a plea may be obtained by incorporation of its contents in the answer itself. It is settled that, if an answer contains a good affirmative plea in substance the right to any discovery is barred. Gaines v. Agnelly, 1 Woods, 238, Fed. Cas. No. 5,173; Samples v. Bank, 1 Woods, 523, Fed. Cas. No. 12,278. I cannot really see how the rule can be different where the answer contains what would be a valid negative plea. In such a case the discovery is limited to so much of the evidence charged as tends to controvert the plea, or is material to the issue. Other discovery the rule seems to take away.

[6] In the case at bar, however, the defendant has not attempted to plead its answer as a plea, or at least to take advantage of rule 39. To do that it should have taken issue with one of the stating parts of the bill, and then answered fully any charges of evidence in support of it. It should then have declined to make any further discovery. I cannot think that the rule means that the defendant, having undertaken to make apparently full discovery, a part of which he need not make under the rule, may stop in midcourse as soon as he comes to a point where further discovery becomes embarrassing. Thus the defendant here might have denied the statement of the fraudulent representations, and, if his discovery had covered all charges of evidence upon those statements, he need have discovered nothing as to the truth of the facts alleged to have been misrepresented. This would have been to use his answer as a negative plea and to refuse discovery. However, the defendant did nothing of the sort, but answered quite fully as to the truth of the facts alleged to have been misrepresented, except in respect of the single particular now challenged. Surely the thirty-ninth rule never meant that; it never meant wholly to abrogate the rule that he who submits himself to answer must

answer fully. What it did mean was, I think, that one should have the advantage of a plea without its peril, which was that when one pleaded one staked the case on the plea alone. Just how discovery was to be obtained at all, if the answer contained a well-pleaded plea and refused full discovery, is not apparent; but parties could already be examined when the rule was promulgated.

I hope that within a few months all these archaisms may yield to a new set of rules, which it will be less labor to resuscitate and apply when the need arises. Everybody now has lost touch with the spirit of the old. It is quite obvious here that neither pleader intended to separate "statement" from "charge" in the bill, or pleading from discovery in the answer. The rules of equity pleading fit the pleadings no better than small clothes would suit as professional costume for the counsel. However, while they last, I suppose we must try to interpret them as they were meant, with so much historical imagination as we can summon.

Exceptions sustained.

In re WARD.

(District Court, D. New Jersey. August 15, 1911.)

BANKRUPTCY (§ 91*)—INVOLUNTARY PROCEEDINGS—EVIDENCE—INSANITY.

Evidence considered, and *held* to show that an alleged bankrupt was insane at the time of his transfer of property charged as the act of bankruptcy and at the time of the contracting of many of the debts necessary to be taken into account to establish his insolvency.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 113; Dec. Dig. § 91.*]

In the matter of William R. Ward, alleged bankrupt. On exceptions to report of special master. Exceptions sustained, and petition dismissed.

Decree affirmed, 194 Fed. 89.

See, also, 161 Fed. 755; 194 Fed. 179.

Robert R. Howard and Edward A. & W. T. Day, for petitioning creditors.

Riker & Riker, for Merchants' Nat. Bank of Newark, intervening creditor.

Vredenburgh, Wall & Carey, for guardians of alleged bankrupt.

RELLSTAB, District Judge. As I view the matter, I think it is necessary for me to take only one of the points into consideration. It seems to me that the case can be determined upon the question of the alleged bankrupt's sanity, and, as I have reached a definite conviction upon that subject, I will arrest the further argument on the respondent's objections to the master's report by saying that in my judgment this alleged bankrupt was not sane at the time he committed this alleged act of bankruptcy.

There is only one act of bankruptcy alleged, that he fraudulently transferred his real estate. If he was insane at that time, of course,

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

that ends these bankruptcy proceedings, as an insane person cannot commit an act of bankruptcy. Furthermore, the question of sanity affects the one of insolvency; for it is very clear from the master's findings that, in order to establish insolvency, it is necessary: First, to give force and validity to many of the claims which have their origin in a period during which the inquisition issued by the state Court of Chancery found that Ward was insane; and, second, that the transferred property should not be treated as part of the assets. Of course, on the question of solvency as affecting the jurisdiction of the bankruptcy court, the value of the property transferred is not to be taken into consideration; but as this property would go to the trustee's hands in the event of adjudication, the result would be that, at the end of the administration, the assets would exceed the debts. A finding of insanity, therefore, necessarily ends the bankruptcy proceedings.

Ward was adjudged a lunatic of unsound mind, incapable of the government of himself or his property, and that he had been so and without lucid intervals. The alleged act of bankruptcy was very recent before the filing of the creditors' petition, and upon the inquisition referred to Ward was found to be insane for a period extending back of the time since which a number of the claims filed against the bankrupt were contracted, and without which claims even a prima facie case of insolvency could not be established. What weight shall be given these findings on the status of the alleged bankrupt during the time when such obligations were incurred and the transfer of such property was made? Being collateral to the present proceedings, perhaps the status so declared is not binding on this court; but such findings are at least prima facie, and at the least the burden is upon the petitioning creditors to show that such indebtedness was incurred and such alleged act of bankruptcy was committed during lucid intervals, or that such findings of insanity were erroneous. The master held otherwise. In addition to such findings, we have the testimony of medical men of standing in their profession, one a medical practitioner, not a specialist, who knew the alleged bankrupt all his life, who had attended him professionally when he lived in his neighborhood; another, also a practitioner, who lived near the bankrupt at his present residence, and who had been called in to attend the family, and who in that way and as a neighbor became acquainted with him. Three others are specialists—alienists—one of whom has achieved eminence as an expert. Two of these specialists had him under surveillance. He was at their institution. They said that within a week after his admission, as I remember their testimony, they had diagnosed his ailment as one of manic depressive insanity. The other one did not have the same opportunity of observation, but he gives his opinion in response to hypothetical questions.

Now, of course, these alienists may have come into the case as advocates. It so often happens that experts present that attitude. It may be because of this that our own profession is loath to adopt their views unless some corroboration is found in other testimony. Perhaps we have gone too far in that particular, and are not giving to the learning and standing of these specialists that credence and weight that, as a

profession, they are entitled to. In this very case I began the study of the testimony with a mental attitude requiring lay corroboration of the expert testimony. I gave the last four days to a study of the record, and I approached the examination with the expectation that the case could be disposed of by merely ascertaining whether there was a rational basis to support the master's findings. Certainly I would not attempt to set aside the master's findings upon a mere doubt of their correctness. If the matter hung in the balance, I should be constrained to set my own doubts aside and accept the conclusion of the master, as he alone had the benefit of a personal scrutiny of the witnesses when testifying. I had not progressed very far in the reading of the testimony bearing upon the question of insanity, however, before I was forced to concede that there was a great deal in the case to support the opinion of the medical gentlemen that this man was insane, and had been for a number of years. To my mind, regardless of where the burden of proof lies, there is no escape from such conclusion.

Assuming that the legal standard of insanity is different from the medical standard of to-day, I unhesitatingly accept the test quoted in the briefs of petitioner's counsel, said to be the one adopted by the courts of New Jersey to determine mental capacity, viz., did the person whose acts are challenged possess sufficient mind to understand in a reasonable manner the nature and effect of his acts? The testimony is in a large measure conflicting. Some who conversed and transacted business with Ward saw no reason to doubt his sanity. I have no doubt that some of the men connected with the banks, when they transacted business with him, thought they were dealing with a sane man.

The conclusion that I have reached does not in any manner impugn either their motives or intelligence; but those transactions, after all, occupied but a very little time. They were but instances in a bank president's or cashier's busy life. Mr. Ward was well known in banking circles, and when he presented himself with good collateral there was not that same reason for scrutiny as in the case of a mere acquaintance or stranger. So that I have no doubt whatever that, in all of the specific instances mentioned, these men firmly believed that they were dealing with a sane man. But in manic depression the *disease* is not always manifest to men of even more than average intelligence and observation. This *disease* is progressive, and perhaps incurable; but because it is incurable it does not follow that it may not be so pronounced as to impair the reasoning faculties beyond legal responsibility and yet fail to disclose it to the ordinary observer. We are told that the peculiar manifestations of this *disease* are alternating mental exaltation and depression, and that the conduct of the afflicted one is different according as the one or the other manifestation is present and as it advances or recedes. His intimates, those who lived in his neighborhood and who saw him frequently as he passed from and to his house, those who had frequent occasion to reflect upon his conduct in the various offices and business places he attended, would be more apt to form a correct judgment of the man's mental condition than the casual business acquaintance. True, it is

the *unusual* that attracts; but "unusual" is a relative expression, and one must be familiar with the usual to say what is unusual. What to the casual acquaintance might be strange and unusual conduct, to the more intimate acquaintance would be but normal. What to the former might appear to be but eccentricities, might to the latter be abnormal and intensely irrational. Of course, those who were in closest touch with Ward are members of his immediate family—wife, children, domestics—and these would be best capable of determining what was unusual in his conduct. True, these immediate relations have a decided interest in the question of his sanity, one that is not to be overlooked in weighing their testimony; but their evidence of abnormal actions is in the main supported by witnesses who seemingly have no personal interest in giving their testimony, and these give voice to a series of acts at different times and places, under varying conditions, which prove to my mind that Ward was suffering from a mental disease, with manifestations more pronounced at some times than at others, and which conform to the portrait given by the alienists of one who is afflicted with manic depressive insanity, and not one who is merely suffering from neurasthenia.

Here was a man who had reached a time in life when habits are generally fixed—over 50 years of age. Those of us who have been striving to change them between 40 and 50 know what a task that is. Here is one who had been trained to routine work. He had been a bank clerk many years. The horizon of his activity was not far reaching. His was a narrow walk in life, but it was one that trained and disciplined him to methods of carefulness. Whatever might have been his earlier tendencies to impulsiveness and volubility, here was a training tending to method and caution. With the acquisition of wealth from his parents, he, in 1896 or 1897, leaves that treadmill life. His environment is now entirely different, but he enters it a gentleman, prudent, reticent, as a result of his business career, and so continues until about the year of 1900, when a marked change takes place noticeable at first only to his family and those who had an intimate acquaintance. With wealth to invest, we find him for a time making careful and safe investments, consulting with his brother. After 1900, however, he not only did not so consult with him, but was adverse to telling him how he was investing his money. He became largely indebted in making investments, but until lately had something substantial to show for it. Before 1906 his indebtedness, while large, could not be said to be the result of bad speculation, but rather in speculating, and his loans were made upon negotiable collateral which had been purchased by him upon such loans. Gradually from 1900 his conduct changes. He is no longer the quiet reticent man, but progressively and alternately very voluable, loud, boisterous, irrational; no longer economical to closeness, but extravagant oft to the extent of wastefulness; no longer demeaning himself gentlemanly, but obtruding himself upon others, arresting people on the streets by hollering at them, whom after he has succeeded in attracting their attention, he passes by as if nothing unusual had happened and entertains very exalted notions of his importance and exaggerated conceptions of his

financial ability. Latterly Ward's conduct in places which he frequently visits is pronounced a nuisance. A reputable attorney who had seen and talked with him frequently declines to administer an oath to him on the ground of his mental incompetency, and upon one occasion he is found upon a train actually hugging unknown women. He is easily persuaded to engage in enterprises of which he knew nothing and for which he had no training, and to guarantee loans and purchases in large amounts, in some of which he could have but a speculative interest, and in others no apparent substantial interest whatever.

The influence which one Sherrer, with whom he became acquainted in 1906, exercises over Ward would be impossible of comprehension, if he is to be considered as a rational being. By him he is easily persuaded into speculations without adequate investigation. Ward's ready cash seems to be at the command of Sherrer, who goes with him on journeys of pleasure and recreation, having Ward's pocketbook and money in his pocket. In the enterprises in which Sherrer had an interest, or is now obtaining an interest, Ward is the money man, to which he gives up his money and credit very easily, and with whom he is on very confidential terms. He shows no hesitancy in guaranteeing by indorsement or otherwise large sums of money which are at once absorbed in Sherrer's concerns, and from which others obtain an immediate benefit. The striking part of Ward's commercial transactions from the time that Sherrer enters into his life is his fatuous yielding to Sherrer and others of his money and credit, his childlike reliance upon Sherrer, and his failure to observe even the ordinary business precautions, including the taking of vouchers in making such advances, and his slipshod manner of keeping his bank accounts. While before 1900 everything was kept in order as might be expected of one trained in banking, now everything is chaotic. The record bristles with evidence of Ward's abnormal conduct, given by those who had an intimate acquaintance with him, or who, having more than a casual acquaintance, had their attention directed to him by his extraordinary conduct; the foregoing being specifically referred to not as the most striking, but as coming readily to mind. Without the obligations incurred after Ward comes under the influence of Sherrer, no prima facie case of insolvency could be established. These were all incurred during the period covered by the state inquisition's finding of insanity, and during the period when Ward's irrational conduct is the most pronounced.

Now, it would be absurd to hold that any one of the specific instances of irrationality is sufficient upon which to found a judgment of insanity. But we do not make up our minds on that question on specific instances. After all, it is the pronouncement of our minds upon the whole conduct, comparing the unusual with the normal, looking for a rational explanation for the difference.

This form of mental *disease* is progressive, and, as I read the testimony of the many irrational acts of this bankrupt, I am unable to yield assent to the proposition that they evidence at most but eccentricities or enlarged self-esteem, but am constrained to the conclusion

that they support and corroborate the opinions of the experts that they are manifestations of a mental disorder of such serious character as to make him irresponsible for his contracts.

To my mind, the conclusion is irresistible that at the time that Ward committed the alleged act of bankruptcy—transfer of property—he was not capable of understanding in a reasonable manner the nature and consequence of such act, and that he was then, and had been for some time previous, laboring under a mental *disease* that made him totally irresponsible for his contracts.

The motion to confirm the master's report is denied, and the fifth and sixth amended exceptions to such report are sustained. A decree may be entered accordingly.

In re WARD.

(District Court, D. New Jersey. August 23, 1911.)

BANKRUPTCY (§ 114*)—INVOLUNTARY PROCEEDINGS—RECEIVER.

The District Court entered a decree dismissing a petition in involuntary bankruptcy on the ground that the alleged bankrupt was insane at the time of the transfer of valuable property to his wife which was charged as the act of bankruptcy. *Held*, that pending an appeal from such decree the court would not discharge the receiver previously appointed nor appropriate moneys in his hands for the support of the alleged bankrupt in a sanitarium; it appearing that his wife still retained the property so transferred to her.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 125–132; Dec. Dig. § 114.*]

In the matter of William R. Ward, alleged bankrupt. Petition by guardians of bankrupt for discharge of receiver and for allowance. Denied.

See, also, 161 Fed. 755; 194 Fed. 89, 174.

Robert R. Howard and Edward A. & W. T. Day, for petitioning creditors.

Vredenburgh, Wall & Carey, for guardians of alleged bankrupt.

RELLSTAB, District Judge. On petition of the guardians of William R. Ward, alleged bankrupt, praying to have the receiver discharged, and to appropriate of the moneys in his hands a sum sufficient to defray the expenses of keeping Mr. Ward at the sanitarium to which he has been committed since the decision in this cause.

The matter of the discharge of the receiver was before the court immediately after the decision holding that Ward was insane, and after an appeal had been taken from such decision. The court then decided such application adversely, giving as its reason, inter alia, that it was in the interest of justice that the status of the property should be preserved pending the appeal. No ground other than those pressed upon the court at such time has been advanced on the rule, and I see no reason to change the conclusions then expressed. Whatever reasons there were for the appointment of a receiver in this case continue at the present time, and the preservation of the property is as much

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

the duty of this court at this time, notwithstanding the appeal taken, as it was at the very beginning of the bankruptcy proceedings.

As to the application that Ward be maintained from moneys now in the hands of the receiver. Assuming that the court has the power to divert such assets for such purpose, it is constrained, in the exercise of a sound discretion, to deny such application. Petitioners base themselves on the finding of the court that Ward was insane at the time he made the transfer of property—the alleged act of bankruptcy. This property was conveyed to the wife of the alleged bankrupt, and she is one of the guardians pressing this application. The record shows that such property is valued at over $100,000; that it is income bearing; and that Mrs. Ward, as such grantee, has been collecting the income. How much income was thus derived is not disclosed. During the pendency of the bankruptcy proceedings, Mrs. Ward has been holding this property and its fruits adversely to the receiver. If the decision of this court should be reversed on appeal, and Ward be declared to have been sane at the time he made such transfer of property, the title thereto would vest in the trustee as of the adjudication, and Mrs. Ward would then be accountable to the trustee for such property as has come to her hands; if the decree of the court should be sustained, and Ward should be declared to have been insane at the time of such transfer, Mrs. Ward would hold the title to such property in trust for Mr. Ward. Whichever the finding, Mrs. Ward is not entitled to the corpus or income of such property, and while she continues to hold it adversely to the receiver, her application for a division of the assets of Ward for the purpose of maintaining him in such sanitarium will not be entertained.

The prayer of petitioner is denied, and the rule founded thereon discharged.

POSTAL TELEGRAPH CABLE CO. v. LIVERMORE & KNIGHT CO.

(District Court, D. Rhode Island. January 15, 1912.)

No. 2,752.

INJUNCTION (§ 121*)—BILL—AMENDMENT.

Where a bill by a telegraph company for an injunction to restrain defendant from publishing and selling for advertising purposes, to be sent through the mails, envelopes resembling those used by complainant in which to deliver its messages, was held demurrable because no actual damages and no substantial ground for apprehension of future damage were alleged, an amendment to supply such allegation should be verified, and the motion for leave should be supported by affidavits setting forth such number of specific instances of loss of patronage and impairment of service as to show that the injury is substantial.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 253–261; Dec. Dig. § 121.*]

In Equity. Suit by the Postal Telegraph Cable Company against the Livermore & Knight Company. On complainant's motion for leave to amend bill. Motion held insufficient.

See, also, 188 Fed. 696.

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

Edwards & Angell, for complainant.
Comstock & Canning, for respondent.

BROWN, District Judge. By the proposed amendments complainant seeks to add to the bill general allegations of actual loss of patronage and of actual impairment of the efficiency of its service, and thus to meet the objection that the bill is defective in failing to allege that any actual injury had occurred, and also to furnish a basis for a reasonable apprehension of future injury.

If substantial loss of patronage, or substantial impairment of service, had occurred, it is difficult to understand the omission of allegations to this effect and the resting of the case upon mere apprehension of injury rather than upon actual injury that had occurred in the past and was likely to recur in future. In these circumstances not only should the proposed amendments to a sworn bill be supported by oath, but the motion for leave to amend should be supported by affidavits setting forth such number of specific instances of loss of patronage and impairment of service as to show that there is a substantial basis of fact for the allegations that many persons have ceased to use its service, and that the complainant's business has been obstructed as an actual consequence of defendant's acts.

The complainant may, within 20 days, amend its motion and file affidavits in support thereof.

In re CLAIRFIELD LUMBER CO.

(District Court, E. D. Kentucky. August 29, 1911.)

No. 574.

1. BANKRUPTCY (§ 140*)—SALES—WHEN TITLE PASSES TO PURCHASER—CONSTRUCTION OF CONTRACT—SALE OF LUMBER TO BE MANUFACTURED.

Claimant entered into an executory contract with bankrupt, which was the owner of a sawmill, for the purchase of lumber of stated kinds, grades, and prices, to the value of over $60,000, to be manufactured by bankrupt and delivered f. o. b. cars at its mill. By the terms of the contract bankrupt agreed to manufacture at least $30,000 of lumber to apply on the contract within three months and to stack the same. Before delivery bankrupt was to measure and inspect the lumber and grade it in accordance with the rules of the National Hardwood Association. Claimant agreed to and did within the three months advance to bankrupt $30,000, to be repaid by applying thereon one-half of the price of the lumber as delivered, paying cash for the other half. *Held* that, under the contract, title did not pass to claimant until the lumber was measured and inspected, and that lumber which had been cut by the bankrupt to apply thereon in accordance with its terms, but which at the time of bankruptcy was still stacked in the yard, and had not been measured nor inspected, remained the property of the bankrupt, and passed to his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

2. SALES (§ 199*)—TRANSFER OF TITLE—INTENTION OF PARTIES.

The fundamental proposition in determining when the title to personal property, which is the subject-matter of a contract of sale, passes from

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

the seller to the buyer, is that it depends on the intention of the parties, to be gathered from the contract, if not expressly stated then by inference or presumption from its terms.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 516–523; Dec. Dig. § 199.*]

3. EVIDENCE (§ 441*)—PAROL EVIDENCE TO CONTRADICT WRITING—RULE OF EXCLUSION.

The rule that a contemporaneous parol agreement cannot be shown to contradict the terms of a written contract applies as well to the implied as to the expressed terms of such contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030–2047; Dec. Dig. § 441.*]

4. SALES (§ 200*)—TRANSFER OF TITLE—APPROPRIATION OF LUMBER ON CONTRACT.

Where an executory contract for the sale of lumber of stated kinds and quality to be manufactured by the seller required that the lumber should be inspected under certain rules and measured before delivery, the mere fact that the parties went through the millyard where lumber which had been cut by the seller to apply on the contract was stacked and estimated the quantity, and that the buyer directed that it be shipped, did not do away with the requirement of inspection and measurement, nor operate as an appropriation of the lumber then in stack to the contract so as to pass title thereto to the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 524–528; Dec. Dig. § 200.*]

In the matter of the Clairfield Lumber Company, bankrupt. On claim of the Gage Lumber Company to certain lumber. Claim denied.

C. L. Marsilliot, for Gage Lumber Co.
E. S. Jouett, for Clairfield Lumber Co.

COCHRAN, District Judge. This cause is before me on a controversy between the Gage Lumber Company, hereafter referred to as the Gage Company, a corporation engaged in the lumber business at Providence, R. I., and the trustee in bankruptcy, M. T. McEldowney. The bankrupt is a Kentucky corporation, whose principal office was at Winchester, in this district, and which, for something over a year prior to September 7, 1907, the date of the filing of the petition in bankruptcy, had owned and operated a sawmill, erected by it, at Clairfield, Clairborne county, Tenn. The controversy relates to lumber sawed and stacked by the bankrupt at its sawmill, most of which was still in the stack at the beginning of these proceedings. On the same day that the petition in bankruptcy was filed, insolvency proceedings against the bankrupt were begun in the proper state court of Tennessee, and one J. H. Bartlett was appointed receiver therein. September 9th he took possession of the assets of the bankrupt, including all its lumber stacked in its yard at Clairfield. Thereafter the Gage Company, claimant herein, brought an action in replevin in the proper state court against the receiver to recover certain of the lumber which he had thus taken possession of on the ground that it, and not the bankrupt, was the owner thereof. The lumber thus claimed by the Gage Company was considerably less than one-half of the lumber stacked in the yard on September 7th and

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

taken possession of by the receiver, as I make it not over a fifth or sixth of the entire quantity. Upon the appointment of McEldowney as trustee in bankruptcy, the receiver surrendered possession of the lumber taken possession of by him, including that claimed by the Gage Company in its action of replevin, and the other assets of the bankrupt to him, and by consent the assertion of its claim thereto was transferred to this court. Thereafter the trustee sold all the lumber that came into his hands, including that so claimed by the Gage Company, to it for certain prices upon the agreement that, in the event it should be determined that it was the owner of that portion thereof so claimed by it, it would not pay therefor, but that otherwise it should account to the trustee for the prices at which it had been taken. The sale came to $24,915.64, and that in controversy to $7,485.16.

But the lumber so claimed by the Gage Company is not all the lumber so sawed and stacked in controversy herein. On and after August 30th down to and including September 6th, the day before the filing of the petition in bankruptcy, the bankrupt delivered to the Gage Company six car loads of lumber that had been so sawed and stacked, and on September 9th after the filing thereof, and before the receiver on that day took possession, delivered to that company a small quantity in addition, as I make it, parts of two car loads. It was delivered in pursuance of a written executory contract of sale entered into between the Gage Company and the bankrupt on September 6, 1906, on which the former had made an advance. This lumber is also in controversy herein. The trustee claims that the Gage Company should account to him for the prices at which it was taken. This the Gage Company denies on the ground that it was the owner of the lumber at the time of the delivery. This is the only real ground on which it can claim that lumber delivered on September 9th after the filing of the petition in bankruptcy, and it is the only practicable ground on which it can claim that lumber delivered before as, if it was not the owner thereof at the time of delivery, there is no room to claim that the delivery thereof was not voidable as a preference. The controversy, therefore, as to this lumber is the same as that as to the lumber not delivered and still in the stack at the time of the beginning of these proceedings. It is as to the ownership thereof at the time of the delivery as, in the case of the other, it is as to the ownership thereof at the time the petition in bankruptcy was filed. The matter of ownership of both depends upon the same considerations.

The plaintiff bases its claim to ownership of all the lumber in controversy on three grounds. One is the written executory contract of sale on September 6, 1906, hereinbefore referred to. The form of that contract is a written offer or order addressed to the bankrupt accepted by it in writing. The second ground is a verbal agreement claimed to have been made by the parties on the same occasion when the executory contract of sale was entered into. The third ground is certain happenings in 1907, on two occasions in June in bankrupt's lumber yard, one in the last week in August in Cincinnati, and one on September 2d in bankrupt's lumber yard again. These three positions are hardly consistent with each other, though probably the first

and third are. Possibly these two should be treated as one, but, in order to determine the value of the first by itself, I will deal with them separately. When I come to deal with the third one, I will consider it in connection with the first, as, indeed, it must necessarily be. I will take these positions up, and dispose of them in the order in which I have stated them.

[1] 1. The contract of September 6, 1906, was, as stated, an executory contract of sale by the bankrupt to the Gage Company. It was for the sale of certain lumber thereafter to be manufactured by it at certain prices. It did not concern lumber then in existence, but lumber thereafter to be produced by manufacture by the bankrupt at its sawmill at Clairfield then, but lately erected and put into operation. The lumber covered by it was poplar, oak, and ash of different grades and sizes—i. e., thickness and widths—the prices varying according to the kinds and grades. The prices were "f. o. b. Clairfield, Tennessee"; i. e., the bankrupt was not only to produce the lumber, but it was to deliver it on board cars at Clairfield. Before it was delivered, the bankrupt was to measure and to ascertain its price and to inspect it according to the rules of the National Hardwood Association, to determine whether it was, in fact, such lumber as was covered by the contract. By it the Gage Company was to advance the bankrupt $30,000 on account of the purchase price of the lumber in four months paper, $10,000 simultaneously with the execution of the contract, $10,000 October 1st, and $10,000 November 1st, which term of the contract was duly complied with by the Gage Company. The bankrupt on its part agreed "to have put on sticks during the month of September at least $10,000 worth of lumber to apply on" the "contract, during the month of October at least $10,000 worth additional to apply on" the "contract" and "to have an additional $10,000 worth of lumber on sticks by December 1st making a total of $30,000 worth of lumber which has been put on sticks to apply on" the "contract." This agreement on the part of the bankrupt seems to have been the moving cause of the agreement on the part of the Gage Company to make the advance. In the writing the former was followed immediately by the latter. The latter was introduced by the words "We hereby agree," and the former by the words, "You agreeing at the same time." This advance was to be repaid, not by the purchase price of the whole of the lumber as it was thereafter delivered, but by the purchase price of one-half thereof only, the other one-half to be paid in cash. The wording of the writing on this matter is:

"We hereby agree to pay one-half cash on each invoice as rendered, the balance to apply on payment of notes given. The same shall continue in this manner until this said advance has been paid in full."

The contract covered more lumber than would in this way repay the advance; i. e., more than $60,000 worth of lumber at the contract prices, just how much I am unable to say, as the full contract is not before me, and, after so providing, the contract continued: "After which your invoices will be paid in full." The contract said nothing as to when the lumber sold other than the $30,000 worth was to be sawed and put on sticks—i. e., stacked—nor anything as to when any

of it was to be delivered. I take it that the rest of the lumber was to be sawed and stacked within a reasonable time after the sawing and stacking of the $30,000 worth, that it was all to be delivered as ordered by the Gage Company, and that it was to order same within a reasonable time after it became seasoned and ready for delivery if not as it became so; the seasoning period being from 60 to 90 days after it was stacked.

The bankrupt had at that time sawed and stacked some lumber, but evidently not much. In stacking that which it had theretofore sawed and that which it thereafter sawed, regard was had to its kind, grade, and thickness, and possibly also to its width and length. It was so stacked that, when an order was received for lumber, all that had to be done was to go to the stack containing lumber of the specific description called for, and fill the order without disturbing other lumber; i. e., lumber not of that specific description so as to get at it. Each stack was marked so as to show the grade and thickness of the lumber contained in it.

The bankrupt had delivered to purchasers before the receiver took possession 153 car loads of lumber, 13 in the year 1906, and 140 in the year 1907. Of these it had delivered to the Gage Company on its contract of purchase 65 car loads, 5 in the year 1906 and 60 in the year 1907. It seems from the date of the delivery of the five car loads delivered to it in 1906 that none of it was lumber that had been sawed or stacked after the making of the contract of September 6th, but came out of lumber previously sawed and stacked. If it was lumber that had thereafter been sawed and stacked, it was delivered before it was thoroughly seasoned. The 60 cars delivered in 1907 include those delivered on or after August 30th, which are in controversy herein. The lumber as delivered by the bankrupt outside of that delivered on or after August 30th came to $21,085.60, and that so delivered to $3,500.47, making the total delivered come to $24,586.07. As heretofore stated, the lumber in the yard at the time the receiver took possession and which was afterwards surrendered to the trustee, and by him sold to the Gage Company, came to $24,915.16, of which that in dispute came to $7,485.16 at the prices fixed by the contract of September 6, 1906. The quantity so sold exceeded 1,000,000 feet, and that in controversy was less than 200,000 feet. It was therefore the best lumber in the yard. It was all the lumber that was there of the description called for by the contract of September 6, 1906. Adding the purchase price of the same to that of the quantity that had been delivered makes a total of $32,071.23. Unless, then, the bankrupt had delivered to purchasers other than the Gage Company lumber of the description covered by its contract, it had after the making thereof sawed and stacked but little, if any, lumber in excess of the $30,000 worth which it had agreed to saw and stack, though it had not done so by December 1, 1906. The ground upon which the Gage Company claims that it was the owner of the lumber in controversy herein under and by virtue of the written contract of September 6, 1906, is that it was such lumber as was called for by the contract and had been sawed and stacked to apply to it. I

think that it is to be taken that it was so sawed and stacked, and that quite likely it is largely, if not entirely, a part of the $30,000 worth of lumber which it had agreed to saw and stack for that purpose by December 1st, but which it had not done. In disposing of this feature of the case, I will take it that this is so, or, to put it most favorable to the Gage Company, I will treat it as if $30,000 worth of lumber had been sawed and stacked to apply on its contract by December 1st, and that in controversy was a part thereof. In such a state of case would the claimant have become the owner thereof as soon as same was sawed and stacked?

[2] The fundamental proposition in determining when the title to personal property which is the subject-matter of a contract of sale passes from the seller to the buyer is that it depends on the intention of the parties. It passes when, and not until, they intend it shall pass. Where, then, the intention on this subject is expressly stated in the contract, there is no difficulty in determining when the title passes. It is only where there is no express statement on the subject, as here, that there is any difficulty. In all such cases the question still is as to what the intention of the parties was, and the question as to when the title passes is settled in accordance with what that intention is taken to have been. There may be terms or expressions in the contract from which a reasonably fair inference as to what the intention was can be drawn. The intention so inferred is controlling. Or these, as well as express statements as to what the intention is, may be lacking, and it may be a pure matter of presumption as to what the intention was. Here the intention so presumed is controlling. In every case, then, that can arise it is the intention of the parties stated, inferred, or presumed that governs. In the case in hand, the intention is not expressly stated. That much is certain. The only terms in the contract from which it is possible to say that the intention is inferable is that as to the advance, and that as to the sawing and stacking $30,000 worth of lumber by December 1st to apply on the contract. With that out of the way, the question of intention would be one of presumption solely. I think the orderly way in which to consider the question now in hand is to determine, first, what the presumption as to the intention of the parties to the contract in question as to when the title to the lumber covered by it was to pass would be with those terms out of the way, and then to determine their effect.

Different situations may exist calling for determination of the presumption as to the intention of the parties as to when the title to personal property, which is the subject-matter of a contract of sale between them, is to pass. It is not important to refer to any except such as has the property still in the possession of the seller, and not yet delivered by him to the buyer. Cases of this sort may be divided into three classes: Those where the property is in existence and identified in whole or in part; those where it is not identified in whole or in part and is not necessarily not in existence; and those where it is not in existence and is thereafter to be produced—either manufactured or grown—by the seller. The rules as to the presumption

of intention are ordinarily laid down in connection with cases of the first class. Here several different situations may exist. The property may be wholly identified, the terms of the contract may all be definitely fixed, and nothing remain to be done but for the seller to deliver and the buyer to pay. The property may be wholly identified, the price may not be definitely fixed, but to be fixed by the seller by counting, weighing, or measuring before delivery. Such a situation as this may also have an added circumstance that the property before delivery is to be inspected to determine whether it is really such as is called for by the contract, or possibly this circumstance alone may be the sole differentiating circumstance in the situation. Again, though the property may be wholly identified and price definitely fixed, yet the property may not be fit for delivery. Something has to be done by the seller to place it in a deliverable state. And, again, the property may not be wholly identified as being part of a mass of things, which may be of uniform or unequal quality, in the one instance calling for mere separation and in the other for selection as well as separation. Now, I understand the law to be that in such cases, except the first one, the presumption is that the title does not pass before the doing of the things that remain to be done, and in that case the presumption is that it passes before delivery upon the bargain being struck. In the second situation the presumption is that the title does not pass before the fixing of the price by counting, weighing, or measuring, even though there is to be no inspection; the fact that there is to be an inspection being an additional consideration for the title not passing at the time the contract is made. This presumption in these several instances I understand to be a conclusive presumption in the absence of any express statement as to intention or anything from which it can be inferred. There is some conflict in the authorities as to the presumption in the second situation above referred to where there is to be no inspection; i. e., where the property is wholly identified, and the only thing to be done is for the seller to fix the price by counting, weighing, or measuring before delivery, and in the fourth where the things in the mass are of uniform quality, and nothing but mere separation is called for, but the decided weight of authority is to the effect stated. Such is the law as laid down by the Supreme Court of the United States and of Tennessee, the only two jurisdictions concerned here, as to the second situation, where both the fixing of the price by measurement and an inspection is called for before delivery.

The second and third class of cases above referred to are alike, in that there is no identification of the property which is the subject-matter of the contract of sale at the time of the making thereof. In the third class, in the nature of things, as the property is thereafter to be produced, there is no such identification. Identification is impossible until it is produced. It is to this class that our case belongs. In such cases it would seem that if, after the production of property of the character which is the subject-matter of the contract of sale, any of the things remains to be done, before the doing of which the presumption is that the title to property in existence at the time of

the contract does not pass, the presumption is that the title does not pass until the doing thereof. If the doing of such things is essential to the passage of title to property in existence at the time of the contract, a fortiori the doing thereof is essential to the passage of title to property not then in existence, but thereafter to be produced by the seller. Where the subject-matter of the contract of sale is property in existence and identified, the alternative is presented as to whether the title passes at the time of the contract or thereafter at some time in the future. Where the subject-matter of the contract of sale is property not then in existence, but thereafter to be produced by the seller, no such alternative is presented. The alternative is presented between the two times in the future—the time of production or the time of the doing of such thing. If the future time is, as against the present time, taken to be the time of the passage of the title in the former case, certainly the same future time as against the earlier future time ought to be taken to be the time of the passage of the title in the latter case.

The classification given above and the positions taken I have gathered from 1 Mechem on Sales, c. 1 to 5, inclusive, in book 2. I do not mean that the matter is stated there just as I have stated it. I mean that my statement is based on what is there given. I am not sure that I have put it exactly right in all instances, as I have not sufficiently reflected on it to be sure of the correctness of every statement I have made. The decisions bearing on the passage of title to personal property which is the subject-matter of a contract of sale are so numerous as to forbid consideration of them in detail, except in so far as they have been cited and relied on by counsel. Those decisions will be referred to later. It must then be held that if the contract of September 6, 1906, contained nothing as to the Gage Company making any advances, and as to the bankrupt sawing and stacking $30,000 worth of lumber by December 1st to apply on the contract, the Gage Company did not acquire title to the lumber on hand at the time of the filing of the petition in bankruptcy, and that it did not acquire title to that theretofore delivered to it before the doing of the things necessary to determine its price, and that it was such lumber as was called for by the contract; i. e., before the measurement and inspection.

What, then, is the effect of the terms of the contract as to making the advance and as to sawing and stacking $30,000 worth of lumber to apply on the contract? Do they rebut the presumption otherwise that the title was not to pass before the lumber was measured and inspected? Is it to be inferred therefrom that it was the intention of the parties that the title to the lumber sawed and stacked by the bankrupt which was of the character called for by the contract, and which was sawed and stacked to apply on the contract, was to pass to the Gage Company before it was measured and inspected, and as soon as it was stacked?

Take first the matter of the advance. That made it the creditor of the bankrupt. Its indebtedness, however, was not to be paid in money. It was to be paid in lumber, and in lumber which the bankrupt would

be aided in producing by the advance. This undoubtedly was a consideration calculated to awaken a desire on the part of the Gage Company to a certain extent at least that the lumber so produced and so applicable should, as soon as it had been produced and stacked, become its property, so that no one else could interfere with its right to have it applied on its debt. Just how strong the desire would be would depend somewhat on how it regarded the financial standing of the bankrupt to be. Possibly, as it was just beginning business, it might have been thought to be better than it would otherwise have been. But there was a counter consideration calculated to awaken desire on its part that the lumber so produced and applicable should not become its property before delivery on board the cars, and that was its possible destruction by fire. The complete control and disposition of things at the sawmill was in the hands of the bankrupt. One would hardly like to run the risk of such severe loss under such circumstances. Point is made of the fact that the bankrupt did not have the lumber in controversy insured. As it was looking after the lumber, it may have relied on its oversight to protect it from loss. It is much more significant that the Gage Company, who had to rely on others saving it from loss by preventing a fire or putting it out as soon as possible if it occurred, did not have it insured if it owned it after it was stacked. I think this consideration sufficient to counterbalance, if not to overthrow, the other.

I find nowhere that it has been held that an advance payment on the purchase price of personal property, the subject-matter of a contract of sale, is sufficient in and of itself to affect the passage of title thereto. And it is to be noted here that the advance was not to be repaid by the entire purchase price of the lumber as it was thereafter delivered, but only by one-half thereof. The other half of the purchase price was to be paid to the bankrupt in cash. If the Gage Company was willing to forego this half of the purchase price, the payment of which would much sooner reinstate it, is there any likelihood that it desired to acquire the ownership of the whole lumber in advance of its delivery to it?

Take, then, the matter as to sawing and stacking $30,000 worth of lumber by December 1st to apply on the contract. I fail to see in this anything but a desire to hasten the delivery of $30,000 worth of lumber. It is simply a provision that the bankrupt should have that much lumber ready for delivery on the contract by December 1st or as soon thereafter as same became seasoned. It covered only enough lumber to pay one-half of the advance on the contract. No provision whatever was made as to sawing and stacking the other $30,000 worth of lumber whose delivery would be essential to pay back its advance in full. It is left just as the excess of the lumber covered by the contract over and above the $60,000 worth essential to reimburse it for its advance is left; i. e., without any provision whatever for its sawing and stacking. The only difference then between the first $30,000 worth and the second $30,000 worth and the excess over $60,000 worth is that the first $30,000 is to be sawed and stacked by December 1st.

If the lumber which was the subject-matter of the contract had been in the bankrupt's lumber yard at the time of the making of the contract, instead of having thereafter to be produced, and hence was in existence and identified under the rules above stated, the presumption would be that the title thereto was not to pass before it was measured and inspected. How, then, is it possible to say when it was not in existence and identified, but was thereafter to be produced, that it was to pass before the doing of those things simply because of a provision in the contract that $30,000 worth of lumber was to be produced and stacked to apply on the contract by December 1st?

I therefore conclude that those terms have no effect on the question as to when the title was to pass; i. e., they do not change matters from what they would have been had not those terms been in the contract. Counsel for the Gage Company cite the following authorities in support of its contention herein, to wit: McCarty v. Blevins, 13 Tenn. 195, 26 Am. Dec. 262; Potter v. Coward, 19 Tenn. 22; Goodrum v. Smith, 22 Tenn. 542; Shaddon v. Knott, 32 Tenn. 359, 58 Am. Dec. 63; Rawls & Griffis v. Patterson, 60 Tenn. 373; Williamson v. Steel, 71 Tenn. 527, 31 Am. Rep. 652; Barker v. Freeland, 91 Tenn. 112, 18 S. W. 60; Mayberry v. Lilly Mill Co., 112 Tenn. 564, 85 S. W. 401; Williston on Sales, p. 309; Young v. Mathews, L. R. 2 C. P. 127; Audenreid v. Randall, 3 Cliff. 99, Fed. Cas. No. 644; Southwestern F. & C. P. Co. v. Stanard, 44 Mo. 71, 100 Am. Dec. 255; Martz v. Putnam, 117 Ind. 392, 20 N. E. 270; Riddle v. Varnum, 20 Pick. (Mass.) 280; McElwee v. Met. Lumber Co., 69 Fed. 302, 16 C. C. A. 232; Kingsley v. White, 57 Vt. 565; Barber v. Thomas, 66 Kan. 463, 71 Pac. 845; Trigg v. Bucyrus Co., 104 Va. 79, 51 S. E. 174; Andrews v. Grimes, 148 N. C. 437, 62 S. E. 519.

I am dependent as to some of these cases on counsel's brief for the points involved and decided in them. I will consider the Tennessee cases together. The first four, to wit, McCarty v. Blevins, Potter v. Coward, Goodrum v. Smith, and Shaddon v. Knott, are alike, in that in each case the contract of sale covered specific personal property and fixed the purchase price. There was nothing to be done by the vendor but to deliver. It was held that the title passed before delivery. In the McCarty v. Blevins Case the specific personal property which was the subject-matter of the contract, to wit, a colt, was not in existence, and it was held that the title passed when it came into existence. This is the only one of all of them where the property was not in existence when the contract was made. In the Rawls & Griffis v. Patterson Case there had been a delivery not to the vendee, but to his agent. It was held that the title passed on the delivery, though the property which was the subject-matter of the contract, to wit, two bales of cotton, was yet to be ginned, separated, and weighed. There is nothing decided in Williamson v. Steel that is of any consequence in this case. It is cited because of a dictum in the opinion, which is to the effect that in a sale of two bales of cotton out of a crop of cotton to be gathered, prepared for the market, and delivered a delivery is not essential to the passage of title. It will pass before delivery if the two bales have been selected and set apart for the

vendee by the vendor. In the case of Barker v. Freeland the subject-matter of the contract was 40 acres of potatoes, and the vendor agreed to deliver them at the depot. It was held that title passed on the making of the contract, and not until delivery. The basis of the decision was the existence of circumstances, to wit, provisions in the contract, from which it was inferable that the title was to then pass. Judge Lurton refers to them in these words:

"The circumstances of this case to be observed in this connection are these. The fact that complainant bought a crop in the field; that he was to have his own agent attend to the filling and sewing of the sacks; that he selected his own vehicles for containing the goods; and that in the field they were put into his own bags."

The decision in Mayberry v. Lilly Mill Co. is not relied on as the point decided is not stated. A quotation from the opinion to the effect that the intention of the parties "is always controlling" is all in the case that is relied on. I fail to find anything in any of these Tennessee cases at all against any position I have taken or supporting the Gage Company's position that before inspection and measurement title to the lumber in question passed to it. And in the quotation from the opinion in Mayberry v. Lilly Mill Company occurs these words:

"Ordinarily when anything remains to be done by the seller or purchaser, as where delivery contracted for is not made or where the property sold is not set apart from other property of like character, or where measurement is necessary to ascertain the purchase price, the contract is incomplete and executory and the title remains in the former."

The opinion in the Tennessee case of Hardwick v. American Can Company, 113 Tenn. 657, 88 S. W. 797, cited by counsel for the trustee, states the matter as well as it is possible to put it. After noting that there are two classes of contracts in which the subject-matter thereof is existing personal property, to wit, a bargain and sale, where the title passes on the making of the contract and an executory agreement where it passes thereafter, and indicating what is a bargain and sale, the opinion proceeds:

"This is a bargain and sale as distinguished from an executory agreement. Benj. on Sales, 213. The latter contemplates that something is to be done to complete the sale, such as weighing, selecting, delivering, or other act, and is converted into a bargain and sale by the appropriation in the mode agreed upon of specific goods to the contract. In either case, as soon as the specific goods sold are ascertained, either by the original contract or subsequent appropriation, the property vests in the buyer without payment, if no condition be annexed to the contract."

In this case no lumber can be said to have been appropriated—I am now leaving out of consideration the happenings relied on as constituting the third ground upon which the property in controversy is claimed—to the contract until inspected and measured. The stacking of the lumber upon a rough inspection of it as it came from the saw as of the character called for by the contract and for the purpose of applying it thereon was not an appropriation thereof to the contract. It was not so appropriated, at least until, upon an inspection under the rules of the National Hardwood Association, it was found to be such

as was called for by the contract, and was measured to ascertain its price. This exhausts the Tennessee authorities.

The quotation from Williston is simply to the effect that the title is presumed to pass when the contract is made if goods are identified, and nothing remains to be done other than delivery and payment, and though, where something else remains to be done, the presumption is that it does not then pass, this presumption may be overthrown by circumstances indicating an intention that it shall then pass. The case of Young v. Mathews will be considered under the third ground relied on by the Gage Company. There is nothing in the case of Audenreid v. Randall having any particular bearing on this case. It has more to do with the validity of a sale against vendor's creditors. In a quotation from Southwestern Freight & Cotton Press Company v. Stanard it is stated that separation is enough to pass the property, though weighing, measuring, or counting may afterwards be necessary to adjust or determine the final amount of the price. I am not advised whether the Supreme Court of Missouri is one of the courts which does not hold in accordance with the majority of the courts that, where the price is to be fixed by weighing, measuring, or counting, the title is presumed not to pass until that is done. But the value of this quotation depends on the word "separation." If what the vendor has done is a real separation of the goods sold to vendee, I cannot see why the title should not pass, though the other thing remains to be done. But the placing the lumber in stacks as it comes from the saw as lumber conforming to that called for in the contract and with the view of applying it thereon was not a separation of it to the contract in the sense in which that word is used in the quotation. Until inspected according to said rules and determined to be such as the contract called for, it cannot be said to have been separated to the contract.

In the case of Martz v. Putnam the quality and size of the timber was ascertained, it was piled on the vendor's premises subject to the vendee's order, and was to be paid for as piled. Invoices were sent from time to time to the buyer, and it was fully paid for when the controversy arose. There was no provision as to any inspection. The court said:

> "The rule that, if anything remains to be done, the property does not pass, applies to anything that is required to be done prior to the delivery of the property. In this case the property was delivered by the piling in stacks and from thenceforward it was held by the vendor subject to the order of the vendee."

This case certainly has no bearing here. In the case of Riddle v. Varnum, the lumber was delivered at the time of the making of the contract, and it expressly so stated. The measuring to ascertain the price, therefore, took place after the delivery. It is quoted by the Indiana court in Martz v. Putnam in support of the doctrine laid down in the above quotation from the opinion herein. The case we have here is one where there had been no delivery under the contract. It will be borne in mind all along here that I am not now considering the effect of the happenings relied on as constituting the third ground

on which the lumber is claimed. The case of McElwee v. Metropolitan Lumber Company, a decision of the Appellate Court of this circuit, is much relied on. The case is like the one in hand, in that the subject-matter of the contract was property not then in existence, but was thereafter to be produced, and the property to be produced was lumber. In no other respect does it resemble the case in hand. There a lumber company in May, 1892, sold the entire product of its mill in Michigan during the season of 1892. The amount of lumber manufactured during each month was to be determined by inspectors on the first day of the succeeding month, and the purchaser was to give his 90-day notes in payment of same less freight from the mill to Chicago. The controversy was in relation to lumber whose quality had been so determined and paid for. It was held that the title passed upon such determination and payment notwithstanding the lumber company was to deliver the lumber at Chicago, and there was to be another and final inspection after delivery began. Judge Lurton said:

"Though this agreement was originally executory being for the sale of lumber to be manufactured, yet when the product of a particular month was completed, and it had been inspected and measured, there was a complete bargain and sale of the lumber thus designated. That particular lumber became appropriated to the contract, and the vendee under the agreement was obligated to make his promissory note to the vendor for the price payable 90 days after date. The element necessary to a complete sale was supplied by the appropriation of a particular lot of lumber to the contract. In the absence of a contrary intention, clearly expressed, by other parts of the contract, the right to the property and of possession would vest in the buyer upon the execution of his promissory notes payable to the seller. The provision for a final inspection at Escanaba after the delivery had begun was merely for the correction of error before final settlement, and does not operate to defeat the presumption that title passed when the lumber was first inspected and accepted and conditional payment made."

No such appropriation was called for in the contract involved here. If the happenings relied on under the third ground amounted to an appropriation, it was an appropriation beyond any called for by the contract. The only appropriation called for by it was upon the inspection and measurement provided therein which was the only inspection and measurement contemplated. If the question in that case had been as to whether lumber sawed and stacked was the property of the purchaser before the monthly and preliminary inspection and conditional payment, it would have presented pretty much the same question we have here. The clear intimation of the case is that, under those circumstances, the property would not have been the property of the purchaser, but of the Lumber Company, the seller.

I do not think I need go through the other cases relied on by one as I have those thus far considered. I have dealt with those mainly relied on. No one of the other cases cited decide anything in conflict with the position here taken and are as readily distinguishable from the case we have here as those which have been considered in detail.

The necessities of this case do not require that I cite any specific authorities in support of the position I have taken. The whole subject is covered by Mechem in his book on Sales, to which I have

referred, so thoroughly, that I need go no further. I may say, however, that this case contains in the provision as to sawing and stacking $30,000 worth of lumber by December 1st to apply on the contract, a feature that I find in none other that has been cited by counsel, or that I have come across in my own investigation, and in so far it is possibly a novel case. But for the reasons heretofore given there is nothing in this feature calling for a disposition different from what would have to be made did it not exist.

[3] This brings me to the second ground relied on, and that is the alleged verbal agreement entered into at the time of the making of the contract. The claim is that at that time it was agreed by the parties that the lumber when sawed and stacked should become the property of the Gage Company subject only to measurement and shipment of same. That there was such an agreement is testified to by both the officers of the Gage Company and the bankrupt. It is, however, somewhat strange that such a position was not asserted when the claim was first presented. It was not asserted until later by way of an amendment. It appears also from the same testimony that the Gage Company desired to have the lumber marked as it was sawed and stacked as its property, but that the bankrupt would not agree to this. This has a tendency to negative the fact that any such verbal agreement was really made, and to show that it was merely talked about, and, upon the bankrupt's refusal to allow the lumber to be marked as the Gage Company's property, it was abandoned. This would account for its not relying on any such verbal agreement in the first instance; its being relied on at all being due to the stress of the case. But, however this may be, I am clearly of the opinion that the evidence is not admissible inasmuch as it contradicts the written contract. We have construed the written contract to mean that the title to the lumber was not to pass before it was inspected and measured. According to the verbal agreement, this was not so. It passed as soon as the lumber was sawed and stacked. Here is a clear and unmistakable contradiction of the written contract. Had the contract said in so many words that the title was not to pass before inspection and measurement, there could not be any possible question as to the testimony as to the verbal agreement being inadmissible. But, though this is not expressed, it is implied. And parol testimony is just as inadmissible to contradict an implied term of a written contract as an express term thereof. A good statement of the law to this effect is cited by counsel for the trustee from Page on Contracts, § 1189. It is to this effect:

"The rule that prior or contemporaneous negotiations cannot be used to contradict, add to, or otherwise vary a written contract applies not merely to the letter of the written contract, but also to its legal effect."

And an authority directly in point is cited by him, to wit, Van Winkle & Co. v. Crowell, 146 U. S. 42, 13 Sup. Ct. 18, 36 L. Ed. 880. I need not look further for authority on this point. Counsel for the Gage Company cites and relies on Hines v. Willcox, 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. 824, 832, 54 Am. St. Rep. 823, and Quigley v. Shedd, 104 Tenn. 560, 58 S. W. 266, as conclusive of the question.

I do not think that either has application to the question before us. In the Hines v. Willcox case the written contract on its face was incomplete. It contained no undertaking on the part of the landlord. One of the recognized exceptions to the parol evidence rule is that it is admissible to supply omissions in an incomplete contract. In the case of Quigley v. Shedd the parol evidence was in accord with what the court construed the written contract to mean. It puzzles me to make out where there was any necessity for the parol evidence in that case. The written agreement did not need any such support according to the construction put upon it by the court, and it was recognized that it was the court's function to construe the contract. I think, therefore, that the Gage Company's claim to the lumber in contest cannot be made out on the basis of the alleged verbal agreement.

[4] There is nothing left, then, on which to base that claim except the happenings referred to. These happenings did not consist in the mere sawing and stacking of lumber to apply on the contract. I have considered the value of such happenings in what I have had to say as to the effect of the contract and the doing of the thing called for by it on the passage of the title. The happenings now to be considered went beyond the mere sawing and stacking of the lumber to apply on the contract. It is claimed they amounted to a setting apart and an appropriation of the lumber to the contract. Of course, if so, many of the cases cited and relied on by counsel for the Gage Company support the contention that the title passed on such setting aside and appropriation. But they differ from what we have here, in that there the setting aside or appropriation was made by the contract itself, whereas here the setting aside and appropriation claimed is by virtue of something that transpired subsequent to the making of the contract. The only setting aside or appropriation which the contract of September 6, 1906, made was upon inspection and measurement. It did not make the sawing and stacking to apply on the contract a setting aside or appropriation. If, then, there was an earlier setting aside and appropriation than upon inspection and measurement, it must have been because of something that transpired after the making of the contract. Such the happenings relied on are claimed to have been. Did, then, those happenings amount to an earlier setting aside and appropriation of the lumber to the contract than was contemplated by the contract; i. e., before inspection and measurement and after the lumber had been sawed and stacked to apply on the contract? To answer this we must know just what those happenings were. As heretofore stated, they took place at the lumber yard on two occasions in June, and on the 2d of September, and on one occasion at Cincinnati the last week of August. All of them had a common element, to wit, an order or direction to deliver lumber that had been sawed and stacked to apply on the contract. Those that occurred in the yard had in addition a survey of the lumber sawed and stacked that was applicable on the contract and an estimate of the amount thereof. Really the order and direction was not to deliver lumber that had been sawed and stacked to apply on the contract. It was to

deliver lumber of the character called for by the contract with the expectation of course that the lumber to meet the order and directions was to come from that which had been sawed and stacked. This was all that took place even on September 2d, when orders and directions were given sufficient to cover all the lumber in the yard that had been so sawed and stacked. It is to be noted in this connection that what took place on September 2d, no matter what its character may have been, can be of no avail to the Gage Company because a vesting at that time of the title to the lumber then in the yard was clearly a preference, as it then knew of the insolvency of the bankrupt. Such then was the character of the happenings relied on. It must be held that they did not amount to a setting aside and appropriation at that time of any lumber to the Gage Company. The orders and directions given were nothing more than it was contemplated by the contract would be given in the course of its performance. Notwithstanding them, the lumber was still to be inspected and measured as the contract provided. It is true that Palmer, one of the directors and managers of the Gage Company, who represented it on each of these occasions, testified that the lumber was set aside for the Gage Company. But that was merely his opinion as to the effect of what took place. When asked to tell what took place his answer was as for instance on the first occasion in June as follows, to wit:

"We went over the propostion very carefully, and went through the yard and took an estimate of the stock, the stuff that was put up for us, and gave an order for the shipment of some of it. Instructions had already been given to forward the lumber. We took an estimate of the whole yard."

This coincides with Jacobs' testimony as to what took place. I am not bound by Palmer's opinion. I must form my own and it accords with that of Jacobs that on none of these occasions was any lumber set aside or appropriated in the legal sense of those words to the contract.

In the case of Young v. Matthews cited and relied on by counsel for the Gage Company and which I passed for consideration until now, where it was held that the title to certain clumps of unfinished bricks had passed, though the seller was still to furnish them, it appeared that the object of the buyer as the seller knew was to obtain an immediate security, and with this in mind the buyer's agent said to the seller, "Are all these appropriated to my principal?" and the seller replied, "Yes." There was no such object here, as the Gage Company was not then suspicious as to bankrupt's financial condition. And no such thing was said here as was said there either in so many words or in effect. All that we have is the opinion of Palmer that as a result of what he says took place the lumber as it stood was set aside and appropriated to the contract.

I therefore conclude that the Gage Company has not established ownership on this ground. But these were not all the happenings that can be said to have any bearing on the question of ownership. There were certain other happenings which bear heavily against the Gage Company's claim of ownership of the lumber in controversy on either one of the grounds relied on. They took place on Sunday morning,

September 1st, in Judge Beckner's library in Winchester, in the lumber yard on September 2d, on the train from Knoxville to Clairfield on September 9th, and in the lumber yard the same day after the arrival of the train. They cover the action of Palmer, the Gage Company's representative. On the first occasion there was a meeting of the officers of the bankrupt, and Palmer was then present. It was then known that the affairs of the bankrupt had been wrecked. The only claim that Palmer asserted was an indebtedness of $20,000. He asserted no claim to any lumber. According to Mrs. Anderson, he said but little. He would shake his head, and say he was wiped out. In the lumber yard September 2d, the next day, he told the bankrupt's superintendent, Jacobs, that the bankrupt was in bad shape financially, and would go into a receiver's hands if some one did not come to the rescue soon, and that his company was a large creditor. He did not claim that the company owned any lumber in the yard, but, after having taken an invoice of all the lumber applicable on its contract, gave orders for enough lumber to cover it. He wanted Jacobs to ship all he possibly could, and gave him to understand that the more lumber they received the better shape they would be left in. The giving of these orders was simply to beat the receiver whose appointment was felt to be imminent and certain. The state receiver, Bartlett, after his appointment, went from Knoxville to Clairfield on the morning of September 9th. Palmer was aboard the same train, and Bartlett had a long talk with him. They talked about the bankrupt's affairs and the Gage Company's claim. The sole claim he asserted on behalf of it was an ordinary creditor. He asserted no claim to any lumber. The matter was discussed why the Gage Company had made such a large advance without any security. He stated that it had considered the matter of obtaining a mortgage or acquiring a lot on which to pile the lumber on, but for certain reasons given neither plan was adopted, and it was without security. Then in the yard after the train arrived at Clairfield, and before Bartlett as receiver had taken possession, Palmer ascertained that on one of his company's orders a car had been partially loaded, sufficiently so that the railroad would transport it, and, without waiting to have it fully loaded, got the inspector to let it be shipped, saying that the receiver would be up there in the afternoon, and this would stop the proceedings.

In view of all these happenings, it is impossible to think that Palmer at any time prior to then had any idea of claiming on behalf of the Gage Company that it owned any of the lumber in the bankrupt's yard.

For these reasons, I am constrained to hold that the trustee is entitled to a judgment for all the lumber in contest, and it will be so entered.

GOLDFIELD CONSOL. MINES CO. et al. v. RICHARDSON et al.

(Circuit Court, D. Nevada. February 1, 1911.)

No. 1,104.

1. INJUNCTION (§ 103*)—EQUITABLE RELIEF—RESTRAINING CRIMINAL OFFENSE—RECEIVING STOLEN ORES.

Where defendants, who pretended to be assayers in a mining district, had purchased large quantities of ore which had been taken from complainants' mines through innumerable thefts committed by their employés with such secret and cunning as to outwit all watching and precaution, complainants had no adequate remedy at law, and were entitled to maintain a suit in equity to restrain defendants from continuing to purchase ore so stolen, notwithstanding such purchase constituted a crime.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 176, 177; Dec. Dig. § 103.*]

2. INJUNCTION (§ 114*)—PARTIES—JOINDER.

Where complainants, who were owners of mines in severalty in a certain district, had long suffered from petty thefts of ore by their employés who had sold the same to defendants, who pretended to be assayers in the district, and a suit to restrain defendants' further purchase of ores, under such circumstances, involved the same question as against all the defendants, complainants were all entitled to join in a single complaint against all the defendants so charged, though there was no concert of action among the defendants in their various purchases, each acting separately for his own benefit.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202-220; Dec. Dig. § 114.*]

In Equity. Suit by the Goldfield Consolidated Mines Company and others to restrain George Richardson and others from purchasing gold ore stolen from complainants' mines. On application for restraining order pendente lite. Granted.

W. H. Bryant, for complainants.

Robert L. Hubbard, for respondents.

FARRINGTON, District Judge. It appears from the bill that each complainant owns valuable gold mines in Goldfield Mining District, Esmeralda county, Nev. These mines join, and form one continuous tract of about 473 acres. Running through this land are a number of veins rich in ores, valued at from 50 cents to several dollars per pound. This ore is of a "peculiar nature, and readily distinguishable from all other ores" found in the district or elsewhere in Nevada; the distinguishing characteristics are alleged to be well known to each defendant. Each complainant has a large number of employés engaged in working these properties. In spite of every precaution some of these employés from time to time steal ore in varying quantities, usually small, and carry it out of the mines when they quit work. It is further alleged that "the respondents are engaged in the pretended business of operating assay offices in the town of Goldfield, but, as a matter of fact, they do not operate assay offices, but mere fences, where the employés of the complainants sell and dispose of the ore stolen from employers; that prior to the bringing of this suit several million dollars' worth of ore had been stolen in this way

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

from the complainants; that said thefts, at one time, were carried on much more extensively than at present, but that during the year 1909, notwithstanding all the precautions plaintiffs could adopt, their employés have taken not less than $160,000 worth of ore, and sold and disposed of the same to the respondents; that the complainants are the producers of all the high grade ore produced in the Goldfield district, and all high grade ore bought by the respondents has been stolen from one or the other of the complainants, which fact is well known to said respondents; that the sums taken by each employé and sold are small in amount, and it is difficult, if not impossible, to detect them in the taking or the sale to the respondents; that the expense of bringing a multitude of suits for each individual offense would be far beyond any recovery that might be had; that the respondents threaten to continue in their business and will continue to purchase ore from employés of the plaintiffs; that there is no other remedy save and except a bill in equity to enjoin the respondents from carrying on their pretended business of assaying, and to enjoin them from purchasing any ores stolen from the complainants' property."

Pending the hearing of complainants' application for an injunction pendente lite, it was ordered that defendants should not purchase any ore without first notifying complainants, or some one of them, thus affording an opportunity to examine and inspect the ore offered. In due time all the respondents except W. F. Lautzenheiser, H. T. Lautzenheiser, and E. R. Wick appeared and demurred to the bill. Want of equity and misjoinder of parties, both plaintiff and defendant, are the objections urged in each demurrer.

In support of the application for an interlocutory injunction, testimony was offered to show that for two years prior to the suit practically all ore mined and produced in Goldfield district came from properties owned by complainants. The only other producing mine in the district was the Daisy from which the shipments were small, and, as a rule, low grade. Inconsiderable quantities of ore had also been taken from the Black Butte, Belmont, Gold Bar, and Great Bend. Ores mined by complainants, save occasional lots shipped to smelters, are treated in mills at Goldfield operated by complainants themselves. Large quantities of ore were stolen from the complainant companies by their employés. The thefts were frequent, but the amount taken in each case was usually small. This practice has continued, despite all efforts to check it. Prior to this suit, and in the year 1909, the several respondents shipped out of Goldfield through different agencies, in the neighborhood of $100,000 worth of bullion as follows, to wit:

George Richardson, between January 9th and November 2d, inclusive	$67,849 46
M. J. Smith, between January 11th and September 23d, inclusive	8,476 64
John Pankey, between January 23d and July 8th, inclusive	1,313 69
Daniel Lane, between June 2d and September 7th, inclusive	6,241 38
Carlton Aguilar, between June 11th and September 23d, inclusive	3,849 29
Alfred Held and A. M. Schwalbach, between January 16th and October 11th, inclusive	12,740 78
Charles Robb, George Rumsey, and Joseph Gruebecker, between January 5th and October 1st, inclusive	6,736 44

The respondents admit purchasing ore, but each, except Mr. Smith and Mr. Held, declares that he never purchased any ore which he knew had been stolen. Mr. Smith states positively that he never bought any stolen ore, and so does Mr. Held, but elsewhere in the affidavit of each is the statement that he never knowingly bought stolen ore.

Much testimony has been offered tending to show that complainants' ores have a characteristic appearance by which they may be readily distinguished. This respondents deny. They testify that complainants' ores can only be distinguished from other ores by microscopical examination or chemical analysis. Each respondent also testifies that he has conducted a legitimate business, openly and without secrecy; that he had fully complied with the Nevada statute of March 29, 1907, which requires a record to be kept of all ore purchased; and also that none of complainants have ever attempted to examine such record. Each defendant declares that he has no secret understanding or agreement with either or any of his codefendants in relation to the purchase or shipment of bullion. I conclude from the testimony that a large part of the bullion disposed of by respondents in 1909 was obtained from ores taken out of complainants' mines. No ore during that time was purchased by either or any of them from complainant companies, or from the Daisy Mining Company, or from any authorized agent of any of said companies.

The evidence convinces me that complainants' ores were stolen; that defendants purchased ore which could have come from no other source than complainants' mines, and through the hands of dishonest employés; and, while it may be necessary to submit Goldfield ores to a chemical analysis or microscopical examination to determine their source with absolute certainty, still complainants' ores have an individuality sufficient to put an experienced dealer in ores of that district on his guard.

[1] It is not clear that any defendant purchased any particular lot of ore knowing positively at the time that it had been stolen, nor is it likely that any one of respondents actually witnessed such a theft. Possibly accurate, positive knowledge was avoided when the circumstances were such as to arouse suspicion. However, after considering and reconsidering all the testimony, I am forced to the conclusion that defendants could not have acquired all of complainants' ores which came into their possession innocently. The facts certainly justified the issuance of the temporary restraining order, and fully warrant its continuance pending the suit, unless the demurrers are well founded. Every person who, for his own gain, receives or purchases ore, knowing it to have been obtained by embezzlement or larceny, is, under the Nevada statute, guilty of a crime. Upon conviction he may be imprisoned for a term not exceeding five years, or by a fine not exceeding $1,000, or by both such fine and imprisonment. He cannot, however, be confined in the state prison unless the value of the property stolen is $50 or more; if the value is less than $50, he will be punished as provided in cases of petit larceny. This fact does not prevent complainants whose ores have been lost through

innumerable petty thefts committed by their employés, with secrecy and cunning sufficient to outwit all watchfulness and precaution, from invoking the aid of a court of equity to suppress the business of purchasing such stolen ores. True, a court of equity is in no sense a court of criminal jurisdiction; but, nevertheless, such a court has the undoubted right to interfere by injunction where property rights are threatened with irreparable injury, for which there is no adequate redress in a court of law. In such cases the only function of equity is the protection of property; it does not interfere with the enforcement of the criminal law. Criminal prosecution is not designed to redress private wrongs; it cannot restore to complainants any equivalent for the lost ores. A familiar application of this principle is seen when the powers of such a court are exerted to prevent acts of criminal violence in the course of labor troubles. The injunction is issued, not because the acts are criminal, but because they are destructive of property rights. In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; High on Injunction, § 1415h; Fetter on Equity, p. 9; Nashville, etc., Ry. Co. v. McConnell (C. C.) 82 Fed. 65, 87; People v. Tool et al., 35 Colo. 225, 86 Pac. 224, 229, 231, 6 L. R. A. (N. S.) 822, 117 Am. St. Rep. 198; Hamilton Brown Shoe Co. v. Saxey, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622, 626.

Some four years ago the Goldfield Mohawk Mining Company filed a bill in this court in which it was stated that the defendants had in their employ a large force of miners engaged in the extraction of ores from property in Goldfield leased by the complainant to the defendants; that the miners were stealing ore; and that defendants had not and would not take proper precautions to prevent the practice. Judge Morrow promptly enjoined the defendants, and their servants, agents, employés and workmen, from removing any ore clandestinely from the mines, and authorized complainant to send watchers into the mines to see that the order was obeyed. It is unnecessary to multiply authorities in support of this proposition. A court of equity has the power in a proper case to enjoin acts which are destructive of property rights, even though the acts in themselves are criminal. And the perpetrator cannot be heard to say when he is indicted therefor that he has already been punished for disobeying the injunction prohibiting the act. The power of a court of equity begins where the jurisdiction of the courts of law ends. Where the latter can afford adequate relief, the former will not interfere.

It is urged that, on the allegations of the bill, complainants are entitled to no equitable relief, because legal remedies are adequate; that is, they are fitted and adapted to the end in view. If each miner who steals ore were known, and his thievish propensities clearly and plainly established, all could be discharged, and the trouble thus ended. But it is shown that these thefts are numerous and difficult of detection; that each theft is small in amount and carefully concealed. Complainants cannot well discharge all their employés—the innocent and the guilty together. Obviously, much time would be consumed, many thefts successfully perpetrated, and large quantities of ore stolen before those who steal could be detected. High-grading is a very

common practice in every mining camp where ores are rich. Furthermore, new men who replace those discharged may not all be honest. If this remedy alone were resorted to, complainants' losses would inevitably be large and irreparable. The same would be true if complainants sought to recover from their dishonest employés the stolen ore, or its value, in actions at law. It is obvious in such event there would be innumerable suits, inability to procure testimony, judgments against insolvent persons, and other difficulties too numerous to mention.

The defendants here did not steal the ore. They simply provided a market for stolen ore. But the mere presence of such places where stolen ore can be disposed of is an incentive to larceny, and pro tanto a menace to complainants' rights. Purchasing the stolen ore is as clearly and distinctly a wrong as the original theft. Notwithstanding it is purchased by a so-called assay office, ore is still the property of the owner from whom it was stolen, and he may recover it, or its value, in an action at law. But if this course were pursued and an action at law had for each wrong, the result would be a multitude of suits, involving expenses probably in excess of the value of the recoveries, as well as many unsurmountable difficulties in procuring testimony. Clearly the legal remedies are inadequate, and in no just sense can they afford the relief to which complainants are entitled.

"Indeed, as has been, in substance, said in other cases, the very fact that a right has been violated, and that this violation is constantly going on, and that a court of law cannot, in damages, compensate the injury or stop the wrong, furnishes the best possible reason for interference by court of equity, and the fact that an actual injury resulting from the violation of a right is small, and the interest to be affected by an injunction large, is not to weigh against the interposition of preventive power in equity, when it is clear that on one hand a right is violated, and on the other a wrong committed." Nashville, etc., Ry. Co. v. McConnell (C. C.) 82 Fed. 65, 70.

In Parker v. Woolen Co., 2 Black, 551, 17 L. Ed. 333, it is said that equity will—

"give its aid to prevent oppressive and interminable litigation, or a multiplicity of suits, or where the injury is of such a nature that it cannot be adequately compensated by damages at law, or is such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance which cannot be prevented otherwise than by an injunction."

In Board of Trade v. Christie & Company, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, it appeared that the Chicago Board of Trade as a portion of its business regularly collected and distributed to certain patrons quotations of prices offered and accepted on its exchange. These quotations the defendant, in some undisclosed, but necessarily wrongful way, had obtained, and was engaged in publishing. The Supreme Court held that these quotations were property, and that the Board of Trade was entitled to an injunction restraining the defendant from using or distributing them.

In the case of Mills v. New Orleans Seed Company, 65 Miss. 391, 4 South. 298, 7 Am. St. Rep. 671, the parties were rivals in the business of buying, collecting, and crushing cotton seed. It was plaintiff's custom to distribute his sacks at railroad stations and river land-

ings, where they could be found and filled by his patrons. The defendant was in the habit of taking these sacks and using them in its own business. Many were thus lost or destroyed. Plaintiff asked a perpetual injunction restraining defendant from further use of the sacks; that defendant be compelled to account for and deliver up all of complainants' sacks in its possession; to pay for all injury to said sacks; and also to pay over all profit derived from their use. On appeal from an order overruling the demurrer to this petition, the Supreme Court said:

"The separate remedy at law for each of such trespasses would not be adequate to relieve the injured party from the expense, vexation, and oppression of numerous suits against the same wrongdoing in regard to the same subject-matter. The ends of justice require in such case that the whole wrong shall be arrested and concluded by a single proceeding. And such relief equity affords and thereby fulfills its proper mission of supplying the deficiencies of legal remedies."

In the so-called ticket scalping cases, the courts have repeatedly applied the rule which is illustrated in the above cases. For instance, in Bitterman v. Louisville & Nashville R. Co., 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, the Circuit Court of the United States for the Eastern district of Louisiana, had entered a decree perpetually enjoining Bitterman and certain other brokers who were engaged in the business of ticket scalping in the city of New Orleans, from dealing in nontransferable round trip tickets issued at reduced rates for passage over complainant's lines. It was charged in the bill that defendants were engaged in buying such tickets from persons who had no right to sell or transfer them, and in selling such tickets to persons who had no right to travel over complainant's lines at reduced rates; and that the purchaser by tendering them, perpetrated a fraud upon the railroad company, put it to large outlays, and injured its legitimate business. The Court of Appeals (144 Fed. 34, 45, 75 C. C. A. 192, 203), after declaring defendants' business to be illegitimate and contrary to equity and good morals, said:

"The remedy at law is plainly inadequate, because not only involving a multiplicity of suits, but because of the difficulty of detecting each offense and of ascertaining pecuniary equivalents for the injury done to complainant's business and for the inconveniences, annoyances, extra expense, outlays, and risks involved in the matter. The case therefore shows an actionable wrong of a recurrent and continuing nature, and, to prevent the same, the complainant is entitled to an injunction. We think, further, that on the case made in the bill, the injunction should be permanent, and we do not perceive the necessity or propriety of driving the complainant to file a bill for a special injunction on every occasion which it finds necessary in the conduct of its business to issue nontransferable tickets at reduced rates. A court of equity having jurisdiction of the parties and subject-matter should, in its final decree, administer full relief."

The decision of the lower court was subsequently affirmed in the Supreme Court of the United States, where it was held that the character of the tickets, the number of persons to whom they were issued; the dealings of the defendants therein; their purpose to continue such dealings; the risk to result from enforcing the forfeiture provisions in the ticket; and the multiplicity of suits necessarily to be engendered, if redress is sought at law—established the inadequacy of the

legal remedy, and the necessity for the intervention of a court of equity. To the same effect see: Nashville, etc., Ry. Co. v. McConnell (C. C.) 82 Fed. 65; Ill. Cent. R. Co. v. Caffrey (C. C.) 128 Fed. 770; Louisville N. R. Co. v. Bitterman (C. C.) 128 Fed. 176; Schubach v. McDonald, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. Rep. 452; Sperry & Hutchinson Co. v. Mechanics' Clothing Co. (C. C.) 128 Fed. 800; Id. (C. C.) 135 Fed. 833; Blondell v. Consolidated Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187.

If there is a misjoinder of parties plaintiff and defendant, the equitable relief sought in this proceeding cannot be obtained in less than 20 suits. Bills must be filed by each complainant against each defendant; each suit will involve the same question, present substantially the same issues, and demand the same injunctive relief. The convenience of court and litigants demands that this controversy shall be determined in one suit, if one decree can be made which will do entire justice to all parties, without jeopardizing any substantial rights.

"Each case," says Mr. Justice Peckham in Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, "if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation, and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any."

In each of the next-cited cases, on petition of a single complainant, a number of ticket brokers were enjoined from dealing in nontransferable railroad tickets. Each defendant was engaged in procuring such tickets from persons who, under their contract with the railroad company, had no right to sell; and in procuring other persons to purchase such tickets, and falsely personate the original purchaser, and thus obtain transportation at less than ordinary rates.

[2] There was no connection between the defendants, or privity between them and the complainant. It was simply an independent business, carried on by each defendant, like the business conducted by every other defendant. The injurious acts were of the same character; the effect of each upon complainant's rights was identical. The same relief was asked against each defendant. Although defendants were severally liable, it was held that the bill was not multifarious, because the joinder would avoid a multiplicity of suits, and because all the defendants were engaged in the same business, and had a common ground of defense in law and in fact against the relief demanded. Illinois Cent. R. Co. v. Caffrey et al. (C. C.) 128 Fed. 770; Pennsylvania Co. v. Bay et al. (C. C.) 150 Fed. 770; Louisville & N. R. Co. v. Bitterman, 144 Fed. 34, 75 C. C. A. 192; Id., 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171.

In volume 1 of Pomeroy's Eq. Jurisp., at section 269, the rule is thus stated:

"The jurisdiction, based upon the prevention of a multiplicity of suits, has long been extended to other cases of the third and fourth classes, which are not technically 'bills of peace,' but 'are analogous to' or 'within the principle of' such bills. Under the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title,' nor 'community of right' or of 'interest in the subject-matter,' among these individuals, but where there is and because there is merely a community of interest among them in the question of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body. In a majority of the decided cases, this community of interests in the question at issue and in the kind of relief sought has originated from the fact that the separate claims of all the individuals composing the body arose by means of the same unauthorized, unlawful, or illegal act or proceeding. Even this external feature of unity, however, has not always existed, and is not deemed essential. Courts of the highest standing and ability have repeatedly interfered and exercised this jurisdiction, where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy. The same overwhelming weight of authority effectually disposes of the rule laid down by some judges as a test, that equity will never exercise its jurisdiction to prevent a multiplicity of suits, unless the plaintiff, or each of the plaintiffs, is himself the person, who would necessarily, and contrary to his own will, be exposed to numerous actions or vexatious litigation. This position is opposed to the whole course of decision in suits of the third and fourth classes from the earliest period down to the present time. While the foregoing conclusions are supported by the great weight of judicial authority, they are, in my opinion, no less clearly sustained by principle."

In Illinois Cent. R. R. Co. v. Caffrey, supra, Judge Thayer concludes a carefully written opinion with these words:

"It may be conceded that persons ought not to be called upon to make a defense to actions against third parties, when the cause of action is one with which they have no concern, and where they are in the attitude of idle spectators of the controversy; but where the cause of action is one in which they have an immediate interest, because a like cause of action exists against themselves, to which they make the same defense as others will make, and by joining them with others the convenience of everybody, including the court, is subserved, and the rights of every one may be safeguarded and valuable time saved, no reason is perceived why they may not be joined, there being no hard and fast rule of law which forbids. Such is the case at bar. The defendants have a common interest in the question to be litigated, and it is desirable that they should be heard and determined in a single trial."

In the present case the rights of each complainant have been violated repeatedly. The violation is constantly recurring, and will continue as long as either or any of the defendants remain in their present business. Every wrongful act complained of is precisely like every other. The operation and effect of each act upon complainants' rights is identical. The injunctive relief sought against each defendant is the same, and the defenses thus far suggested are common to all the defendants, and involve like legal questions. Each

affidavit so far filed in behalf of the several defendants states that each is engaged in a lawful business; that he purchases ore, but does not know that any of it was stolen. The rule followed in the cases above cited seems to me to have in its favor the weight of authority. Under that rule the demurrer cannot be sustained on the ground of misjoinder of defendants. The same reasoning and the same authorities which permit the joinder of defendants in this bill favor and support the view that complainants may also be united. Although they own their own properties in severalty, and have distinct interests, still they have a common concern in the relief sought, to wit, in the suppression of the business of receiving and purchasing stolen ores.

The situation here is analogous to that which is presented when a number of persons file a bill to abate a nuisance. They are not only permitted to unite against one defendant whose business is harmful in like manner to each complainant; but they may in the same bill join as defendants a number of persons, each of whom conducts the same kind of objectionable business, the effect of which upon the rights of complainants is identical, save in the amount of injury inflicted. An illustration of this is afforded in American Smelting & Refining Co. et al. v. Godfrey et al., 158 Fed. 225, 89 C. C. A. 139. In that suit there were 409 complainants, farmers owning in severalty as many tracts of agricultural land in Salt Lake county, Utah. The defendants, four in number, owned and operated smelters in the same county, in proximity to each other and to complainants' farms. They were not acting in concert. The fumes from the smelters were shown to be destructive both to animal and vegetable life. Judge Marshall said that if each complainant were remitted to an action at law, the remedy would be worse than the evil. A decree was entered enjoining each defendant from further roasting or smelting objectionable ores.

It is suggested in the demurrers that complainants are seeking damages in such manner and form as can only be recovered in a court of law. I assume this refers to the prayer for an accounting; but as this matter has not been argued, I shall not consider it. The allegations of the bill are sufficient, if established, to entitle the complainants to equitable relief—that is, to a decree abating the business of further purchasing and receiving stolen ores—and for this purpose complainants are entitled to unite as against defendants.

The restraining order heretofore entered in this cause will be continued pending the suit.

Ex parte HYDE et al.

(Circuit Court, N. D. California. September 3, 1904.)

Nos. 13,652, 13,653.

1. HABEAS CORPUS (§ 59*)—ISSUANCE OF WRIT—HEARING ON APPLICATION.
While it is usual, on an application for a writ of habeas corpus, for the court to issue the writ and dispose of the case on return, the writ may be waived, and the case considered on the facts presented in the petition, and the prisoner discharged if brought before the court and the facts warrant it.
[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 59.*]

2. HABEAS CORPUS (§ 92*)—INQUIRIES—SCOPE—LIMITATION.
Where a writ of habeas corpus was issued to review the action of a United States commissioner in holding defendants to answer an indictment returned in another district, on the theory that the indictment failed to charge the defendants with the commission of any crime or offense against the United States, and that the court of the district in which the indictment was returned had no jurisdiction to try the case, the scope of inquiry was limited to the question whether the indictment charged any offense whatever within the jurisdiction of the court in which it was returned.
[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 92.*]

3. CONSPIRACY (§ 43*)—NATURE OF OFFENSE—FRAUD ON UNITED STATES—EXCHANGE OF LIEU LAND—"OWNER."
Where an indictment alleged that defendants had conspired to defraud the United States by fraudulently obtaining title to state land within a forest reservation for the purpose of exchanging the same as authorized by Forest Reserve Act June 4, 1897, c. 2, 30 Stat. 34 (U. S. Comp. St. 1901, p. 1538), it stated an offense against the United States, since, when Congress provided in such act that the "owner" of land within a forest reservation might exchange his land for land open for settlement outside the reservation, the owner of a full, complete, and indefeasible title was meant, and not one who held land the title to which was subject to forfeiture for fraud.
[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 43.*
For other definitions, see Words and Phrases, vol. 6, pp. 5134–5151; vol. 8, p. 7744.]

In the matter of the application of F. A. Hyde and Henry P. Dimond for writs of habeas corpus and certiorari. Denied.

F. J. Heney, Sp. Asst. Atty. Gen., Arthur B. Pugh and Oliver E. Pagan, Sp. Asst. U. S. Attys., and Marshall B. Woodworth, U. S. Atty., for the United States.

G. W. McEnerney and Bert Schlesinger, for defendant Hyde.

Samuel Knight, for defendant Dimond.

MORROW, Circuit Judge (orally). Two applications have been presented to the court, one on behalf of F. A. Hyde, and the other on behalf of Henry P. Dimond, for writs of habeas corpus. The petitioners allege that they are held by the United States marshal under color of authority of the United States by virtue of warrants of removal issued under section 1014 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 716), the warrants of re-

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

moval being dated September 2, 1904, signed by the Honorable J. J. De Haven, judge of the District Court of the United States for the Northern district of California, and that they have been committed and are detained only by virtue of said warrants and not otherwise, and not by virtue of any judgment, decree, or final order of any court or judge thereof.

Section 1014 of the Revised Statutes of the United States provides as follows:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, * * * be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. * * * And where any offender is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

It appears that the petitioners were indicted by the grand jury of the Supreme Court of the District of Columbia, in which indictment they are charged with having conspired with others to defraud the United States out of the possession and use of, and the title to, divers large tracts of public land of the United States open and to be opened to selection under the laws of the United States in that behalf, in lieu of lands included and to be included within the limits of certain forest reserves established and to be established by the United States in the states of California and Oregon.

The indictment is based upon section 5440 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3676), which provides that:

"If two or more persons conspire, either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, and to imprisonment for not more than two years, or both fine and imprisonment, in the discretion of the court."

The petitioners are residents of this district. The indictment was accordingly sent to this district, and the petitioners were arrested here and brought before the commissioner of this district, examined with respect to the charges contained in the indictment, and were held by the commissioner to answer the charges.

Upon application to the district judge for a warrant, the district judge reviewed the proceedings before the commissioner, and determined that they should be held under the indictment, and issued his warrant for removal. The matter is now brought to the attention of this court by petition for writ of habeas corpus, and the court is urged to issue writs of habeas corpus upon the ground that there is a debatable question in this case as to whether these petitioners should be held upon this indictment and removed to the District of Columbia for trial.

[1] I have determined that I will consider the merits of the case upon this application for writs of habeas corpus. I believe I am jus-

tified in this action upon the authority of decisions of the Supreme Court of the United States approving such a course.

In the case of Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281, I find upon page 110 of 4 Wall. (18 L. Ed. 281) the following, with reference to the procedure upon petition for writ of habeas corpus:

"It is true that it is usual for a court, on application for a writ of habeas corpus, to issue the writ, and, on the return, to dispose of the case; but the court can elect to waive the issuing of the writ and consider whether, upon the facts presented in the petition, the prisoner, if brought before it, could be discharged. One of the very points on which the case of Tobias Watkins, reported in 3 Pet. 193, 7 L. Ed. 650, turned was whether, if the writ was issued, the petitioner would be remanded upon the case which he had made. The Chief Justice, in delivering the opinion of the court, said: 'The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently, the writ ought not to be awarded if the court is satisfied that the prisoner would be remanded to prison.'"

That opinion was followed in the case of Ex parte Royall, reported in 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868. The part of the opinion of the court to which I refer is on page 250 of 117 U. S., on page 739 of 6 Sup. Ct. (29 L. Ed. 868). The court, speaking of the proceeding in that case, said:

"It remains, however, to be considered whether the refusal of that court to issue the writ and to take the accused from the custody of the state officer can be sustained upon any other ground than the one upon which it proceeded. If it can be, the judgment will not be reversed because an insufficient reason may have been assigned for the dismissal of the petitions. Undoubtedly the writ should be forthwith awarded, 'unless it appears from the petition itself that the party is not entitled thereto'; and the case summarily heard and determined 'as law and justice require.' Such are the express requirements of the statute. If, however, it is apparent upon the petition that the writ, if issued, ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made"—citing a number of cases.

These cases have been followed in a number of other cases that have come before the courts of the United States, so that it is clearly within the province of the court to inquire preliminarily, upon the allegations of the petition, whether it shall issue the writs of habeas corpus or not.

The objections to the warrant of removal and to the petitioners being held upon the indictment in this case are based upon the charges contained in the indictment, and not upon any matter outside of that document. It is therefore competent for the court to examine into this case upon the merits, upon this application.

[2] What is the scope of such an examination? That is the first question the court is called upon to determine. This is an application to review the action of the commissioner in holding the defendants to answer to this indictment. It is also a petition to review the action of the district judge in issuing the warrant of removal. Both proceedings are claimed to be erroneous, because: First, the indictment fails to charge the petitioner with the commission of any crime or offense against the laws of the United States, or any frauds against the United States; and, second, the Supreme Court of the District

of Columbia is without jurisdiction to try the offense, or any offense said to be set up in the indictment.

In the case of Horner v. United States, 143 U. S. 207, 12 Sup. Ct. 407, 36 L. Ed. 126, this very question of the scope of the inquiry upon writ of habeas corpus involving removal was considered by the court. It was there sought by writ of habeas corpus to test the sufficiency of the indictment upon which the petitioner was held under the lottery act for sending circulars through the mails for the sale of certain Austrian bonds, which were charged to be nothing but a scheme for a lottery. The question made on the petition for the writ of habeas corpus was that the bonds were not a lottery, within the meaning of the federal statute. The Supreme Court held that the question whether the scheme was a lottery was a question to be determined by the commissioner, by the grand jury, and by the District or Circuit Court in which the indictment was to be tried, and that it was not for the Circuit Court or for the Supreme Court, on the writ of habeas corpus, to determine this question in advance.

This case was referred to in another case, brought before Circuit Judge Taft of the Ohio Circuit, that of In re Rickelt, reported in 61 Fed. 203. Judge Taft follows the case of Horner v. United States, and decided that a writ of habeas corpus would not lie to determine the question of law whether the facts proved before a United States commissioner on a preliminary hearing are sufficient to constitute the crime for which the prisoner has been committed. In this connection the court said:

"The only question which it is sought to make here on behalf of the petitioner is that the facts developed before the commissioner were not evidence sufficient to constitute the offense described in section 3892 [U. S. Comp. St. 1901, p. 2657]. That is a mere question of law, the decision of which is in the first instance committed, by section 1014 of the Revised Statutes, to the jurisdiction of the United States commissioner before whom the preliminary examination is had. * * * The writ of habeas corpus cannot be used as a writ of error to review the action of the United States commissioner within his jurisdiction. If it were a question whether the crime charged had been committed in the district to which the removal was about to be made—that is, whether the crime charged was within the jurisdiction of the courts of that district—this would be a proper proceeding to test it. If it were a question whether the act under which the prosecution is being conducted was constitutional, that, too, might be tested by habeas corpus proceedings. Not so, however, the simple question whether the facts alleged and proven are in law sufficient to constitute the crime described in the statute. That is a question for the consideration of the regular tribunals before whom it may be raised in the due procedure of preliminary examination, indictment, and trial. The writ of habeas corpus is a collateral proceeding, and its scope is limited, as above stated."

Applying these decisions to the cases now before the court, we find that the scope of the inquiry upon these applications is limited; that the question as to whether or not the indictment sufficiently charges an offense under the laws of the United States is not to be reviewed as a case would be reviewed upon a writ of error. The sufficiency of the indictment has been considered by the commissioner and by the district judge, and may again be considered by the trial court; but it is not, in any technical sense, a subject for review upon this pro-

ceeding. I am of the opinion, however, that, if the indictment does not charge any offense whatever under the laws of the United States (which is the allegation of this petition), it is the duty of the court to determine that question; and to that extent the charge contained in the indictment should be examined. Of course, the authorities hold that it is within the jurisdiction of the court, upon writ of habeas corpus, to determine whether the court that found the indictment, and to which the prisoner is about to be removed, has jurisdiction of the case. This court is required to review that question, and that upon well-settled grounds of jurisprudence. It is within the province of the court of the state where the accused is arrested to determine whether or not the court to which he is being removed has jurisdiction of the offense charged in the indictment.

I have considered very carefully the question whether or not the District of Columbia has jurisdiction of this case, and I consider the law settled. I am satisfied that it has such jurisdiction, and that that claim of the petitioners cannot be considered as entitling them to be discharged from arrest.

[3] The question which has been presented and discussed this morning with great earnestness is whether or not this indictment charges the petitioners with any crime against the United States. The indictment is not drawn in language that charges the offense described in the statute in such terms as would be called good pleading under ordinary circumstances. The charging part of the indictment is not in very clear or concise language; but it is contended that it is based on certain statutes of the United States, and refers to certain proceedings under the laws of the United States which render it necessary to make the charge of the offense in such language as is used in this indictment. Notwithstanding this explanation, it does appear that the indictment is open to criticism. But the question for this court to determine is whether or not it appears that the petitioners are charged, in general substance, in this indictment, with an offense under the laws of the United States; whether or not this indictment, under any construction of its language, may be held to charge an offense under the laws of the United States. If it does, the petitioners cannot be discharged from arrest upon writs of habeas corpus, for the reason, as said before, that this is not a court of appeals.

The objection to the indictment is that it charges these petitioners with having conspired together to obtain title to certain lands from the state of California or Oregon in the name of fictitious persons, and that the titles obtained from the state were to have been used in obtaining, by exchange under the forest reserve act, titles from the United States for lands which the United States holds and owns.

It is said that that is not an offense against the United States; that if these petitioners have conspired to secure titles from the state, and under the statutes of the United States they were entitled to exchange those titles, however fraudulently obtained, for lands belonging to the United States, the exchange does not amount to a fraud under section 5440 of the Revised Statutes of the United States.

Judge Lacombe, of the Circuit Court of New York, has taken this view of the indictment, and has held that this does not constitute an

offense. Judge Lacombe is an able judge, of recognized experience and ability in every branch of the federal jurisdiction. It is the duty of this court to give consideration to a decision from such an eminent source; but, at the same time, the duty still remains for this court to pass upon the question as an independent proposition. It is the duty of this court to determine for itself as to whether the charge in this indictment substantially states an offense against the United States. Judge De Haven, of this district, has rendered an opinion upon a review of the proceedings on the application for a warrant of removal, and has reached the conclusion that, while the language of the indictment is open to criticism, nevertheless, in his opinion, it does charge an offense. His decision appears to have been reached after careful consideration, and I have great respect for his judgment in the case. But this does not relieve me from the duty of reaching an independent judgment of my own.

The charging part of the indictment material to be considered upon this inquiry is as follows:

"That the said Frederick A. Hyde, John A. Benson, Henry P. Dimond, and Joost H. Schneider, * * * unlawfully did conspire, combine, confederate, and agree together, and with divers other perons to the said grand jurors unknown, knowingly, wickedly, and corruptly to defraud the said United States out of the possession and use of, and the title to, divers large tracts of the public lands of the said United States, * * * in pursuance and by means of a false and fraudulent practice whereby the said Frederick A. Hyde and John A. Benson were to obtain fraudulently from the said states of California and Oregon title to and possession of school lands lying within the limits of such forest reserves and open to purchase from those states; * * * which said school lands were to be so obtained from the said states by making and filing with the said authorities *applications for the purchase of the same*, and assignments of the same, and of the certificates of purchase thereof, *in the names of fictitious persons*, * * * and by supporting such applications with forged and fraudulent affidavits and affidavits false, and known to the said Frederick A. Hyde and John A. Benson to be false, in this, that they would purport to be, some the affidavits of real persons, and *others the bona fide sworn affidavits of the persons whose names were signed* thereto, whereas in truth and in fact the former would be the affidavits of fictitious persons and would not be the affidavits of real persons or affidavits sworn to by any person, and the latter would not be the bona fide or sworn affidavits of the persons whose names were signed thereto, because such latter affidavits would not only state that the affiants therein were persons qualified under the laws of the said state of California, or of the said state of Oregon, as the case might be, to make such applications and to purchase such lands, by reason, amongst other things, of their intending to purchase the same in good faith and for their own benefit respectively, and of their having made no contract or agreement to sell the same, while in truth and in fact none of such real persons would intend to purchase such lands in good faith for his own use or benefit at all, but would be either knowingly aiding and assisting the said Frederick A. Hyde and John A. Benson in their said fraudulent practice, or innocently acting upon their said false representations, but because, also, the said latter affidavits would not in truth and in fact have ever been sworn to at all by any of the persons whose names were signed thereto; and whereby the said Frederick A. Hyde and John A. Benson were to cause to be relinquished, assigned, transferred, and conveyed, by means of false and forged relinquishments, assignments, and conveyances, to the said United States, * * * the pretended rights of such fictitious persons respectively, and require and procure such real persons to make relinquishments, assignments, tranfers, and conveyances, either directly, or indirectly through the said Frederick A. Hyde, or through

the said agents and attorneys of the said Frederick A. Hyde and John A. Benson, * * * of the titles to and possession of such school lands * * * in exchange as aforesaid for public lands to be selected, and for titles thereto by patent to be obtained, by and on behalf of the said Frederick A. Hyde and John A. Benson in the names of such fictitious or real persons, * * * in lieu of such school lands lying within the limits of such forest reserves as aforesaid, * * * well knowing such title to such school lands to be, as they were and would be, false, fraudulent, fictitious, void, and worthless, and the possession acquired thereunder unlawful, and intending thereby, and by afterwards selling and disposing of such public lands and patent titles to the general public, to defraud the said United States out of the possession and use of, and of the title to, the public lands so to be selected, obtained, and appropriated in lieu of such school lands as aforesaid, to the profit, gain, use, and benefit of themselves as aforesaid."

This charge, reduced to a simple term, is that the accused conspired together to obtain from the United States, under the forest reserve act, patents to lands belonging to the United States in exchange for and in lieu of school lands lying within the limits of such forest reserve, the title to which the accused had obtained, or were to obtain, fraudulently from the state by means of applications for the purchase of the same in the names of fictitious persons.

By the Act of March 3, 1891, c. 561, 26 Stat. 1103 (U. S. Comp. St. 1901, p. 1537), it is provided, in section 24 thereof:

"That the President of the United States may, from time to time, set apart and reserve, in any state or territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof."

The Forest Reserve Act of June 4, 1897, c. 2, 30 Stat. 34, 36 (U. S. Comp. St. 1901, pp. 1538, 1541), provides as follows:

"That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: Provided further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

The purpose of this last act and the original act of March 3, 1891, was to preserve the remaining forests on the public lands of the United States from depredation and destruction. To accomplish this object, it was necessary that all lands within such forest reservations should belong to the United States for the purpose of full and complete administration and control; but Congress had previously granted to California, Oregon, and other public land states sections 16 and 36 in each township of the public lands within those states for school purposes. These lands were either held by the state for sale, or they had been sold and conveyed to private parties under the laws of the state providing for such sales. There were also settlers upon some of the lands within such reservations who had gone upon the

lands to obtain title by entry and improvement under the homestead laws of the United States, but who had not perfected their titles by the necessary residence, improvements, and so forth; and there were also others who had perfected their titles and had received patents from the United States therefor. To extinguish these titles and enable the government to obtain title and possession to all of the land within the reservation, Congress provided that a settler within the reservation might relinquish his unperfected bona fide claim, and select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim; credit being allowed for the time spent on the relinquished claim. The statute also provided that the owner of a tract of land within the reservation might relinquish his land and select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his patent. Under this provision would come those who had become the owners of school lands within the reservation by state patents. Now, what did Congress mean when it provided that the *owner* of land within a forest reservation might exchange his land for land open to settlement outside of the reservation? Did it not mean the owner of a full, complete, and indefeasible title? This was the title the government had to offer for its land, and it must have been intended that the government was to receive such a title in exchange.

We had before the Circuit Court of Appeals for this circuit the question as to the title that could be exchanged under the forest reserve act, in Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, and, while the precise question involved in this case was not there discussed, it was determined, in effect, that the titles to be exchanged were full and complete titles, and that the government would not recognize the selection of land in lieu of land the title to which had been surrendered, until the selection had been approved in the manner provided by law, for the reason that until such approval the selection was subject to be defeated by proof, either that the land was mineral in character and therefore not open to settlement, or that it was not vacant at the time the selection was made. In other words, no rights accrued against the government until it was in a position to convey an indefeasible title. And this must be so. The government cannot deal in fraudulent titles. It cannot impose an imperfect title upon the purchasers of its lands, and it cannot be imposed upon by those who seek to exchange fraudulently acquired titles for good ones. The United States has frequently been compelled to bring suit to recover the title to land where the patent has been issued, upon the grounds that the grantees have merely secured the legal title, and that the equitable title, the right to the land, still remains in the United States, and has never gone out of it, because the title had been obtained by fraud. Any one familiar with the Spanish land grants, and the litigation that grew out of those grants, knows that a great many suits were brought by the United States to cancel those patents and recover the titles that had been conveyed, upon the allegation of fraud and upon the claim that the equitable title remained in the United States.

The conspiracy in this case is charged to be the claim of ownership

of land by the accused, the title to which they had obtained fraudulently from the state, leaving the equitable title in the state, and the exchange of the legal title alone for land to which the government had a perfect title and would convey, in exchange, a perfect and indefeasible title.

"Ownership" means the possession of the full and complete title. The books are full of decisions to that effect. To assume that Congress intended that patents should issue to lands in exchange for lands to which the parties making the exchange had no title except that acquired by fraud is to assume that Congress was proposing to engage in a most extraordinary method of disposing of the public lands. It is impossible to imagine that Congress would sanction anything of that kind. It has been forfeiting railroad land grants because it was claimed the railroads had not earned them or built the roads as Congress intended. It has forfeited grants to the states for the same reasons, and has authorized suits to recover grants for much less reason than the fraudulent transactions alleged in this indictment. It is impossible for this court to believe that Congress intended to dispose of the title to its public lands in any such way. As suggested by Judge De Haven, if the accused had gone into the Land Office and said: "We have the title to this land; but we went into the state land office and used the names of fictitious persons in our applications, and presented fictitious affidavits to obtain this land; and now we want you to give us a perfect title to land in exchange for our fraudulently acquired title"—does any one suppose that an officer of the government, while in possession of his senses, would carry out such a fraud? Does any one suppose that the Secretary of the Interior would knowingly enter into a transaction of that kind? I think, if he did, he would expect to be impeached the next day and brought before the bar of Congress.

I am of the opinion that the indictment sufficiently charges an offense under the laws of the United States, and that the Supreme Court of the District of Columbia has jurisdiction of the offense. The court therefore declines to issue the writs of habeas corpus.

MINNEAPOLIS GENERAL ELECTRIC CO. v. CITY OF MINNEAPOLIS.

(Circuit Court, D. Minnesota, Fourth Division. December 22, 1911.)

1. ELECTRICITY (§ 11*)—REGULATING RATES OF ELECTRIC COMPANY.
   Under the rule that legislative grants of power to municipal corporations must be strictly construed and limited to such powers as are expressly delegated, or are indispensably necessary to the exercise of some other power expressly delegated, the city of Minneapolis has no power to regulate rates to be charged by an electric company, and an ordinance which attempts, directly or indirectly, to fix such rates, is ultra vires and void.
   [Ed. Note.—For other cases, see Electricity, Dec. Dig. § 11.*]

2. ELECTRICITY (§ 11*)—CONSTITUTIONAL LAW (§ 298*)—ORDINANCE REGULATING BUSINESS OF ELECTRIC COMPANY—VALIDITY.
   A city ordinance requiring an electric company to install service and furnish electricity on demand from "any citizen" without reference to

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

the distance of such installation from the constructed lines of the company, upon the deposit by the applicant of the estimated cost of one month's service, and in certain cases without any deposit, on the giving of a bond, and not to discontinue such service except on request, or by consent of the city council, regardless of whether the rates were paid when due, is void as unreasonable and as taking the company's property without due process of law for the private use of another.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 11;* Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298.*]

3. EMINENT DOMAIN (§ 61*)—POWERS—TAKING PROPERTY FOR PRIVATE USE.

A municipal corporation has no power, nor can power be conferred on it by statute, to enact an ordinance, the effect of which will be to take the property of a public service corporation for a private use.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 61.*]

4. INJUNCTION (§ 85*)—JURISDICTION—SUIT TO ENJOIN ENFORCEMENT OF VOID ORDINANCE.

A court of equity has jurisdiction to enjoin the enforcement of a city ordinance regulating the business of a public service corporation, the effect of which, if obeyed, would be to take the property of the corporation for the private use of others without compensation, while disobedience would subject the corporation to penalties prescribed for each violation.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

5. INJUNCTION (§ 137*)—PRELIMINARY INJUNCTION—ISSUES ARISING ON MOTION.

It is no objection to the granting of a preliminary injunction that it involves the decision of an issue of law which virtually determines the case.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 307–309; Dec. Dig. § 137.*]

6. INJUNCTION (§ 85*)—SUBJECT OF INJUNCTION—PUBLICATION OF VOID ORDINANCE.

Under a city charter providing that ordinances shall take effect and be in force from and after their publication, such publication after an ordinance has been passed and signed is a ministerial, and not a legislative, act, and may be enjoined by a court of equity which has adjudged the ordinance void.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 85.*]

In Equity. Suit by the Minneapolis General Electric Company against the City of Minneapolis. On motion for preliminary injunction. Granted.

The Walker ordinance, referred to in the opinion, fixed the maximum rate to be charged by public service corporations for the distribution of electricity in the city of Minneapolis, but prescribed no penalty. The Heywood ordinance referred to in the opinion is as follows:

"An ordinance requiring public service corporations using the city streets or alleys for distribution of electricity for light, heat and power to install its service upon proper demand.

"The city council of the city of Minneapolis do ordain as follows:

"Section 1. That every public service corporation now or hereafter using the streets or alleys of the city of Minneapolis, for the distribution of electricity for light, heat and power, shall install its service upon demand from any citizen, subject to the ordinances regulating such installation, provided

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

that such corporation may, if it deems itself insecure, require the deposit of an amount of money equal, at the rates established by the city council, to the probable monthly value of the services so demanded. Such service when so installed shall not be discontinued by such public service corporation except by consent of the city council or by request of the consumer.

"Sec. 2. In case any such public service corporation shall have discontinued its services within ninety days prior to the adoption of this ordinance, without the consent of the consumer, it is hereby required to restore said service, upon demand of the said consumer, provided the said consumer, if requested by said corporation, shall deposit with the city clerk a good and sufficient bond indemnifying it against any loss on account of electricity furnished or services rendered or to be furnished or rendered, at the legal rates established by said city council by ordinance adopted June 28th, 1907.

"Sec. 3. Any such public service corporation, or any officer or agent thereof, who shall fail or neglect to comply with the requirements of this ordinance, shall be punished, on conviction thereof, by a fine not exceeding $100 for each offense, or by imprisonment not exceeding 90 days.

"Sec. 4. This ordinance shall take effect and be in force from and after its publication."

Koon, Whelan & Hempstead and Brooks & Jamison, for complainant.

Daniel Fish, for defendant.

WILLARD, District Judge (orally). If the case made by this bill related only to the ordinance of June 28, 1907, which is called the Walker ordinance, I should deny the motion for a temporary injunction. But the bill is not so limited. It embraces, also, the ordinance of September 29, 1911, which is called the Heywood ordinance. Upon this motion for a temporary injunction the decision itself will be limited to the latter ordinance. That ordinance is said to be void for two reasons. One is because it puts in force or attempts to put in force the rates prescribed by the Walker ordinance, which ordinance it is claimed by complainant is void; and the other is because, even assuming that the Walker ordinance is valid, nevertheless the Heywood ordinance deprives complainant of its property without due process of law. So far as the validity of the Walker ordinance is concerned, as bearing upon the Heywood ordinance, the only question which the case presents is whether the council had any authority to pass such an ordinance. The question as to whether the rates fixed by that ordinance are reasonable or unreasonable will never in my judgment be an issue in this case, either now or upon the final hearing. If the city council had no power to to pass an ordinance regulating the rates, that would end the case, and it would be of no consequence whether the rates fixed by the ordinance were reasonable or unreasonable. If, on the contrary, the city council had power to pass the ordinance, then no case is presented by this bill for an adjudication upon the question as to whether the rates are reasonable or unreasonable. There is no allegation in the bill that these rates are confiscatory, and no allegation in the bill that the ordinance of June 28, 1907, deprives the complainant of its property without due process of law.

We come, then, so far as the Walker ordinance is concerned, and so far as the allegations in the bill are concerned, to the bald case of

a suit in which it is asked that the court determine that certain rates fixed by a council which has power to regulate rates are reasonable when it is not claimed that they are confiscatory. It is settled beyond controversy that a court has no power to fix rates for the future. If the rate-making power has authority to determine rates, then those rates must stand, so far as the court is concerned, unless they are confiscatory, unless they deprive the complainant of its property without due process of law, and there is no claim that they do in this case. So I do not see how the question of the reasonableness of these rates will ever be an issue here.

But the question is whether the Heywood ordinance is void because it attempts to put in force the Walker ordinance which it is claimed is also void. It is insisted by complainant that that is an issue in the case, and I see no escape from a decision upon this question by the court, although there may be other grounds upon which the validity or the invalidity of the Heywood ordinance may be determined. That is one ground. As has been said, the two ordinances in this respect are so interwoven that it is impossible to hold the Heywood ordinance valid, as far as rates are concerned, if the Walker ordinance is invalid. While I have no intention of making any decree declaring the Walker ordinance void, yet I do consider it my duty in this case to express an opinion upon the validity or invalidity of that ordinance, because it affects the validity or invalidity of the Heywood ordinance.

[1] The only question necessary to consider is whether the Legislature has ever conferred upon the city power to regulate the rates of this company. Upon questions of this kind I call attention to the case of Omaha Electric Light & Power Company v. City of Omaha, 179 Fed. 455, 459, 102 C. C. A. 601, 605, decided by the Court of Appeals of this circuit. It was said:

"Legislative grants of power to municipal corporations must be strictly construed, and cannot operate as a surrender of legislative power except so far as expressly delegated or as indispensably necessary to the exercise of some other power which has been expressly delegated."

In support of that proposition, a large number of cases are cited. That doctrine, of course, is controlling upon this court.

No section of the charter has been cited by defendant which expressly delegates this power. No section of the charter is cited by defendant which shows that this power to regulate the rates of this company is indispensably necessary to the exercise of any other power granted by the Legislature to the city. In fact, the only section and the only law to which my attention has been called by the defendant is section 2842 of the Revised Laws of Minnesota. It is sufficient to say that that section does not come anywhere near the requirements of this statement by the Circuit Court of Appeals in the Omaha Case. In my opinion the city council had no authority and has no authority now to determine the rates to be charged by this company. It having no power to determine the rates to be charged by the company, it follows that the ordinance of 1911, which compels the company to furnish service at the rates fixed by the ordinance of 1907, cannot be enforced.

[2] But, even if the 1907 ordinance were valid, there are grounds which in my opinion make the ordinance of 1911 void. The ordinance provides in the first place:

"That every public service corporation now or hereafter using the streets or alleys of the city of Minneapolis, for the distribution of electricity for light, heat and power, shall install its service upon demand from any citizen, subject to the ordinances regulating such installation," etc.

There is nothing in that section of the ordinance, or in any other part of the ordinance, which limits the operation of the first section to those parts of the city to which the conduits or lines of the company are now extended. It appears that there are large districts in the city where these conduits do not reach, and that they are sparsely populated districts. If that section is to be given its plain meaning, it indicates that any person in the extreme borders of the city can make a demand upon the company for installation of its service, although he may be miles from any conduit or line. It would then be its duty to obtain an order from the city council to extend its lines to that section, and the company would be compelled to comply with this demand under the penalty provided by the ordinance. The Supreme Court in the case of Northwestern Telephone Exchange Co. v. City of Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175, indicates that such a request is unreasonable, and that an ordinance containing such a provision is void. This ordinance further provides that installation shall be made upon "the deposit of an amount of money equal, at the rates established by the city council, to the probable monthly value of the services so demanded." It seems to be agreed by both sides that that requires a deposit of the value of only one month's service. The ordinance then continues:

"Such service when so installed shall not be discontinued by such public service corporation except by consent of the city council or by request of the consumer."

That ordinance can mean nothing more than that by the deposit of the value of one month's service the company is bound to install its service, and it is bound to continue that service indefinitely until the consumer asks to have it stopped, or until the city council issues orders to stop it. I see no warrant in the ordinance for the construction suggested by defendant that this requires a deposit each month of the value of that month's service. There is nothing said about a deposit every month, but the ordinance distinctly provides that the service shall be installed on one deposit only, and, when once installed, it shall not be discontinued without the consent of the city or request of the consumer. The result would be by the terms of this ordinance that the company would be bound to furnish light, heat, and power to irresponsible persons for an indefinite time, unless it could get the consent of the council to do otherwise. It seems to me that the ordinance deprives the company of its property without due process of law. It is taking the property of the company not for public use, but for private use. It is taking its property and giving it to a private person without any compensation, and it leaves the company to its

remedy by action to recover the price. What would be said of an ordinance of the city which required the street car company to furnish a book of 100 tickets at 5 cents per ticket upon deposit of the price, and then require the company to carry that person indefinitely upon the deposit of the value of one book, until it was relieved from that obligation by the request of the passenger or by the consent of the city council? The state itself would have no power to provide that railroad companies should transport freight upon a deposit of the amount of the probable value of a month's service, and should continue such transportation indefinitely for that person until the railroad company secured the consent of the state Legislature or of the shipper to stop it. I see no difference between the two cases. It is to my mind nothing less than taking the property of the company and giving it to a private person. The ordinance is void for that reason.

Section 2 relates to persons as to whom the service has been discontinued within 90 days prior to the adoption of the ordinance. As I look at the ordinance, I see no particular reason why a person coming under that section could not have come in on section 1, also. Section 1 applies to every person who desires installation made, and the fact that installation has been once made and taken out is no reason that I can see why he could not demand another installation under section 1. He could thus relieve himself from the necessity of giving a bond for past service.

Passing that point, it is provided that service must be resumed, "provided the said consumer, if requested by said corporation, shall deposit with the city clerk a good and sufficient bond indemnifying it against any loss on account of electricity furnished or services rendered." This does not require him to pay anything at all, even the rate prescribed by the Walker ordinance. He is simply required to give a bond that he will pay. It not only allows him to give a bond for what he already owes, but it does not require him to make a deposit for future service as does section 1. It allows him to furnish a bond for such future service. There is nothing in the section which gives any indication whatever as to what the amount of the bond shall be, whether it shall be for the value of a month's service, or the value of a year's service, or the value of a day's service. There is nothing to indicate by whom the bond is to be approved. There is nothing to indicate whether there are to be any sureties, although the word "bond" might possibly indicate that there must be sureties. But, in any event, it is open to precisely the same objection that has been stated with reference to the first section. It is even worse than that, because the first section does require a deposit of the actual cash value for at least one month's service. Section 2 does not require the deposit of anything, and that section in my judgment is void, because it deprives the company of its property without any process of law whatever. It takes the property of the company and gives it to the private consumer.

The result is that the ordinance is void—void because it deprives the company of its property without due process of law, and void,

also, because it attempts to put in force rates which the city had no right to establish.

[3] Upon the question of the effect of section 2842 of the Revised Laws of Minnesota, I had occasion to consider a similar question in the case of Edison Electric Light & Power Company v. Blomquist (C. C.) 185 Fed. 615. It was there said:

"This defendant also relies upon ordinance No. 1,675, approved April 22, 1893, and particularly on section 16 thereof, which provides, in part, as follows: 'The grantees herein, their successors and assigns, shall at all times be subject to and comply with all the ordinances of the city of St. Paul now in force, or that may be hereafter passed, governing the use of and occupancy of street of said city, subject only to the limitations herein provided, and shall comply with all police regulations, now in force or hereinafter enacted.'"

This was inserted in the franchise of the complainant, which it accepted.

"Ordinance 2,424, approved January 21, 1904, which relates particularly to the Gaslight Company, declares, in section 21, that its franchise shall be held and exercised subject to all the conditions and limitations in said charter prescribed. Section 23 of chapter 4 of the charter provides that the common council may by ordinance provide for regulating and controlling the exercise by any person or corporation of any public right, franchise, and privilege in any of the streets and any public places in said city, whether such right, franchise, or privilege has been or may be granted by said city, or by or under the laws of the state of Minnesota or any other authority. * * *

"As to all of these provisions, it is sufficient to say that no one of them does or can authorize the council to pass any ordinance taking the property of the complainants for a private purpose. The claim of defendants' counsel is that the ordinances constituted a contract between the complainants and the city to such an extent that under them the city would have the right to require complainants to furnish lights and power to a private person for nothing. I cannot consent to this proposition."

Now it may be said that the light or power furnished may amount in any particular case to a very small sum, so insignificant as not to justify a court in interfering. A similar question was raised in the Blomquist Case, and I there say:

"But whether the damage in a case of this kind is small or great does not seem to be the determining factor. If the company can be compelled to move its wires at expense to itself, it can be compelled to move its poles. If the moving of a house through the streets is a public use of the streets, then the companies can be made to submit to any extent, however great. The lowering of the tunnel in Chicago must have been done at very great expense. The relaying of the pipes in New Orleans must have been very burdensome. On the other hand, the expense of building the side track in the Nebraska case was comparatively trifling, $450. In no one of these cases was the amount of the expense considered at all important. It was held that a state could not deprive a corporation of its property for a private purpose without compensation. If the state cannot compel companies to expend $100,000 for these purposes, it cannot compel them to expend $10. The late Senator Davis of Minnesota, in arguing a question somewhat similar, said: 'It is no answer that the infraction is slight, or that it might be worse, or that it may be mitigated, or that it is a case for damages, or that a similar injury has before been tolerated.'"

[4] The ordinance of September 29, 1911, being void, the question is what shall be done with this motion. It is suggested by defendant

that there is no equity in this application, that the rates fixed are not shown to be unreasonable, and that no injustice would be done to the complainant by being compelled to observe the ordinance. As I said before, the question of reasonableness of rates is not an issue in this case. It is also said that the complainant has no interest in a determination of this question, because it has not shown that it has suffered anything by reason of unreasonable rates. Whatever application that may have to the Walker ordinance, it has no application to the Heywood ordinance. That is an ordinance which as I said at first is void because it takes away the property of the corporation, and gives it to private persons without compensation. It enforces its obligation by a penalty. The law is well settled that in a case of this kind a suit of an equitable nature is presented, and that a court of equity, as distinguished from a court of law, has jurisdiction over it.

In addition to the cases cited by counsel, I will call attention to the case Ex parte Young, 209 U. S. 123, on page 163, 28 Sup. Ct. 441, on page 455 (52 L. Ed. 714). The court there said:

"It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity, therefore, has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But, in the event of a single violation, the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and, if it should be determined that the law was invalid, the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery. * * *

"Another obstacle to making the test on the part of the company might be to find an agent or employé who would disobey the law, with a possible fine and imprisonment staring him in the face if the act should be held valid. Take the passenger rate act, for instance: A sale of a single ticket above the price mentioned in that act might subject the ticket agent to a charge of felony, and upon conviction to a fine of $5,000 and imprisonment for five years. It is true the company might pay a fine, but the imprisonment the agent would have to suffer personally. It would not be wonderful if, under the circumstances, there would not be a crowd of agents offering to disobey the law. The wonder would be that a single agent should be found ready to take the risk."

The court, after discussing the matter further, continued:

"To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take."

Under the provisions of this ordinance, any number of persons might apply to the company for installations, 100, 150, 200, and, if the company refused in each case, there would be as many violations of the law as there were refusals. For such refusals the penalties prescribed by the ordinance might be inflicted. I think that case comes clearly within the decision to which attention has been called, and that it is a case of equitable cognizance.

[5] It is further suggested that, upon an application for a temporary injunction, the court should not decide an issue which virtually determines the case, and authorities have been cited to the effect that, where there is a question of law involved, the court should not undertake to determine the question upon an application for a temporary injunction. But such practice has never prevailed in this court. My distinguished predecessor granted an injunction in a case where there was much more reason for doubt than there is here, in a case where the reasonableness of the rates was in question. As I have already stated, I have repeatedly decided cases upon a motion for a temporary injunction. I say decided, for, after the decision granting or denying the motion for a temporary injunction, nothing was heard of the case thereafter. The case to which I have just called attention—Edison Light & Power Company v. Blomquist—is one where the motion for a temporary injunction was granted, and I think that ended the case. The ordinance was held invalid. It is true that the point was not raised in that case. It never has been raised before; and I must say that I was surprised at its presentation here, because I would suppose that, if the determination of a motion for a temporary injunction required a decision upon a question of law, it would be just as much the duty of the court to decide that question as it would be to decide a question of fact. In the case of the Tri-State Telegraph & Telephone Co. v. City of Thief River Falls (C. C.) 183 Fed. 854, I held that the pretended franchise was void. The case of the Minneapolis Street Railway Co. v. City of Minneapolis (C. C.) 189 Fed. 445, related to a service ordinance which was held valid. In every one of these cases a question of law came up, and it never occurred to me before that it was not the duty of the court to decide them.

[6] Finally, it is said that the court has no power to enjoin the publication of the ordinance, because the publication is a legislative act of the council, and with legislative functions the court has nothing to do. Under the charter of the city, after an ordinance has passed the council and been approved by the mayor it becomes a law, in the same way as an act which has been passed by the Legislature and approved by the Governor becomes a law, although it does not take effect by its terms for some time after. The charter provision requiring publication is simply a provision which relates to the time when the ordinance shall take effect. The charter might have said that it shall not take effect until 60 days after approval by the mayor; instead of that, it declared that it should not take effect until after publication. The publication is purely a ministerial act, and not a legislative act of the council. The charter probably imposes upon some officer of the city the duty of sending the ordinance to the official paper for publication.

I will make an order in this case declaring the Heywood ordinance void and of no effect, and enjoining the publication of it, and also enjoining the authorities of the city from taking any action pursuant to it. I shall make no decree as to the validity or invalidity of the

Walker ordinance nor injunction order relating thereto, although, in passing upon the validity of the Heywood ordinance, I have necessarily expressed my opinion as to the validity of the Walker ordinance.

THE THELMA.

(District Court, E. D. Pennsylvania. January 24, 1912.)

No. 57 of 1910.

SHIPPING (§ 84*)—LIABILITY OF VESSEL—INJURY TO STEVEDORE.

A ship, which under the provisions of a charter furnished the winches and power and men to operate the same in the loading of cargo by the charterer, is liable for an injury to a stevedore through the negligence of a winchman, who was one of the crew, although he operated his winch under orders of a hatch tender furnished by the contracting stevedores.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 84.*]

In Admiralty. Suit by John Coleman against the steamship Thelma to recover for personal injuries. Decree for complainant.

Howard M. Long, for libelant.

Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. On December 27, 1910, the Norwegian steamship Thelma was taking on cargo in the port of Philadelphia. When the injury complained of was done, she was receiving heavy sheets or slabs of steel piling varying in length from say 30 to 50 feet, or even more. These slabs were intended for use in the cofferdam around the wreck of the Maine in the harbor of Havana. The ship was under a time charter that required the charterers to pay the cost of loading and discharging, but the ship was to furnish "ropes, falls, slings, and blocks necessary to handle ordinary cargo," etc.; and it was further provided that—

"all steam winches [were to be] at charterer's disposal during the loading and discharging, and steamer to provide men to work same both day and night as required, charterers agreeing to pay extra expense, if any, incurred by reason of night work, at the current local rate."

The loading was being done by a master stevedore under contract with the charterers. The ship lay, bow in, with the pier close to starboard, and the piling was on railroad cars alongside. The particular work in question was going on at No. 3 hatch, and the method was this: Two winches were in use, No. 3 and No. 4. Two booms, A and B, extended from the mainmast, approximately at right angles to each other, and were firmly fixed in place by guys; A extending over the hatch, and B over the car. A wire rope ran from No. 4 winch through two blocks to the end of boom B, where it hung over the car, ending in a short chain and a hook. Another wire rope ran from No. 3 winch through two blocks to the end of boom A, and thence across the ship's deck to starboard, until it reached the wire rope hanging from boom B. These two ropes were then shackled together,

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

probably near the top of the short chain. The slab was moved in the following manner: A loose chain was first made fast around the slab nearer one of its ends than the other. The hook was then inserted between the slab and the chain. No. 4 winch lifted the slab until it was clear of the car, whereupon No. 3 applied its power, drew the slab hanging at an acute angle across the deck to the mouth of the hatch, and then lowered it slowly into the hold. There the laborers laid hands upon it as it came down and guided it to a momentary resting place upon rollers, afterwards stowing it wherever it was to go. They were, of course, obliged to take off the loose chain that encircled the slab, and if the rollers supported the slab at the right place this could easily be done. Sometimes, however, the sagging of the slab pressed down the chain upon the slabs already stowed, and when this happened the chain was held fast. The weight of the slab was too great for the strength of the laborers, and it then became necessary to apply the power of No. 3 winch, and raise the slab slightly, so that the chain might be taken off. In every instance—whether or not there had been previous trouble with the loose chain—after it was taken off, No. 3 winch raised both chains (the loose chain and the short chain with the hook) above the hatch combings, and they were then drawn back by No. 4 across the ship to starboard, and again lowered to the car for another draft. While a slab was being moved from the car to the hold, both ropes were taut; but, after the slab had been detached and No. 3 winch began to lift the chains out of the hold, there would be some slack in the rope running from No. 4, and, in order to take this up, No. 4 winch was started very soon after No. 3 began to raise the chains. It is evident that No. 4 could not lift or lower the slab after it reached the hatch. If this winch should apply its power while the slab was being lowered or stowed, it could only drag the slab from port to starboard; but it was not a proper part of the operation thus to drag the slab at any time. Nevertheless, it was just this that happened, and caused the injury. The slabs were being stowed on the port side of the hold. One of them (the last for the day, as it happened) had been lowered, and had sagged down so as to hold the loose chain fast. It became necessary that No. 3 winch would raise the slab slightly, so that the chain might be freed and taken off. The proper order for this purpose had been given; but the winchman at No. 4 mistook the instruction, supposed that the chains were to be hoisted, put on his own power in order to take up the slack of his rope, and thereby dragged the heavy slab from port towards starboard, caught the libelant between the slab and the shaft alley, and thus did the injury complained of. It is much disputed whether the injury was done by No. 4 winch, or by the too rapid movement of No. 3. Without discussing the voluminous testimony upon this point, but after reading and considering all of it, I find as a fact that the offending winch was No. 4, and that the injury was done in the manner I have described. Both winches were operated by the orders of the hatch tender, who stood within a few feet of both, and was attending to his duties. He had given a proper order to No. 3 to go ahead a half turn, so as to raise the slab far enough

to allow the loose chain to be released; but the winchman at No. 4 mistook the order and started his own winch prematurely.

Is the ship liable for his negligence? The hatch tender, the winchman at No. 3, and all the men in the hold were employed by the master stevedore; but the winchman at No. 4 was a seaman, hired, maintained, paid, and furnished by the ship under the charter. He was experienced and competent, and his mistake was not due to lack of skill. He had been assigned to this work by the ship, and could not be removed by the master stevedore. He could only be discharged, or assigned elsewhere, or removed, by the ship. If, for any reason, his conduct at the winch had been objectionable, the stevedore could have stopped work, or complained to the mate. Probably another man would then have been substituted; but as long as the seaman was at the winch he was the ship's man, and was doing the work the ship had agreed to do. Nevertheless, whether he had become a fellow servant of the injured man is a question upon which the decided cases differ. If I were at liberty to follow The Elton, 142 Fed. 367, 73 C. C. A. 467, a case in the Court of Appeals of this circuit, I should hold that he was a fellow servant, and that the libelant could not recover against the ship. But I am under a superior obligation to the Supreme Court, and in my opinion the more recent decision in Standard Oil Co. v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480, requires me to hold that he was not a fellow servant, and that the ship is liable for his negligence.

The situation in The Elton did not differ materially from the situation here, as will appear by the following quotation from the syllabus:

"The consignee of a cargo exercised its option to discharge the cargo, being allowed a deduction from the freight therefor, and the vessel being required to furnish steam winches and men to operate the same. The winchman so furnished acted under the immediate orders of the master stevedore employed by the consignee. Held that, if ordinary care was exercised by the master of the vessel to furnish competent winchmen, the vessel was not liable for an injury to the stevedore resulting from a negligent act of one of the winchmen."

The test applied by the court was this:

"In a case like the present, we think the true test of fellow servant is whether both are, at the precise time of the accident, working in a common employment under the same general control and direction."

In Standard Oil Co. v. Anderson the syllabus states the court's conclusion as follows:

"A winchman employed by the person furnishing the hoisting power to a master stevedore for loading a vessel held to remain that person's servant, notwithstanding the hoisting signals were given by the stevedore's foreman, and not to be a fellow servant of an employé of the stevedore who was injured by his negligence."

The Supreme Court concedes that a servant in the general service of another may be so transferred to the service of a third person as to become the latter's servant pro hac vice, with all the legal consequences of the new relation, but adds that to change the original re-

lation, so as to relieve the master, more is required than the mere fact that the servant is sent to do work pointed out by such third person, who has made a bargain with the master for his services. The following paragraph contains part of the court's reasoning:

"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 the 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 thus 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."

In applying this test of authoritative direction and control to the facts of that case—which I think are not essentially different from the facts now under consideration—the court said (212 U. S. 225, 29 Sup. Ct. 255, 53 L. Ed. 480):

"Was the winchman, at the time he negligently failed to observe the signals, engaged in the work of the master stevedore, under his rightful control; or was he rather engaged in the work of the defendant, under its rightful control? We think that the latter was the true situation. The winchman was, undoubtedly, in the general employ of the defendant, who selected him, paid his wages, and had the right to discharge him for incompetency, misconduct, or any other reason. In order to relieve the defendant from the results of the legal relation of master and servant, it must appear that that relation, for the time, had been suspended, and a new like relation between the winchman and the stevedore had been created. The evidence in this case does not warrant the conclusion that this changed relation had come into existence. For reasons satisfactory to it, the defendant preferred to do the work of hoisting itself, and received an agreed compensation for it. The power, the winch, the drum, and the winchman were its own. It did not furnish them, but furnished the work they did to the stevedore. That work was done by the defendant, for a price, as its own work, by and through its own instrumentalities and servant, under its own control.

"Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. But, when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be co-operation and co-ordination, or there will be chaos. The giving of the signals under the circumstances of this case was not the giving of orders, but of information, and the obedience to those signals showed co-operation, rather than subordination, and is not enough to show that there has been a change of masters."

Following this decision, I am obliged to hold that the ship is liable for the negligence at No. 4 winch. There was no contributory neg-

ligence on the part of the libelant, and the remaining question, therefore, is the question of damages. The injury was a Potts' fracture of the lower right leg, and there is little serious dispute about the consequences, except about the length of time some of them may continue. Upon this point there is a difference among the medical witnesses; but as a practical matter I think the libelant's recovery is so nearly complete that he cannot be said to have suffered a serious impairment of earning power. From the professional standpoint, it may perhaps be said with accuracy that there will always be some inconvenience, and (it may be) some diminution of the ability to work; but I feel little hesitation in coming to the conclusion that, while such impairment may be perceptible to a trained sense, it is not marked, and is almost certain to grow better, rather than worse. Taking everything into consideration, his confinement in the hospital, his pain and suffering, the medical attention he has had and may still need, his loss of wages, and some diminution in his ability to work, I think the libelant would be properly compensated by an allowance of $1,800.

A decree for this amount, with costs, may be entered.

In re JABLIN.

(District Court, E. D. New York. February 27, 1912.)

1. BANKRUPTCY (§ 250*)—WITHHELD ASSETS—EVIDENCE—INABILITY OF BANKRUPT.

Evidence that by reason of a bankrupt's abject poverty he would be unable to comply with an order requiring him to surrender alleged withheld assets to his trustee could be considered by the commissioner in testing the bankrupt's honesty and good faith in determining the issue whether assets had been in fact withheld.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 250.*]

2. BANKRUPTCY (§ 250*)—WITHHELD ASSETS—EVIDENCE.

Evidence *held* to sustain a commissioner's finding that assets of a bankrupt had not been unlawfully withheld, as alleged in a creditor's petition to compel surrender thereof to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 250.*]

In the matter of bankruptcy proceedings of Isaac Jablin. Petition to review a referee's order dismissing proceedings to compel the bankrupt to turn over alleged withheld assets amounting to $3,425. Affirmed.

Richard Cohn (Max Meyer, of counsel), for bankrupt.
Archibald Palmer, for trustee.

CHATFIELD, District Judge. Certain creditors have instituted a proceeding to compel the bankrupt to turn over the sum of $4,007.43, alleged to have been concealed by him in contemplation of bankruptcy and to be still within his control. The amount of their demand is now modified to the figures to accord with the details of the testimony taken upon the reference, viz., the sum of $3,425. The issue as raised by the bankrupt's denial was referred to a special commissioner, who

has reported that the motion should be denied. He bases this, both upon the appearance of the witnesses and the testimony given before him, from which he decides as a question of fact that the bankrupt has not been conclusively shown to have had in his possession any substantial amount of property which he has not accounted for, even though his testimony with relation thereto has been unsatisfactory and difficult to pass upon, through his poor knowledge of the English language and lack of education and intelligence.

[1] The commissioner also based his conclusion upon the present financial condition of the bankrupt and his family, as evidenced by the abject poverty in which they have been living since this proceeding was started. In this the commissioner has referred to the inability of the bankrupt to comply with any order, as if the proceeding were to punish the bankrupt for contempt for failure to comply with the court's order, rather than to determine whether an order should be made. But in so far as the commissioner used this testimony as to the financial condition of the bankrupt in testing the honesty and good faith of the bankrupt's statements, his conclusions would seem to be correct. The whole matter is a question of fact, and as to this the commissioner has formed an opinion well fortified by testimony.

[2] A certain amount of money was derived by the bankrupt from insurance paid after a fire upon a settlement with the insurance companies for less than one-half the claimed loss. This amount, like some of the debts owed to the bankrupt's family, appears to have been used by the bankrupt's brother and other of his relatives in an attempt to save what they might from the bankruptcy proceedings. But even if some of these claims should be disallowed, and even if the bankrupt has been to a certain extent a party to bolstering up claims that did not arise in the way in which they are said to have occurred, nevertheless the mere conduct of the bankrupt and of his relatives upon the hearing or the proving of claims does not prove that property existed prior to the bankruptcy, more than what has been brought out in the proceedings.

The well-known rule that the testimony of a witness may be held entirely unworthy of belief, if it be proven false or untrustworthy with respect to some material fact as to which the witness had knowledge, might have been invoked by the special commissioner, if he had found that the testimony as to the nonexistence of assets was not credible or satisfactory. But, on the other hand, if the special commissioner is satisfied that the sum realized from the insurance is the only property of substantial amount which the bankrupt failed to give an account of or turn over to his creditors, then his finding should not be disturbed, and the additional finding that the bankrupt would in all likelihood be unable to turn over anything, if ordered, and hence that he would have to be released upon any possible contempt proceedings, furnishes by itself a reason why the court need not go into the details of the issue referred in order to see if the opinion of the court would have been the same in all respects as that expressed by the special commissioner who heard the witnesses. It has nevertheless been necessary for the court to make an examination of the testi-

mony and exhibits, and these, coupled with the special commissioner's opinion of the witnesses themselves, would seem to be ample justification for the conclusion reached by the commissioner.

The report will be confirmed.

BARNES v. TREES et al.

(District Court, S. D. New York. February 19, 1912.)

1. COURTS (§ 351*)—FEDERAL COURTS—EXAMINATION BEFORE TRIAL.

The state law of New York, authorizing an examination before trial as a substitute for discovery, does not apply to actions in the federal courts within such state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. § 351.*

Conformity to state practice, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 393.]

2. DISCOVERY (§ 70*)—DEPOSITION DE BENE ESSE—EXAMINATION OF DEFENDANT—REFUSAL TO ANSWER INTERROGATORIES—PENALTY—STRIKING ANSWER.

Rev. St. § 863 (U. S. Comp. St. 1901, p. 661), provides that the testimony of any witness may be taken in any civil cause pending in a District or Circuit Court by deposition de bene esse when the witness lives at a greater distance from the place of trial than 100 miles, or is bound on a voyage to sea, etc., on reasonable notice, and any person may be compelled to appear and depose as provided in the same manner as witnesses may be compelled to appear and testify in court. *Held*, that where plaintiff, in an action at law, propounded interrogatories to defendant on an examination de bene esse initiated under such section, the court would not strike out defendant's answer because of his refusal to answer certain interrogatories so propounded.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 84–86; Dec. Dig. § 70.*]

At Law. Action by Thurlow Weed Barnes against Joseph C. Trees and others. On plaintiff's motion to strike out defendant's answer unless defendant answered certain interrogatories propounded by plaintiff on an examination de bene esse initiated by plaintiff under Rev. St. § 863 (U. S. Comp. St. 1901, p. 661). Denied.

Samuel Untermyer, for plaintiff.
Frederic R. Kellogg, for defendant.

HAND, District Judge. If this were a suit in equity and the defendant refused either inspection or discovery, perhaps the court might have power to strike out the answer. I have been at some pains to find an authority for the practice without finding any, unless it be Walker v. Walker, 82 N. Y. 260, little weight to which can be accorded after Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215. The revisers' note (5 Edmonds' Statutes, 411), to the original revision of the New York statutes (2 R. S. p. 199, §§ 21–27) certainly shows that no change in procedure was intended in respect of striking out the answer, when that provision was made applicable

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

to actions as well as suits in that state. The United States statute (section 724 [U. S. Comp. St. 1901, p. 583]), although it has been construed (Carpenter v. Winn, 221 U. S. 533, 31 Sup. Ct. 683, 55 L. Ed. 842) as only adding a new sanction to the right to compel the production of papers, refers to the procedure in chancery, and was probably drawn from it in respect of this feature too. Indeed, the courts of England had in the latter part of the eighteenth century already adopted a similar proceeding (Clifford v. Taunton, 1 Taunt. 167; Goldschmidt v. Marryat, 1 Camp. 562), which they avowedly chose to avoid a bill for inspection. I understand it as an order for preliminary inspection, and not therefore like section 724 as now interpreted. It does not indeed appear whether the sanction included striking out the pleading or a nonsuit. The cases in volumes 1 and 2, Anstruther, are somewhat similar, but, as they were in the Exchequer, they are less significant, for the Exchequer always had some equitable jurisdiction in any event, and was perhaps more readily influenced. In New York (Bank of Utica v. Hillard, 6 Cow. [N. Y.] 62) the rule had some recognition, but only when the document was that on which the right rested, a sort of extension of oyer. It seems likely that the power always existed in equity, for default in either discovery or inspection, and I have no doubt further inquiry would disclose authorities.

The present section 870 of the New York Code had its origin in 2 R. S. p. 200, § 26, or at least goes back so far, and was avowedly an effort to extend to actions the remedy which formerly one could get only in suits or by ancillary bills for discovery.

[1] The "examination before trial" which has been ever since a part of the procedure of New York is therefore a substitute for discovery, and it is well settled that it does not apply to actions in the federal courts within the state. Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117. If it did, then the relief here asked for could have been obtained, as an incident to that relief which has long had statutory authority. The proceeding now pending is nothing of the kind, but an examination de bene esse under section 863, and it merely happens to be the case that the witness being examined is a defendant.

[2] At the time when the procedure was becoming settled upon which we can now rely, except as Congress changes it, a party could not be examined at all, and there is nothing that I know in the customary law, except the cases which I mentioned above, which justifies the suggestion that either discovery or inspection had ever been imported by the common-law courts into their procedure. Possibly the same judges who did so as to inspection might have done so as to discovery in advance of trial, if the testimony of witnesses had been admissible; but they did not, and certainly to-day I cannot, without the aid of a statute.

Motion denied, without prejudice to an application in the Western District of Pennsylvania for an order compelling the witness to answer.

LOCKER et al. v. AMERICAN TOBACCO CO. et al.

(District Court, S. D. New York. January 22, 1912.)

1. PLEADING (§ 320*)—BILL OF PARTICULARS.

Where, in an action for damages for injuries sustained by an alleged unlawful combination in restraint of trade, the complaint alleged a combination, which was not against plaintiffs specifically, the proof of which might be founded on inferences to be drawn from the course of business, and two of the defendants had already been held to have participated in the illegal combination in a proceeding brought by the United States on behalf of the public, and the other had knowledge of its own relation to the defendants and wherein it participated in any combination, defendants were not entitled to a bill of particulars, alleging specific details of the combination and its effect on plaintiffs.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 972; Dec. Dig. § 320.*]

2. PLEADING (§ 317*)—BILL OF PARTICULARS—SPECIAL INJURY.

Where, in an action to recover damages for injuries due to an alleged unlawful combination in restraint of trade, the damages claimed were very large, and were in the nature of special damages, defendants were entitled to a bill of particulars with reference thereto.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 317.*]

At Law. Action by John A. Locker and another, trading as E. Locker & Co., against the American Tobacco Company, the Metropolitan Tobacco Company, and others. On application for bill of particulars. Granted in part.

Charles Dushkind, for plaintiffs.

Nicoll, Anable, Lindsay & Fuller, for defendants American Tobacco Co. and others.

Goldsmith, Cohen, Cole & Weiss, for defendant Metropolitan Tobacco Co.

WARD, Circuit Judge. The court, when asked to order a bill of particulars, has to steer between two evils, namely, unreasonably restricting the plaintiff's case or exposing the defendant to surprise at the trial.

[1] The combination alleged in the complaint is not one against the plaintiff specifically, in which case greater particularity might be required, but against the public generally. The proof of it may be founded on inferences to be drawn from the course of business, and the plaintiffs may be unable to state specific details. The other defendants, the American Tobacco Company, the American Snuff Company, and Blackwell's Durham Tobacco Company, have already been held to have participated in an illegal combination in a proceeding brought by the United States on behalf of the public. The defendant the Metropolitan Tobacco Company, which asks for the bill of particulars, of course has knowledge of its own relation to its codefendants, and whether it has participated in any combination, especially in relation to the charges in articles 32 to 40 of the complaint, in which it is specifically named. Its codefendants may be

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

relied on to meet other charges in the complaint of which it has no direct knowledge.

[2] In view of all the circumstances, I think the pleading sufficiently apprises the Metropolitan Tobacco Company of what it will have to meet at the trial; but the damages claimed being very large, and being in the nature of special damages, I think the defendants are entitled to a bill of particulars showing the amount and kind of damage the plaintiffs have suffered since the year 1905, and how the same resulted from the conspiracy alleged in the complaint.

To that extent the motion is granted.

In re BROCKTON IDEAL SHOE CO.

Ex parte LAVERS.

(District Court, S. D. New York. February 28, 1912.)

BANKRUPTCY (§ 117*)—ANCILLARY RECEIVER—SALE OF ASSETS.

Bankruptcy proceedings having been instituted against a corporation in Massachusetts, and an ancillary receiver appointed to take charge of the bankrupt's business in New York, such receiver's duty was limited to the collection of assets and to hold the same awaiting the appointment of a trustee; and, in the absence of any application by the Massachusetts receivers, the New York court would not authorize the ancillary receiver to sell the bankrupt's entire stock in New York, merely because the season for the sale thereof had passed and the keeping of the goods entailed some cost.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 167, 724; Dec. Dig. § 117.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Brockton Ideal Shoe Company. On application of Henry Lavers, ancillary receiver appointed in New York, to sell the bankrupt's New York stock. Denied.

HAND, District Judge. The order asked for may be very satisfactory in this instance, but the practice is capable of great abuse. The ancillary receiver wishes to sell out the whole stock of shoes here in New York, because it costs something to keep them and they are winter goods. I do not believe the act ever contemplated any such thing. If the creditors could be got together, all of them, and their wishes considered, I should not stand on the formality of a trustee, if the case originated here.

But, even if those facts existed here, it is the District Court of Massachusetts that will have jurisdiction of such sales after a trustee has been appointed. There has already been an adjudication, and for all substantial purposes of administration the Massachusetts court ought to be regarded as already in charge. The New York receiver has nothing to do but collect the assets and wait for a trustee. If

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

the Massachusetts receivers think the matter of pressing importance, they can go to their own court for instructions. If Judge Dodge, or the referee, thinks it wise and proper to sell, I will gladly cooperate by ordering a sale upon an application here of the ancillary receiver showing that fact. That will be the nearest approach possible to the result, if a trustee were in fact appointed, and it ought to take only a short time. No such pressing necessity appears as justifies anything further.

UNITED STATES v. HOCKING VALLEY RY. CO.

(District Court, N. D. Ohio, W. D. December 9, 1911.)

No. 1,357.

1. CARRIERS (§ 38*)—INTERSTATE COMMERCE ACT—VIOLATIONS.

The acceptance by a railroad company in settlement with a coal company for interstate shipments of coal made during the preceding month, sent as prepaid and settled for monthly under a general custom of the business, of notes of the coal company for a part of its freight charges, under a previous understanding and arrangement therefor, constitutes a "willful failure * * * to strictly observe its tariffs" in violation of section 6 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]), as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 (U. S. Comp. St. Supp. 1909, p. 1153), and a misdemeanor thereunder whether it be considered as an acceptance of a "less or different compensation" for the service or the extension of "privileges and facilities in transportation" not specified in its published tariffs.

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

2. CARRIERS (§ 38*)—INDICTMENT FOR VIOLATION OF INTERSTATE COMMERCE ACT—SUFFICIENCY.

An indictment against a railroad company for a failure to observe its published tariffs by extending credit to a shipper under joint rates for a part of the freight due is not insufficient because it does not exclude the possibility that it received in cash its own share of such freights.

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

3. CARRIERS (§ 32*)—INTERSTATE COMMERCE ACT—VIOLATION—"DISCRIMINATION."

A railroad company practices a discrimination in respect to transportation in violation of section 6 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]), as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 (U. S. Comp. St. Supp. 1909, p. 1153), in favor of one interstate shipper and against others of the same class, shipping the same commodity from the same points and under substantially the same conditions as to time of shipment, destinations, connections, and manner of transportation and other details identifying the similarity of transactions, by the device of extending credit to such favored shipper for the freight charges, and exacting and collecting such charges from the other shippers.

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

For other definitions, see Words and Phrases, vol. 3, p. 2099.

What constitutes an unlawful preference or discrimination by carrier under interstate commerce regulations, see note to Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co., 94 C. C. A. 230.]

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

Criminal prosecution by the United States against the Hocking Valley Railway Company. On demurrer to indictment. Overruled.

U. G. Denman, U. S. Atty., J. G. Fogg, Asst. U. S. Atty., and John H. Marble, Sp. Asst. U. S. Atty.

James Byrne and James H. Hoyt, for defendant.

KILLITS, District Judge. An indictment has been found by the grand jury of this court in 28 counts against the Hocking Valley Railway Company, a corporation organized and existing under and by virtue of the laws of Ohio, being a common carrier operating a line of railroad wholly within such state.

The several counts divide themselves into three classifications, within which the language of each count is identical, save such changes as are necessary to involve transactions different in facts but of natures entirely similar. An abstract of one count in each of the three classifications will serve to illustrate the entire indictment. The indictment is attempted to be found under the act of 1887 to regulate commerce, and the so-called "Elkins Act" of 1903 (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1909, p. 1138]), as both were amended in 1906 (34 Statutes at Large, 584, Compiled Statutes, Supplement of 1909, pages 1155, 1156). Counts 1 to 10, inclusive, deal with monthly settlements for coal shipped as prepaid freight in December, 1908, and several months in 1909, each count relating to an individual month. Counts 11 to 20, inclusive, deal with the same monthly settlements and relate to the same transactions as those covered by the previous charges. Each of the remaining counts, 21 to 28, takes up a single car load shipment of coal, being one involved in some one of the several monthly settlements dealt with by the previous counts, and in each of these last counts reliance is had upon those terms of the law last quoted.

A brief statement of one count in each of these three classifications will be sufficient for the purposes of this opinion.

Omitting the formal averments relating to the road's location, its engagement in interstate commerce through the connections therein named, and other matters which bring the defendant company under the provisions of the act in question, and that it had complied with the law's requirements touching the publishing of its rates, count 1 avers the existence of a corporation known as the Sunday Creek Company, operating coal mines adjacent to the defendant's road at Nelsonville, Ohio, and shipping coal therefrom, and avers, in language sufficient for the several purposes, these additional facts:

That during the month of December, 1908, the defendant received from the said Sunday Creek Company coal in car load lots, and shipped the same in interstate commerce in 32 cars bound into states other than Ohio.

That each of the said cars was so received for shipment and shipped as prepaid freight, the total freight charges therefor within and without the state of Ohio to be charged against and paid by the shipper, the Sunday Creek Company.

That the total freight charges, computed by published rates for

such shipments, for the shipment of said 32 car loads of coal, were $1,823.63.

That during the same month were received from the said Sunday Creek Company for shipment and shipped to points within the state of Ohio in car load lots, as prepaid freight shipments, the freight charges therefor to be charged against and to be paid by the Sunday Creek Company as prepaid freight, in the aggregate amount for freight at the published tariff rate of $24,667.42.

That the total amount of freight charges for prepaid freight to be charged to and paid by the Sunday Creek Company to the defendant upon shipments of coal by defendant during the month of December, 1908, as aforesaid, was $26,491.05.

That a custom made inevitable because of the nature of the business and the work of accounting provided for a monthly credit for freight charges to the shippers of coal over defendant's road, including the Sunday Creek Company, for coal received to be shipped and shipped by defendant as prepaid freight, such credit to terminate with monthly settlements.

That when the regular monthly accounting for the freight for the aforesaid interstate and intrastate shipments for December, 1908, was had, on January 27, 1909, the defendant railroad made a settlement with the Sunday Creek Company therefor on these terms: In money, $1,491.05; for the balance of the $26,491.05, namely, $25,000, a promissory note executed by the said Sunday Creek Company, at four months, at 5 per cent.

That at and previous to such settlement on the terms aforesaid no demand was made by the defendant company upon the Sunday Creek Company for the payment of said prepaid freight charges wholly in money, nor was any effort made at any time to collect said charges.

That said note, interest being paid, was renewed from time to time by the defendant company until April 1, 1910, on which date it was merged, with other debts due to the defendant, into 5 per cent. debenture bonds of said Sunday Creek Company, payable April 1, 1913, which bonds are wholly unpaid.

That this settlement for 1,491.05 in cash and $25,000 in credit was the fruit of an understanding and arrangement between the defendant and the Sunday Creek Company had and existing before and at the time of each of the shipments of coal whose prepaid freight charges went to make up said amounts and up to the time of making said settlement and the taking of said note.

That "by the acceptance and taking of said note as part payment for such transportation the said the Hocking Valley Railway Company, common carrier as aforesaid, did demand, collect, and receive a less and different compensation for the transportation of such property, and for the service connected therewith between the said points of shipment, such points being named in the aforementioned tariffs, than the rates and charges which were specified in said tariffs so filed with the said Interstate Commerce Commission, and so in effect at the time of said shipments. That by the means aforesaid, to wit, the taking of said note in part payment for such transportation, the

said the Hocking Valley Railway Company did remit by said device a portion of the rates and charges so in said tariffs specified, and did extend to said Sunday Creek Company a privilege, in the transportation of its said property, not specified in such tariffs."

The count concludes with the formal charge that the defendant through these facts unlawfully demanded, collected, and received a less and different compensation for the transportation of this property and for its service in connection therewith, and unlawfully remitted a portion of the rates and charges for the transportation of such property, and that through the device of receiving and accepting said note unlawfully remitted a portion of the rates and charges for the transportation of such property so in said tariff specified, and did unlawfully extend to the said Sunday Creek Company a privilege in regard to the transportation of the property above named not specified in its tariffs, contrary to the form of the statute.

This count and 2 to 10 following are drawn to meet that portion of section 6 of the Act of 1887, as amended in 1906, which reads:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariffs filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The act of 1906 also amends the original section 6, touching the details required in the published schedules, the law now reading:

"The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee."

It is very plain from the context that the word "tariffs," as used at the close of the first quotation above from the law, is used in the sense of schedules, rates, and charges, and that the two provisions we quote are to be read together.

Count 11, which may be referred to as illustrative of the second classification of counts, relates to the same transaction as that set out in count 1, and follows in the main the allegations of that count, with the additional averments: That when the indebtedness arising for such transportation charges for December, 1908, arose, certain other companies and persons were engaged in the business of mining, selling, and shipping of coal in the vicinity of Nelsonville, Ohio, and shipping therefrom during said month upon the defendant's railroad and its various connecting lines in interstate and intrastate commerce and under conditions similar to and substantially like those under which shipments were made, as stated, by the Sunday Creek Com-

pany, naming some of said other persons, firms, and corporations so shipping coal. That from each said shippers so named, excepting only the said Sunday Creek Company, the defendant railroad company demanded and collected in legal money shortly after the close of the month of December, 1908, and at the time of the settlement for the business of said month, the entire amount of the freight charges due on account of shipments sent as prepaid freight, including all of said shipments made by each of said respective shippers in interstate commerce. That to insure the collection of the freight charges on account of the transportation of property as prepaid freight in interstate as well as intrastate commerce, with monthly credits extended to each of said shippers as to the Sunday Creek Company, the defendant railroad company demanded, exacted, and obtained from each of said firms, corporations, and persons shipping coal from said Nelsonville, excepting only from the Sunday Creek Company, bonds with sureties guaranteeing the payment of the charges on such shipments from month to month. That as a part of the plan and device to favor and to grant concessions and discriminations to the said Sunday Creek Company the said the Hocking Valley Railway Company did not ask, demand, exact, or obtain any such bond from the said Sunday Creek Company. That by the taking and accepting of such note in part payment and in settlement for the charges for the transportation of coal in interstate commerce due from the Sunday Creek Company to the defendant railway company the latter unlawfully granted and gave a concession and advantage to the Sunday Creek Company in respect to the transportation of such property in interstate commerce by which device the coal was transported at a rate less than that named in the published tariffs, "and whereby, in the manner and form aforesaid, a discrimination was practiced in favor of and an advantage given to said Sunday Creek Company, by the said the Hocking Valley Railway Company in respect of the transportation of said coal so transported as aforesaid as specified in this count, in said interstate commerce for said Sunday Creek Company, and against other persons, firms, and corporations, and particularly against the other persons, firms, and corporations hereinbefore mentioned as being shippers of coal, and for whom, as aforesaid, the said the Hocking Valley Railway Company was doing like and contemporaneous service in the transportation of a like kind of interstate traffic under substantially similar circumstances and conditions, and who were each required by said the Hocking Valley Railway Company, as aforesaid, to furnish bonds to insure payments and to make timely and proper payments in money of the charges for the transportation of property so shipped by said shippers, other than said Sunday Creek Company."

Count 21, which is typical of the last eight counts, is substantially identical in wording with count 11, dealing, however, as we have said, with but one single shipment of coal from Nelsonville, Ohio, to Chicago, Ill., the prepaid freight charges of which being one of the items going to make up the amounts involved in the settlement between the defendant railway company and the Sunday Creek Com-

pany for the business done in January, 1909. The count need not be further described because of its similarity to each of counts 11 to 20, and our consideration of count 11, as illustrative of counts 11 to 21, inclusive, is applicable to count 21 and its fellows in its classification.

Counts 11 to 28 are attempted to be drawn to meet that portion of the language of the Elkins Act which was not changed by the amendment of 1906, and which reads:

"It shall be unlawful for any person, persons, or corporation to offer, grant, give, or solicit, accept or receive, any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce, or by any common carrier subject to said act to regulate commerce and the acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such common carrier, as required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced."

[1] The government argues that the only question presented by the facts pleaded in counts 1 to 10, respectively, is:

"May a carrier subject to the act publish its rates for services subject to the act to regulate commerce in terms of money and then receive promissory notes as payment to it for such services, without violating that portion of section 6 of the act to regulate commerce which provides that no carrier shall 'charge or demand or collect or receive a greater or less or different compensation' for its services subject to the act 'than the rates, fares, and charges which are specified in the tariff filed and in effect at the time'?"

If we may take the government's position that the acceptance of a note for an amount so large as to necessarily include at least $332.58 of its charges against the Sunday Creek Company for prepaid interstate freight charges for December, 1908, as shown in count 1, was a "payment" of that portion of such charges not paid in cash, the answer to its question is easy. The situation would clearly involve the defendant in a violation of those provisions of the law above quoted. But the difficulty lies in finding in the indictment allegations of fact warranting such an assumption. Undoubtedly the law is characterized accurately and fairly in the indictment, that, it provides, "in substance, that corporation common carriers, engaged in the transportation of property in interstate traffic, should charge and collect in legal money, from shippers, the full and exact amount of transportation charges as determined and fixed by the published tariffs and schedules."

In Louisville & Nashville R. R. v. Mottley, 219 U. S. 467, 475, 477, 479, 31 Sup. Ct. 265, 267 (55 L. Ed. 297), an injured passenger had released the company from liability for damages in consideration of free passenger transportation during his life. The Supreme Court held that continued observance of its obligation under this agreement with Mottley made the company an offender against the law, saying:

"But the act of June 29, 1906, made a material addition to the words of the act of 1887; for it expressly prohibited any carrier, unless otherwise provided, to demand, collect, or receive 'a greater or less or different compensation' for the transportation of persons or property, or for any service in

connection therewith, than the rates, fares, and charges specified in the tariff filed and in effect at the time. We cannot suppose that this change was without a distinct purpose on the part of Congress. The words 'or different,' looking at the context, cannot be regarded as superfluous or meaningless. We must have regard to all the words used by Congress, and, as far as possible, give effect to them. Market v. Hoffman, 101 U. S. 112, 115 [25 L. Ed. 782]. The history of the acts relating to commerce shows that Congress, when introducing into the act of 1906 the word 'different,' had in mind the purpose of curing a defect in the law and of suppressing evil practices under it by prohibiting the carrier from charging or receiving compensation except as indicated in its published tariff. * * * The evident purpose of Congress was to establish uniform rates for transportation, to give all the same opportunity to know what the rates were as well as to have the equal benefit of them. * * * That money only was receivable for transportation is the basis upon which the Interstate Commerce Commission has proceeded; for, in one of its conference rulings (207) issued in 1909 (1906), the commission held that nothing but money could be lawfully received or accepted in payment for transportation, whether of passengers or property, for any service connected therewith; 'it being the opinion of the commission that the prohibition against the charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time precludes the acceptance of service, property or other payment in lieu of the amount specified in the published schedules.' It is now the established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute. That rule was established in execution of a public policy which, it seems, Congress deliberately adopted as applicable to the interstate transportation of persons or property. The passenger has no right to buy tickets with services, advertising, releases, or property, nor can the railroad company buy services, advertising, releases, or property with transportation. The statute manifestly means that the purchase of a transportation ticket by a passenger and its sale by the company shall be consummated only by the former paying cash and by the latter receiving cash of the amount specified in the published tariffs. * * * The purpose of Congress was to cut up by the roots every form of discrimination, favoritism, and inequality, except in the cases of certain excepted classes to which Mottley and his wife did not belong, and which exceptions rested upon peculiar grounds. * * * The words of the act, therefore, must be taken to mean that a carrier engaged in interstate commerce cannot charge, collect, or receive for transportation on its road anything but money."

Again, in C., Ind. & L. Ry. Co. v. United States, 219 U. S. 486, on page 496, 31 Sup. Ct. 272, on page 274 (55 L. Ed. 305) the court say:

"The legislative department intended that all who obtained transportation on interstate lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. Those ends cannot be met otherwise than by requiring transportation to be paid for in money which has a certain value known to all and not in commodities or services or otherwise than in money."

The language of the indictment, however, is such as to leave something to the operation of a doubtful presumption before we can say that the taking of the note was a "payment of the charges to the extent of its face." Considering that the charges in question are described as prepaid, which involves the idea of payment before service, the effect of the allegation that the cash payment ($1,491.05 of the $26,491.05 actually due at the settlement) "was so taken and accepted in pursuance of an arrangement and understanding had and

existing before and at the time of said shipments and up to the time of making said settlement and the taking of said note, to wit, * * * between said the Hocking Valley Railway Company and said Sunday Creek Company, and their respective officers and agents," is to relate the act of settlement on that basis to the time of making the charge as "prepaid." The defendant cannot object to so treating the transaction if, in this particular, the indictment states the facts.

These allegations, then, require us to regard the giving of credit for $25,000, involving these $332.58 at least of interstate charges as contemporaneous with the creation of the debt, but, considering the clarity requisite in a criminal pleading, they do not warrant our holding that the taking of the note should be related to the time when "prepaid charges" should have been prepaid in fact. The pleading does not state that the "arrangement and understanding" in effect at the time of creating the charges involved in terms the acceptance of a note for any part of them. The allegation is simply that the understanding related to the acceptance of a small installment in cash. In an indictment every doubtful meaning must be resolved against the pleader. We are compelled, therefore, to regard the taking of the note as applicable to an antecedent indebtedness, as to which the law is that an express agreement to that effect must be pleaded and shown before acceptance of a promissory note will be taken as payment. Merrick v. Boury, 4 Ohio St. 60; Hall v. Stevens, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802; Atlas S. S. Co. v. Colombian Land Co., 102 Fed. 358, 42 C. C. A. 398.

At this point, therefore, we are with the defendant that the facts as pleaded show nothing more than an extension of credit to the Sunday Creek Company, but we do not accept defendant's further contention that they present the still smaller issue, namely, the right of the company to extend longer credit to the Sunday Creek Company than to its rivals and thus to violate a custom rather than a law, which defendant assumes to be the only question presented.

Plainly, there is reason in the indictment's statement that "necessity and convenience" created a custom for a charge of prepaid freight to the user to be settled monthly after checking and auditing. We must assume that Congress legislated in this act with reference to the exigencies of the business and with a view to assist it rather than to hamper it, and neither the context nor the spirit and purpose of the act suggest the abrogation of the rule of common law that criminal intent is a necessary ingredient of an offense under it. The custom being one making not only for the convenience of both shipper and carrier, but also born of necessity in the facilitation of transportation, one with a fruitage of better public service, uniform observance of it cannot be imputed for a violation of the law, however superficially it may appear to be inconsistent with the exact letter. Besides, as we shall notice later, it is a "willful failure" to observe this section of the act that is imputed a misdemeanor. Uniform observance of so beneficial a custom can hardly be said to be a willful failure.

But do not the facts pleaded establish an offense? Is not even the extension of credit, as the fact is charged here, a violation of the act of 1906? The court is not bound in answering this question to look only to those provisions of the law which either the government or defendant or both assume are alone applicable. The fact that the government in the margin of its indictment opposite the beginning of each of its counts numbers 1 to 10 places the words, "Act to regulate commerce, section 6," and argues only in its brief the provisions we quote above, does not prevent the consideration of other language of the statute and provisions in pari materia. Nor is the court concluded by the government's formulation of the question which it assumes the facts present, which we have quoted above. Taking up defendant's challenge, the whole law should be considered, and the whole law is not only those parts of the act of 1906 which are in pari materia and germane to the facts pleaded, but the entire law to regulate commerce as that act amends it. We cannot be asked to treat separately that part of the Hepburn act which affects in terms to amend the original act to regulate commerce from that part which puts changed reading into the so-called Elkins act. In effect, the act of 1906, in its section 2, brings together provisions dealing with the same subject matter, and to be read with reference to each other just as if they were originally enacted together, section 6 of the act of 1887, as amended in 1889 (Act March 2, 1889, c. 382, § 1, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3156]), and section 1 of the act of 1903 (the Elkins law), and then injects these provisions into the main act for its amendment, so that the whole is to be considered together.

We have, then, a law the spirit and purpose of which is, as the Supreme Court said in the Mottley Case, to root out every form of discrimination, favoritism, and inequality, one which will, as the court says, in Armour Packing Co. v. United States, 209 U. S. 56, 72, 28 Sup. Ct. 428, 432 (52 L. Ed. 681), "proceed upon broad lines, and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and posted, as required by law. It is not so much the particular form by which, or the motive for which, this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates duly posted and published." We have a law, then, which, when we attempt to enforce it penally, we must consider with reference to the spirit and purpose of its enactment and harmonize the letter therewith, if that may be done reasonably. In United States v. Lacher, 134 U. S. 624, page 628, 10 Sup. Ct. 625, page 626 (33 L. Ed. 1080), the court say:

"As contended on behalf of the defendant, there can be no constructive offenses, and, before a man can be punished, his case must be plainly and unmistakably within the statute. But, though penal laws are to be construed strictly, yet the intention of the Legislature must govern in the construction

of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature."

It is unnecessary to cite the easily found additional mass of authority, for this is a controlling canon of interpretation entirely applicable in this case and to the facts pleaded here. We therefore adopt the reasoning of the court in United States v. Williams (D. C.) 159 Fed. 310, 313:

"That, while it is true that before a case can be held to fall within a penal statute the case must come within the letter and spirit of the statute, yet, if it comes within the spirit and also within one reasonable interpretation of the letter of the statute, it is sufficient, although there may be a literal construction that might be put upon the statute which would not include the case."

We have quoted above the words of Justice Harlan in the Mottley Case that "the statute manifestly means that the purchase of a transportation ticket by a passenger and its sale by the company shall be consummated only by the former paying cash and by the latter receiving cash of the amount specified in the published tariffs;" and it is obvious that this observation is applicable as well to freight transportation as to passenger. Bearing in mind the mischief to which the statute was directed, is it not fairly within its letter, as it surely is within its spirit, to hold that a published tariff, expressing rates in terms of money, implies unmistakably a cash transaction, and which is to be consummated by the payment of "ready money or money in hand, either in current coin or other legal tender, or in bank bills or checks paid and received as money"? In re Palliser, 136 U. S. 257, 263, 10 Sup. Ct. 1034, 1035 (34 L. Ed. 514). The court there observes:

"A sale on credit is not, ordinarily speaking, and in the absence of any evidence of usage, a sale for cash within the meaning of that word as used in the statutes or contracts."

So it seems to us, considering, we repeat, the purpose of the act and the mischiefs against which it is directed, an extension of credit is against the clearly implied terms of the published tariff rates, and a granting of the same does not meet the evident purpose of those provisions of the act which deal with this subject.

The thought of the court in New Haven Rd. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 26 Sup. Ct. 272, 277 (50 L. Ed. 515), is that which we seek to apply here:

"Now, in view of the positive command of the second section of the act, that no departure from the published rate shall be made 'directly or indirectly,' how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier as a public agent to give

equal treatment to all. Now, if by the mere fact of purchasing and selling merchandise to be transported a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal."

So here, considering what is to be accomplished by the law respecting rates and their collection, if there is room in it for favor to one shipper over another by the extension of credit, the law fails, for there still is clear opportunity to the carrier to determine whether it will receive from the favored shipper a less or different compensation than the rates applicable to the case. The exercise of judgment in the carrier in giving credit which the law then would uphold is the same which the law would sustain respecting the continuance and extent of credit, and the advisability of attempting collection at any time in whole or part. The option remains with the carrier to collect in the credit and get full rates with perhaps interest, or to carry the credit and so increase the line, or defer the collection until it is impossible to obtain full rates. Once it is conceded that credit may be given, as defendant claims the right here, with that concession runs the right of the creditor to compromise, adjust, or even forgive the debt. The opportunity in such a construction for evading the law is so obvious that, if it is the proper one, the law is an absurdity.

The court is not required to determine whether the extension of credit is the acceptance of a less or different compensation, or whether it is the extension of a privilege or facility not specified in the tariffs, in order to conclude that in it, as a favor to one shipper, the law is violated. The fact that the statute points out four classifications of acts of commission which are held unlawful does not mean that acts of omission are not equally so. The statute, to be effective, must put it out of the power of the carrier to treat differently shippers making contemporaneous shipments of the same class, and it seems clear to the court that an implication is necessary and obvious, both in the letter and spirit of the act, that collection of the published rates is to be either contemporaneous with the service or made in advance. The court may take judicial notice not only of the prevalent custom to this effect, but of the business consideration which makes the custom necessary, that the carrier may retain the means to best serve the general public, and we may construe the law in the assumption that Congress legislated with reference to such custom and business consideration.

As we have noted above, the deviation from cash collections, due to inconvenience and delay in carriage involved in collecting and accounting immediately for each shipment, out of which has arisen the custom of charging for prepaid freights to be settled monthly upon accounting for tare and other incidentals of the traffic, is apparent only. The transaction under these circumstances is substantially

cash, to be considered as contemporaneous with the service. We shall have occasion in discussing the demurrers to the subsequent counts to treat of this again, but, as applicable here especially, we suggest anew that, having accepted the coal on a prepaid basis, the defendant ought not to be heard to claim that it was not in fact prepaid.

If the court were forced to choose in relating a deliberately planned and executed extension of credit for prepaid freights to a favored shipper to one of the two reprehended acts of commission—the acceptance of a "less or different compensation" or the extension of "privileges or facilities in transportation"—it would, with the apparently better reasoning, refer it to the first class; for, as we have seen, the act affords the carrier the uncontrolled choice to say just how much, if any, of the published rate of compensation it will collect eventually from the favored one, although there is good ground for argument that it may come within both provisions, notwithstanding the apparently cogent reasoning of defendant's counsel that the "privileges or facilities" understood by the statutes are those which have to do only with the mechanics and physics of "transportation." This last word is obviously not used in its commonly accepted meaning of "act of transporting or state of being transported" (Webster's International Dictionary [Ed. of 1910]), for the first section of the Hepburn act expressly widens its definition, and applies it to instrumentalities and even services in transportation in the narrow sense of the word.

We do not understand that the maxim, "Expressio unius exclusio alterius," applies to limit the extended meaning of the word exactly to the particulars mentioned in the law's definition, especially as lexicographers recognize a colloquial use of the word as involving the credentials which give the possessor the right to have carriage. Webster's International Dictionary (Ed. of 1910).

The language here used, "Privileges or facilities in transportation," as well as the words, "all privileges and facilities granted or allowed," in the paragraph which prescribes what shall go into the schedules, are part of the amendment of 1906. "Privilege" has different meaning from "facility." There is no synonymity between them; and it takes the elaborate argument of defendant's counsel to get us away from the first and almost abiding impression that a chance to get one's goods transported on credit is a "privilege in transportation." The law is specifically directed to compelling carriers to uniformly collect money for carriage. Transportation of goods without compensation is wholly unlawful and impossible under it.

The indictment pleads that the act complained of violates the law in both particulars, and, if we are correctly construing the statute, then the failure of the defendant to collect the full amount of the interstate charges for December at the December settlement in the following month, being an omission due to an arrangement and understanding had before the services of the carrier were engaged by the shipper, becomes on the part of the defendant a "willful failure * * * to strictly observe its tariffs," an act which is made a mis-

demeanor, whether it is referable to the one particular or the other or both.

[2] It is no objection to the indictment that it does not exclude the possibility that in collecting $1,491.05 the defendant received payment in full of all its share of the interstate rates which the Sunday Creek Company's shipments involved. The point is fully met by the decision in C., B. & Q. Ry. Co. v. United States, 157 Fed. 830, 85 C. C. A. 194, affirmed by the Supreme Court, 209 U. S. 90, 28 Sup. Ct. 439, 52 L. Ed. 698, and also the decision of the Supreme Court in the Packing Cases, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681.

The demurrers to each of counts 1 to 10 are therefore overruled.

[3] As we interpret counts 11 to 28, respectively, the question raised is whether a carrier, under the act to regulate commerce as amended in 1906, practices a discrimination in respect to transportation, as forbidden by that law, in favor of one shipper and against others of the same class, shipping the same commodity, from the same points and under substantially the same conditions as to time of shipment, destinations, connections, and manner of transportation, and other details identifying the similarity of transactions, by the device of extending credit to such favored shipper for the freight charges on such shipments by it, while exacting and collecting cash compensation for such substantially similar shipments from the other shippers in question.

To be sure, counsel for the defendant argue that the indictment does not state that credit was denied to any of the other shippers occupying the same relation, in that capacity, in which the Sunday Creek Company stood to defendant company, but it is averred very clearly that from each of such shippers other than the Sunday Creek Company the defendant exacted a bond as security that each of said shippers would pay, as cash payments after accounting and auditing, the same prepaid freight charges for which their rival, the Sunday Creek Company, was getting a credit as the result of a private understanding with the carrier that it should have that favor. The averment of such an exaction as this is sufficient to present an attitude of discrimination in favor of the Sunday Creek Company in this respect. The essential part of each count touching the charging portion is that the defendant, in the manner and form stated, gave—

"a concession and advantage to the said Sunday Creek Company, * * * whereby and by which said device of taking and accepting the said note the said property * * * was transported * * * at a rate less than that named in the said tariffs, * * * and whereby, in the manner and form aforesaid, a discrimination was practiced in favor of and an advantage given to the said Sunday Creek Company * * * in respect of the transportation of said coal so transported as aforesaid * * * in said interstate commerce for said Sunday Creek Company, and against other persons, firms, and corporations * * * for whom the said the Hocking Valley Railway Company was doing like and contemporaneous service," etc.

We are not with defendant's counsel in their criticism of this language, for we do not read it as bringing a complaint against defendant for giving a "concession and advantage," but for practicing a

discrimination in favor of the coal company by means of devices which worked a concession and advantage to the latter, nor do we think that the language used in the pleading warrants either the court or defendant to limit the meaning of the word "concession" to that given it by the statute as fundamental to an offense. The word is used in the indictment, as the context makes plain, in its ordinary acceptation of something yielded or allowed. "A boon" is one of Webster's definitions. Counsel's construction distorts the pleading. The exact part of the statute invoked by it is that which makes it unlawful to engage in a practice whereby "property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier * * * or whereby any other advantage is given or discrimination is practiced"; the "discrimination" inhibited being, of course, such as that which is "in respect to transportation."

The count, then, is substantially in the words of the statute, and the court's task is to determine whether the extension of credit pleaded here is, under the circumstances pleaded, an unlawful discrimination. That the act is in respect to transportation there seems no reason to doubt, even if we construe the word no more liberally than do defendant's counsel. The credit is with reference to freight charges for transportation, and therefore is with respect thereto, notwithstanding the elaborate argument to the contrary. The court in construing a statute is not called upon to refine its words to an extreme nicety of thought, nor to apply microscopic distinctions in the meanings of words. The analysis of neither a criminal statute nor an indictment thereunder is an excursion in dialectics. The underlying purpose of the statute is to be observed in construing its words and phrases, which are to be given their ordinary acceptation, unless the latter is clearly modified by usage or definition peculiar to the statute; and the attempt to predicate on the facts alleged an offense is to be considered reasonably by applying those inferences and conclusions which apparently flow naturally from such facts, and which appeal to men of average intelligence as the proper deductions therefrom. The time for keenly analytical reasoning in an effort to discover, in either a statute or an indictment, loopholes of escape by engaging in finely spun discriminations of meaning or by offering turns of thought of which the language is found capable only after deep cogitation disappeared in criminal practice with the passing of the extreme punishments anciently visited on slight offenses. Paying freight charges in common and reasonable acceptation is doing something in respect to that transportation which authorizes the imposition of such charges, especially as the term is used in a statute which makes it obligatory upon a carrier to put a charge upon his act of transporting. Transportation and a charge therefor to be collected by the carrier are concomitant, inseparable. One cannot exist legally without the other.

The first impresssion one gets from the statement of the facts is that the Sunday Creek Company was substantially favored by the device in question; that it was given, by the defendant, a decided

advantage over its fellows in business at Nelsonville, and further study of the situation tends in no wise to weaken that early feeling. Discrimination in ordinary understanding and definition is the act of treating differently; it is the antithesis of advantage; one who enjoys an advantage over another at the hands of him with whom they have common dealing has his fellow within a corresponding discrimination; the positive measures the extent of the negative. Section 2, from the beginning in 1887, has defined an "unjust discrimination" to be the direct or indirect charging, demanding, collecting, or receiving from any person or corporation a greater or less compensation for transportation service "by any special rate, rebate, drawback, or other device."

If we are correct in our reasoning and conclusion touching counts 1 to 10, and all of the discussion there had is applicable to the consideration of the remaining 18 counts in this particular, and it is proper, in the case, to hold that the acts and device complained of violate the provisions specific to the amendment of 1906 against the collection, etc., of a less or different compensation, then the question is answered against the demurrers to counts 11 to 28, respectively, for then the definition of section 2 applies. The act is not only a discrimination, but specifically "unjust," and consequently an offense under the statute. If we are wrong in this respect in holding for the first 10 counts, there still remains to consider the conduct of defendant, as set forth, and the results flowing from such acts, to determine whether there is here a "discrimination in respect to transportation" obnoxious to the Elkins act, which, as the court in Armour Packing Company v. United States, 209 U. S. 56, on page 72, 28 Sup. Ct. 428, on page 432 (52 L. Ed. 681), says—

"proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service, under the same conditions, should be the one established, published, and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates duly posted and published."

The Supreme Court has reiterated this purpose and intent and effect of the statute in every case before it, whether civil or criminal, in so many turns of language and differences of expression as to leave hardly the least opportunity for the escape from the law's operation for any situation which appeals to common understanding and intelligence to depart from equal favor and just treatment to all shippers in common relation to the carrier that it is difficult to relieve the situation before us of the application of the decisions in their cumulative effect, and were it not for the great reliance of defendant's counsel upon the language of Judge Kohlsaat, in United States v. Wells Fargo Express Company (C. C.) 161 Fed. 606, 610, and upon the decision of Gamble-Robinson Commission Company v. Chicago & N. W. Ry. Co., 168 Fed. 161, 94 C. C. A. 217, 21 L. R. A. (N. S.) 982, we would feel our duty done in concluding this opinion against the demurrers at this point.

Before considering these cases, and as preliminary thereto, we revert again to the Packing Cases, and ask attention to the opinion therein, page 71, 209 U. S., p. 431, 28 Sup. Ct. (52 L. Ed. 681), wherein the court emphasizes the attempt of Congress, in repeated amendments, to make the statute more and more effective by discussing the enlarged meaning given to the word "device," as used in the Elkins act, saying that the word is therein found—

"disassociated from any such words as 'fraudulent conduct, scheme, or contrivance,' but the act seeks to reach all means and methods by which the unlawful preference of rebate, concession, or discrimination is offered, granted, given, or received. Had it been the intention of Congress to limit the obtaining of such preference to fraudulent schemes or devices, or to those operating only by dishonest, underhanded methods, it would have been easy to have so provided in words that would be unmistakable in their meaning. A device need not be necessarily fraudulent. The term includes anything which is a plan or contrivance. Webster defines it to be 'that which is devised or formed by design; a contrivance; an invention; a project,' etc."

The use of Judge Kohlsaat's dictum (page 610, 161 Fed.), upon which counsel for the defendant pivot an argument that the present law is inoperative in the present instance because indefinite, is ingenious, but not persuasive. As we understand the position of Judge Kohlsaat, which, after all, was mere dictum, neither noticed nor followed in the subsequent affirmation of his judgment by the Supreme Court (212 U. S. 522, 29 Sup. Ct. 315, 53 L. Ed. 635), it is that the word "discrimination" as used in the Elkins law is to be given its common acceptation, which, as the court observes, involves the idea of unjust distinction, wherefore the adding of an adjective, "unjust" or "unreasonable," is tautological as representing an idea already fixed in the noun "discrimination." Upon this substance defendant's counsel predicate the point that the law leaves it to each jury to determine the scope of its operation, and makes possible that in the same state of facts one jury may find an offense and another nothing reprehensible, and therefore one engaging in practices susceptible of a characterization of discrimination cannot know in advance whether he is violating a law. The argument is advanced, therefore, that the law, as attempted to be applied here, is void for indefiniteness. Two considerations occur here: First, that such an argument has no place in support of a contention that this act, being in derogation of the common law, must be construed strictly, for the reason that in the common law the same assumed indefiniteness obtains with reference to much inhibited and punishable conduct of private agencies attempting public service in respect to their treatment of a public entitled to equal consideration in circumstances substantially similar; second, the point overlooks the function of the court in an attempt to enforce the law criminally. It is for the court to first pass upon the application of the law to the facts which a prosecution offers against a defendant. The proper performance of this duty leaves to the jury, to the prejudice of the defendant on trial, no latitude for speculation on the question which is the court's alone. The court in such a case deals with a descriptive noun of long-established usage, having a meaning which appeals to the understanding, and meets the compre-

hension of every one of average intelligence who uses the English language. Its usage in the nomenclature of the railroad business is, at least, not peculiar; on the contrary, it is therein a well-understood term with a meaning right in the line of its ordinary acceptation. Hines v. W. & W. R. Co., 95 N. C. 434, 59 Am. Rep. 250. We see no occasion for alarm that the construction which defendant's counsel contend against may involve the carrier in mazes of complaints involving matters of little consequence in which one shipper may complain that he is not receiving precisely and exactly the same detailed consideration which he thinks his competitor is obtaining. Criminal law, as well as civil, honors the maxim, "De minimis non curat lex," which has controlling application to the enforcement of a statute which aims at the repression of real and substantial abuses in transportation of a kind known and appreciated by all in the business as well as by the general public. In connection with the use made of Judge Kohlsaat's opinion, we note his observation that the construction of the act of 1906 asked for by the government is not necessary to be made, "bearing in mind the general trend of the statute and amendments thereof," and, saying, page 610 of 161 Fed.:

"It is, however, evident that the passage of the acts of 1903 and 1906 contemplated a more effectual enforcement of the statute. The requirements are made more specific and the prohibitions more emphatic."

And again, on page 617 of 161 Fed., quoting with approval from the brief of the carrier company that "the purpose of that statute [the Elkins act] was to prescribe penalties and supply remedies for the better and more effectual enforcement of the interstate commerce act," he says (page 618 of 161 Fed.): "The amendments of 1906 infuse greater vitality into the act." This language is idle if the dictum relied upon by counsel for defendant can be fairly used for the purpose attempted.

We have observed above that, the law having been enacted to apply to a business in which the custom as well as the exigencies of the business made compensation for and rendition of service substantially contemporaneous, wherefore an implication necessarily arises that the schedule of rates must be observed in cash collections, the statute is not to hamper the honest business of the carrier, but to encourage and facilitate it. It cannot be employed to curtail any opportunity to secure to the carrier its full compensation, and no apparent discrimination which is effectual to accomplish that end is under the inhibition of the law. Here is where the case of Gamble-Robinson Company v. C. & N. W. Ry. Co., 168 Fed. 161, 94 C. C. A. 217, 21 L. R. A. (N. S.) 982, is found to depart from defendant's case before us. There the alleged discrimination is nothing more than conduct designed to secure the company's full rates, and to save embarrassment and trouble involved in dealing, after the service, with troublesome shippers who show a disposition to be captious touching the carriage of products "perishable in their nature, of a character which renders them susceptible to claims for errors in charges for transportation and for damages during transportation." The credit which the court upholds as proper under the law is evidently nothing more than the

credit which continues while the goods are undelivered to the consignee and while the lien for carriage is held by the carrier. This is plain from the fact that the majority opinion unquestionably limits its force to circumstances substantially similar, and in which articles of commerce of like infirmities are involved. Aside from the difference in character of the commodities, the two cases would be apposite only if the carrier in the case before us had actually made its collection from the Sunday Creek Company, for then in this case, as in that, the only possible discrimination would be predicated upon the exaction from some shippers of bonds to secure payments, and the relief of others from the same requirement. The parallel ceases and a divergence destructive of the Gamble-Robinson Case as authority appears when we consider that here is not an effort to secure payment, as there, but a granting of a different credit from that which Gamble-Robinson Company claim it should have, a credit which is not influenced by the character of the commodity but by a desire to extend a favor, as to which no other reasonable inference is possible, a credit, too, which, the wider it goes, the more is weakened the authority of the law to compel defendant to treat all its shippers with equality. In this case, the weapon which a majority of the Circuit Court of Appeals for the Eighth Circuit upholds as one of defense is used as one of offense to put defendant in position to engage, at its option, in the very mischief at which the law is specifically aimed.

We are not impressed with the argument which asks the government to defer its objection until the defendant chooses, by definitely abandoning its claim against its debtor, to exercise its option. The offense is complete when the shipper is given the privilege to do business upon the capital of the carrier, which must strike any one of fair intelligence as such a substantial advantage over competitors as to involve them, with respect thereto, in a corresponding substantial discrimination. Nor does it appeal to us that the circumstance is nothing more than the loaning to the coal company of money belonging to the carrier, for the reason that one's imagination suffers no strain in anticipating the argument of the same counsel if the circumstances were used upon which to base a claim of ultra vires on the theory that the railroad company was acting as banker for the Sunday Creek Company.

Of course, it is not practicable for Congress to set a limit on human ingenuity in the devising of schemes obnoxious to the act to regulate commerce by attempting a description of all possible methods. The act accomplishes its end by directly and unmistakably condemning results, wherefore every devisable plan to produce the objectionable conditions is under its ban. Surely our jurisprudence is not so inept and feeble that a statute exhibiting a definite purpose to meet palpable mischiefs must be construed so narrowly as to oblige Congress from time to time to amend it that its provisions may be kept, at the best, only in the immediate rear of a procession of new methods born of the fertility of human invention and designed to circumvent that legislative will which it attempts by each amplifying amendment to express.

Before December, 1908, the courts had spoken with such uniform emphasis as to the broad scope of the statute that it would seem that one filled with a genuine anxiety to obey the law, when he knew what it was, need make no other inquiry than to ask himself what he hoped to effect by a line of conduct occupying his mind. If it is, by a new method or by one not specifically described in the statute, to accomplish that which the act aims to prevent, the contemplated action is against the statute. So considered, the statute is not indefinite; and in this light we hold that it must be construed. The law condemns the means by condemning the end which gives character as a violation of the law to the device which effectuates such end. If extending credit for freight charges to one shipper while exacting cash payments from his competitor in similar and contemporaneous enterprises is not extending an advantage to such shipper which involves a correlative discrimination in respect to transportation against those not so favored, the court is wholly in error. If it is the practice of such a discrimination, then the act is fully covered by the explicit language of the statute, for the means to such end readily meet the definition of a "device," as that term is used in the law.

As we have heretofore suggested, the impression comes quickly and abides tenaciously that such treatment is a decided advantage to the one so favored, an advantage which is as measurable and substantial as the inevitable discrimination which it creates against those who are compelled to compete in business on the basis of such partiality.

Thus viewing the law, the demurrers to counts 11 to 28 respectively, are severally overruled.

UNITED STATES v. SUNDAY CREEK CO.

(District Court, N. D. Ohio, W. D. December 9, 1911.)

No. 1,358.

1. CARRIERS (§ 38*)—INTERSTATE COMMERCE—FREIGHT CHARGES—"DISCRIMINATION"—INDICTMENT.

An indictment against a coal company for accepting and receiving discrimination in freight charges paid on coal shipped in interstate commerce alleged that it was the custom of the carrier because of the exigencies of the business to grant a credit of 30 days to coal operators for freight on prepaid shipments; that the carrier required other operators in the same district to give bonds to secure payment of their monthly account for prepaid freight in money; that pursuant to an agreement between defendant and the carrier, existing before and at the time the prepaid shipments were made, defendant's monthly bill for such shipments for a certain time amounting to $26,491.05 was paid by delivering to the railroad company in cash $1,491.05 and defendant's 5 per cent. four-months note for $25,000; that no demand was made by the carrier on defendant for payment of the freight charges in money; and that the note was renewed from time to time until, on April 1, 1910, it was merged with other debts due from defendant to the railroad company into 5 per cent. debenture bonds of defendant company, payable April 1, 1913, delivered to and accepted by the railroad company in payment for such freight. *Held*, that the term "discrimination" is used in

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

the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1909, p. 1138]), in its common sense, as well as with whatever enlarged or more definite meaning the context of the amendment of 1906 (Act June 29, 1906, c. 3591, 34 Stat. 587 [U. S. Comp. St. Supp. 1909, p. 1149]), gives to it, includes a case where a shipper is permitted to settle his charges by paying a less or "different" compensation to the carrier than other shippers shipping under similar circumstances are compelled to pay, and that the indictment alleged facts showing that defendant had received a discrimination in violation of the act, and was therefore not demurrable.

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

For other definitions, see Words and Phrases, vol. 3, p. 2099.

What constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations, see note to Gamble Robinson C. Co. v. Chicago & N. W. Ry. Co., 94 C. C. A. 230.]

2. PAYMENT (§ 67*)—ACCEPTANCE OF NOTE—ANTECEDENT INDEBTEDNESS.
While the taking of a note for an antecedent indebtedness does not raise a presumption of extinguishment of that debt, the acceptance of a note for a present indebtedness raises a presumption of payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 189–194, 198; Dec. Dig. § 67.*]

3. CARRIERS (§ 32*) — INTERSTATE COMMERCE — DISCRIMINATION — "DIFFERENT COMPENSATION."
Where a carrier receives a note from a shipper in payment of freight on shipments in interstate commerce, it thereby receives a "different compensation" from that which only the law authorizes, to wit, money, in violation of the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1909, p. 1138]), as amended in 1906 (Act June 29, 1906, c. 3591, 34 Stat. 587 [U. S. Comp. St. Supp. 1909, p. 1149]), providing that a shipper who is permitted to settle his charges by paying a less or different compensation to the carrier than is required by other shippers operating under the same or similar circumstances accepts or receives a discrimination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83–85; Dec. Dig. § 32.*]

On demurrer to indictment against the Sunday Creek Company for accepting discrimination in the transportation of coal in interstate commerce over the Hocking Valley Railway Company in violation of the Elkins law. Overruled.

U. G. Denman, U. S. Atty., J. G. Fogg, Asst. U. S. Atty., and John H. Marble, Special Asst. U. S. Atty.

William O. Henderson, for defendant.

KILLITS, District Judge. The views expressed by us in the opinion filed to-day, overruling the demurrers to the several counts of the indictment against the Hocking Valley Railway Company, requires us to take the same action in this case. The indictment here contains eight counts, embodying the same transactions as those embraced in counts 11, 13, 14, 15, 16, 17, 18, and 19 of the bill against the railroad. As against the defendant coal company, the law invoked is that part of the Elkins law which makes it unlawful for any "corporation to solicit, accept or receive any * * * discrimination in respect to the transportation of any property in interstate commerce by any common carrier," etc.; and the only question here raised is

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

whether the transaction which is discussed at length was a "discrimination in respect to transportation."

[1] All that we have said in comment on the other case has the same application here. The criticism advanced respecting the assumed deficiencies in the language of the indictment is substantially that advanced against the other bill. We suggest that, while in pleading a statutory offense it is safe to employ the words of the statute, such action is not obligatory, and any language which is seen to be capable of apprising one of ordinary intelligence of the several essential ingredients of the crime meets every requirement.

The word "discrimination," as used in the Elkins act, is employed in its common sense, as well as with whatever enlarged or more definite meaning the context of the amendment of 1906 gives to it. Thus a shipper who is permitted to settle his charges by paying a "less or different compensation" to the carrier is accepting or receiving a "discrimination." In this view the indictment against the defendant in this case leaves less to statutory construction than in the main case, for here there is a distinct allegation that the note was taken in payment of that portion of the charge not paid in cash, and pursuant to an agreement to that effect before and at the time the charge was incurred.

We have confidence in our theory that, under all the circumstances here, the settlement on the accounting day for prepaid freights must be related for actual time to the date of service, especially when, as here, such settlement is not only deferred because of an exigent custom of the business which, in that respect, is given uniform operation, but is had, in the form it is given, pursuant to an agreement had at and before the creation of the obligation. The taking of the note, therefore, in legal effect, is contemporaneous with the rendition of the consideration.

[2] As we suggested in the other opinion, the taking of a note for an antecedent indebtedness does not presume extinguishment of that indebtedness, but the taking of a note for a present indebtedness does, in fact, raise a presumption of such payment. Hall v. Stevens, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802; Sheehy v. Mandeville, 6 Cranch, 253, 3 L. Ed. 215. Even where it is claimed that the payment was for an antecedent indebtedness, the agreement therefor may be established by circumstances, if they afford a clear inference. Peter v. Beverly, 10 Pet. 532, 568, 9 L. Ed. 522. Here the government not only pleads facts raising such presumption of payment, but pleads the fact of payment by note directly. Had it been equally explicit in the other case, the demurrers to the first 10 counts of the railroad indictment would have been quickly handled.

[3] Receiving payment by note is receiving a "different compensation" from that which only the law authorizes, namely, money. As we understand it, our position in this case is in no wise out of harmony with the decision in Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co., 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192, or Gamble-Robinson Co. v. C. & N. W. Ry. Co., 168 Fed. 161, 94 C. C. A. 217, 21 L. R. A. (N. S.) 982, or any other decision which upholds

the effort of a carrier to secure payment of its services. If there was nothing more in this case than in those mentioned, namely, a requirement upon some shippers to pay freights in advance, while carrying the same commodities on the basis of collecting the freight charges in due course of business for other shippers, this court would make short work of this indictment. These cases cannot be cited in support of a state of facts which work the effect of an option to the carrier to occupy a position of inability, through the lapse of time, or the aggregation of uncollected charges, to collect in full, and then offer that situation as a defense to a charge that it has not collected in full. Should it be urged that this is mere speculation, we reply that, given a purpose to evade the law, this is a logical possibility, if not probability, from the facts.

The demurrer to each count is overruled.

YORK HAVEN PAPER CO. v. YORK HAVEN WATER & POWER CO.

(Circuit Court, M. D. Pennsylvania. December 18, 1911.)

No. 72.

1. NAVIGABLE WATERS (§ 36*)—LANDS UNDER WATER—RIPARIAN RIGHTS—LAW OF PENNSYLVANIA.

Under the law of Pennsylvania, the absolute estate of a riparian owner on the principal rivers of the commonwealth extends no further than to ordinary high-water mark, but beyond this point to ordinary low-water mark he holds a qualified estate subject to the public rights of navigation, while beyond ordinary low-water mark the title to the bed of the stream is in the commonwealth, and the right to the use of the water follows the ownership of the bed in which it flows.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180–200; Dec. Dig. § 36.*]

2. NAVIGABLE WATERS (§§ 36, 46*)—RIPARIAN RIGHTS—EXTENT OF RIGHT TO USE WATER.

Under the Pennsylvania milldam act of March 23, 1803 (4 Smith's Laws, p. 20), a riparian owner on the Susquehanna river has the right to erect dams for mills or other works adjoining his lands and to lead off on his own lands so much of the water as may be necessary for his purposes, subject to the navigation rights of the public. Such right is no more than a revocable license which may be revoked by the state whenever the interests of the public may require it, but the license is coupled with a riparian interest, which, unless excepted or reserved, passes with a conveyance of the land and any sensible interference with which by another constitutes an actionable trespass.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 189, 283–293; Dec. Dig. §§ 36, 46.*]

3. NAVIGABLE WATERS (§ 46*)—DAMAGES (§ 78*)—INJUNCTION (§ 48*)—CONVEYANCE OF RIPARIAN LANDS—EXCEPTION OF WATER RIGHTS—CONSTRUCTION—LIQUIDATED DAMAGES—CONTINUING TRESPASS.

Complainant conveyed riparian lands on the Susquehanna river adjoining those on which it operated a large paper mill by water power to defendant, a power company, with all water rights excepting as therein reserved, but reserving to itself and its successors for all time a sufficient flow of water to enable it to develop 3,000 horse power, said supply to be furnished without cost or charge to it at the head gates to be con-

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

structed by defendant in accordance with plans to be approved by complainant. There was a further provision that, in the event of a failure or refusal to supply such water, defendant should pay liquidated damages at the rate of $40 per horse power per annum for the deficiency. Defendant constructed its plant, but during seasons of low water willfully failed to furnish to complainant the required quantity of water, diverting the same to its own use, with the result that complainant could not operate its mill to full capacity and sometimes not at all, to its serious damage. Defendant's sole business was the generation of electric power which it sold to public service and other corporations. *Held*: (1) That the clause in the deed was an exception by which complainant retained, as appurtenant to its mill property, the paramount right to water sufficient in quantity to generate 3,000 horse power from the water it was then licensed by the state under the milldam act to appropriate, to be delivered from that flowing into defendant's forebay, and that the willful appropriation of any part of such quantity by defendant was a trespass on complainant's property rights; (2) that the provision for liquidated damages did not cover such misappropriation, but only the failure to furnish the water; (3) that defendant was not a public service corporation nor entitled as such to treat complainant as a customer, with the same rights as other customers; (4) that defendant's acts constituted a continuing trespass which threatened irreparable injury to complainant's business and entitled it to maintain a suit in equity for relief both on that ground and as avoiding a multiplicity of suits.

[Ed Note.—For other cases, see Navigable Waters, Cent. Dig. § 290; Dec. Dig. § 46;* Damages, Dec. Dig. § 78;* Injunction, Cent. Dig. § 101; Dec. Dig. § 48.*]

4. DEEDS (§ 138*)—CONSTRUCTION—"EXCEPTION" OR "RESERVATION."

The distinction between a "reservation" and an "exception" in a deed is that the subject of the former is something which did not exist before but is created by and grows out of the transaction, while an "exception" is of something or some right previously existing.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 456; Dec. Dig. § 138.*

For other definitions, see Words and Phrases, vol. 3, pp. 2538–2544; vol. 8, p. 7656; vol. 7, pp. 6140–6144; vol. 8, p. 7787.]

5. EQUITY (§ 71*)—LACHES—DELAY AND ACQUIESCENCE.

In a suit by a grantor against a grantee more than 10 years after the conveyance, where no fraud is shown, the defendant is debarred by laches from setting up as a defense that the transaction was unconscionable.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204–211; Dec. Dig. § 71.*]

6. ESTOPPEL (§ 93*)—EQUITABLE ESTOPPEL—SILENCE.

Where defendant was under covenant to furnish to complainant a permanent flow of water of a stated quantity for power purposes from its dam, complainant was not estopped to enforce such covenant by the fact that it made no objection, when defendant so constructed its dam and head gates, that at certain stages of water it could not operate its own works if it complied with its contract.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 264–275; Dec. Dig. § 93.*]

In Equity. Suit by the York Haven Paper Company, to the Use of Henry W. Stokes, receiver, against the York Haven Water & Power Company. On final hearing. Decree for complainant.

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

R. Stuart Smith, John P. Kelly, W. U. Hensel, and Charles E. Morgan, for complainant.

V. K. Keesey, C. L. Bailey, Jr., J. S. Black, and Le Roy J. Wolfe, for defendant.

WITMER, District Judge. On December 4, 1909, Henry W. Stokes was appointed receiver of the property of the York Haven Paper Company by the Circuit Court of the United States for the Middle District of Pennsylvania, upon a bill filed by Hunter & Dickson Company, a New Jersey corporation, and creditor of the York Haven Paper Company, alleging, inter alia, that by reason of the interruption of the operation of its plant, resulting from failure of water power from the Susquehanna river, the York Haven Paper Company was unable to derive its usual revenue from the manufacture and sale of paper and was without cash and quick assets sufficient to pay its current liabilities. The receiver was authorized to operate the plant and to manage and conduct the business of the company until the further order of the court.

January 10, 1910, on petition of Henry W. Stokes, receiver, the court ordered that said receiver be authorized and directed to file a bill in equity against the York Haven Water & Power Company, ancillary to the receivership proceedings, in the name of the York Haven Paper Company, but for the use and benefit of Henry W. Stokes, receiver of said company. The petition on which this order was entered alleged that, for a long time prior to the appointment of the receiver, the York Haven Water & Power Company had been diverting water from the head gates of the York Haven Paper Company and depriving the latter company of the flow of water to which it was entitled; and since the appointment of the receiver, the York Haven Water & Power Company had continued to divert the supply of water from the receiver who was operating the paper mill under the decree of the court.

Thereupon the receiver filed this bill of complaint against the York Haven Water & Power Company, by which it appears: That both the York Haven Paper Company and York Haven Water & Power Company are owners of land in York county, Pa., on the west bank of the Susquehanna river. The original tract of land, comprising the two tracts now owned by these two companies, was, from 1885 until 1901, owned entirely by the Paper Company. In 1901 the Paper Company conveyed a portion of the entire tract with a frontage on the river of about 6,825 feet through an intermediate owner to the Power Company, with the exception set forth in paragraph 3 of the bill. The remainder of the tract, having a frontage of about 208 feet, and being situated downstream from the tract conveyed to the Power Company, is still owned by the Paper Company in fee. That both before and since the conveyance to the Power Company, the Paper Company has maintained and operated upon the land which it now owns a large plant for the manufacture of paper by means of water power from the Susquehanna river. That by the deeds of conveyance under which the Power Company obtained title to its tract of land,

there was excepted and reserved to the Paper Company a sufficient flow of water from the river to enable the Paper Company to develop 3,000 horse power for the operation of its plant.

The bill further alleges that the Power Company for a long space of time, in violation of the reservation contained in the conveyance aforesaid, has so operated its water power plant as to deprive the Paper Company of a supply of water from the river sufficient to develop 3,000 horse power, and that such deprivation has been continuous, and has resulted and will further result in irreparable injury to the Paper Company.

The bill prays for an injunction restraining the Power Company from appropriating or using any water from the forebay supplying both companies, which is required in order to furnish the Paper Company with sufficient flow of water to develop 3,000 horse power; and for a decree fixing the amount of damages sustained by the Paper Company and its receiver, by reason of the defendant's wrongful use of the water, and directing the defendant to pay over such amount to the receiver; and for general relief.

The defendant demurred to the bill on the grounds that the plaintiff had an adequate remedy at law, and that the defendant, being a public service corporation, the effect of an injunction would be to put the plaintiff in the position of a favored customer entitled to water power under all circumstances.

The demurrer was argued before Judge Archbald, on July 28, 1910, and on August 3, 1910, the demurrer was overruled with leave to answer.

The defendant's answer was thereafter filed, and, upon the filing of a replication, testimony was taken, and the case is now before the court on final hearing.

Findings of Fact.

First. The York Haven Paper Company was incorporated under the laws of Pennsylvania on January 7, 1885, for the purpose of the sale and manufacture of paper and of the materials from which paper is made.

York Haven Water & Power Company was incorporated under the laws of Pennsylvania on January 16, 1895, for the purpose of supplying water and power to the public and to firms, individuals, and corporations in the borough of York Haven, York county, Pa., and the territory adjacent thereto.

Second. On February 23, 1885, B. Gilpin Smith et al. conveyed to the York Haven Paper Company in fee, for a consideration of $100,000, a tract of land situate in Newberry township, York county, Pa., abutting on the Susquehanna river, and containing 314 acres and 33 perches, with the hereditaments and appurtenances thereunto appertaining; the said consideration having been paid with 1,000 shares of the capital stock of that company of the par value of $100 each.

Third. On May 30, 1901, the York Haven Paper Company conveyed to the Security Title & Trust Company of York, in fee, for a nominal consideration, a tract of land situate in Newberry township,

York county, and containing 374 acres and 17 perches. This conveyance, inter alia, included that portion of the original tract conveyed by B. Gilpin Smith et al. to the York Haven Paper Company which abutted on the Susquehanna river and extended "by the various courses of the said Susquehanna river easterly and southeasterly sixty-eight hundred and twenty-five feet more or less," and, furthermore, "all and singular the water rights and privileges of said grantor in the said Susquehanna river, except as hereinbefore reserved." The exception contained in the conveyance is as follows:

"Reserving also to the said York Haven Paper Company, its successors and assigns, a sufficient flow of water to enable the said York Haven Paper Company to develop three thousand horse power for all time after the construction of the contemplated power plant by said York Haven Water & Power Company, said supply of water to be furnished said York Haven Paper Company without cost or charge to it, and delivered at head gates to be constructed at the expense of the said Power Company, in accordance with plans to be approved by the York Haven Paper Company, at such point on the lands belonging to the said Paper Company as it may designate; and the said York Haven Paper Company shall be first entitled to receive from the said York Haven Water & Power Company the said supply of water to enable it to develop the said three thousand horse power before any power which may be developed by the said York Haven Water & Power Company be used by it or furnished by it to any person or corporation; and no power shall be used or furnished at any time by said Power Company, unless said Paper Company shall be so supplied with the water necessary to develop said three thousand horse power so reserved to it. And in the event of the said Power Company refusing or failing to supply the said water necessary to create said three thousand horse power, the York Haven Water & Power Company shall pay to the said York Haven Paper Company at the rate of forty dollars per horse power per annum, for as many horse power as are represented by the difference between the amount actually furnished and the said three thousand horse power agreed to be supplied, and this payment shall be considered as liquidated damages between the said York Haven Paper Company and the said York Haven Water & Power Company. In the event of the deficiency of supply being caused by destruction of or injury to the dam race or waterworks in consequence of floods or ice, such liquidated damages shall not be enforced."

Fourth. On May 31, 1901, the Security Title & Trust Company of York conveyed to York Haven Water & Power Company in fee, for a nominal consideration, the same tract of land which was conveyed to the grantor by the York Haven Paper Company by deed of May 30, 1901, with the same exception of water power as set forth in third finding.

Fifth. Immediately after the incorporation of the Paper Company in 1885, the company commenced the erection of a paper mill on the tract of land above described and at the same time developed the water power of the river at that location to furnish power for the mill. The mill was located at the lower end of Conewago Falls, where there was a natural fall of about 19 feet. At the head of the falls was a reef of rocks from which an old canal had extended downstream along the Paper Company's property. In this canal some distance below the reef of rocks, head gates were constructed, and below the head gates the old canal was widened and deepened and used as a head race leading the water to the mill. Above the head gates, a crib dam was built extending upstream to the reef of rocks which was partially

blasted out so as to permit the flow of water into the basin formed between the crib dam and the shore. Between 1885 and 1901 this crib dam was twice rebuilt, each time with a greater width of basin between the shore and the head of the crib dam. All this work was done under the direction of Henry L. Carter, president of the Paper Company.

Sixth. Immediately after the incorporation of the Power Company in 1901, a power house equipped with turbine wheels and electrical machinery was erected by the Power Company alongside the paper mill but farther out from the shore. From the power house a stone retaining wall was built upstream for a distance of 3,300 feet, and farther out from the shore than the old crib dam of the Paper Company. Then from the upper end of the wall there was built a crib dam for a further distance of 1,500 feet past the middle of the river and in the direction of an island (known as Duffy's Island) lying near the Lancaster county shore. The old crib dam was entirely destroyed. The retaining wall and new crib dam formed a large basin or forebay, at the lower end of which, along the side of the power house, were the pen stocks or openings leading to the turbines, which were protected from ice and débris by iron racks. At the same time, the old head gates of the Paper Company were removed and the old race bank partly destroyed, and new head gates were constructed at the upper end of the paper mill, about opposite the turbines of the Power Company. Thereafter the turbines of the Power Company and the head gates of the Paper Company both received their supply of water from the same basin or forebay. The new head gates of the Paper Company consisted of a cement wall in which there were six openings, each nine feet in diameter and each provided with a "butterly" gate, pivoting on a vertical shaft in the center. Below these head gates, the head race of the Paper Company lay between the paper mill and the shore, with inlet pipes leading to the wheels installed in the several buildings of the paper mill plant. Henry L. Carter supervised the erection of the Power Company's plant and water power works and at that time was president of both the Power Company and the Paper Company.

Seventh. The Paper Company manufactures principally wrapping paper from hemlock or spruce wood, by the sulphite process and ground wood process. The plant of the Paper Company includes a group of buildings located between the head race and the river, on land still owned by the Paper Company. These buildings are the sulphite mill, containing the digesters which prepare the sulphite pulp; the ground wood mill, where the wood is prepared for the sulphite mill and is also ground to make mechanical pulp; the wet machine room, containing the wet machines; the beater room, where the raw material is finished up and prepared for the paper machines; and the machine room, containing the paper machines.

The plant has an average capacity of 57 tons of paper every 24 hours. There are four water wheels (turbines) in the ground wood mill. One operates the "chipper" for chipping wood for the sulphite mill, two operate the grinders, and one operates the machinery in the

wet room and a generator for electric lighting. There is one turbine in the beater room, which operates the "beaters" and all the machinery for conveying the sulphite and ground wood to the paper machines. The four turbines in the ground wood mill have a capacity of 350 horse power each. The beater wheel has a capacity of 700 horse power. Making a total water power capacity for the whole plant of 2,100 horse power. There is a steam plant of small capacity which furnished power for the machine room and steam for cooking the sulphite, but is insufficient to operate the other departments of the plant.

The manufacture of the raw material (wood) into pulp and preparing it for the paper machines is entirely dependent on water power. If water power fails for any reason, the plant is obliged to shut down. The water flows from the forebay formed by the Power Company's works, through the head gates built by the Power Company, into the Paper Company's head race, which is 75 feet wide, 300 feet long, and 18 feet deep. From the head race the water passes through flumes to the five turbines and discharges into the tail race located below the Power Company's plant. The maximum head—i. e., the difference between the level of the water in the head race, and its level in the tail race—is 22 feet.

To operate all five wheels at the proper speed and without interruption, the water in the Paper Company's head race must be maintained at a depth of 12 feet, measured from the bottom of the head gates. When the water gets below that level, the power gradually decreases and the wheels lose their normal speed. It is possible to operate some but not all of the wheels with the water at less than 12 feet in depth, and under those conditions part of the plant must be shut down. In order to run the mill to its full capacity and prepare the raw materials for the paper machines, it is necessary to operate all of the five turbines. When the speed of the wheels is reduced by the water falling below 12 feet in the head race, it also interferes with the finishing processes and the operation of the paper machines.

Eighth. The Power Company has an installation of 20 pair of 78½-inch turbines and one pair of 62-inch turbines. The turbines of the Power Company are at such a level below the turbines of the Paper Company that the Power Company can run when the Paper Company cannot, and the Power Company's turbines have about 11 times greater capacity for drawing water from the river than those of the Paper Company. When the paper mill race is dry, there are still about nine feet of water in the forebay, and the Power Company can operate, though not at full load.

Ninth. The Paper Company kept a record known as a "log book," in the regular course of its business, showing the total quantity of paper produced, the height of water in its head race, and data relating to the operation of the turbines. Measurements of the height of water and observations of the operation of the turbines were recorded daily in this book by the men that made them. This record shows that during the latter part of the year 1909, and the year 1910, the

plant of the Paper Company was often either partially or wholly shut down by reason of low water.

The daily station records of the York Haven Water & Power Company which are in evidence (pages 328–329) show that during the same periods, and at the same time, the turbines of the Power Company were in operation drawing water from the forebay from which the Paper Company gets its supply of water, and thereby furnishing power to generate electric current at the plant of the Power Company. It happened frequently that while the Paper Company's turbines were in operation, the water in their head race was drawn down by the Power Company so that the paper mill was obliged to stop running.

Tenth. When all the turbines of the Paper Company are running to their full capacity, they are capable of using only 2,100 horse power; so that any operation of the Power Company's turbines at a time when there is not sufficient water in the Paper Company's head race to fully operate the Paper Company's turbines necessarily results to some extent in depriving the Paper Company of the 3,000 horse power reserved in the conveyances.

Since 1905 the plant of the Power Company has been operated under the management of Edwin F. Baker, who, until February 24, 1910, was general manager, and after that date the receiver of the York Haven Water & Power Company.

On various occasions Mr. Baker operated the Power Company's turbines with the expressed purpose of depriving the Paper Company of water, and frequently he compelled the paper mill to shut down by starting more wheels of the Power Company when there was no necessity or demand for the additional current thereby produced. He admitted, on cross-examination, that his practice when the water got below a normal level was to continue operating the Power Company's turbines, regardless of the needs of the Paper Company.

Eleventh. The water supply in the Susquehanna river is variable. At certain times of the year the volume of water in the river is very much reduced. It is a rule recognized among all millowners that at times when the stream is at its low-water stage, it is important that the head should be kept to the highest mark; that the wheels should be operated under as high a head and fall as possible, the head being the water above the wheel, and the fall being the water passing out from the wheel to the tail race through the draft tube, and the two together making the head and fall, operating upon the turbine wheel. At seasons of low water it is important, and it is the general rule among millowners, to keep the head as high as possible, because that permits operating the turbine wheel at a less opening of gate to obtain the same power, and therefore there is no unnecessary waste of water.

Twelfth. The only recognized and scientific method of operating such a plant as that of the Power Company, when the volume of the water in the river is reduced, is to maintain as high an effective working head as possible and to so regulate the load on the turbines that the water passing through the turbines will never exceed the normal flow of water in the river. By the term "load" is meant the demand

made on the turbine by the generator to which the turbine is connected. If the turbines draw from the forebay or reservoir more water than is naturally flowing into the forebay, the level of the water of course falls.

A given quantity of water operating under a certain head will produce a certain output on the electrical generators. If for any reason the head is reduced, it requires a correspondingly greater volume of water through the same turbines to produce the same output on the generators.

It is necessary, in order to deliver the power to their customers under the best efficiency, that the speed and voltage be kept at a predetermined value and be kept constant. If, for any reason, the working head of water is reduced, it then becomes necessary, in order to maintain these conditions, to increase the volume of water passing through the turbine; and, if there is not a sufficient volume of water to do this, then the plant is operating at a very low efficiency.

The method adopted by Edwin F. Baker in his management of the power plant of the Power Company during 1909 and 1910 was such that the Power Company did not obtain the full efficiency of the water passing through the turbines during the periods when there was a limited volume of water in the river. His method of operating the plant during the periods of reduced volume of water in the river was frequently such as to pass through the turbines a larger volume of water than the natural flow of the river, and, by so doing, to draw upon his storage capacity, thereby reducing his working head until eventually it became necessary to demand that his customers take off their load to enable him to accumulate water in his storage basin and thereby obtain a suitable working head.

Thirteenth. These methods were employed by Mr. Baker in 1909 and 1910, when the volume of water in the river was reduced. These methods not only operated to the disadvantage of the Power Company, but also took the water supply away from the Paper Company, and owing to the fact that the Power Company was able to draw a larger volume of water from the storage basin than the Paper Company, the water supply was often completely taken away from the Paper Company, thereby making it impossible for the Paper Company to operate its plant, which threatens to continue if not otherwise prevented.

Fourteenth. The effect of this interference with the supply of water of the Paper Company has been injurious to the company's business. The fixed charges and overhead charges continued while the mill was idle. Paper that had been sold could not be promptly manufactured and delivered, and a great many orders were canceled. The company was obliged to lay off men, and in many instances experienced men would get employment elsewhere.

Fifteenth. The property of the Paper Company does not abut on the Susquehanna river at any point, and the head gates of the Paper Company are now the property of the defendant, built there by mutual agreement.

Sixteenth. In 1906 and 1907 the defendant raised the level of the water in the river at York Haven 30 inches by extending the dam from a point known as Anchor Rock over to Duffy's Island, a distance of about 3,875 feet. The result of the extension of the dam was to provide greater reservoir capacity in the forebay, and consequently more available head for both companies.

Seventeenth. The principal customers of the defendant are the Harrisburg Light, Heat & Power Company, Valley Traction Company, Pennsylvania Steel Company, Steelton Light, Heat & Power Company, Middletown borough, Edison Electric Light Company of York, which supplies current to the York Railways Company, and a number of manufacturing establishments in York and Middletown.

Eighteenth. The defendant is not engaged in supplying electrical current directly to the public. It does not operate any electric lighting plants or street railways of its own. Excepting Middletown borough, all of the current produced by the defendant is sold to other corporations which are themselves in some instances public service corporations. The Harrisburg, Light, Heat & Power Company, the Valley Traction Company, the Pennsylvania Steel Company, and many of the manufacturing establishments have auxiliary steam plants of their own, and are consequently not dependent on the defendant company for current. The Steelton Light, Heat & Power Company had an arangement to get current from the Pennsylvania Steel Company when the power from the defendant company failed. The Edison Electric Light Company of York had a steam plant, but not of sufficient capacity to supply its own needs and that of the York Railways Company, its customer; so that if the power derived from the defendant failed, either the electric lighting system or the street railway system of York would be crippled. Of all the defendant's patrons, Middletown borough was the only consumer of electrical current with no other source of supply than the defendant.

Nineteenth. For the reason that the defendant company was unable to control the river conditions, all its contracts, except that with the Pennsylvania Steel Company, expressly stipulate:

"That the company (defendant) agrees to use reasonable diligence in providing a regular and uninterrupted supply of electricity, but does not guarantee the constant supply of electricity and will not be liable in damages to the consumer for failure to supply electricity when prevented by causes beyond its control."

Twentieth. The attempt by the defendant to put the Paper Company in the position of interfering with public necessities fails for want of sufficient evidence. It is clear that the only result of enforcing the paramount license of the plaintiff to sufficient flow at its head gates to develop 3,000 horse power during low stages of the river is to injure the private business of the York Haven Water & Power Company.

Twenty-First. There is no evidence of fraud or deception practiced by the plaintiff upon the defendant or the Security Title & Trust Company at the time of the sale. Neither does the evidence show an unconscionable bargain.

Conclusions of Law.

First. The right of both plaintiff and defendant to develop any water power on the Susquehanna at the locus in quo is merely a revocable license under the milldam act of 1803.

Second. The license of the plaintiff to develop 3,000 horse power is paramount to the right of the defendant.

Third. Any interference by the defendant with this paramount license of the plaintiff is an invasion of the latter's right of property.

Fourth. The case is one of continuing trespass upon a right of property and is cognizable in equity (a) because the injury threatens to become permanent, (b) because equitable intervention is necessary to prevent a multiplicity of suits, and (c) because the remedy at law is inadequate to meet the exigencies of the case.

Fifth. The clause in the deed from the plaintiff to the Security Title & Trust Company of York, dated the 30th day of May, 1901, providing for a sufficient flow of water at and into the head gates of the plaintiff to develop 3,000 horse power, is an exception.

Sixth. The stipulation as to liquidated damages in the conveyance of the 30th of May, 1901, by the plaintiff to the Security Title & Trust Company, covers only a refusal or failure to deliver the water belonging to the plaintiff at its head gates, and is not a provision for a wrongful appropriation and use thereof by the defendant, constituting a trespass upon plaintiff's right of property.

Seventh. The plaintiff's rights are clear and undoubted, and a prior adjudication thereof in a court of law is not necessary to entitle the plaintiff to injunctive relief.

Eighth. The defendant is not a quasi public corporation, nor is it engaged in business as a public service company.

Ninth. The transaction between the plaintiff and the Security Title & Trust Company of the 30th of May, 1901, and that between the latter and the defendant corporation on the same day, was not a legal fraud.

Tenth. There is no estoppel operative against the plaintiff in this case by reason of the fact that its officers stood by and saw the defendant placing its head gates considerably lower than the head gates of the plaintiff.

Discussion.

[1] "The common-law doctrine that fresh-water rivers, in which the tide does not ebb and flow, belong to the owners of the banks, has never been applied to the Susquehanna, and other large rivers in Pennsylvania." Carson v. Blazer, 2 Bin. (Pa.) 475, 4 Am. Dec. 463. The absolute estate of a riparian owner on the principal rivers of the commonwealth extends no further than to ordinary high-water mark, but beyond this point to ordinary low water the riparian proprietor holds a qualified estate, subject to the public rights of navigation. Beyond ordinary low-water mark the title to the bed of the stream is in the commonwealth.

[2] By the act of the 19th of February, 1801 (3 Smith's Laws, p. 462), the Susquehanna river to the Maryland line was declared to be

a public highway. By the act of the 23d of March, 1803 (4 Smith's Laws, p. 20), otherwise known as the milldam act, all riparian owners on any navigable stream of water, declared by law a public highway, excepting the rivers Delaware, Lehigh, and Schuylkill, were authorized to erect dams for mills or other waterworks upon any such stream, adjoining their own lands, and to keep the same in good order and repair, together with the right to lead off on his own land so much of the water of such stream as might be necessary for the operation of such mills or waterworks, subject to the navigation rights of the public.

However, the right of a riparian proprietor on the Susquehanna, under this act, is no more than a revocable license (Monongahela Navigation Co. v. Coons, 6 Watts & S. [Pa.] 101), and may be revoked by the state whenever the paramount interests of the public shall require it (N. Y. & N. R. R. Co. v. Young, 33 Pa. 175). Under this legislation the riparian owner acquires no title to the corpus of the water. Mayor, etc., v. Commissioners, etc., 7 Pa. 348. He has none at common law. Said Mr. Justice Williams, in Fulmer v. Williams, 122 Pa. 207, 15 Atl. 728, 1 L. R. A. 603, 9 Am. St. Rep. 88:

"In the case of all navigable rivers the bed in which they flow belong to the public. The right to the use of water follows the ownership of the bed in which it flows."

In the case just cited, being on the Lehigh river, and therefore not within the provisions of the milldam act, it was held that the riparian owner had no interest in the waters of the river for the purpose of water power, and this principle was applied to the waters thereof flowing over the qualified estate between high and low water marks.

While the right of the riparian proprietor on the Susquehanna under the milldam act is a revocable license, it is nevertheless a license coupled with a riparian interest; it follows the interest and passes to the alienee thereof, unless excepted or reserved.

Said Mr. Chief Justice Gibson in McCalmont v. Whitaker, 3 Rawle (Pa.) 84, 23 Am. Dec. 102:

"The water power to which a riparian owner is entitled consists of the fall of the stream when in its natural state, as it passes through his land, or along the boundary of it, or, in other words, it consists of the difference of level between the surface where the stream first touches his land, and the surface where it leaves it. This natural power is as much the subject of property as is the land itself, of which it is an incident, as it may be occupied in whole, or in part, or not at all, without endangering the right or restricting the mode of its enjoyment, unless where there has been an actual adverse occupancy or enjoyment for a period commensurate with that required by the statute of limitations."

Any sensible interference with the natural flow of the stream, if wrongful, whether attended with actual damage or not, is actionable. Clark v. Railroad Co., 145 Pa. 449, 22 Atl. 989, 27 Am. St. Rep. 710.

[3] The bill of complaint in this case proceeds upon the theory of the right of property of the Paper Company in the water power appurtenant to the land conveyed to the Power Company. The deed from the Paper Company to the Power Company contains a specific reservation to the grantor of the right to use sufficient water of the

river to develop 3,000 horse power, and 3,000 horse power was excepted from the grant. The bill is to restrain a continuing trespass by the Power Company upon the right of property of the Paper Company to the 3,000 horse power excepted out of the grant and reserved by the deed. The thing complained of is a tort. The bill alleges an unlawful interference with the complainant in the use of the water and the threatened continuance thereof by the Power Company, to the irreparable injury of the Paper Company.

One of the defenses set up by the Power Company was that by its deed it acquired all the water power rights incident to the land conveyed, and that by the conveyance it became bound by a covenant to furnish and supply sufficient water to the Paper Company to develop 3,000 horse power, whereby the Paper Company became one of the power customers of the Power Company; that, if the water was not furnished, the remedy of the Paper Company was an action at law to recover the liquidated damages provided for in the deed.

We think this defense not well taken. When the Paper Company sold the tract to the Security Title & Trust Company of York, the conveyance carried with it the revocable license under the milldam act, as an incident to the land conveyed, subject to the exception therein contained, which reserved to the Paper Company, for the benefit of the land remaining to it, the right to exercise the revocable license to the extent of the development of 3,000 horse power. In other words, the license of the Paper Company to develop 3,000 horse power was paramount to the license of its grantee. Originally the Paper Company was vested with the whole license appurtenant to the whole tract. It parted with part of the tract, excepting and reserving a certain tract, and further excepting to itself, as the owner of the excepted tract, the paramount right to develop 3,000 horse power. The license of the Power Company to develop any water power by reason of its riparian ownership under its conveyance from the Security Title & Trust Company was made subservient to the paramount license of the Paper Company.

[4] While the clause relating to the water power uses the words "reserving" and "reserved," yet nevertheless we think this clause an exception.

"The essential characteristics of a 'reservation' in a deed, as distinguished from an 'exception,' is that its subject is something that did not exist before, but is created by and grows out of the transaction. An 'exception' applies only where the subject already exists." Sheffield Water Co. v. Elk Tanning Co., 225 Pa. 614, 74 Atl. 742.

Here the thing already existed, i. e., the revocable license appurtenant to riparian ownership, under the milldam act. A portion of this license was excepted from the grant, and, although the words used in this connection may not be the apt words of an exception, it is nevertheless an exception. A paramount license to 3,000 horse power was carved out of the whole license and retained by the grantor for the benefit of the lands excepted, while the residue of the license, whatever it was, passed to the grantee.

The new water power works, by agreement between the parties

litigant, were constructed by the Power Company, and the works were so located with relation to the two plants that it became absolutely necessary that the supply of water deliverable to the Paper Company at its head gates should flow through the works of the Power Company. By reason of the fact that the Power Company was in physical control of the dam, forebay, and other appliances, certain covenants were incorporated in the excepting clause. They are, in substance, as contended by plaintiff, as follows:

(a) The water not included in the grant to the Power Company is to flow from the river to the Paper Company's head gates, through the water power works and appliances constructed by the Power Company.

(b) The Paper Company is to be put to no expense in receiving the water to which it is entitled.

(c) If the Power Company prevents the Paper Company from receiving the water sufficient to develop the 3,000 horse power, the Power Company is to pay the Paper Company as liquidated damages $40 per horse power per annum for the deficiency.

The use of the words "furnish," "deliver," and "supply" in the excepting clause does not import title in the Power Company to the 3,000 horse power. The Power Company became bound thereby, by a covenant running with its land, to permit the excepted of water to pass through its works into the head gates of the Paper Company.

The superior right, recognized by the deed as being in the Paper Company, was a right as a riparian owner, notwithstanding the fact set up by the defendant that the Paper Company does not now own any lands abutting the river. It was riparian at the time of the execution of the conveyance to the Security Title & Trust Company. The exception in the deed was therefore to itself as a then riparian owner. It follows, therefore, as the covenants in the deed related to the lands of the grantor and grantee and were to be performed thereon and in connection with the use and enjoyment thereof, they ran with the land and regulated the mutual rights of the parties and their successors in title. Horn v. Miller, 136 Pa. 640, 20 Atl. 706, 9 L. R. A. 810.

We adopt the plaintiff's construction of the deed of conveyance, and, in the language of its counsel, we say:

First. Plaintiff did not convey or divest itself of its riparian right to a flow of water, at its head gates, in quantity not less than sufficient to generate 3,000 horse power. That which was granted to defendant was what might well be described as a contingent remainder or residue of the flow; the quantity being dependent upon the excess over and above the quantity of which the plaintiff did not divest itself and which was expressly excepted out of the grant. It was only so much as should remain as a surplus over and above the specified quantity or portion of the flow, and therefore was uncertain and contingent upon the quantity of water in the forebay, while the plaintiff's was fixed and not subject to diminution by defendant for any cause.

Second. The clause in the deed not only preserved unimpaired the plaintiff's right of property to a flow of water sufficient to develop 3,000 horse power, but, by an express covenant running with the land, there was imposed a charge upon the title of the defendant to furnish said supply of water to plaintiff without cost or charge to it, delivered at its head gates as then and now constructed.

If in order to comply therewith, defendant finds it necessary at certain times and under certain conditions to maintain a storage basin containing more than the quantity of water which would be required if the wheels of both parties, plaintiff and defendant, were at the same level, it must do so.

Even if, at times, it should be inconvenient, or practically impossible, for the defendant to carry on its business without trespassing upon that portion of the flow which belongs to the plaintiff, such a condition would not be a justification for trespass by the defendant on plaintiff's right of property.

The Paper Company, with its business wholly dependent upon the use of water, never intended that the supply stipulated for should be uncertain or subject to be depleted or exhausted whenever the necessities of the Power Company, coupled with low water in the river, should make it convenient or desirable, or even essential, for the purpose of its business, to use that portion of the water not conveyed or belonging to it.

The stipulation as to damages covered only a refusal or failure to deliver the water belonging to the Paper Company at the Paper Company's gates and not wrongful appropriation and use by the defendant, constituting a trespass upon plaintiff's estate.

As clearly appears from the terms of the deed, the clause providing for liquidated damages was intended to secure performance by defendant of its covenant to deliver, and not as an alternative or substitute therefor, at the defendant's election.

It did not deprive the plaintiff of its right to relief in a court of equity.

In a majority of the cases where equitable relief has been granted for violation of water rights, damages have been awarded as well as injunctions granted.

This construction of the deed in suit is in consonance with the authorities in Pennsylvania. Said Mr. Justice Sharswood, delivering the opinion of the Supreme Court in Lindeman v. Lindsey, 69 Pa. 99, 8 Am. Rep. 219:

"When the proprietors of two opposite banks of a stream of water are desirous of enjoying the advantage of the water power for propelling machinery, a dam for that purpose cannot be built except by mutual consent, unless indeed it may be what is termed a 'wing dam,' confined to the soil of the person who erects it, or that half of the bed of the stream which belongs to him. If erected by either on the land of the other, it would clearly be a trespass, and could lawfully be abated by him upon whose land it was built without his consent. When, therefore, they enter into an agreement to erect such a dam, with a covenant for themselves, their heirs and assigns, to repair or rebuild it if necessary, it is not a personal covenant merely, but runs with the land of the respective proprietors, and the stipulations contained in such agreement in respect to the enjoyment of the water power created by the dam form the basis of their respective rights."

The learned justice also said when discussing the form of the action for a violation of the privilege or easement to take and use one-half of the water (page 102 of 69 Pa., 8 Am. Rep. 219):

"But in regard to the easement or privilege of Whisler, his heirs and assigns, to take and use one-half of the water, it was a direct grant, not a covenant. * * * No one has ever supposed before that upon a grant by deed of an easement or privilege upon land or upon land covered with water by one man to another, the remedy for a disturbance of such easement or privilege was an action of covenant upon the deed. Take a common case of the grant or reservation of a right of way. Surely an action on the case may be maintained by the grantor for the obstruction of it, as well against the grantee and those claiming under him as against strangers. * * * But, contends the counsel for the plaintiff in error with great ingenuity, the grant to Whisler of one half of the water is an implied covenant that the grantor will not take the other half. True it is so, in popular language, but that does not constitute a technical covenant. In the grant of a right of way or common in the grantor's land, there is the same implied covenant by the grantor that he will not disturb its enjoyment. But that, as we have seen, does not prevent the plaintiff from resorting to an action on the case to recover damages for its disturbance."

The case of Horn v. Miller, 136 Pa. 640, 656, 20 Atl. 706, 708 (9 L. R. A. 810), lays down a similar doctrine. In this case, Cade, Horn's predecessor in title, and Miller, the defendant, owned adjoining lands on a stream and made an agreement, in settlement of an action by Cade against Miller for diverting the water from one channel to the other. This agreement provided that Cade, his heirs and assigns, should enjoy a "water right or power" for two wheels on any part of his land, and Miller, his heirs and assigns, should enjoy water for his mill only when there was a surplus. Horn brought trespass against Miller and others for an alleged wrongful diversion of the water from the plaintiff's mill. Said Mr. Justice Clark:

"This action is trespass upon the case, for diversion of the water to the prejudice of the plaintiff's rights as a riparian owner, which, in view of the alleged previous artificial diversion of the water of the stream, were fixed and determined by the agreement of 1852. Trespass was the proper remedy. The agreement of 1852 established the rights of the parties, and the covenants were to that effect merely. The agreement was equivalent to a grant. Whatever may be conveyed by grant may be secured by covenant in this form."

Equitable intervention is sought by the plaintiff as the appropriate remedy for the prevention of continued trespasses by the defendant upon the paramount water privilege or license of the plaintiff. It is alleged that, by reason of the persistency with which these trespasses are repeated, the injury to the plaintiff threatens to become permanent. Equitable relief is also sought to avoid a multiplicity of suits.

"Equity frequently entertains a proceeding when thereby a multiplicity of suits can be avoided. * * * So while ordinarily courts of equity will not interfere merely to redress a trespass, they will do so where the trespass is a continuing one, and a multiplicity of suits is involved in the legal remedy. * * * And on this ground a suit may be maintained to prevent interference with a water privilege." Beach, Eq. Jurisp. vol. 1, § 22, pp. 22, 23.

A plaintiff will not be relegated to the pursuit of several remedies at law where the interference of equity will avoid circuity of action

and a multiplicity of suits. 16 Cyc. p. 45 (11, A, 5, a). Said Mr. Justice Thompson, in Scheetz's Appeal, 35 Pa. 95:

"In the case in hand, if the complainants had the right they claimed, namely, the right to an uninterrupted flow to their mill of the waters of Sandy Run through the premises of the respondent, and, for the enjoyment of that right, the further right to enter on his premises to remove obstructions, the interruption of that right, by a refusal to permit the removal of obstructions, or throwing them again into the stream when removed, were acts obviously injurious not only to the enjoyment of the right, but prejudicial to its existence. Damages at law would be wholly inadequate to the vindication of such a right. Successive suits for successive interferences, instead of redressing the wrong, would in the end be worse than the wrong itself. There are many cases in the books of restraint by injunction for such interferences. In principle, it is the same as the one cited from 5 Casey, 382. Courts of equity will restrain acts of trespass, or nuisance, to prevent multiplicity of suits. Brightly's Eq. § 293. That is, where the redress could only be by and through the medium of a multiplicity of suits or actions. So, where wrongful acts might become the foundation of an adverse right, such as the diversion of water. Webb v. Portland Manufacturing Co., 3 Sumn. 189 [Fed. Cas. No. 17,322]; [Gardner v. Village of Newburgh] 2 Johns. Ch. [N. Y.] 164 [7 Am. Dec. 526]. It is just in cases like the present, if the right be fully established, that the power of a court of chancery is most salutary. The right can be ascertained, and by the same proceeding petty annoyances and vexatious litigations restrained."

Said Judge Dallas in Railroad Co. v. Fiske, 123 Fed. 760, 60 C. C. A. 621:

"The proofs made it quite evident that the trespass which had been committed would, if not restrained, be repeated, and continued; and it is well settled that, under such circumstances, an injunction may and should be awarded to secure a plaintiff against probable irreparable injury and for the avoidance of a multiplicity of suits."

It sufficiently appears from the bill in this case that neither one action nor successive actions will afford the plaintiff the complete and adequate remedy to which it is entitled. In the language of plaintiff's counsel in their argument:

"How could the York Haven Paper Company possibly continue its business, maintain its organization and working force, meet its current obligations, and satisfy its customers of its ability to manufacture and deliver at the times fixed by its contracts, if it is to be subjected to constant interruptions of power to run its plant, and compelled to look for relief to an annual suit at law against the York Haven Water & Power Company to recover $40 per annum for each unit of horse power of which it is deprived?"

Equitable relief is sought to prevent a multiplicity of suits and to stay the irreparable injury which would result to the plaintiff by the continued and repeated trespasses by the defendant upon the paramount water privilege of the plaintiff. The fact that, in an action at law, the damages would not have to be liquidated by the jury, for the reason that they have been liquidated by the parties, can have no bearing upon the question of the right to equitable relief. There can be no doubt about the right of the plaintiff to injunctive relief. Beaver Falls Water Power Co. v. Wilson, 83 Pa. 83; Wilkes-Barre Water Co. v. Lehigh Coal & Nav. Co., 3 Kulp (Pa.) 389; Whitney v. Fitchburg Ry. Co., 178 Mass. 559, 60 N. E. 384; Eastman v. Parker, 65 Vt. 643, 27 Atl. 611. We are of the opinion that, in or-

der to injunctive relief, the plaintiff need not have established its right, preliminarily thereto, by an action at law. Bitting's Appeal, 105 Pa. 517; Schuler v. Schuler, 39 Pa. Super. Ct. 635; Manbeck v. Jones, 190 Pa. 171, 42 Atl. 536. Said Judge Archbald, in Ferguson's Appeal, 117 Pa. 439, 11 Atl. 885:

"Where the complainant's rights are clear and undoubted either by the admissions of the defendant or the undisputed facts in the case, equity will enjoin the infringement of them, without remitting the party to the inadequate remedies which the law may afford."

We think the pleadings and testimony in this action presents just such a case as falls within the rule laid down.

The York Water & Power Company was incorporated under the provisions of the general corporation act of the 29th of April, 1874 (P. L. 273), and its supplements, for the "purpose of supplying water and power to the public and to firms, individuals and corporations in the borough of York Haven, York county, Pennsylvania, and the territory adjacent thereto." The evidence shows conclusively that it is not now, and never has been, in the exercise of its corporate powers for the purpose of supplying "water" to the public or to firms, individuals, or corporations in the Borough of York Haven, or elsewhere. A water company is a quasi public corporation. Foster & Co. v. Fowler & Co., 60 Pa. 27; Guest v. Water Co., 142 Pa. 610, 21 Atl. 1001, 12 L. R. A. 324. It is a public service corporation. We know of no authority in Pennsylvania holding that a power company is a quasi public, or public service corporation. So far as the furnishing of power by the defendant, to the public, is concerned, it does not stand in the attitude of a public service corporation, and its defense that the injunction prayed for, if awarded, would "interfere with the performance of its duties to the public," is not supported either by the law or the evidence. Conceding, for the sake of argument, that the defendant is a public service corporation, invested with the right of eminent domain, it must nevertheless proceed in the manner directed by the Constitution (article 1, § 10) and the acts of assembly of the commonwealth, in order to the condemnation of the paramount license of the plaintiff to sufficient flow of water to develop 3,000 horse power.

The defendant set up as a defense (12 paragraph of answer) that the price of the land conveyed by the Paper Company to the Power Company through the medium of the Security Title & Trust Company of York, was unconscionable and far in excess of the real value of the land, and that the sale of the land with the exceptions contained in the deeds was in fact and in law a fraud upon the Power Company. There is absolutely no evidence of any deception practiced by the Paper Company or by any of its officers or agents in the making of this sale. At the time of the transfer practically the same persons were interested in both companies. There was nothing concealed in the transaction. The conditions were open to both parties. They had to all intents the same officers. It is an executed contract. There has never been an application to have the contract rescinded for fraud or overreaching by the Paper Company. The

Power Company has never made any offer to surrender the fruits of the bargain to the Paper Company.

[5] If there was fraud practiced by the Paper Company upon the Power Company and its intermediary the Security Title & Trust Company, the defendant has lost its day in court on this defense, by reason of its laches. Ten years have elapsed since the date of both conveyances, and it needs no citation of authority for the principle that under such circumstances equity will not interpose on behalf of the party who has slept upon its rights for that length of time. Said Mr. Justice Mestrezat, in Jackson v. Thomson, 203 Pa. 624, 53 Atl. 506:

"Equity, like the law, abhors laches, and those who sleep on their rights must awaken to the consequences that they have disappeared."

"The rule that the statute of limitations does not begin to run or that a party cannot be charged with laches until the discovery of the fraud does not mean that one can shut his eyes to obvious facts. A person who is injured by fraud must be prompt in seeking redress. Laches and neglect are always discountenanced. Nothing can call a court of chancery into activity but conscience, good faith, and reasonable diligence." Goggins v. Risley, 13 Pa. Super. Ct. 316.

However, there is another insuperable bar to the relief of the Power Company from the terms of its bargain upon its defense of fraud. If there was a fraud, the Power Company was particeps fraudis, and under such circumstances equity will leave the defendant exactly where it placed itself.

At the time of the oral argument, the defendant's counsel laid some stress upon certain alleged irregularities on the part of the Paper Company affecting its corporate existence. Suffice it to say that this is a matter about which the commonwealth alone can complain and then only in a direct suit in the name of the commonwealth against the plaintiff. And for this authorities need not be cited.

[6] Is the plaintiff estopped to assert its right to a paramount flow of the waters of the river sufficient to develop its 3,000 horse power, by reason of standing by and permitting the defendant to construct its head gates at a lower level than the plaintiff's head gates? We think not. The manner of construction of the defendant's works gave no notice to the plaintiff that the defendant intended to, or ever would, invade the paramount right excepted by the Paper Company. Neither was it notice to the plaintiff that at certain stages of the water it would be impossible to operate the defendant's works subservient to the plaintiff's paramount license. However, if it did so appear to the plaintiff, its mere silence amounts to nothing. The mere silence of the plaintiff withheld no facts, knowledge, or information of which the plaintiff was possessed, which the defendant did not know or could not have known. The rights of the parties were fixed by the deeds. The conditions prevailing along the river, its habits, etc., were as open and obvious to the defendant as they were to the plaintiff. If estoppel at all, it would be estoppel "by silence." It has been held that "estoppel by silence" arises "where a person who, by force of circumstance, is under a duty to another to speak, refrains from doing so, and thereby leads the other to be-

lieve in the existence of a state of facts in reliance upon which he acts to his prejudice." 16 Cyc. p. 681 (1, A, 10). Surely silence cannot be held to be a waiver of a right when there is nothing to suggest an infringement or an intended infringement of that right. There is absolutely nothing in this case warranting the application of the doctrine of estoppel. To constitute estoppel by silence, the silence must amount to a fraud.

The question of damages was not pressed at the argument, and we, therefore, will not give it any consideration. In our opinion there is not sufficient evidence before us upon which we could base a decree for damages.

It is therefore adjudged and decreed:

First. The defendant, its receiver, Edwin F. Baker, its servants, agents, and employés, be and they are hereby perpetually enjoined and restrained forever hereafter from depriving the plaintiff, the Paper Company, and its receiver, Henry W. Stokes, of a sufficient flow of water at the head gates of the plaintiff corporation to develop the 3,000 horse power excepted and reserved to the plaintiff, the York Haven Paper Company, under its deed to the Security Title & Trust Company, dated the 30th day of May, 1901, recorded in the office of the recorder of deeds in and for York county, Pa., in Record Book 12 M, p. 340.

Second. The defendant, its receiver, Edwin F. Baker, its servants, agents, and employés, be and they are hereby perpetually enjoined and restrained forever hereafter from appropriating or using at any time, for any purpose whatsoever, any water in the dam or forebay of the defendant, the York Haven Water & Power Company, necessary to allow a sufficient flow of water at the head gates of the plaintiff the York Haven Paper Company to develop the 3,000 horse power excepted and reserved to the plaintiff, as aforesaid.

Third. The defendant, the York Haven Water & Power Company, its receiver, Edwin F. Baker, its servants, agents, and employés, be and they are hereby perpetually enjoined, and restrained forever hereafter, from appropriating or using at any time, for any purpose whatsoever, any water in the dam or forebay of the defendant, the York Haven Water & Power Company, to any extent which will not leave unappropriated and unused by the said defendant a sufficient flow of water at the head gates of the York Haven Paper Company, the plaintiff, to develop the 3,000 horse power excepted and reserved, as aforesaid.

Fourth. That on plaintiff's motion a special master be appointed to ascertain, and report to the court, the amount of damages suffered by the York Haven Paper Company, and its receiver, by reason of said wrongful use and appropriation, by the defendant, of the said supply of water reserved to the said plaintiff, and for defendant's failure to supply and deliver, at the plaintiff's head gates, the water as aforesaid, to the end that a proper order may be made requiring and directing the said defendant, the York Haven Water & Power Company, to pay over to the plaintiff the receiver of the York Haven Paper Company the amount of damages sustained in manner, as aforesaid.

ALCORN v. ALCORN et al.

(Circuit Court, N. D. Mississippi, W. D. December 4, 1911.)

No. 434.

1. DEEDS (§ 196*)—FRAUD OR UNDUE INFLUENCE—BURDEN OF PROOF.
One suing to cancel a deed has the burden to show that its execution was induced by fraud or undue influence, including, as elements of fraud, falsity of representations made to the grantee by the grantor, knowledge by the grantee of their falsity, intent by him to deceive, and grantor's reliance on the representations to his damage.
[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587–593; Dec. Dig. § 196.*]

2. CONTRACTS (§ 99*)—TRANSACTIONS BETWEEN PARENT AND CHILD—BURDEN OF PROOF.
Contracts and business dealings between parent and child are not per se fraudulent, and must be treated as transactions between other persons, and, where the bona fides thereof is attacked, fraud must be clearly proved.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 448–453; Dec. Dig. § 99.*]

3. DEEDS (§ 196*)—EXECUTION—UNDUE INFLUENCE—BURDEN OF PROOF.
In an action to set aside a deed from a parent to a child, the burden is on complainants to show that defendant exercised undue influence over grantor overcoming grantor's will, and it must appear that the undue influence was exercised when the deed was executed.
[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587–593; Dec. Dig. § 196.*]

4. DEEDS (§ 211*)—EXECUTION—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.
In an action to set aside a deed from a parent to a child, evidence *held* insufficient to show that defendant secured the deed by fraud or undue influence.
[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637–647; Dec. Dig. § 211.*]

5. DEEDS (§ 72*)—EXECUTION—UNDUE INFLUENCE—REQUISITES.
Undue influence, to avoid a deed, must be unlawful or fraudulent influence controlling grantor's will, and does not comprehend the natural affection, confidence, and gratitude of a parent, unless such influence is used to confuse his judgment and control his will.
[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 190–199; Dec. Dig. § 72.*]

In Equity. Bill by Mrs. Amelia W. Alcorn against May Yates Alcorn and another, revived by E. W. Rector and others, executors on complainant's death. Decree for defendants.

J. W. Cutrer and R. H. Thompson, for complainants.
Calvin Perkins and Jas. H. Watson, for defendants.

NILES, District Judge. Mrs. Amelia W. Alcorn originally brought this suit individually and as executor and trustee under the will of James L. Alcorn, deceased, in the chancery court of Coahoma county, Miss., to annul a deed executed by her on October 14, 1895, by the terms of which she conveyed to her son, James Alcorn, reserving to herself a life estate, the remainder in fee, to Eagle's Nest planta-

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

tion, which had theretofore passed to her under the will of her husband, James L. Alcorn (hereinafter called Gov. Alcorn), who died December 19, 1894.

The original bill in this cause was filed March 30, 1905, in the said chancery court of Coahoma county, Miss., and at the return term of said court, on account of the diverse citizenship of the parties, on petition of the defendants, was removed to this, the United States Circuit Court for the Western Division of the Northern District of Mississippi.

The original complainant, Mrs. Amelia W. Alcorn, died in November, 1907, leaving a will by which she devised the said Eagle's Nest plantation, share and share alike, to her daughters, Mrs. Rosebud Rector, Mrs. Gertrude Russell, Mrs. Justina Swift, Angelina Alcorn, now Angelina Corley, and James L. Alcorn, defendant herein, the son of James Alcorn, who died November 30, 1898, leaving surviving him his widow, the defendant May Yates Alcorn, and a minor child, the said James L. Alcorn.

A short time after the death of Mrs. Amelia W. Alcorn, on a bill of revivor filed by her daughters and her executors, Messrs. E. W. Rector, P. B. Russell, and W. A. Glover, the cause was revived, and now stands in their names as complainants.

The relationship of the parties to this suit is as follows: Gov. Alcorn was the husband of Amelia W. Alcorn. The issue of this union was the four daughters, Mrs. Rector, Mrs. Russell, Mrs. Swift, Angelina Alcorn, and James Alcorn (the only son), who died in November, 1898, leaving a widow, May Yates Alcorn, and a minor son, James L. Alcorn, the grandson of Gov. Alcorn and Mrs. Amelia W. Alcorn.

The property involved in this litigation is Eagle's Nest plantation, a valuable body of land in Coahoma county, Miss., upon which is situated the family residence erected by Gov. Alcorn, and known as the Eagle's Nest mansion house.

By her original bill, complainant sought cancellation of the deed of October 14, 1895, by which she conveyed the said Eagle's Nest plantation to her son James Alcorn, deceased, reserving to herself a life estate, upon the following grounds: (1) That under the terms of the will of Gov. Alcorn, the property had been devised to her for the equal benefit of their children, in the form of a "precatory trust." (2) That this deed of October 14, 1895, had been secured by her son, the said James Alcorn, deceased, in an "unconscionable manner," and by "absolutely unfounded and fraudulent representations," and by the "overpowering and dominating influence exercised over her by her said son."

The first ground relied upon by complainant for cancellation of said deed was not presented on argument, nor is it now presented for the consideration of the court, because of the decision of the Supreme Court of Mississippi in the case of Rector et al. v. Alcorn, 88 Miss. 788, 41 South. 370, to the effect that:

"From an examination of the entire will of Gov. Alcorn, we do not take the view that the words in reference to Mrs. Alcorn are precatory."

Complainant's first ground of relief having been thus eliminated, the issue is narrowed to the sole contention that *James Alcorn, de-*

ceased, secured the deed of October 14, 1895, from his mother, Mrs. Amelia W. Alcorn, by false and fraudulent representations, and by the exercise of undue influence.

The defendants, answering, deny each and every allegation of the bill.

In this case a picture is presented wherein fraud and undue influence go hand in hand, interwoven and blended, and whose light and shadows vividly portray the defenseless citadel of a mother's heart stormed by a crafty, avaricious, and thankless son, armed with a great two-edged sword, "sharper than a serpent's tooth," and wielded with a bold, merciless cruelty, shocking to the sensibilities and proclaiming the monster.

There is a reverse side, however, upon which is painted the fond old mother, glorified with the beautiful qualities and attributes of a mellow age, one whose lines had been cast in pleasant places, who had been the life partner of a distinguished lawyer, soldier, and statesman, leaving an indelible impress upon his state and country's history, a man whose heart had been ever overflowing with attachment to his family circle, though never attempting to conceal his boundless affection and extreme partiality for his only son, James. Though cold in death, the tender attestation of this overwhelming affection speaks through his will with a solemnity and pathos which can but touch the heart:

"My son James has treated me with great affection, and I love him with deep affection, and I request my wife, Amelia, to whom I bequeath my estate, shall treat him with the favoritism and partiality which I well know her heart inclines her to do."

So well was this message heeded that, as long as this favorite child and son *lived,* he was the idol of his mother's heart.

[1] We are confronted at the outset of the consideration of this question by the "twin influences" (if I may so term them) brought to bear to secure this deed—fraud and undue influence. Are they so blended as to be separated?

"In strictness 'undue influence' and 'fraud' are distinguishable. In one case, the mind of the testator is so overmastered that another will is substituted for his own. In the other, he is, in a sense, a free agent, but is deceived into acting upon false data." Terry v. Buffington, 11 Ga. 337, 56 Am. Dec. 423.

But more often is it a mere question of a choice of terms. Ginter v. Ginter, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024.

It is elementary that fraud is never presumed, but must be affirmatively proven. The presumption, if any, is in favor of innocence, and the burden falls on him, who asserts "fraud," to establish it by "proving every material element" of the cause of action by a "preponderance of evidence." Thus the burden rests on him to prove the falsity of the representations, the scienter, the intent to deceive, and his reliance on the representations to his damage. 20 Cyc. 108, J, with authorities cited.

It is equally true that, where one seeks to establish undue influence in order to set aside a will or conveyance, the burden of proof is on

him. Mallow v. Walker, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158.

Further, under this authority it is stated that:

"Where one seeks to set aside a conveyance on the ground of undue influence, the evidence must show the influence so great as to overcome the will of the grantor or testator.

"It must show that the undue influence was exercised at the time the act referred to was done.

"That the deed was executed by reason of the influence resulting from affection is insufficient if the free agency of the testator or grantor be not impaired.

"That the distribution made by a testator of his property among his children by deed is unreasonable or unjust does not alone establish undue influence."

[2] These principles are of universal application as applied to fraud and undue influence aside from that connected with fiduciary relations, such as hold in the instant case, and counsel for complainant aptly quotes that broad and beneficient doctrine of equity applying to fiduciary relations as based on the highest morality; and that the court "will not allow any transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks a contract with the person so trusting him; and that this doctrine not only applies to that of parent and child, but extends to the entire field of confidential relationship." And especially as regards parent and child, equity scrutinizes and "weighs in golden scales" every transaction between them which includes, or consists of, a benefit secured by the superior from him who occupies the condition of dependence.

Counsel also recognizes the doctrine, as announced by the same high authority (3 Pomeroy, Eq. J. [3d Ed.]), that:

"It is impossible to formulate a single definition which shall embrace all forms and phases of undue influence; each case must largely depend upon its own circumstances."

In applying the latter principle, it should not be overlooked that contracts and business dealings between parent and child are not per se fraudulent, but they must be treated just as are transactions between other persons, and, where the bona fides of their transactions are attacked, the fraud must be clearly proved. 29 Cyc. 1657, A, with authorities cited.

[3] This being an action to set aside a deed from a parent to a child: (1) The burden of proving undue influence is on the complainants. (2) The evidence must show that the influence was such as to overcome the will of the grantor and to "destroy her free agency," and it must appear that the "undue influence was exercised at the time the act referred to was done." 39 Cyc. 1658.

[4] It is not necessary to discuss and review in detail the testimony in this case, and the events leading up to the unhappy differences between the members of this family, parties litigant to this suit.

From a careful reading of the testimony and hearing argument of counsel, unusually interesting and able, the court is of opinion that Mrs. Alcorn, at the time she deeded Eagle's Nest plantation to her

son James, reserving to herself a life estate therein, was in full possession of her unusually bright mentality, and thoroughly understood and appreciated her position; that the idea of undue influence is completely dissipated by the fact that she had the benefit of counsel, who prepared the prior contract of date July 20, 1905, and was present at the execution of the deed, of date October 14, 1895, both in the capacity of complainant's counsel and her friend—indeed, closer than a friend, being related to her by marriage—and that Mrs. Alcorn's daughters were fully acquainted with its terms.

Mrs. Alcorn at that time was endowed not only with those feminine graces and accomplishments which had enabled her to shine resplendently as mistress of Eagle's Nest, but took a keen interest in everything going on about her, and, from the death of her illustrious husband to that of her son James, constantly availed herself of advice in respect to the management of her estate, discussing her affairs freely with the members of the family, other relatives and friends, including one of her sons-in-law, a lawyer of distinction whom she visited and who visited her frequently, and with whom she maintained correspondence, receiving the benefit from him of a broad experience and a trained legal mind.

In July, 1895, Mrs. Alcorn entered into a contract and agreement to convey Eagle's Nest plantation to her son James, reserving to herself a life estate, under the terms of which certain benefits and advantages would accrue to her should James fulfill his obligations as fully set forth therein. This contract and agreement was drawn by counsel heretofore referred to, acting for both parties. In pursuance of this prior contract and agreement, Mrs. Alcorn directed her attorney to prepare the deed of conveyance of October 14, 1895.

Is it reasonable to consider Mrs. Alcorn, under the conditions outlined, as being so *overmastered* that *another mind* was *substituted for her own,* or that while she was, in a sense, a free agent, she was *deceived* into *acting* upon *false data?* Does it not seem more natural and probable that, after entering into the preliminary agreement to deed the property to her son upon his complying with the obligation therein stipulated, he *did* comply therewith, or substantially so, or in a manner entirely satisfactory to her, and in full knowledge of all the facts as explained to her by her son and her son-in-law, the latter acting as her attorney in this matter, *Mrs. Alcorn freely, voluntarily, and willingly signed the conveyance?*

Upon the proof, Gov. Alcorn's estate owed debts at his death of some magnitude, that two years prior to his decease his planting operations had not been successful, and that the outlook occasioned by the prevalent and hitherto unprecedented low price of cotton was gloomy. At this juncture James Alcorn took sole charge of the estate under these adverse conditions, and, whatever ill may be related of him otherwise, he undoubtedly instituted such a system of economy and prudent management as to enable him to discharge practically the indebtedness of the estate, finally turning it back to his mother free of incumbrance.

During this time, and until his death, his mother trusted him implicitly, and apparently needed not Gov. Alcorn's admonition that she

"treat him with that favoritism and partiality which he well knew her heart inclined her to do."

It is conclusively shown that James Alcorn desired Eagle's Nest plantation, a most natural wish, and it may be that, in pursuance of his desire, he was led into conduct and undertakings which sometimes lacked delicacy and propriety; yet is it sufficiently in evidence that his actions, however open to the criticism of occasional indelicacy and impropriety, descended in any instance to the slimy depths of fraud? We do not so consider.

[5] But as regard fraud and the exercise of undue influence, the proposition is clearly stated that:

"The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the *will of the grantor*. The *affection, confidence, and gratitude* of a parent to a child which inspires a deed or gift is a *natural and lawful influence*, and will not render the deed or gift voidable unless such influence has been so used as to confuse the *judgment* and *control the will* of the donor." Sawayer v. White, 122 Fed. 223, 58 C. C. A. 587.

Applying the above rule to the consideration of the case at bar, is the proof sufficiently convincing that James Alcorn exercised such an unlawful and fraudulent influence as to confuse the judgment and control the will of his mother in securing this deed? Rather was it not the affection, confidence, and gratitude moving a fond mother's heart and inspiring the wish for her only son to enjoy after her death the property, which the proof shows he managed and served and extricated from the weight of heavy incumbrances? This son remained her only protector, filling in a measure his father's place. How well he did so is of record in this cause, and a reading abundantly discloses that she at no time during his life questioned his fidelity to her interests. Neither does it appear that there was a time during the years subsequent to Gov. Alcorn's death to the day of the death of James Alcorn that he was compelled, had he been disposed so to do, to resort to fraud to induce his mother to a compliance with his wishes.

She did "what her heart inclined her to do," and which was only a "natural lawful influence" bubbling from that unfailing fount, the purest, a mother's holy love, which has been beautifully characterized as "boundless as the sunlight, as deep as fathomless sea."

Meanwhile with Mrs. Alcorn old age creeps on apace, and, with it, its attendant train of infirmities. The dead husband fades into a memory, and the son, whose lips are cold in death, has none to plead his cause. Unhappy differences since his death have arisen, and relations with her son's widow and her grandson have been strained to the breaking point. The living are present and very dear, becoming dearer, and naturally so, as life's shadows lengthen. In this decline, the living become the dearest, and in their direction the pendelum of their mother's affections swung, culminating in the attempted disposition of that property which she, in another more unclouded day, bestowed upon her dead son.

In view of the foregoing, the court is of opinion that the complainants should be denied the relief sought in the bill.

Independent of the defenses of ratification, acquiescence, equitable estoppel, and laches interposed, we think the bill should be dismissed. These defenses, however, will be briefly considered. They have been presented with great clearness, and as ably controverted by counsel of the respective parties. Without going into a discussion of the technical significance of each of the terms and their application to the case at bar, under the proof herein the principle of ratification that "any acts of recognition of a contract as subsisting, or any conduct inconsistent with the intention of avoiding it, have the effect of an election to affirm" (Cyc. 37, with authorities), would seem to be controlling.

The entire record of the case No. 700 in the chancery court of Coahoma county, made a part of the record in this cause, establishes beyond controversy that *Mrs. Alcorn recognized the deed of October 14, 1895*, to her son James as did *her daughters and relatives,* besides *friends of the family and employés* of the estate, and that in bringing this suit her conduct is certainly inconsistent with an intention of avoiding it. On this ground alone, the relief sought should be denied. The further application of the principle of acquiescence and equitable estoppel would tend only to strengthen this conclusion; the doctrine and principle of laches, however, would have no application.

Let a decree in accordance with this opinion be entered, taxing the complainants with the costs of this cause.

TWEEDIE TRADING CO. v. NEW YORK CENT. & H. R. R. CO.

(District Court, S. D. New York. January 2, 1912.)

1. SHIPPING (§ 184*)—CONTRACT OF AFFREIGHTMENT—TIME FOR DISCHARGING.
   Evidence *held* to sustain the finding of a commissioner that the working day for discharging certain vessels at Colon was eight hours, and not ten hours.
   [Ed. Note.—For other cases, see Shipping, Dec. Dig. § 184.*]

2. SHIPPING (§ 177*)—CONTRACT—DISCHARGE OF CARGO.
   A provision of a shipping contract, requiring the shipper to receive cargo as fast as it could be discharged by the ship, is to be reasonably construed, and, where the parties knew that cargo was to be transported by rail from the dock, the shipper had the right to discharge into cars, although it involved a somewhat longer time.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 576–584; Dec. Dig. § 177.*]

3. SHIPPING (§ 177*)—DEMURRAGE—DELAY IN RECEIVING CARGO.
   Under a contract of affreightment for the carriage of bricks from New York to Colon, which required the shipper to receive cargo "as fast as steamer can unload, working all hatches," where cargo of other shippers was stowed above the bricks, and had to be first unloaded, time did not begin to count against the shipper until the last hatch was ready to discharge the bricks, and, if such hatch was not kept waiting, the shipper was not chargeable with demurrage.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 576–584; 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.]

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

In Admiralty. Suit by the Tweedie Trading Company against the New York Central & Hudson River Railroad Company. On exceptions to report of commissioner. Sustained in part.

See, also, 166 Fed. 993.

Ralph James M. Bullowa, for libelant.

Charles C. Paulding, for respondent

HAND, District Judge. [1] The libelant's exceptions to the report are of four kinds, which I shall take up seriatim. The first is that it finds the working day was eight hours, not ten hours. The whole discharge was done without exception by eight hours' work day, and absolutely the only evidence to show that the customary day is ten hours is Biord's and Smith's. Biord's testimony is reconcilable with the conceded facts only by supposing that the "ten-hour day" to which he referred included the two-hour dinner period, which all concede to have existed. Else it is very strange that he should have spoken without comment of a custom which he did not observe in a single instance throughout the discharge of all three of these ships. Moreover, if he did not mean to include the dinner period, the occasional 12-hour day which he speaks of must have begun at 5 a. m. and lasted till 7 p. m., or began at 6 a. m. and lasted till 8 p. m. While, of course, such hours are possible, they are highly unlikely especially in tropical climates. In view of the uniform practice in these cases, I agree with the commissioner in this interpretation of Biord's testimony. As to Smith's testimony, it does not appear that he knew anything of the work day at Colon except as he learned it in this instance, which was not "ten hours' work in a day," but eight hours' work without a single exception. Certainly the commissioner was quite right in holding that there was no proof that the eight-hour day as practiced was not the customary day there. It is quite clear that, although the West Indian negroes were not within the eight-hour law (Act Feb. 27, 1906, c. 510, 34 St. at L. p. 33 [U. S. Comp. St. Supp. 1909, p. 1372]), it would be impossible to work them for more hours than their gang foreman, if he was a "laborer or mechanic" under the act, and that, in any event, it would be likely to lead to all sorts of complications to have working days of different lengths among laborers who might be doing work side by side. Thus the train crews which shifted the drills were presumably not West Indian negroes, and were within the act. When they struck off work, the discharge necessarily stopped.

The second point is the delay in supplying the Sangstad with a berth between February 1st and February 4th. The charter party provided "at Colon berth to be supplied each steamer * * * immediately on steamer's arrival." I cannot see how in view of this absolute undertaking the respondent can avoid liability for these three days. The commissioner does not charge the ship with this, because she was not ready to discharge bricks till the general cargo was out, but I think that he fails to observe that a delay of three days in failing to berth delayed the time when the general cargo could begin discharging and therefore when it was finally discharged. Thus it delayed

the discharge of the bricks along with the general cargo. Surely it makes no difference at which end the delay occurs, if the respondent be responsible for it. I must therefore charge the Sangstad with these three days.

[2] The third point is that the discharge was into cars, and not upon the dock. I agree that the respondent must be held to a strict liability to receive as fast as the buckets or "tubs" could be loaded and dumped over the side, but the question here is how the "tubs" were to be dumped, whether helter-skelter in a pile, or accurately over a car. It takes longer to steady them over a car, and the difference of time has been calculated. The question is how the respondent was to "receive" the cargo. Considering that the parties knew the purpose for which the bricks were to be used, the idle waste involved in rehandling, the destination of the bricks to a place reached from Colon only by rail, and considering the practical construction of the contract by the libelant's agents, who did not suggest at the time any other way of "receiving," I agree with the commissioner in regard to this point. The phrase "ship's tackle" in the bill of lading has nothing to do with the matter, so far as I can see. The ship accepted such a mode of discharge as was reasonable and customary under the circumstances. It would be absurd and oppressive to say that the ship might dump them on the dock to be there once again picked up and put into cars for carriage. It would be as reasonable to say that they might roll them out of a short chute and let half of them break from a 20-foot drop, because that was a quicker way.

[3] The fourth point is that the commissioner did not hold the respondent for demurrage until after all the general cargo had been delivered. The true rule is, as applied by the commissioner in the case of the Dundonian, that the time for discharging bricks from each hatch began when the superimposed general cargo was taken out, and that thereafter the proper rate of discharge was 22½ tons per hour per hatch. The hatch last emptied under these conditions put a period to the lay days, and thereafter demurrage ran against the respondent. It is, of course, absurd to add together the total number of hours which all the hatches were kept waiting, and charge the respondent with that. It would be of no consequence how long those hatches which began first were kept waiting, provided that they finished before the hatch which began last, and that that last hatch was not kept waiting. The meaning of "working all hatches" is that no hatch shall be kept waiting for any others. The allowance of five days' demurrage in accordance with these figures I confirm.

The question of law raised in this branch of the case is whether, if the cargo of a ship be in layers, the owner of the lower layer is responsible under the charter party for demurrage, although he discharges with all reasonable dispatch, if the owner of the upper layer be delinquent in his own discharge. When the charter party engages the charterer or cargo owner to discharge by a fixed day, or in a fixed number of days, the law is now settled in England that the owner of the lower layer is responsible regardless of his own default (Leer v.

Yates, 3 Taunt. 387, Porteus v. Watney, L. R. 3 Q. B. Div. 534), in spite of two rulings of Lord Tenterden to the contrary in Rogers v. Hunter, Moody & Malkin, 63, and Dobson v. Droop, Moody & Malkin, 441. Regardless of which rule is preferable, if the matter were to be decided in this case, I think the rule clearly distinguishable as being only an instance of the stringent principle of Thiis v. Byers, L. R. 1 Q. B. Div. 244, that, when a charterer engages to deliver by a day certain, he assumes all risks of what may come up to prevent. The rule is the same in this country (Empire Transportation Company v. Philadelphia & Reading Company, 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623), but it is not applicable in the case at bar because the charterer did not engage to discharge the ship by a certain day, or indeed to discharge her at all, but only to receive the cargo as fast as the steamer could unload, working all hatches at once. The commissioner was clearly right under such a charter party in holding that each cargo owner was answerable only for his own default. Thus, if the cargo of A. has to be removed before that of B., B.'s only duty is to receive as fast as the steamer can unload from the time she begins to unload his cargo, and, to recover against B., the ship must show, first, that B. did not receive, and, second, that there was a period of delay caused by B.'s failure. I do not mean that, if A.'s cargo was in one hold and B.'s in another so that each could receive independently, it would excuse B. to show that, if he had not been in default, A. would have detained the ship anyway. That is another case, and I leave that to be passed on when it occurs, but I do mean that, whenever the discharge of A.'s cargo is a condition upon B.'s, then B. is liable only for demurrage after A.'s has been removed.

In the case of the Melderskin, the difficulty of making any allowance is that there is no way of fixing the time when the last hatch could begin to discharge bricks, and that, as I have shown, fixes the time when the lay days begin, assuming that all hatches have the same number of bricks. The estimates of the commissioner in his first report are about as near as the matter can be fixed, and I see no reason to change his finding in that respect. If there had been the discharge reports which were produced in the case of the Sangstad and the Dundonian, this might have been remedied, but they were apparently not available. The difficulty is indeed in determining what part of the delay occurred when drills were needed for brick and what part when they were needed for the general cargo. I know of no way in which any quantitative estimate can be reached as to this a priori, and nothing is therefore left but to take the admissions of Biord as to what he remembers the average delay to have been. The other ways are all falacious. One should not divide the delay proportionately according to the tonnage of the brick and the general cargo, because that would assume that the cargo was all dischargeable at the same rate per ton, which was certainly not true. One cannot assume that the bricks had no time to wait, because there was general cargo in the holds and no one can tell how long it took to get it out. If the respondent were

responsible for all the delays, the problem would be easy, but under the facts as they are the commissioner has done as well as can be done

The case of the Sangstad is similarly baffling, because the delivery from all hatches of general cargo and bricks went on up to the 23d of February, and it is therefore impossible to say whether the delay in getting out the bricks was, as Biord insists, because the general cargo which lay mixed with the bricks was delayed, or because there was delay in supplying the cars for the bricks themselves. The ship's master's stipulated testimony is certainly wrong when he says that after February 10th all the general cargo was out of the hatches. It is the only testimony to contradict Biord's, and the discharge reports tend to corroborate Biord in supposing that the cargo in the holds was mixed up. Of course, it was possible that each hold contained the general cargo in a different part from what the bricks occupied, yet it is somewhat hard to suppose that the cargo should have been so stowed. On the whole, the commissioner was certainly right in holding that it was ambiguous whether the general cargo which was being discharged until February 23d did or did not interfere with the removal of the bricks; that is, whether they were in layers, or generally mixed, or how they were stowed. It is therefore quite impossible to fix a time before February 23d, and say that from it the bricks should be delivered at the rate of nine hundred tons per diem, and to charge the respondent with the delays. Thus the case is like the Melderskin rather than the Dundonian.

I cannot, however, agree with the commissioner in allowing but one day's demurrage. Assuming with him, as I do, that there is nothing in the additional proofs which would enable any one to get to a nearer quantitative valuation of the delay, and that the ship's master was in error, there is still nothing to cause him to abandon Biord's general estimate which he accepted on the first report. On the other hand, there is strong corroboration of the libelant's claim that the ship was greatly delayed in the discharge of the bricks by the failure to furnish cars. The letters of the master to the libelant are in evidence, and show very persuasively that the respondent continually failed to have enough cars on hand. Although this delay applied indifferently to both bricks and general cargo, it must nevertheless be charged in some part against the respondent, because it by no means follows that the respondent is not responsible till the last of the general cargo is out of the ship, provided there was opportunity before then to discharge some of the brick. Thus, if there was a delay of two hours in taking out one layer of bricks and afterwards there came the last layer of pipe and then the last layer of bricks, the respondent would be responsible for the two hours' delay, though it occurred before the last layer of pipe was touched. Moreover, the respondent may have removed the last layer of bricks in standard time which would make it improper to charge him with anything for that. Thus, it seems to me that the commissioner was in error in his calculations regarding the Sangstad. I will allow for demurrage in discharge three days as in the case of the Melderskin.

The decree will be as follows:

For the Melderskin:		
Three days' demurrage at Colon.....		$ 924 16
For the Dundonian:		
One day's demurrage at New York.....	$ 256 74	
Five days' demurrage at Colon.....	1,243 70	
Paid stevedores at New York.....	214 50	
		1,714 94
For the Sangstad:		
One day's demurrage at New York.....	$ 233 51	
Three days' demurrage at Colon, for failure to berth	700 53	
Three days' demurrage for delay at Colon in supplying cars.....	700 53	
Paid stevedores at New York	150 48	
		1,785 05
		$4,424 17

The interest will run as stated in the report. Let a decree pass for such a sum with costs.

TWEEDIE TRADING CO. v. BARRY et al.

(District Court S. D. New York. January 19, 1912.)

1. SHIPPING (§ 181*)—DEMURRAGE—LAY DAYS FOR DISCHARGING.
   Where a contract of carriage requires the vessel to discharge her cargo at a specified wharf, lay days for discharging do not commence to run until she obtains a berth at such wharf.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 589–592; Dec. Dig. § 181.*]

2. SHIPPING (§ 184*)—ACTION FOR DEMURRAGE—SUFFICIENCY OF EVIDENCE.
   In a suit for demurrage for delay by a cargo owner in discharging, where the contract fixed no time for discharging, proof by libelant that the actual time taken exceeded a reasonable time casts on the respondent the burden of showing a legal excuse therefor to avoid liability.
   [Ed. Note.—For other cases, see Shipping, Dec. Dig. § 184.*]

3. SHIPPING (§ 173*)—DEMURRAGE—LIABILITY OF SHIPPER—CONSTRUCTION OF BILL OF LADING.
   Where a bill of lading for a cargo requires its delivery "to order," the legal effect is to make the consignor the consignee, and the title remains in the shipper until the bill of lading is indorsed over; and where such a bill made the consignee liable for demurrage at the port of discharge, and further provided that the shipper should be liable for all sums for which the owner or consignee was liable, the failure of the shipowner to collect demurrage from the indorsee did not release the shipper from liability.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. § 570; Dec. Dig. § 173.*
   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.]

In Admiralty. Suit by the Tweedie Trading Company against Charles D. Barry and others. Decree for libelant.

Ralph James M. Bullowa, for libelant.
Burlingham, Montgomery & Beecher, for respondents.

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

HOLT, District Judge. This action is brought to recover demurrage for the detention of the steamer Sangstad at the port of Rosario, in the River Plate, in September, 1905. The libelant made a contract with the respondents to carry 850,000 feet of lumber from Portland, Me., to the ports of Rosario and Campana, on the River Plate, of which approximately 640,000 feet was to be delivered at the Central Argentine Railroad Company's wharf at Rosario. The lumber was loaded at Portland, and a bill of lading issued by the libelant, which provided that the lumber should be delivered at Rosario, at the Argentine Railroad Company's wharf, "to order"; any detention in discharging to be accounted for by the payment of demurrage by the consignees at the rate of 8 pence British sterling per steamer's net register ton per day. The steamer arrived at Rosario on September 24, 1905, but was not moored to the railroad company's wharf until September 26th. She began discharging on the 26th of September, and finished the discharge on October 5th.

[1] The libelant claims to recover for detention in the port of Rosario from September 24th until September 26th, before she got a berth; but, in my opinion, as the contract and bill of lading specified that the delivery was to be made at the Central Argentine Railroad Company's wharf, the lay days did not begin to run until the steamer arrived at the wharf on the 26th. Carver on Carriage by Sea (5th Ed.) § 623, and cases cited. The bill of lading did not fix any specific time for the discharge. The evidence satisfies me that three days was a reasonable time for the discharge of this cargo at Rosario. Ten days were occupied, from September 26th to October 5th. There is no clear evidence what the reason for the delay was.

[2] The respondents assert that the libelant was bound to prove affirmatively that there was no justification for the delay; but, in my opinion, the libelant having proved that the actual time of discharging the cargo exceeded a reasonable time for such discharge, the party liable is bound to establish an excuse for not discharging in season. Carver on Carriage by Sea, § 614, p. 797.

The respondents also claim that, being the shippers, they are not responsible for demurrage at the port of discharge. The libelant presented a claim for demurrage to the Central Argentine Railroad Company at Rosario shortly after the discharge of the cargo began, and made no claim against the respondents, the shippers of the lumber, for some time after. Such a fact undoubtedly suggests that the libelant originally looked first to the persons who took the lumber; but it is not decisive on the legal rights of the parties.

[3] The bill of lading provides that the lumber shall be delivered "to order." The legal effect of such a bill of lading is to make the consignors the consignees. The legal title to the property remains in the consignors until the bill of lading is indorsed over to the parties at the port of discharge to whom the goods are sent, and the ninth paragraph of the bill of lading makes the consignees liable for demurrage. The seventh section of the bill also provides that the shipper shall be liable for all sums for which the owner or consignee

may be liable. I think that under this bill of lading the respondents are liable for demurrage. Tweedie Trading Co. v. Pitch Pine Lumber Co. (C. C.) 146 Fed. 612.

The bill of lading provides that the rate of demurrage shall be eight pence British sterling per steamer's net register ton per day; but the contract contains a provision, and the bill of lading contains an indorsement, to the effect that, in consideration of the libelant's customary form of bill of lading being used, "the shippers are not responsible for any clauses contained therein which are not contained in the regular River Plate Syndicate form of bill of lading; the shippers binding themselves only to the aforesaid syndicate form of bill of lading." The evidence shows that there were then four lines of steamers running to the River Plate, which had entered into some kind of a combination and were commonly called the "River Plate Syndicate." But there never was any regular River Plate Syndicate form of bill of lading; each steamship company using its own form of bill of lading.

These forms differed in various respects, and among other respects in regard to the rate of demurrage charged. One of them fixes the rate at four pence; the others state no rate. Under these circumstances it would be difficult to decide what the agreement was about the rate of demurrage; but I understand that the counsel for the libelant consents that it should be fixed at four pence per ton, instead of eight pence, at which rate the demurrage would be $155.40 per day. There were ten days occupied in the discharge, from September 26th to October 5th. From these ten days should be deducted three days as a reasonable time for discharge, leaving seven days for which demurrage might be charged.

My conclusion, therefore, is that the libelant is entitled to judgment for $1,087.80, with interest and costs.

STEINHAUSER v. ORDER OF ST. BENEDICT OF NEW JERSEY.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1912.)

No. 3,520.

1. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONFLICTING EVIDENCE—REVIEW.
A finding of fact by the Circuit Court, though based on doubtful evidence, will not be set aside on appeal, where it is not entirely without support.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982; Dec. Dig § 1010.*]

2. RELIGIOUS SOCIETIES (§ 18*)—CANON LAW—ENFORCEMENT.
The canon law is of no intrinsic authority outside the jurisdiction of its origin, or countries observing that system of law, except as sanctioned by statute or immemorial usage, and does not authorize or render valid a rule of a monastic order in this country which attempts to prohibit its members from acquiring or holding property in their own right.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 124–129; Dec. Dig. § 18.*]

3. RELIGIOUS SOCIETIES (§ 18*)—MONASTIC ORDERS—MEMBERS—PROPERTY—INDIVIDUAL OWNERSHIP.
An issue of legal ownership of specific personal property as between a member of a monastic religious order and the society must be determined by the law of the land, and not by the canon or church law.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 124–129; Dec. Dig. § 18.*]

4. RELIGIOUS SOCIETIES (§ 18*)—RULES—VOWS OF MEMBERS—EFFECT.
Where a priest on joining a monastic order by his vows and rule agreed to devote his time and labor thereafter during the remainder of his life to the exclusive benefit of the society, and to convey to it all property that he then owned or might thereafter acquire, in consideration of its agreement to suitably support and care for him in health and sickness while a member of the order, so far as it applied to property subsequently acquired as the result of the member's literary efforts and not turned over to the society, but held by the priest in his own name, was at most an executory contract which, though not violative of constitutional guaranties, nor offensive to public policy, was not enforceable by the society, either at law or in equity.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 124–129; Dec. Dig. § 18.*]

5. RELIGIOUS SOCIETIES (§ 18*)—RULES—CONSTRUCTION.
Chapter 33 of the rule of St. Benedict provided that no member of the order might presume to give or receive anything without the command of the abbot, nor to have anything whatever as his own, but that everything that was necessary they must look for from the father of the monastery, and that no one should have anything "which the abbot did not give or permit him to have." *Held*, that such provision authorized the monk to have and hold in his own right that which the abbot in fact permitted him to have, so that, where a member of the order was permitted by his abbot to retain as his own property the income from certain literary productions which he had accomplished, but he was never required to account for the same to the order during his lifetime, the legal title and possession to such property vested in him under the rule, and at his death descended to his legal heirs, and not to the order.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 124–129; Dec. Dig. § 18.*]

*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 District of Minnesota.

Suit by the Order of St. Benedict of New Jersey, a corporation, against Albert Steinhauser, individually and as administrator of the goods, chattels, and credits of Augustin Wirth, deceased. Judgment for complainant (179 Fed. 137), and defendant appeals. Reversed and remanded, with directions to dismiss the bill, and to grant the prayer of defendant's cross-bill.

William H. Pitzer and William Hayward, for appellant.

Otto Kueffner (Albert Schaller and Arnold & Greene, on the brief), for appellee.

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

REED, District Judge. The "Order of St. Benedict," an association of religious men living in monastic life and incorporated under the laws of New Jersey, which will be called the complainant, brought this suit in the Circuit Court against Albert Steinhauser, as administrator of the goods and chattels of Augustin Wirth, deceased, a member of the Benedictine order of monks, and alleged to be a member of the complainant order, to establish an equitable title to certain personal property under an alleged agreement made by the deceased in his lifetime, whereby he agreed to account for and pay over to the complainant all of his future earnings, and transfer to it all property of every kind that he might thereafter acquire (of which the property in controversy is a part) in consideration of the care and maintenance that the order agreed to render, and which it is alleged it did render the deceased during his lifetime.

The defendant answered, admitting that he was the administrator of Wirth's estate, but denied the contract or agreement alleged to have been made by Wirth, its validity if made, and pleaded the statute of limitations of Minnesota, and some other defenses in bar of this suit; and by cross-bill alleged that complainant, after the death of Wirth, wrongfully took possession of certain securities, the property of Wirth and in his possession and under his control at the time of his death, removed the same from the state of Minnesota where Wirth then resided, and converted the same to its own use, and prayed that his right and title to said property be established and complainant required to return the same or account to him, as administrator of Wirth's estate for its value. Upon the final hearing the Circuit Court granted the prayer of the bill, and dismissed the cross-bill. 179 Fed. 137. The defendant appeals.

The agreement relied upon by complainant as having been made by Wirth consists of certain vows alleged to have been taken by him upon joining a Benedictine order of monks at St. Vincent's Mission in Pennsylvania, and what is known in the Roman Catholic Church as the "Rule of St. Benedict" and its own charter, and the constitution of its society founded upon that rule. The "rule" it is claimed was originally devised by St. Benedict of Nursia, in the latter part of

the fifth or early in the sixth century A. D., at Subiaco, or Monte Casino, Italy, for the guidance and government of an association of religious men then living in monastic life near Subiaco, who selected him as the head or superior of an order, which still bears his name, the "Order of St. Benedict." Of this association or order there is no evidence in the record, save such as may be gathered from the history thereof; and it is probable that none is now obtainable from any other source. For summaries of the history of the order and of monachism generally, its rise and spread over Western Europe, its decline in the Reformation era and later, its suppression by many of the European states in the Middle Ages and later, and its present status in Europe and the United States, see 2 Catholic Encyclopedia (Robert Appleton, New York, 1907) articles "Benedict" and "Benedictine"; 3 Encyclopedia Britannica (9th Ed.) article "St. Benedict"; and vol. 16 "Monachism," where synopses of the 73 chapters of the "Rule of St. Benedict" are given; and a Short History of Monks and Monasteries, by Wishart (1900). Aside from the history of the order, the ultimate facts shown by the testimony, so far as necessary to be considered, are substantially as follows:

Augustin Wirth, a Bavarian by birth, came to this country prior to 1852, when about 23 years of age. In that year he was ordained a Roman Catholic priest, and joined and became a member of a Benedictine society, or order of monks established about 1846, at St. Vincent's Mission, Westmoreland county, Pennsylvania, by Boniface Wimmer and others. The society was later incorporated under the laws of Pennsylvania. Its charter and the constitution of the society are substantially the same as those of the complainant hereinafter set forth. At the time Rev. Wirth joined the St. Vincent Society he made and delivered to it vows in writing which read as follows:

"In the Name of Our Lord Jesus Christ, Amen.!

"I, Brother Augustin Wirth, a Bavarian of the diocese of Wuerzburg, to the honor of Almighty God, of the ever Blessed Virgin Mary, and our holy Father St. Benedict, and of all the Saints, by these present vows, promise stability and the conversion of my morals, and obedience according to the Rule of the same Holy Father St. Benedict, in the presence of God and His Saints, whose relics are here present in the church, and also in the presence of the Right Reverend Father in Christ and Lord Boniface, the Superior of this Monastery of St. Vincent's, and of you Rev. Fathers and Brothers here present; in the name of the Father, and of the Son and of the Holy Ghost, Amen.

"In Witness Whereof I have written with my own hand this present paper in this venerable place of St. Vincent, in the year one thousand eight hundred and fifty-two from the Incarnation of our Lord, on the feast of the Assumption of the Bl. Virgin Mary, the fifteenth day of August. (Sign of the Cross.)"

Wirth remained a member of the St. Vincent Society until 1865, when he went to Atchison, Kan., as prior of the monastery of the Benedictine order at that place, and remained with that institution for some years. In May, 1887, he transferred his membership in the order of St. Vincent to, and became a member of, the complainant order, which was originally established at Newark, N. J., prior to

1868, and was incorporated in that year by a special act of the Legislature of New Jersey, which act is as follows:

"An act to incorporate the Order of St. Benedict, in New Jersey.

"Section 1. Be it enacted by the Senate and General Assembly of the state of New Jersey, that Boniface Wimmer (and others, naming them) and their associates, members of the society called the Order of St. Benedict, being a society of religious men living in community and devoted to charitable works and the education of youth, be, and they are hereby, constituted a body politic and corporate by the name, style and title of the 'Order of St. Benedict' of New Jersey, to have perpetual succession, to use a common seal, and alter and renew the same at pleasure, to take hold and enjoy lands, tenements and hereditaments, and to make such by-laws for their government and for the admission of members into the corporation as they shall deem necessary and proper; provided, that such by-laws shall not be repugnant to, nor inconsistent with the Constitution of the United States or of this state; * * * and provided, that no person shall be or remain a corporator except regular members of said religious society, living in community and governed by the laws thereof.

"Sec. 2. That the essential objects of said corporation shall be the education of youth and the establishment of churches and conducting service therein. * * *

"Approved March 5, 1868."

The constitution of the society, so far as necessary to be stated provides:

"Sec. 2. The object of this corporation is divided between the educational training of youth and the spiritual guidance of souls. Each is conducted in conformity with the principles and the general discipline of the Roman Catholic Church and in accordance with the disciplinary statutes of the Order of St. Benedict, well known throughout the Roman Catholic Church.

"Sec. 3. The officers of the corporation shall consist of a president, first vice-president, second vice-president, treasurer and secretary. The Rt. Rev. Abbot of St. Mary's Abbey, 528 High St., Newark, New Jersey, * * * shall be ex officio president. * * * The president is also acting treasurer. * * *

"Sec. 4. The president * * * shall have full power to make, execute, sign, seal and deliver all * * * writings whatsoever, necessary to the proper conduction, carrying on and transacting the temporalities of the order. * * *

"Sec. 10. To become and to be a member of this Corporation it is absolutely necessary:

"(1) To become a member of the Order of Saint Benedict founded about the year A. D. 525 by St. Benedict in Italy, and well known in the Roman Catholic Church.

"(2) To have made solemn vows in the said order and to have received the order of priesthood in the Roman Catholic Church.

"Section 11. Membership is lost at once:

"(1) By being dismissed according to the disciplinary statutes of the Order of St. Benedict of New Jersey, approved of by Pope Pius IX for the American Cassines Congregation of Benedictines.

"(2) By voluntarily leaving the order for any purpose whatsoever.

"(3) By joining any other order or secret society or any other religious denominations.

"Sec. 12. Since the Order of St. Benedict of New Jersey is solely a charitable institution, the real estate of said order and the individual earnings of its members, are and must be considered as common property of the Order of St. Benedict of New Jersey from which the members of said order derive their support and the balance of which income and property should serve for following up and carrying out the charitable objects of the order.

"It is therefore agreed upon by all the members of the said Order of St. Benedict of New Jersey that no member can or will claim at any time or un-

der any circumstances more than their decent support for the time for which they are members of the charter of the Order of St. Benedict of New Jersey, and no further.

"And, moreover, that each member individually pledges himself to have all property, which he now holds or hereafter may hold, in his own name conveyed as soon as possible, to the legal title of the Order of St. Benedict of New Jersey. * * *"

An English translation of what purports to be chapter 33 of the rule of St. Benedict, which is observed as such by the St. Vincent and complainant societies, was put in evidence by complainant and is as follows:

"The vice of personal ownership must above all things be cut off in the monastery by the very root, so that no one may presume to give or receive anything without the command of the abbot; nor to have anything whatever as his own, neither a book, nor a writing tablet, nor a pen, nor anything else whatsoever; since monks are allowed to have neither their bodies nor their will in their own power. Everything that is necessary, however, they must look for from the father of the monastery; and let it not be allowed for any one to have anything which the abbot did not give or permit him to have. Let all things be common to all, as it is written. And let no one call or take to himself anything as his own. But if any one should be found to indulge this most baneful vice, and having been admonished once and again, doth not amend, let him be subjected to punishment."

In about 1897, Wirth, with permission of complainant's abbot, became priest of a German Catholic church society at Springfield, Minn., and went there and remained in charge of that parish as priest until his death, December 22, 1901. He left a brother and a nephew and niece surviving him as his heirs at law; but left no debts, other than those of his last sickness. At the time of his death he had in his possession and under his control some $1,500 in money, and notes, mortgages, and other credits to the amount of some $5,000 or more, the legal title to all of which he then held. This property was acquired by Wirth in this way: While a member of the Society of St. Vincent he wrote a number of books upon religious subjects and translated others, which he copyrighted in his own name, and published and sold, the income from which he received and retained as his own property with the permission of the abbot of St. Vincent. When he came to the complainant order in 1887, the abbot of that order, the Rt. Rev. Hilary Pfraengle, gave him permission to continue such literary work, receive the income therefrom, and retain the same in his own right as he had previously been allowed to do at St. Vincent; and the money and other property that he had on hand at the time of his death are the proceeds arising from the sale of such books and the investment thereof in the mortgages and securities before mentioned, none of which property had ever been transferred to the complainant or to any other Benedictine order. After Father Wirth joined the complainant society in 1887, the relations between him and its abbot were not pleasant or satisfactory to either, and Wirth at times was desirous of leaving the monastery. They had many acrimonious disputes over matters pertaining to the order; but none regarding the money received by Wirth as the income from his books, all of which was received by him with the knowledge of, and without objection from, either abbot. While Father Wirth was in New Jersey he served for several years as parish

priest of religious congregations in the vicinity of complainant's monastery, with permission of its abbott, and also at other places. He also remained away from the monastery much of the time without the abbot's permission, at one time going abroad and visiting Rome, at his own expense; and whenever absent from the monastery he received no support from complainant. After going to Springfield he never returned to the complainant order, never received any support from it, and never accounted to it for the income from his books, and was never requested to do so until in June, 1899, when Hildebrand, abbot primate, resident in Rome, of the Benedictine orders who met Wirth when he was in Rome, directed him by letter to write Abbot Pfraengle and apologize to him for his conduct, account to him for any moneys that he had not accounted for, and to obey his orders in the future. Hildebrand also wrote Abbot Pfraengle in February preceding to impose upon Wirth suitable penance, and require of him obedience in the future, and to account to him, Pfraengle, for all moneys that he had not accounted for. Wirth disregarded Hildebrand's letter, and so did Abbot Pfraengle the one to him. The latter testified that he did so because Hildebrand did not know of the permission that the abbot of St. Vincent, and he as complainant's abbot, had given Wirth to receive and retain the income from his books. Abbot Pfraengle also testified, however, that the permission given by him and by the abbot of St. Vincent to Wirth to have and use the income from his books was that he might use the same for the benefit of the orders only. Suffice it to say that the property involved in this suit is the income received by Father Wirth from his books, the investment thereof in the securities mentioned or other property, the right to the copyright of his publications after the expiration of his contract with the publishers thereof, and the credits due him for books sold prior and subsequent to his death, none of which was ever conveyed or transferred by him to complainant, and all of which was taken possession of by complainant's abbot after the death of Father Wirth without any legal proceedings authorizing him to do so; and complainant bases its right to the same upon the vows made by Wirth when he joined the Order of St. Benedict (chapter 33 of the rule of St. Benedict), and the transfer by Wirth of his membership to the complainant order, and the charter and constitution of its society.

It is admitted by the defendant in argument that Rev. Wirth became a member of the complainant order in 1887; but whether or not he withdrew from that order and severed his connection with it is a matter of much doubt under the testimony. Certain it is that he never returned to, nor in any way affiliated with, the complainant order or received any support from it, after he went to Springfield, unless the salary earned by him as priest of the German Catholic society at that place, and from which he supported himself, be deemed the property of the complainant.

[1] The decree of the Circuit Court, however, includes the finding as a fact that Wirth did not withdraw from the complainant order, but remained a member thereof until his death; and that finding is not so without support in the testimony as to warrant setting it aside.

The case will, therefore, be determined on the assumption that Wirth remained a member of the complainant order until his death. Witnesses in behalf of complainant, its abbot and the abbot of St. John's Abbey, a Benedictine order at Collegeville, Minn., testified upon the hearing that the vow of poverty, which they say is included in the vows of Father Wirth, when made in a religious order, would, under the canon law, "incapacitate the member from ever after acquiring or possessing property for himself, and from making individual use of temporal things that can be valued in money"; and some contention is made in argument of counsel for appellee that this vow in connection with chapter 33 of the "rule of St. Benedict" should be so construed and enforced accordingly.

[2] It is necessary to read into the vows of Father Wirth the "vow of poverty" so much relied upon by complainant, for it is not expressed in the vows as written by him. But admitting, without deciding, that such testimony is competent to show the meaning and effect of the vows, in connection with the rule of St. Benedict upon the right of Wirth to thereafter acquire and hold property in his own right under the canon law; that law is of no intrinsic authority outside the jurisdiction of its origin, or countries observing that system of law, except as it is sanctioned by statute or immemorial usage. 1 Bl. Com. 82–84. There is no question of church doctrine, or of religious belief, or discipline involved in this controversy; nor is it a dispute between contending factions of a church or other society as to which faction has conformed its practices and beliefs to the standards of the church, or society, and by reason thereof claims the right to the control and use of its property, in which event the decisions of the tribunal created by the church or society for the determination of such questions would be accepted by the civil courts as final. Watson v. Jones, 13 Wall. 679, 20 L. Ed. 666.

[3] The only question involved is that of the legal ownership of the specific property described in the bill, as between the complainant and the defendant, and that question is not to be determined by the canon, or church law, but by the law of the land. The canon law, however, or the law of the church, of Rome, as between Father Wirth and the church or the Benedictine order, may have required of him during his lifetime strict adherence to his vows and observance of the rule; but it cannot be seriously contended that either the vows or the rule or both together can have any effect whatever upon the legal right of Wirth to acquire and hold property in his own right.

[4] The most that can rightly be claimed for these vows in connection with the rule is that they are evidence of a contract of a civil nature between Wirth and the order, whereby he agreed to devote his time and labor thereafter during the remainder of his life to the exclusive benefit of the society or order, and to convey to it all property that he then owned or might thereafter acquire, in consideration of the agreement upon the part of the order to suitably support and care for him in health and in sickness while a member of the order; and complainant predicates its right of action against the defendant upon such a contract so made. That the vows of

Wirth and that portion of the rule in evidence are in effect a contract as between him and the order is not seriously disputed by the defendant; but its validity is challenged by him as being inconsistent with the "fundamental principles of American institutions as expressed in their constitutions"; or, if it is held valid, then he contends that its true interpretation does not entitle the complainant to have the same enforced against the property in controversy.

Contracts of a similar nature where the service has been rendered, the property conveyed, and the support furnished pursuant thereto have been adjudged by controlling authority to be not in violation of constitutional guaranties nor offensive to the public policy of the state where made. Goesele et al. v. Bimeler, 14 How. 589, 14 L. Ed. 554; Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; Schwartz v. Duss, 187 U. S. 8, 23 Sup. Ct. 4, 47 L. Ed. 53; Burt v. Oneida Community, 137 N. Y. 346, 33 N. E. 307, 19 L. R. A. 297, and the several cases cited therein. These suits were brought by members of the Separatists and Harmony Societies established in Ohio and Pennsylvania early in the last century, and the Oneida Community in New York established in 1848, by members thereof, respectively, after they had withdrawn from the society, or by the heirs of a member after his death, for partition of the property of the society, or to recover the value of property conveyed or services rendered to it before the withdrawal or death of the member, except that in the Oneida Case the suit was by one who had withdrawn from the society to be reinstated therein. The contracts there involved had been fully performed by each of the parties, and it was held in each case that there could be no recovery. And see State v. Amana Society, 132 Iowa, 304–313, 318, 109 N. W. 894, 8 L. R. A. (N. S.) 909, 11 Ann. Cas. 231. The facts in each case are so materially different from those in this case that the decisions have little or no bearing upon the questions here involved. This suit involves only the property acquired by Father Wirth after he joined the society, the legal title and possession of which he retained until his death.

Although it is admitted in the brief of counsel for appellee that a member of the order may voluntarily withdraw therefrom, as provided in section 11 of the constitution of the complainant society, yet it was vigorously maintained by complainant's abbot while a witness that this meant by "secularization" only, and by that we understand him to mean some affirmative action on the part of the church. The abbot says:

"He (the member) is bound for life by his vows, and the only way to get out is by secularization, being secularized by transferring the vow of obedience to a bishop and being dispensed by living with permission outside of the monastery. * * * It is when a religious, a priest, by permission of the Pope, the Holy Father, the head of the church, is dispensed from his vows and also dispensed from his obligation of living in the monastery."

By this Rev. Abbot obviously means that under the law of the church the vows of a member of the order are regarded as such that they can only be absolved therefrom by the affirmative action of the Holy Father as the head of the church; and unless he sees fit to give the requisite dispensation, the member is bound for life in tem-

poral, as well as in spiritual, affairs. If such is the meaning of the vow, is it, in connection with chapter 33 of the rule, enforceable in the civil courts, either at law or in equity? We think not. Chapter 33 provides:

"The vice of personal ownership must above all things be cut off in the monastery by the very root; so that no one may presume to give or receive anything without command of the abbot; *since monks are allowed to have neither their bodies nor their will* in their own power; everything that is necessary, however, they must look for from the father of the monastery; and let it not be allowed for any one to have anything which the abbot does not give or permit him to have. * * *"

The vow in connection with this rule, not only binds the member in physical and mental servitude to the order for life, or until the head of the church shall see fit to absolve him from his obligations, but he also surrenders all control of his will to the order. Such an agreement is no more enforceable, in the civil courts at least, than would be an agreement by one to surrender or forfeit to another his life. See Clark's Case, 1 Blackf. (Ind.) 122, 12 Am. Dec. 213, and note. In this country it is the inherent and natural right of every person to acquire and hold property in his own right; and the state is interested in preserving the liberties as well as the lives of its members, and they are guaranteed against the deprivation thereof, either by the state or by any person, individual or corporate, without due process of law. If the agreement to perform the services is not enforceable, then upon what principle can it be enforced as an equitable title or right to the fruits of such services? We are of opinion that there is none. Complainant has cited to us no authority which sustains its contention, and upon a somewhat diligent search we have not been able to find any that does. Authorities are not wanting, however, if the vow and rule together are treated as a contract and to mean what is claimed for it by complainant, that it is not enforceable as against after-acquired property, either at law or in equity.

In Baltimore Humane Society v. Pierce, 100 Md. 520, 60 Atl. 277, 70 L. R. A. 485, Elisha Pierce had been admitted as an inmate of the Aged Men's Home of the Baltimore Humane Society, and while there his son died intestate leaving property which under the law of Maryland descended to his father, the inmate of the home. The suit was brought upon a contract made by the defendants upon the admission of Elisha to the home to recover the value of this inherited property, which contract was in substance as follows:

"We hereby covenant and declare that Elisha Pierce about to be admitted into the Aged Men's Home of the complainant corporation hath not now any property, and is not the recipient of any income from any source whatever; and so also covenant that should he, by any devise, legacy or otherwise, become the owner of any property whatever, we will have the same, with any now owned, conveyed and transferred to said corporation, in obedience to this covenant."

This contract was adjudged by the unanimous opinion of the Court of Appeals of Maryland to be not enforceable as to the property in-

herited by the inmate from his son, upon the ground as stated in the syllabus (60 Atl. 277) that:

"A contract executed on entrance into an old men's home, whereby any property which the inmate may receive in the future is to become the property of the home, is unenforceable, as against public policy."

Aspinwall Manf'g Co. v. Gill (C. C.) 32 Fed. 697, was a suit to restrain the alleged infringement of a patented machine, and the question arose whether or not an agreement to assign future improvements that the patentee might obtain upon his invention was valid. Mr. Justice Bradley, at circuit, in speaking of the validity of such agreement, said:

"That such assignments of future improvements upon a machine, in connection with the assignment of a patent for such machine, are valid, is settled, I think, by the case of Littlefield v. Perry, 21 Wall. 226 [22 L. Ed. 577]. But a naked assignment, or agreement to assign in gross, a man's future labors as an author or inventor—in other words, a mortgage on a man's brain, to bind all of its future products—does not address itself favorably to our consideration. It is something like engagements of an expectant heir, binding the property which he may afterwards inherit, which are always looked upon with disfavor by the law."

Hershy v. Clark, 35 Ark. 17, 37 Am. Rep. 1, involved the question of the validity of a contract between two brothers neither of whom was married, who by their joint industry had acquired a large property real and personal which they held in common. They entered into an agreement whereby it was agreed that upon the death of one the survivor should hold all the interest of both in the property to the exclusion of all other persons. Upon the death intestate of one of the brothers his heirs claimed his share of the property as against the heirs of the other, who died intestate some time after the death of the first. Of this contract the court said:

"It professes to convey nothing in præsenti, and cannot stand as a conveyance; nor can it be upheld as a mutual covenant. It is unreasonable and against public policy that one should be allowed, by an irrevocable contract, not only to denude himself of all control of all his property, of every nature whatever, which he at the time possesses, but also of all he may afterward acquire. Such a contract would not be enforced either in law or equity. It is obvious, too, that the brothers did not intend their obligations to have that force during their lives. * * * It was revocable at pleasure by either."

Benziger et al. v. Steinhauser (C. C.) 154 Fed. 151, cited by complainant, arose out of the same transaction involved in this suit. A demurrer to the bill was interposed, and all that is held is that the facts alleged state a cause of action, without deciding what the decision might be upon the evidence.

It is said in support of the decree under review that:

"So far as the performance of the contract is concerned, this suit presents the case of an executed contract and not the case of an executory contract. * * * The claim of the defendant upon the facts is, in effect, a claim that had Wirth before his death paid over to the order what he received for the sale of his books, or for his personal services, his administrator or his heirs could nevertheless after his death have maintained an action to recover back the amount so paid and the value of his services."

This, we think, is a clear misconception of the purpose of this suit, and of the status of this controversy. If the alleged contract

between the complainant and Father Wirth had been fully executed, by the rendition of the services, or the conveyance of the property in controversy, to the complainant, there would, of course, have been no occasion for it to resort to a court of equity for the specific performance of the contract, or to establish an equitable right to the property, which the Circuit Court held the suit in effect to be, but it could have rested upon its legal title to, and possession of, the property. The fact that complainant was driven to this suit is of itself sufficient to show that the alleged contract was not in fact an executed one. The distinction between an executory contract and one fully executed is nowhere more clearly or tersely stated than by Chancellor Kent, in volume 2 of his Commentaries (page 450), where he says:

"An executory contract is an agreement * * * to do or not to do a particular thing. * * * The agreement conveys an interest either in possession or in action. If for instance one person sells and delivers goods to another for a price paid, the agreement is executed and becomes complete and absolute; but, if the vendor agrees to sell and deliver at a future time and for a stipulated price, * * * the contract is executory and rests in action merely."

That the alleged contract was not executed as to the property in controversy we think admits of no doubt. The fact that complainant took possession of this property, and the other effects of Rev. Wirth, after his death and removed them to New Jersey, does not in the least strengthen its claim thereto, and the legal right to the property must be determined as if complainant had not thus acquired its possession, and the administrator had secured it upon his appointment and qualification. We have no doubt that as to the property in controversy the alleged contract on the part of Father Wirth was executory only.

It may be that, if Wirth in his lifetime had conveyed this property to the complainant, he could not thereafter have recovered it back, and that his legal representatives could not after his death; but of this we need express no opinion, for the question is not involved.

[5] We are of opinion, also, that the complainant is not entitled to recover for another reason. It is obvious that chapter 33 of the rule, considered as a contract, does not forbid absolutely a member of the order from owning and holding property in his own right. The rule provides:

"And let it be not allowed for any one to have anything which the abbot did not give, or permit him to have."

This plainly authorizes the monk to have and hold in his own right that which the abbot, who is the superior officer of the order, may permit him to have. The rule is by reference made a part of the complainant's charter, and whatever the rule permits the charter authorizes. The complainant cannot accept so much of the rule as may be to its benefit, and reject that which may work to the advantage of the member.

It appears with reasonable certainty that at the time Father Wirth joined the complainant society he owned in his own right, and had

in his possession, some at least of the income from his books that the abbot of St. Vincent had permitted him to have as his own. Just how much does not appear. Complainant's abbot knew this, and he testified that the taking of the vows required of a member upon joining the order was always accompanied by a transfer to the order of all property he then owned; yet he did not require of Father Wirth that he transfer to the society that property. The abbot also testified repeatedly that he gave Wirth permission at the time he joined the complainant order to have and retain the income from his books as he was allowed to do at St. Vincent, and that he never required him to account therefor, even at the request of Hildebrand, the abbot primate in Rome, that he do so. He also testified that this literary work of Wirth's from which he derived this income was beyond what he was required to do for the order. The conclusion is unavoidable that Wirth was permitted by the abbot of St. Vincent, and the complainant's abbot, to retain as his own property the income from his books. It is true that later in his testimony the abbot testified that the permission given by him, and the abbot of St. Vincent, was that he might devote the income from his books to the charitable purposes of the orders. He was not present when the abbot of St. Vincent gave his permission, which was many years before Wirth came to the complainant; and he failed to explain how he knew that abbot attached any such condition to his permission, nor does he explain how Rev. Wirth while in Minnesota could have expended the income from his books for the charitable purposes of the order in New Jersey. Again, it would have been a useless thing to have given Wirth permission to have expended this income for the benefit of the complainant; and such a permission is wholly inconsistent with the conduct of the abbot in reference to such income, for he knew that Wirth was receiving and using it for his own benefit, and, if he understood that such income was to be expended for the benefit of the order, he certainly would have required of Father Wirth that he account for the expenditures, especially when requested by the abbot primate to do so. This he never did, for the reason, as he says, that Father Wirth had permission to use the same. We are satisfied beyond any doubt that Wirth had permission of both abbots to receive the income from his books and retain it as his own property, and that the rule upon which the complainant relies, and which is a part of its charter, permits this. The legal title to and possession of the property in controversy was in Wirth at the time of his death, and under the statutes of Minnesota would descend to his legal heirs. The complainant by this suit seeks to divert it from that channel by showing that it was the equitable owner thereof, and that it was held by Wirth only in trust for it. The burden is upon it to establish that fact by clear and satisfactory evidence. It has failed to do so, and is not, therefore, entitled to a decree adjudging it to be the owner of the property.

This renders it unnecessary to consider the defense of the statute of limitations, or that the probate court of Minnesota has exclusive jurisdiction of this controversy, and some other defenses urged by the defendant. The decree of the Circuit Court is reversed, and the

cause remanded to that court with directions to dismiss the complainant's bill at its costs; and to grant the prayer of the defendant's cross-bill.

It is so ordered.

HOPKINS et al. v. HEBARD et al.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1911.)

No. 2,031.

1. EQUITY (§ 455*)—BILL OF REVIEW—NEWLY DISCOVERED EVIDENCE.
The filing of a bill of review on the ground of newly discovered evidence is not a matter of right, but leave may be granted or refused by the court in the exercise of a sound discretion, in view of the circumstances of the particular case.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1111; Dec. Dig. § 455.*]

2. EQUITY (§ 450*)—BILL OF REVIEW—RIGHT OF—PURCHASER PENDENTE LITE.
Purchasers of land from one of the parties to a suit involving the title to a portion of the tract, which had been adversely decided and was then pending on appeal, by a conveyance which expressly excepted the tract in dispute from the covenant of warranty, held not entitled to maintain a bill of review on the ground of newly discovered evidence six years after the affirmance of the decree by the appellate court, as against a purchaser in good faith from the prevailing party after the final decree and in reliance thereon.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1095; Dec. Dig. § 450.*]

3. VENDOR AND PURCHASER (§ 224*)—BONA FIDE PURCHASERS—HOLDERS BY QUITCLAIM.
A grantee under a quitclaim deed may be a bona fide purchaser.
[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 469–473; Dec. Dig. § 224.*]

4. EQUITY (§ 456*)—BILL OF REVIEW—DEFENSES—EFFECT OF GRANTING LEAVE TO FILE.
The granting of leave to file a bill of review is not such an adjudication of the equitable right of the party to maintain it as to preclude a consideration of the question on final hearing and on appeal.
[Ed. Note.—For other cases, see Equity, Dec. Dig. § 456.*]

Severens, Circuit Judge, dissenting.

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

Bill of review by W. R. Hopkins and others against Charles Hebard, the Smoky Mountain Land, Lumber & Improvement Company and others. From a decree dismissing the bill of review, complainants appeal. Affirmed.

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

The case of Charles Hebard against D. W. Belding and others was pending and determined in the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee, and, on appeal, in the United States Circuit Court of Appeals for the Sixth Circuit. (103 Fed. 532.)

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

The purpose of the bill filed by Hebard in the original case was to restrain trespass and remove a cloud from the title to a large tract of wild mountain land claimed to lie within Monroe county, Tenn. The complainant claimed title to the land under a grant from the state of Tennessee. The defendants claimed title to the land under a grant from the state of North Carolina. The title turned upon the location of the boundary line between the state of Tennessee and the state of North Carolina. The object of the bill was to have the state line ascertained and determined between the points where the state line crosses the Little Tennessee river and the junction of Hangover and Big Fodder Stack ridges, near a mountain peak called Stratton Bald, a distance of about eight miles.

The claim of complainant, Hebard, was that the state line reaches the Little Tennessee river about one-half mile above, and nearly east, of where Slick Rock creek empties into said river; that it there crosses the river and follows a leading ridge of the mountain known as Hangover ridge, and along the extreme height of that ridge to its junction with "Fodder Stack" ridge. This contention, if sustained, places the lands lying between Slick Rock creek and Hangover ridge within the state of Tennessee, and would confirm the title to complainant Hebard under his Tennessee grant.

The defendants to the bill contended that the state line crosses the Little Tennessee river at or near the mouth of Slick Rock creek and runs up said creek, following its meanders, about five miles, thence up Little Fodder Stack ridge to Big Fodder Stack ridge, and thence southwesterly with the crest of Big Fodder Stack ridge to the junction with Hangover ridge, at or near "Stratton Bald" point. This contention, if sustained, places the lands lying between Slick Rock creek and Hangover ridge within the state of North Carolina, and would defeat the title of complainant Hebard under his Tennessee grant.

When the case was at issue, it was referred to Asbury Wright, Esq., as special master, to hear the evidence and to determine and report to the court "the true state line between the states of Tennessee and North Carolina from the Little Tennessee river to the junction of Hangover and Fodder Stack ridges, as run and located by the Commissioners of the states of North Carolina and Tennessee in 1821, and confirmed by the respective Legislatures of said states." Special Master Wright's report was submitted July 7, 1898, wherein he finds and reports, among other things, as follows, to wit: "After a careful consideration of the whole case, I am of the opinion, and so report, that the line between the states of Tennessee and North Carolina from the Little Tennessee river to the junction of the Hangover and Fodder Stack ridges, as run and located by the commissioners of said states, in 1821, and confirmed by the respective Legislatures of said states, crosses the Little Tennessee river at a point where it reaches the river on the northeast side, and from the river runs up the Hangover lead, as shown on complainant's map, and along the extreme heights of this ridge, passing the black or red oak, Slick Rock Gap, Cold Springs Knob, Big Flat Knob, Hangover, Haoe, Grassy Gap, and Stratton Bald, to the junction of Hangover with Fodder Stack."

Defendants filed exceptions to this report, which were heard by the court, and on June 10, 1899, a decree was entered, overruling the exceptions and confirming the report of the special master in all things. The court found and decreed the line between the states of Tennessee and North Carolina to be located as reported by the special master, and that the titles of the complainant to the lands described in the bill were valid, and the titles claimed by defendants thereto were void, etc. From this decree of the Circuit Court an appeal was prayed and prosecuted to the United States Circuit Court of Appeals for the Sixth Circuit at Cincinnati, Ohio, where the same was heard on March 14, 1900, and decided July 13, 1900, in an opinion by Judge Lurton, in which he carefully reviewed the whole case, affirming the decree of the Circuit Court. Charles Hebard v. D. W. Belding et al., 103 Fed. 532, 43 C. C. A. 296.

On August 6, 1907, more than seven years after this final decree was made and entered by the Circuit Court of Appeals, W. R. Hopkins et al.

presented their petition to this court, alleging that on October 29, 1900, they became the purchasers of the 8,000 acres of land involved in the case of Hebard v. Belding et al., and praying that they be permitted to file a bill of review which accompanied the petition, and in which was set out certain newly discovered evidence. This new evidence, it is alleged, when considered with the evidence in the original case, would lead the court to a different conclusion, and enable the court on reconsideration to right said petitioners in matters in which they were aggrieved by the decree in the original case. And it appearing to the court by affidavits and a certified transcript of the record in the United States Circuit Court of Appeals for the Sixth Circuit, where said original case was decided on appeal, in which court, as appeared by said transcript, a petition for leave to file a bill of review was filed and leave given to apply to this court. Upon consideration this court permitted the bill of review to be filed, subject to all legal objections by demurrer, answer, plea, or otherwise as the defendants may be advised.

Thereupon the bill of review was filed, and, after stating the history of the original case, it is alleged: That while said original case was pending, on, to wit, December 9, 1899, the interests of all the defendants thereto in the lands involved in that case, except Braggs and Coopers, came to petitioners, W. R. Hopkins and his associates, and the title to said land is vested in said Hopkins and his associates. That some time in the year of 1905 the map made by the original commissioners of the states of North Carolina and Tennessee, who ran the line under the cession act (2 Ired. & B. Rev. St. N. C. p. 171), was discovered in a barrel of waste at Nashville, Tenn. A certified copy thereof is attached to the bill of review. That in February, 1906, one M. E. Cozad heard a rumor for the first time of the discovery of said map, and that he obtained on the 26th day of February, 1906, a certified copy thereof. That further attempts were made to find the written report of said commissioners accompanying the map, and the field notes of the survey, but, after the most diligent search, no other papers connected therewith could be found. That none of the grantees had any information of the finding of said map, and none of the defendants herein knew of it until about June 26, 1906, and the existence or contents of said report could not have been proven at the trial of the cause.

It is alleged: That said newly discovered map shows that the state line "crosses the Little Tennessee river at or near the mouth of Slick Rock creek, and that it includes all the land, and more, than said defendants claimed." That said map is new and decisive evidence of the contention of the defendants in the original case, and that, if it had been found and presented to the court, would have been decisive in favor of the defendants, and would have resulted in a decree in their favor. That petitioners and their grantees have exercised true and perfect diligence, and could not have ascertained the existence thereof sooner than it is alleged.

On August 6, 1907, the day in which the petition was filed praying for permission to file the bill of review, an order was made and entered, directing that a rule issue and be served on the Smoky Mountain Land, Lumber & Improvement Company, grantees of Charles Hebard, the complainant in the original case, and T. E. H. McCroskey, attorney representing said company, to show cause why the prayer of said petition should not be granted and directing said company to answer thereto on or before the next rule day of this court, which was September 2, 1907. The said land company filed its answer to the petition and to the bill of review, setting up the following defenses necessary to be noticed: The suit sought to be reviewed was finally heard and determined in the United States Circuit Court of Appeals for the Sixth Circuit, July 13, 1900. The application by W. R. Hopkins et al. to file a bill of review was first made in the said United States Circuit Court of Appeals September 25, 1906. On August 6, 1907, said Hopkins and others filed in this court their petition to file a bill of review in said suit.

The petitioners and all other parties are barred by the statute of limitations. Section 4848, Shannon's Code of Tennessee, provides that "no bill

of review shall be brought or a motion made therefor, except within three years from the time of pronouncing the decree," with certain exceptions not material here. Acts 1801, c. 6, § 53, Legislature of Tennessee. The newly discovered evidence, the map itself, is not such evidence as is decisive or controlling in character as to the essential merits of the litigation, or would justify the court in granting the relief prayed for in the bill of review. The petitioners having purchased the right, title, and interest of Belding et al. to the lands in dispute, after title to said lands had been by final decree vested in Hebard and before the discovery of any new evidence, have no interest which gives to them a right to secure a reversal of said final decree upon newly discovered evidence. The land company having in good faith purchased the right, title, and interest to said lands from Charles Hebard, the successful party in the suit sought to be reviewed after final decree vesting title in Hebard, its title cannot be affected by this bill of review filed by complainants, based upon newly discovered evidence, which was not discovered until after the land company purchased. The laches of complainants bars their right to any benefits from a bill of review.

An attentive examination of this record leads me to the conclusion that the relief sought by those filing the bill of review should be denied upon more than one of the grounds relied upon by the defendants. I shall content myself, however, with discussing only one of them, and that one goes to the merits of the controversy, and in my judgment is clearly conclusive of the case.

It must be assumed at the outset that the original case of Hebard v. Belding et al. was decided correctly upon the testimony in that case. That decision must stand as the law of that case, and is not now subject to review, except in connection with the newly discovered evidence set out in the bill of review. As has been seen, the question to be determined in the original case was the correct location of the boundary line between the states of North Carolina and Tennessee, and especially between a point on the North Bank of the Little Tennessee river and the point of junction of Hangover and Big Fodder Stack ridges, a distance of about eight miles. By final decree in the original case it was held that said state line between these two points runs from the Little Tennessee river to and along the crest of Hangover ridge, to its junction with Big Fodder Stack. Why? Because, as pointed out by Judge Lurton in Hebard v. Belding et al., 103 Fed. 532, 43 C. C. A. 296, the cession act of North Carolina of 1789 (2 Ired. & B. Rev. St. N. C. p. 171) provides, among other things, that the line between Tennessee and North Carolina shall run "to the top of Bald Mountain; thence along the extreme heights of the said mountain to the Painted Rock, on French Broad river; thence along the highest ridge of said mountain to the place where it is called the Great Iron or Smoky Mountain; thence along the extreme height of the said mountain to the place where it is called Unicoy or Unaka Mountain." It is as to the last run named that the dispute arises, and from the point where the line reaches the Little Tennessee to a point, about eight miles southwesterly thereof, at the junction of Hangover and Big Fodder Stack ridges.

The act of the Tennessee Legislature 1821 (chapter 35, p. 45), confirming the report of the commissioners, after the Little Tennessee is reached, provides as follows: "From the Tennessee river to the main ridge and along the extreme height of the same to a place where it is called the Unicoy or Unaka Mountain." "The general course of the line," says Judge Lurton in Hebard v. Belding et al., supra, "as called for by the calls which brought the line to the river, was southwesterly, and this course was to be continued to the Unaka. This course would require the line to cross the river. The general direction of the cession act would keep the line on the extreme height of the mountain range or ridge. Immediately across the river, and in the general course of the line was the Hangover ridge." This is the main or highest ridge, and is the course which the line was given by the Circuit Court and approved by the Circuit Court of Appeals.

Now, what is there in the newly discovered map that would have warranted the Circuit Court in rendering a different decree in the original case, and to have found in favor of the defendants in that case? Upon an examination of the newly discovered map, it appears that the state line crosses the Little Tennessee river at right angles, and at the point where the line first reaches the river, and that it proceeds in a southwesterly direction along the ridge, lying adjacent to and immediately south of the river, towards the Unicoy Mountains. There is a black line upon the newly discovered map, marked "creek" which forms a junction with the Tennessee river a short distance above where the line crosses the river, and east of the line. But there is no indication upon the map, nor in the report accompanying it, that this line ran up said creek for any distance, or that it touches the creek at any point. Indeed, if the line followed either the river or creek for any distance, that fact is not indicated upon the map, nor is there any reference to such thing in the commissioner's report.

In order that the map or the report of the commissioners be of any service to the petitioners, it should show that the state line, after crossing the river, followed Slick Rock creek, if, indeed, it be Slick Rock creek that is indicated on the map, to a junction with Little Fodder Stack. From the location of this stream marked "creek" on the map, considered in the light of all the evidence in the case, I am inclined to the opinion that it is Cheoah river, and not Slick Rock creek. The map and the report upon their faces failing to shed any new light upon the issues in the original case, let us examine the evidence taken upon the issues under the bill of review.

Here we are met with the testimony of witnesses seemingly of equal credibility and of equal opportunity to know the facts about which they testify that is contradictory and unreconcilable. Instead of elucidating the newly found map, it tends to confuse that which appears upon the face of the map, and also it is confusing in its relation to the evidence and findings in the original case. Indeed, if this map sheds any additional light upon the issues, it is to make clearer and more certain the correctness of the conclusion reached in the original case, now under review.

An examination of the commissioners' map discloses that the state line approaches the north bank of the Little Tennessee river, running in a southwesterly direction, crosses it at right angles, leaving the south margin of the river in a southwesterly direction immediately at the point of crossing, and runs along the crest of a ridge toward Unaka Mountain, and in this particular follows the direction of the cession act from the Smoky to the Unaka Mountains, wherein it is provided as follows: "Thence along the extreme height of the said mountain to the place where it is called Unicoy or Unaka Mountain." The report of the commissioners and the confirmatory acts of the North Carolina and the Tennessee Legislatures all use identical language in describing this line from the Tennessee river, to wit: "From the Tennessee river to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain." This is the course and location given the state line by the final decree in the original case. There is nothing in the newly discovered evidence to warrant this court, in holding that, had it been before the court at the original hearing, a different conclusion would have been reached, but, on the other hand, the newly discovered evidence rather tends to strengthen the correctness of the original decree. It would require a far stretch of the imagination to hold that the newly discovered map, which is silent on this point, except the use of the word "creek," is sufficient to warrant the court to reverse the holding in the original case, and write upon the face of the map, and into the commissioners' report, according to the showing on the Burns' map, the words: "Thence along the North bank of the Tennessee river to the mouth of Slick Rock creek; thence westerly up said creek with its meanderings about five miles to Little Fodder Stack lead; thence along the extreme height of Little Fodder Stack to Big Fodder Stack; thence along the crest of Big Fodder Stack to its junction with Hangover."

Yet this, in substance, must be done, if the petitioners are granted the relief sought by their bill of review.

As indicated above, there are other grounds upon which the relief sought by the bill of review should be denied, but I prefer to base my action upon the ground that the newly discovered evidence, if it had all been before the court at the original hearing, would not have led the court to a different conclusion than the one reached.

It is pointed out in the brief of counsel for petitioners that Judge Clark in deciding the original case in the Circuit Court said that "it is a very close case on the facts and the equities of the case are rather with the defendants," etc. And that Judge Lurton, speaking for the Circuit Court of Appeals, said that "the case, on the whole, is one not free from doubts," etc. And it is argued from this language and the further fact that permission was granted to file the bill of review that the court granting such permission must have entertained the opinion that the bill of review was of sufficient merit to warrant the Circuit Court in granting the relief sought by it. If this were all, or the substance of all, that was said by these learned judges in the decision of the original case, it might be of great weight in tending to support the contention of the petitioners, but this is not all, or the substance of all, that was said.

Judge Clark used this language in his opinion deciding the case: "I do not underestimate the great force found in the better marked line of the defendant. It must not be forgotten, however, that the commissioners, in surveying and marking the line, followed the mountain range down to the Tennessee river, and that, according to the calls actually made, they would cross that river and proceed along the mountain crest, where complainants contend the line is. It was the crest of this same mountain range which brought them to the river, and it was the obvious and conspicuous range to have followed by directly crossing the river and keeping up the previous course. It is extremely difficult to believe that the commissioners at this point would have dropped down the river for half a mile and then followed Slick Rock creek for a distance of five or six miles without ever making the slightest reference to this water stream.

Granting, as argued, that the creek may at that time have had no name whatever, nevertheless, it would have been so natural and so necessary to avoid misleading for the commissioners to have said that they changed their course, and, instead of going directly across the river, went down, and then followed a creek or water stream up the valley and then to the ridge which led out to the junction, that it is next to impossible to think that such a deviation as this would have been made without a word to give any indication of the fact. Following the calls as actually given, it would be impossible to run the line as claimed by the defendants. "Looking at the case from the legal point of view (and no other seems permissible), I am certain that by the weight of the evidence the case is with the complainants." This is a positive statement of the law and the evidence in the original case as viewed by Judge Clark, expressed in clear and positive terms, and this view was affirmed on appeal after careful consideration by the Circuit Court of Appeals composed, as then constituted, of Judges Taft, Lurton, and Day.

But this is not all. When application was made to the Circuit Court of Appeals for leave to file the bill of review, that court declined to act upon it further than to enter an order allowing the petitioners to make application to the Circuit Court that originally tried the case for permission to file the bill of review. This application was made before the late Judge Clark, and in passing on it he said: "It does seem upon examination of this case that there is no ground on which the success of the proposed bill might finally be expected." Yet out of a great abundance of caution he permitted the bill of review to be filed, because, as he said, he was not sure that his act in refusing the application would be subject to review. So it appears from these utterances of the court trying the original case that it was satisfied that the conclusion reached in that case was correct. It further appears that Judge Clark, after having considered the bill of review, in which was

set out the newly discovered evidence, was of opinion that there was no ground set out therein on which the relief prayed for might finally be expected.

In that view I concur. An order will be entered denying the relief prayed for, and dismissing the bill of review, with costs.

C. B. Matthews, for appellants.

W. A. Stone and J. F. Shields, for appellees.

Before SEVERENS and KNAPPEN, Circuit Judges, and COCHRAN, District Judge.

KNAPPEN, Circuit Judge. The appeal in this cause is from a decree of the Circuit Court dismissing the bill filed to review and reverse the decree of this court in Belding v. Hebard, the opinion in which case is reported in 103 Fed. 532, 43 C. C. A. 296. The bill in the original cause was filed by Hebard against Belding and others to quiet the title of, and restrain trespasses upon, the tract in question, containing (according to the allegations of the original bill) about 8,000 acres, and, as stated in one of the briefs of counsel, about 6,600 acres; Hebard claiming under grants from the state of Tennessee, Hopkins and his associates claiming under grants from the state of North Carolina.

The decision in the original suit turned upon the location of a portion of the boundary line between the states of Tennessee and North Carolina, as run in 1821 by commissioners appointed by the respective states. This court affirmed the decree of the Circuit Court, which was rendered in accordance with Hebard's contention as to the location of the boundary line, and thus held that the lands in dispute were in Tennessee and Hebard's title thereto good under the Tennessee grant. Before the final decree of this court (which was rendered July 13, 1900), but after the decree of the Circuit Court in the original case, Belding and his associates conveyed to Archer and McGarry, in trust, for the payment of certain indebtedness, a large tract of land of which the lands here in question formed part; and, after the final decree of this court, Archer and McGarry, trustees, conveyed to Hopkins and his associates, appellants here, the lands so conveyed to said Archer and McGarry by Belding and his associates. The contract of sale, in pursuance of which the deed was given, declared that it was dependent upon the condition that "there shall not be less than 38,000 acres of land in the purchase." The deed of conveyance to Hopkins and his associates recited that the conveyance from Belding and his associates to McGarry and Archer was subject "to all deductions, if any, arising by, through or under the 'state line' suit hereinafter mentioned. Grants Nos. 8,100 for 16,800 acres, and No. 2,336 for 14,800 acres, above mentioned, being for the same lands," and contained this further language:

"But there is especially excepted from the covenants of this conveyance, all those lands situated at or near the state line, between the state of North Carolina and Tennessee, which were recovered in a certain action known as the 'state line' suit which was pending in the United States Circuit Court for the Eastern District of Tennessee and was brought by one Hebard against David W. Belding and others if future proceedings do not recover the title thereof."

Immediately after the final decree of this court, Hebard sold the lands in question, as part of a total acreage of 41,000 acres, to Blaisdell and others, who later conveyed the same entire tract to the Smoky Mountain Land & Improvement Company, which purchased with knowledge of the final decree and in reliance upon it. September 25, 1906, and thus more than six years after the final decree of this court, Hopkins and his associates asked leave to file a bill in the name of the original defendants, Belding and his associates, but on behalf of Hopkins and his associates, to review said decree, upon the ground that the then newly discovered map of the commissioners' location furnished evidence controlling and decisive of the actual location of the boundary line according to the contention of Belding and his associates, and thus that the lands here in question are in the state of North Carolina, and so belonged to Hopkins and his associates by virtue of the grants from that state. The Smoky Mountain Company was given notice of this application, and allowed to intervene for the protection of its rights. This court granted the petition to apply to the Circuit Court for leave to file a bill; the per curiam opinion filed in connection with said order containing the following statement:

"Without deciding any question which may be involved in the application for leave to file such a bill, this court, for reasons satisfactory, now consent that the petitioners may apply directly to said Circuit Court, which court will grant or refuse permission as it may be advised."

The judge of the Circuit Court said in his opinion that it seemed to him that:

"There is no ground on which the success of the proposed bill of review might finally be expected. The objections which are made to permitting this bill to be filed go to the very merits of the bill, and can, and in my opinion should, more properly be taken up by demurrer to the bill if filed. If, in the exercise of discretion, I refuse to allow the bill of review to be filed, it is not certain that my refusal to do so would be subject to review. On the contrary, if the bill is filed and a demurrer should be sustained to it on the same grounds that are now urged against its filing, the action of the court would be subject to easy review, and so the petitioners for review would suffer no error at the hands of this court that could not be readily corrected. In view of these considerations I have determined to allow the bill of review to be filed, subject, of course, to all legal objections by demurrer, answer, plea or otherwise, as the defendants may be advised, and it is ordered accordingly."

The Smoky Mountain Company, both by answer to the petition for leave to file the bill and by its answer to the bill as filed, raised the objections, among others, that appellants, being assignees of the original defendants, could not properly file such bill, and that the Smoky Mountain Company, being a good-faith purchaser for value, should be protected in its purchase as against the leave asked; and in answer to the petition for leave to file invoked the rule, among others, that a bill of review may be refused although the evidence, if admitted, would change the decree, when the court, looking to all the circumstances, shall deem it productive of mischief to innocent parties or for any other cause unadvisable.

The Circuit Court, upon hearing on pleadings and proofs, dismissed the bill of review, saying in its opinion that relief should be denied

upon more than one of the grounds relied upon by defendants, but basing its decision specifically upon the fact that the newly discovered evidence was not such as to show that the original decree was wrong. Belding and his associates did not appeal from this decree of dismissal, the appeal being taken by Hopkins and his associates "prosecuting a bill of review herein in the name of the original defendants."

[1] In the opinion of a majority of the members of this court, the decree of the Circuit Court, dismissing the bill of review, should be affirmed. This bill of review is not filed for error apparent upon the face of the decree, but solely for newly discovered evidence. The rule is well settled that while a bill of review, on account of error upon the face of the decree, may be filed as matter of right, the granting of a bill of review on account of newly discovered evidence is not of right but of sound discretion in the court. In Dexter v. Arnold, 5 Mason, 303, 315, Fed. Cas. No. 3,856, Justice Story, speaking of such a bill, said:

"It may be refused, therefore, although the facts, if admitted, would change the decree, where the court, looking to all the circumstances, deems it productive of mischief to innocent parties, or for any other cause unadvisable. Bennet v. Lee, 2 Atk. 528, Wilson v. Webb, 2 Cox, 3, and Young v. Keighley, 16 Vez. 348, are strong exemplifications of the principle."

The rule thus laid down by Justice Story is not only adopted by the text-books generally, but has been declared and affirmed by numerous decisions, which, as well as the text-books, have generally stated the rule in the precise language of Justice Story. 2 Daniell's Ch. Pr. 1577; Story's Eq. Pl. § 417; Hughes v. Jones, 2 Md. Ch. 289, 296; Harris, Adm'x, v. Edmondson, 3 Tenn. Ch. 211; P. & M. Bank v. Dundas, 10 Ala. 661, 669; Massie's Heirs v. Graham's Adm'rs, 3 McLean, 41, Fed. Cas. No. 9,263; Craig v. Smith, 100 U. S. 226, 233, 25 L. Ed. 577; Ricker v. Powell, 100 U. S. 104, 107, 25 L. Ed. 827; Thomas v. Harvie's Heirs, 10 Wheat. 146, 150, 6 L. Ed. 287; Stockley v. Stockley, 93 Mich. 307, 313, 53 N. W. 523.

In Ricker v. Powell this language was used:

"A bill of review on the ground of newly discovered matter can only be filed on special leave, which depends on the sound discretion of the court to which the application is made. Thomas v. Harvie's Heirs, 10 Wheat. 146 [6 L. Ed. 287]; Rubber Company v. Goodyear, 9 Wall. 805 [19 L. Ed. 828]; Story, Eq. Pl. 421c; 2 Daniell, Ch. Pr. (4th Ed.) 1577. 'It may be refused, although the facts, if admitted, would change the decree, when the court, looking to all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause unadvisable.' Story, Eq. Pl. § 417; Griggs v. Gear, 8 Ill. [3 Gilman] 2."

In Craig v. Smith it was said:

"There is no universal or absolute rule which prohibits the courts from allowing the introduction of newly discovered evidence under a bill of review to prove facts which were in issue on the former hearing. 'But the allowance of it is not a matter of right in the party, but of sound discretion in the court, to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause.' Such was the language of Mr. Justice Story in Wood v. Mann, 2 Sumn. 334 [Fed. Cas. No. 17,954], and he states the rule none too strongly."

In Stockley v. Stockley it was said:

"An application for leave to file a bill of review is the method employed to obtain a rehearing and to vacate a decree after its enrollment; but the results to be attained, and the facts properly to be considered, are the same as though it were a motion for a new trial, or a motion for a rehearing and to vacate a decree before its enrollment, and in like manner it addresses itself to the fair discretion of a court. In passing upon it, each case stands by itself, and is controlled by the circumstances surrounding it, and without reference to any other case. The power of the court in granting or denying it is largely discretionary, and is always to be exercised in view of the peculiar circumstances of each case, so as to effectuate substantial justice, and protect the legal and equitable rights of the parties."

[2] In the opinion of a majority of the court the case is one calling for the application of the principle recognized by the decisions cited. The appellants here are purchasers of the lands after decree and under express exception thereof from the covenants of warranty. Their purchase, so far as concerns the lands here involved, was speculative. On the other hand, the Smoky Mountain Company was a good-faith purchaser for value and in reliance upon the decree.

In Thompson v. Maxwell, 95 U. S. 391, 397, 398 (24 L. Ed. 481), it is said that "none but parties and privies can have a bill of review. It does not lie for assignees;" and that the fact that the original defendants were joined as complainants with their assignees does not obviate the difficulty. But we do not decide that an assignee cannot, under any circumstances, file a bill of review, nor that this case is controlled by Thompson v. Maxwell, nor that the mere fact of a good-faith purchase by a party in reliance upon, but not under, a decree precludes the review and reversal of that decree. What we do mean to decide is that in our opinion, taking into account not only the speculative purchase by appellants, but also the good-faith purchase by the Smoky Mountain Company, a case is not presented which appeals to the equitable discretion of the court to allow the review of a decree upon the ground alone of newly discovered evidence. We rest our decision solely upon this proposition. Bearing in mind the rule that this bill of review for newly discovered evidence is not of right, no matter how persuasive of error in the original decree the new evidence may be, and that it should not be allowed if such allowance would result in mischief to innocent parties, and having in view the stability necessary to be afforded to decrees, especially of courts of last resort, where disturbance thereof is not essential to the protection of the real equities of the parties before the court, we think the review asked for should be denied. In our opinion, the stability of judgments, and thus the protection of rights acquired in reliance upon them, are such as, under the peculiar circumstances of this case, to make the review asked for inequitable. Nor do we think the situation is changed by the fact of the conveyance by Belding and his associates to the trustees pending the suit, nor by the fact that appellants were negotiating for, and possibly may be said to have had, to some extent, an option for the purchase of the land previous to the final decree. The appellants were not bound to make the purchase until contract therefore was actually made, which was after the decree sought to be

reviewed was entered; and the purchase then made, as has been said, was speculative as to the land here involved.

It is urged that the Smoky Mountain Company is not a good-faith purchaser, because of an option taken by Peck and his associates previous to the decree of this court. But even if the Smoky Mountain Company or its grantors derived any interest from the Peck option, which does not clearly appear, the actual purchase was not in fact made until after the decree of this court, and is shown to have been made with knowledge of and reliance upon that decree, and thus the earlier option could not affect the status of the Smoky Mountain Company as a good-faith purchaser.

It is urged that the original defendant lost his land by the decree of the court, and that the court was the means by which this result came about. But this court committed no error. It decided rightly upon the case presented to it. It was the misfortune of the defendants that the map was not discovered before the hearing of the original cause. But the reversal of this decree would result, on the one hand, not in benefit to the original defendants, but to purchasers of their rights after the unfavorable decree was made, and, on the other hand, to the detriment of those who bought in reliance upon that decree. Proceedings under bills of review are in the nature of applications for rehearings or new trials. In Pomeroy v. Noud, 145 Mich. 37, 44, 108 N. W. 498, it is said that the rules governing the granting of bills of review are, to some extent, founded upon considerations of public policy as well as those of private rights.

[3] We have not overlooked the fact that the deed from Hebard to Blaisdell and his associates contained no covenants of warranty, except as against those claiming under the grantor, and that the deed to the Smoky Mountain Company was a quitclaim deed. But such facts are not controlling. A person holding under a quitclaim deed may be a bona fide purchaser. Moelle v. Sherwood, 148 U. S. 21, 28, 30, 13 Sup. Ct. 426, 37 L. Ed. 350; United States v. California & Oregon Land Co., 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354. In Moelle v. Sherwood, Justice Field, speaking for the court, said:

"The doctrine expressed in many cases that the grantee in a quitclaim deed cannot be treated as a bona fide purchaser does not seem to rest upon any sound principle."

And again:

"The character of a bona fide purchaser must depend upon attending circumstances or proof as to the transaction, and does not arise, as often, though, we think, inadvertently, said, either from the form of the conveyance or the presence or the absence of any accompanying warranty. Whether the grantee is to be treated as taking a mere speculative chance in property, or a clear title, must depend on the character of the title of the grantor when he made the conveyance; and the opportunities afforded the grantee of ascertaining this fact and the diligence with which he has prosecuted them will, besides the payment of a reasonable consideration, determine the bona fide nature of the transaction on his part."

[4] It is true that the specific proposition upon which we rest our decision was not in terms presented by answer, but we think that the defense as presented, in connection with the objection to granting

leave to file a bill of review, is sufficient to properly present it to this court. In reaching this conclusion, we have not overlooked the fact that leave to file the bill was granted by the Circuit Court. In our opinion, however, the granting of such leave, especially under the conditions we have before set out, was not so far an adjudication of the equities of the cause as to preclude their review. An order allowing the filing of a bill of review is not appealable, while an order denying permission is final and appealable. Maxfield v. Freeman, 39 Mich. 64; Scriven v. Hursh, 39 Mich. 98. Unless, therefore, this defense may be considered upon final hearing, the decision of the Circuit Court granting the leave to file could never be reviewed. But, this consideration apart, we think the party against whom a bill of review is filed is not foreclosed from a defense of this nature by the mere granting of leave, especially where, as in this case, both this court and the Circuit Court have apparently refrained from adjudicating anything except the leave to file. See Massie's Heirs v. Graham's Adm'rs, 3 McLean, 41, 48, Fed. Cas. No. 9,263.

For the reasons above stated, the decree of the Circuit Court, dismissing the bill of review, must be affirmed.

SEVERENS, Circuit Judge (dissenting). For the reasons stated in the following opinion, I am unable to agree with the majority of the court or with the reasoning on which their conclusion is based. Inasmuch as the statement of facts contained in the opinion of the other judges is not, as I think, sufficiently full to disclose the whole case and omits to mention several important facts material to the proper disposition of it, I am constrained to state the case in my own way.

This is an appeal from a decree of the Circuit Court dismissing a bill of review which was allowed to be filed there by the consent of this court given upon a petition filed here August 6, 1907. The decree which was complained of was made by this court on an appeal, July 13, 1900, affirming the decree of the Circuit Court. The reasons which induced this court to affirm the decree of the court below are stated in the opinion by Judge Lurton reported in 103 Fed. 532, 43 C. C. A. 296. The object of the original bill was to obtain an injunction to restrain trespassers on certain described lands alleged by the complainant to be in Tennessee and to belong to him, and to obtain a decree quieting the complainant's title to said lands. The complainant claimed title under a grant from the state of Tennessee. The answer of the defendants averred that the lands were not in Tennessee, but were in North Carolina, and claimed title in themselves under grants from the latter state. The lands lie along the boundary line between the two states, and the question was which of the two lines claimed by the respective parties to be the boundary was the true boundary line, for the lands in controversy lie between those lines. This was the sole question in controversy. The regularity of the derivation of the titles was not disputed on either side. The following excerpt from the statement of facts prefacing the opinion of the court will explain the history of the respective grants, the steps which had

been taken by the public authorities of the two states to ascertain and settle the boundary line and the character of the lands in controversy:

"The territory now comprising the state of Tennessee was ceded by the state of North Carolina in 1789 [2 Ired. & B. Rev. St. p. 171] to the United States. The Session Act describes the eastern boundary line as follows. 'Beginning on the extreme height of the Stone Mountain, at the place where the Virginia line intersects it, running thence along the extreme height of the said mountain to the place where the Wautauga river breaks through it; thence a direct course to the top of the Yellow Mountain, where Bright's road crosses the same; thence along the ridge of said mountain, between the waters of Doe river and the waters of Rock creek, to the place where the road crosses the Iron Mountain; from thence along the extreme height of said mountain to where Nolichucky river runs through the same; thence to the top of the Bald Mountain; thence along the extreme height of the said mountain to the Painted Rock, on French Broad river; thence along the highest ridge of the said mountain to the place where it is called the "Great Iron" or "Smoky" Mountain; thence along the extreme height of the said mountain to the place where it is called "Unicoy" or "Unaka" Mountain, between the Indian towns Cowee and Old Chota; thence along the main ridge of the said mountain to the southern boundary of this state.' The line here to be ascertain is included within the call beginning 'thence along the extreme height of the said mountain to the place where it is called Unicoy or Unaka Mountain.' The mountain whose extreme height is to be followed until Unaka Mountain is reached is the 'Great Iron or Smoky Mountain.' The necessity for a definite location and marking of the line became evident to both states, and in 1821, under acts passed by each state, a joint commission was appointed for the purpose of settling, running, and re-marking the boundary line. The Tennessee commissioners were appointed under an act which provided that the commissioners should 'settle, run and remark the boundary line between this state and the state of North Carolina, agreeably to the true intent and meaning of the said act of the General Assembly of the State of North Carolina, entitled: "An act for the purpose of ceding to the United States of America certain western lands therein described."' Acts Tenn. 1820, c. 22 [2 Scott's Laws, p. 635]. The North Carolina act, providing for the running of the line, was substantially identical with the Tennessee statute above set out. 2 Ired. & B. Rev. St. N. C. p. 94. The joint commissioners did run and re-mark the line, and each state passed an act ratifying, confirming, and adopting the line as run and reported by the commissioners. Acts Tenn. 1821, p. 45, c. 35; 2 Ired. & B. Rev. St. N. C. p. 96."

It will be sufficient for the present purpose to state that the line run by the commissioners as claimed by the plaintiff in the original suit would be a line starting from a known point where the disputed lines separate northeast of the land in controversy and extending southwardly and somewhat westwardly over what is known as Hangover Rock to another known point where the disputed lines converge. If this were the true line, these lands lie in Tennessee. The line which the defendants in the original suit claimed was the one run by the commissioners starts from or near the same point as the other, but diverging therefrom extends more to the right, as one looks to the southwest, and passes over the Fodder Stack range of heights to the converging point. This line lies west of these lands and would locate them in North Carolina. The evidence in the original case showed that there were signs and marks along each line, the character of which is stated in Judge Lurton's opinion on the original case. On the Fodder Stack ridge line there were 41 trees marked like those on the general and undisputed line established by the commissioners. This court

thought the probability was that these trees were thus marked by the commissioners, but concluded that this line was only temporarily run, and was afterwards abandoned, and the Hangover Rock line substituted. We need not go into the various reasons which led the court to conclude that the Hangover Rock line was the true boundary line. The necessary result was that the land in question passed by the Tennessee grant, and that, therefore, the complainant was the true owner; and the court decreed accordingly. Counsel for the defendant remind the court with great earnestness of the importance to the public of the stability of judgments. But it is of even higher interest to the public that the citizen shall not be despoiled by a wrong judgment. It is for the prevention of such unjust consequences that the law gives to the courts the power of correction by a bill of review. It is an ancient principle of equity that, if a man shall lose his property to his adversary by the decree of the court, he still retains the right to regain it, if, by subsequent discovery of hitherto unknown proof bearing directly on the issue, he is able to convince the court that its decree was clearly wrong. This right is one to which the right acquired by the decree is subordinate, and neither the opposite party nor any one claiming under him can successfully deny that right, so long as the true owner has done no act either of commission or omission, whereby he should be estopped from claiming it.

When the former suit was pending nothing of the work of the commissioners was to be found in the archives of either state, although diligent search was made. The state house of North Carolina at Raleigh was burned in 1831, and its archives nearly all destroyed. But what had become of the report of the commissioners which came to the state of Tennessee no one could explain. The court had only scant means for locating the line, and was in doubt about the conclusion to be drawn from what it had, but based its judgment upon the probabilities as they seemed to be. But about the beginning of the year 1904 and after the three years which a statute of Tennessee prescribes as a limitation for bills of review had elapsed, the report of the commissioners and the map which accompanied it belonging to the state of Tennessee were discovered in a barrel of rubbish in the basement of the capitol of the state at Nashville, which the state authorities had ordered to be cleaned out. The rumor of this discovery spread abroad and came to an agent of the defendants residing in North Carolina. The grants of these lands by the state of North Carolina were made upon sales made during the years 1853, '54, '55, and '56. That by the state of Tennessee was made in 1892, and probably was at a time subsequent to the time of the disappearance of the commissioners' report and map. I say "probably," because it is hardly to be credited that the official who had charge of the making of the grant would have allowed it if he had knowledge of the action of the commissioners. But it is possible that the making of this grant was the result of the seemingly loose practice of the land department of that state which is stated thus by Judge Caruthers in State v. Crutchfield, 3 Head (Tenn.) 113, at page 115:

"The state does not warrant the title to the land which she grants. She opens her offices, and permits individuals to enter, at their own risk, any

lands they choose, and she issues her grants. They must beware of the titles they get."

The lands were wild, rough, and uncultivated, and almost unsettled, and were valuable mainly for their ore mines and timber.

The state of Tennessee at one time caused a survey and sectionizing to be made of lands in this locality. Of this survey Judge Clark in his opinion in the original case said:

"That the state has through the Ocoee District commissioners established its line on Slick Rock creek, and has sectionized all the territory supposed to belong to the state."

This survey and sectionizing took place in 1836, and Slick Rock creek is on the line running over the Fodder Stack range. Aside from the making of the grants, neither state had made any distinct claim of territorial dominion. Taxes have been assessed upon them by the state of North Carolina, and they have been paid by the appellants or their predecessors in title. And recently the appellees have paid taxes to the state of Tennessee. The complainant in the original suit alleged that he was in possession, but this statement was not supported by the evidence. Judge Clark, in the opinion on which he based his decree, said:

"After careful consideration of this case, I reach the conclusion that I am not warranted upon the facts in differing from the commissioner in the view which he takes of the case. It is a very close one on the facts, and the equity of the case is rather with the defendants in view of the fact that they obtained their grants earlier, and have been paying taxes upon the property while the plaintiff's grant was only recently obtained."

The report and map of the commissioners above mentioned were put in evidence in the court below in this proceeding, and are now before us. The authenticity of them is not disputed. The map shows the line run by the commissioners in distinct color, and it shows the line as it was contended to be by the defendants in the original case, and is the line running over the Fodder Stack ridge, and is on the line of the 41 marked trees above mentioned. The inevitable conclusion is that the original decree was erroneous. The appellees contend vigorously that these documents are not conclusive, and still insist that the true line runs over by Hangover Rock. But it is, as I think, a hopeless contest, and my conviction that the map shows the true line is in no wise shaken. What is the result of this conclusion if it is correct? It must be that these lands lie in North Carolina, that the appellees had no title, and that the appellants are the lawful owners of them.

Counsel for appellants urge that, where it is found that the lands are not within the territorial limits of Tennessee, the jurisdiction of the Circuit Court fails, and that the order should be that the bill be dismissed on that ground. This objection was presented to the Supreme Court in boundary cases at an early day, and was overruled, the court being of opinion that, if upon the allegations of the bill the land is within the territorial jurisdiction of the court, that is enough, and that its authority will not be divested by its final conclusion that the land is located in an adjoining state. Fowler v. Miller, 3 Dall.

411, 1 L. Ed. 658; New York v. Connecticut, 4 Dall. 1, 1 L. Ed. 715; Handly v. Anthony, 5 Wheat. 374, 5 L. Ed. 113; Rhode Island v. Massachusetts, 12 Pet. 657, 726, 727, 9 L. Ed. 1233; Howard v. Ingersoll, 13 How. 381, 14 L. Ed. 189.

On the merits the conclusion above stated is fatal to the claim of the appellees. The bald, but perfectly true, state of the case is this: The real owners of the property have defended it against a claimant having in truth no interest in it by all the lawful means available to them, but by the adverse decision of the court the owners have lost it. The court has been the instrumentality by which this grievous miscarriage had been accomplished. It does, indeed, sometimes happen that by error or accident such injustice is done and is irremediable; but it certainly ought not to happen by the conscious act or omission of the court while it yet has the power and opportunity to prevent the mischief.

The only question in the case at the original hearing was that of the location of the boundary line between the states. The new evidence seems to be conclusive of that question. It is difficult to conceive of a case more suitable for the remedy now invoked.

But the appellees, apprehending that perhaps the court would come to the foregoing conclusion in respect to the boundary line upon the new facts, interpose a great variety of objections to the relief prayed, among them these: First, it is urged that these complainants are not persons aggrieved by the original decree; and, further, as they contend, the parties in whose behalf the bill of review is filed are assignees, in whose favor the court will not review the decree. These contentions are directed to the ultimate question, namely, whether they have any interest affected by the decree which entitles them to the relief which they seek. The first of these, that these complainants were not aggrieved, does not merit prolonged discussion, certainly not, if this bill is to be treated as a bill by the original defendants as I think it should. The second, concerning the rights on such a bill, is more serious, and is the principle ground as I understand on which the court is to affirm the decision of the court below. The general rule is stated by the Lord Chief Baron Gilbert in his book on the Chancery Practice entitled Forum Romanum at page 186, which is this:

"None but parties and privies, such as heirs, executors, or administrators, can have this bill of review, since nobody else can be aggrieved by such decree because it can only be revived upon such privies."

Mr. Justice Story in his work on Equity Pleadings, note to section 409, in quoting this language uses the word "by" instead of "upon" in the last line. But I suppose this is an error, as the original publication has it "upon." This rule has been stated and followed in many judicial opinions, and is no doubt the foundation of the practice of the court. Some qualifications to its generality, however, have been made where the special circumstances require it, which is an incident to all general rules. And Mr. Justice Story in the note above mentioned says: "This language is very broad, and requires qualification." And he proceeds to state several of such.

The majority of the court treat this bill of review as one brought by assignees, and not as one brought by the parties to the original decree to enforce their own rights. While it is true that the petition filed in this court for permission to make application to the Circuit Court for leave to file it was presented by the "assignees," as we will call them, the bill which was allowed by the Circuit Court to be filed is the bill of the original defendants themselves as complainants, and they pray in their bill that they may be allowed to file it. The case stated is the case of those parties. The relief prayed is in their own behalf, and the bill is signed by their solicitors. No statement of any facts in behalf of any other persons than themselves is made—nor, indeed, is there any reference to the rights or interests of any other person. They thus became parties to the suit, and subject to the jurisdiction of the court, and would be bound by the decree which the court should render. The discretion of the Circuit Court as to whether leave to file should be granted was invoked and exercised and at no time was its permission to file the bill recalled. Nor does the fact that the other parties assisted in the promotion of the suit consitute an objection. They had an interest which they might subserve without censure.

It would seem from the rule approved by the Supreme Court upon the authority of the Lord Chief Baron Gilbert's book that the original parties and their privies by representation who were bound by the decree are the only ones properly joined in the suit. Thompson v. Maxwell, 95 U. S. 397, 24 L. Ed. 481; Gies v. Green, 42 Mich. 107, 3 N. W. 283. Nevertheless, a purchaser subsequent to the decree was allowed to intervene as defendant.

But, passing by this objection for the present, I proceed to inquire whether the parties complainants are so affected by the original decree that they are entitled to maintain a bill of review. The original defendants are aggrieved because the decree cut them out of the interest they had in the lands subject to the deed in trust to Archer and McGarry, and so affected the value of the title conveyed in trust as to materially depreciate the price that could be obtained for it, and the extent to which their debt would be paid. This deed in trust was made pendente lite. The deed of the trustees was offered in evidence by the defendant, and is therefore evidence of any disserving statements made in it. 1 Wharton's Evidence, § 619. Turning to the deed itself, it appears to have been given to carry into effect certain trust agreements entered into before the making of the final decree. It was of these and other lands to secure a large indebtedness, a very considerable portion of which was due to Archer, one of the trustees. It contained a power of sale, the power being coupled with an interest, and was irrevocable. The good faith of the transaction is not questioned. It was therefore perfectly valid in law and in equity. Hartley v. Russell, 2 Simons & Stuart, 244; Hartington v. Long, 2 Myl. & K. 590. To be sure, the grantees would be bound by the decree if one should be finally entered against the grantors. This because of the rule which the court applies for the maintenance of existing conditions and consequently of its jurisdiction to make an ef-

fective decree. The fact that the grant was made pendente lite has no other consequence. In earlier times the courts looked with disfavor upon a purchase pendente lite, not only because of its disturbance of the status quo, but also because it afforded an opportunity for maintenance and champerty. To avoid the first of these objections, the rule that the purchaser should be bound by the judgment was applied. With respect to the subject of maintenance and champerty, the objection has lost much of its force, and is now only sustained upon a plain case. It is not sustained where the purchaser has an interest in the subject of the litigation, but only when he comes in as a volunteer, to assist the party from whom he buys. 6 Cyc. 865, where the subject is fully treated and numerous authorities are cited in support of the rule just stated. After the transfer by the defendants, they, to the extent of the interest transferred, continued as representatives of the transferee as was said by Chief Justice Waite in Stout v. Lye, 103 U. S. 66, 26 L. Ed. 428, and repeated by Mr. Justice Brewer in Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 386, 14 Sup. Ct. 122, 37 L. Ed. 1113. Archer and the other creditors sought to obtain this security for their debt, and, if we look to ultimate justice, it would be more just that the debt of the real owner should be paid to his creditors, rather than that the fund should go to a stranger to that ownership. If the purchasers from the trustees would have no other means of protection, it would seem that they should have such a right as the trustees had. It was necessary that there should be purchasers, else the power of the trustees could not be executed. The title would not be marketable, and would remain stagnant in their hands. But we need not pursue this subject. It is enough that the original defendants are in due form before the court, and were injured by the decree. And it is of no concern whatever to the defendant in this bill what use the complainants make of the fruits of the decree, as, for instance, whether they shall thereby make good their own conveyance to their grantee. Counsel for defendants maintain in effect that, notwithstanding the original decree had the effect to pass the title from the defendants to the complainant, no one was aggrieved thereby.

I have been induced to discuss these questions touching the interests of parties deriving such interests from one of the parties to the original suit, but who were not themselves parties because the case has been presented and argued as if such questions were open on a bill of review. It is only by such an assumption that the presence of the Smoky Mountain, etc., Company can be recognized; for its rights are only such as it has derived since the decree sought to be reviewed. Thus on both sides proofs have been introduced as if new issues could be raised and decided in this proceeding, a proposition which I doubt. There are some precedents cited by counsel wherein, as is claimed, such a broad jurisdiction has been exercised on a bill of review. But it seems manifest that this practice destroys the proper limitations of such a proceeding and confounds it with the proceedings of an ordinary suit in equity; and it is inconsistent with the equity practice of the federal courts. It is a singular circumstance

that in this case the defense is made by a party who, under the rule referred to, could not properly be made a party to the proceeding at all. But proceeding, further, another objection is that:

"A bill of review will not affect the title of a bona fide purchaser (of the property in controversy) from the successful party after a final decree and without notice that a bill of review is to be filed."

Now, whatever application such a rule may have to a bill filed to review a decree for error apparent on the face of it, it can have none to a case where the bill is filed on account of newly discovered evidence of which the plaintiff in most cases would have no knowledge and no definite hope of discovery. Moreover, how is he to give notice of an intention to file such a bill? And to whom must the notice be given? How is he to know who is an intending purchaser? In this connection it may be worth while to remark that the original complainant lost no time in disposing of the lands to another after the decree of this court was entered. Only a few days elapsed after the decree before he had sold it, and it was conveyed before the time had elapsed for moving for a rehearing or applying for a certiorari. If in such circumstances a man may cut off the true owner by forthwith conveying away the property, then, as said by the Court of Appeals of Kentucky, a bill of review is of little value. Clark's Heirs v. Farrow, 10 B. Mon. 446, 451, 52 Am. Dec. 552. This point is made in the interest of the Smoky Mountain, etc., Company, which claims to be a bona fide purchaser. Admitting it to have that character, for the sake of argument, it would not suffice to defeat the claim of the complainants; for it never acquired the title to the property, and it is only in such case that a bona fide purchaser can have protection. 1 Story's Eq. Jur. § 64. The grant of the state of Tennessee conveyed no title, legal or equitable, and the grantor of the Smoky Mountain, etc., Company, had no title to sell and nothing passed by the deed. Non dat qui non habet is a maxim of the law, as well as sound logic. An apparent title is not always enough; as, for instance, when the name of the true owner has been forged, or the grantor was under a disability, or when, for any reason, the deed conveyed no title. The defendants in the former suit, who are complainants here, derived the true title from the state of North Carolina. It was of a fee simple absolute, the highest and best title known to the law. The owner of property cannot be deprived of it without some fraud or fault on his part by a bona fide purchase of it by another from some other party than the owner. In 2 Pomeroy's Eq. Jur. § 735, the author says:

"A subsequent holder, even for a valuable consideration and without notice, has certainly no higher right than a prior holder equally innocent and with an equally meritorious ownership. American courts seem sometimes to have acted upon exactly the opposite notion, and to have assumed that a subsequent title was necessarily the better one. When the original legal owner has done or omitted something by which it was made possible that his property should come into the hands of a bona fide holder by an apparently valid title, it may be just to regard him as estopped from asserting his ownership, and thus to protect the subsequent purchaser. But when the prior legal owner is wholly innocent, has done and omitted nothing, it

certainly transcends, even if it does not violate, the principles of equity to sustain the claims of a subsequent and even bona fide purchaser."

And again, after an extended discussion of the subject, he says at the close of section 739:

"The foregoing description shows that it is wholly unwarranted by the settled principles of equity for a court to sustain and enforce the subsequent legal estate acquired by A. in any kind of property or thing in action merely because he is a bona fide purchaser for a valuable consideration without notice against the prior legal and equally innocent owner, B., or even to sustain A.'s defense as a bona fide purchaser in a suit brought by B."

It seems to me that this doctrine rests upon a fundamental principle, and is indisputable. It has been recognized and enforced by the federal courts in several cases. Vattier v. Hinde, 7 Pet. 252, 8 L. Ed. 675; Boone v. Chiles, 10 Pet. 212, 9 L. Ed. 388; Smith v. Orton, 131 U. S. Appendix lxxviii, 18 L. Ed. 62; Texas Lumber Mfg. Co. v. Branch, 60 Fed. 201, 8 C. C. A. 562. Lindblom v. Rocks, 146 Fed. 660, 77 C. C. A. 86. Judge Gilbert, in this last case, puts the matter in a nutshell when he says:

"The doctrine of bona fide purchaser without notice does not apply where the purchaser buys no title at all. His good faith cannot create title."

In the case of Texas Lumber Mfg. Co. v. Branch, supra, the deed to the bona fide purchaser for a valuable consideration stated that the grantors were the heirs of the deceased owner, and the purchaser supposed that to be so. But it turned out that another was the lawful heir, and the property was decreed to him. See, also, Latham v. Barney (C. C.) 14 Fed. 433, 446. The doctrine concerning bona fide purchaser has been built up and has always rested upon the assumption that the purchaser paying value, has acquired a title, in the enjoyment of which a court of equity will protect him. At one time the court of chancery pressed the rule so far as to permit the purchaser to get hold of the title by seizing the evidence of it by any means in his power, even by trespass if he could. This excess was subsequently disallowed. But the requirement that the purchaser must have a title in order to enable him to call for the protection of the court has always continued to be regarded as an essential condition; and, indeed, upon sound reason, it must be so.

The cases of Rector v. Fitzgerald, 59 Fed. 808, 8 C. C. A. 277, and Ohio R. Co. v. Fisher, 115 Fed. 929, 53 C. C. A. 411, which are relied on by the defendants, decide nothing opposed to this. In the first of these cases it appears from Judge Thayer's statement that the bona fide purchaser had acquired the legal title. And the references which Judge Thayer makes indicate that Rector had been seeking to defeat the title which the defendant who was the grantor of the bona fide purchaser, had acquired, and to obtain a declaration that he was himself entitled to it. The case finally turned on the question of the laches of the plaintiff in filing his bill. The other case, that of Ohio River R. Co. v. Fisher, was not one of a bill of review, but it involved facts and proceedings occurring after an original decree and the filing of a bill of review. The railway com-

pany had become a purchaser for value through a sale and conveyance by the trustees under a will. The trustees held the legal title and the railway company had acquired it by their deed. Judge Simonton referred to the case of Bank v. Ritchie, 8 Pet. 146, 8 L. Ed. 890, where Chief Justice Marshall distinguished such a case from one where the title had not been acquired by the purchaser, at least that was the interpretation of it by the learned judge. The same observations apply to the case of Perkins v. Pfalzgraff, reported in 60 W. Va. 121, 53 S. E. 913.

The notion that, because at the time these lands were purchased of the complainant in the original suit he had obtained a judgment in his favor which precluded the defendant from asserting title to the lands, he might ever afterwards rely upon the estoppel by which the defendant was then bound, is unsound. On the contrary, the true rule is that, when the ground on which the estoppel of the judgment rests is removed and the truth is let in, the estoppel collapses and the structure built upon it falls to the ground; whereupon there must be restitution of that which by the previous error of the court the party has been unjustly deprived of. 2 Foster's Federal Practice (4th Ed.) 1132; Mitford's Ch. Pl. 107, 89. Cases where judicial sales made in pursuance of decrees, and before the reversal of such decrees have been protected in the hands of purchasers at such sales, rest upon the security which must be afforded to the purchaser in relying upon the action of the court. It is necessary that the purchaser should have such confidence or sales could not be made for the proper value. Moreover, the price inures to the benefit of the true owner. What would be thought of such a case, if the court in addition to divesting the owner of his title should also deprive him of the proceeds? The rule itself results from a balance of inconveniences, the one which the owner suffers from a forced sale of his property and the other in depriving the purchaser of the necessary safeguard which the general interest of the public requires. Such cases have no application to an ordinary sale made after the court lets go its hold, and leaves the property to the ordinary incidents of business transactions. The distinction is stated by Gilfillan, C. J., in Lord v. Hawkins, 39 Minn. 73, 38 N. W. 689, as follows:

"The second question in this case is, Does a purchaser in good faith from a successful party in a judgment determining the title to real estate come within the rule which protects a bona fide purchaser under a judicial sale; that is, a sale made pursuant to a judgment or to enforce a judgment, from the effect of a subsequent reversal or vacation of the judgment? The reason for the rule is obvious, and suggests the answer to the question. It is founded upon considerations of public policy, which require that property shall not be sacrificed at sales that the law makes, that at such sales purchasers shall be encouraged to bid a fair price. And this cannot be effected if the title they acquire is subject to be defeated in consequence of errors or irregularities in the judgment under or pursuant to which the sale is made. This is no such case. Here was no sale nor anything equivalent to a sale. The judgment did not assume to pass any title. It passed on only the previously existing title like an action in trespass or ejectment. The appellant purchased from the party and took only the title that he had."

In 24 Cyc. 6, it is said:

"A sale is not a judicial sale, properly speaking, unless it is made under an order of the court, and subject to confirmation of the court [citing a number of cases]."

This distinction is highly important in the present case.

Another ground taken in defense, but not alluded to by the other judges, is that the bill of review is barred by a statute of limitations of the state of Tennessee which is as follows:

"No bill of review shall be brought, or a motion made therefor, except within three years from the time of pronouncing the decree; saving to infants, married women, persons of unsound mind, imprisoned or beyond the limits of the United States, a right to a bill of review within three years after such disability has been removed." Shannon's Code, § 4848.

I should suppose that this statute was intended to apply only to bills of review for errors appearing of record; for, if it be applicable to bills filed because of newly discovered evidence, the result would be that parties who have no knowledge of such evidence would be cut off at the end of three years, and many cases might arise where the new evidence might not have been discovered before the period of this limitation should elapse, and yet be of such a character as to show that great injustice had been done. It has always been a favorite doctrine in courts of equity that the time for limiting recourse to those courts should begin when the cause of action is discovered, and some of the states have enacted statutes extending this rule to all cases whether at law or equity. But I am of opinion that, if it be conceded that this statute was meant to include all bills of review, it is not a law which binds the courts of the United States. It was enacted for the regulation of the procedure in the courts of the state. The Legislature of the state had not the power to regulate the procedure of the courts of equity of the United States. Nor, indeed, has it the power by its own authority to regulate the procedure in any actions in the federal courts. Congress has power to adopt such legislation, and has done so in respect to actions at law. But the act expressly excludes suits in equity and in admiralty from the rules prescribed by state legislation for actions at law. Nor can a state prescribe a law which restricts the equitable jurisdiction of the federal courts. It may indirectly extend the jurisdiction of those courts by supplying new conditions wherein the federal courts, without departing from their own fundamental principles, may exercise equitable jurisdiction. The consequence of applying the statute of Tennessee to cases such as this would defeat the exercise of jurisdiction by the equity court of the United States in all cases of bills of review filed after three years from the original decree, although the courts of equity have hitherto and through a long period of time taken jurisdiction and decreed relief in many cases where a much longer period had elapsed. And this further result would happen, that the power of the court existing in other states would be restricted in the state of Tennessee to a part only of its familiar jurisdiction. As we said in Kentucky Coal & Timber Co. v. Kentucky Union Co. (C. C. A.) 187 Fed. 948:

"State statutes of limitation are prescribed for the tribunals of the state. They are not ex proprio vigore of any force in the courts of the United States. They may be, and in many instances have been, adopted by acts of Congress as laws of the United States. There is no general statute of limitations in the laws of the United States relating to suits in equity. But, speaking now of the equity courts of the United States, there has been, for the sake of conformity, a disposition to accept the statutory regulations of the states prescribing the time within which suits may be brought. And this practice has ripened into a rule which will be enforced whenever by observing it the court is not required to abrogate its own principles, in which case it will protect its own jurisdiction. Alsop v. Riker, 155 U. S. 448, 460 [15 Sup. Ct. 162, 39 L. Ed. 218]; Patterson v. Hewitt, 195 U. S. 309 [25 Sup. Ct. 35, 49 L. Ed. 214]. Instances are found where those courts have enforced the doctrine of laches in favor of defendants where the lapse of time has been shorter than that prescribed by state laws, but where the peculiar circumstances gave rise to an equity which the court was bound to protect. By the same token it would allow a longer period for bringing suit than that prescribed, when by fraud or concealment of the cause of action had not been discovered, or would not by reasonable diligence have been discovered."

This brings us to the last defense which the defendants make, which I think it material to notice. This is, that the complainants have been guilty of laches in taking measures to obtain leave to file the bill. There is no statute of the United States which limits the time for filing a bill of review. The general rule is that the party should move within a reasonable time after discovering the new evidence. It is a question of laches. In many cases it has been tested by the analogy of statutes fixing the time for taking an appeal from the original decree. But this has never been regarded as an absolute rule in applying the doctrine of laches. But, by whatever rule the matter is to be tested, I think there was in this case no such delay as should bar the remedy. The complainants were nonresidents. They had an agent in Cherokee county, N. C., who had charge of lands they held in that state, and apparently of those in Tennessee. He testified that he first heard a rumor that the map had been found in February, 1906; that he at once set about verifying it; that in March of that year he obtained a copy of the map; that he tried to find out whether the field notes of the commissioners could be found at Nashville; that he made trips to Raleigh, N. C., and made thorough search of the state archives there, for the map, the report and the field notes of the North Carolina commissioners, which he hoped to find there, but failed to find them; that, when he had secured all that he could find, the matter was placed in the hands of local attorneys The details of his search are stated more at length in his testimony. It appears that subsequently counsel at Cincinnati was employed to assist. The petition for leave to file the bill of review was filed by the counsel at Cincinnati, August 6, 1907. It does not appear that any change of conditions occurred meantime.

Reference is also made in the opinion of the majority of the court to the character of the appeal, and it is suggested that it is the appeal of the "assignees." But I think, when construed by the whole record, it may properly be regarded as the appeal of the original parties. The privilege of prosecuting the suit in the court below would

seem to carry with it the right to appeal if there should be occasion. As elsewhere said, the bill presented only a controversy to which the original defendants were parties plaintiff, and it is plain that that was the controversy intended to be removed to the appellate court. Evidently the parties have so understood it. There has been no motion to discuss the appeal, and it has been argued and submitted without any controversy on that point. This court has, instead of dismissing the appeal as it should have done if it was deemed fatally defective, entertained it, considered the case on its merits and now affirms the decree.

Restoration of the premises is, as I have said, an incident to the remedy. The remedy of the grantee of the baseless title in such a case would seem to be an action against his grantor to recover the consideration paid.

The proper order would be to reverse the decree of the Circuit Court, and to direct that the original decree be reversed, and the original bill dismissed, and for a restoration of the possession of the premises

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VELIE MOTOR CAR CO. v. KOPMEIER MOTOR CAR CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1912.)

No. 1,765.

1. CONTRACTS (§ 10*)—REQUISITES AND VALIDITY—MUTUALITY OF OBLIGATION.

By a written contract, plaintiff, an automobile manufacturing company, purported to grant to defendant for the term of a year the exclusive right to sell its machines within certain territory, and agreed that its machines should be invoiced to defendant at stated prices. The contract required defendant to deposit $1,000, to order at least 50 machines during the year, and sell under a guaranty for a year and to maintain a repair shop and keep at least one machine in stock for exhibition. Plaintiff did not obligate itself to sell to defendant any machines and reserved the right to return the deposit and cancel the contract at any time. *Held*, that whether the contract be regarded as one of sale or agency, so long as it remained executory it was void for want of mutuality and not enforceable against defendant.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21–40; Dec. Dig. § 10.*

Mutuality in contract, see note to American Cotton Oil Co. v. Kirk, 15 C. C. A. 543.]

2. CONTRACTS (§ 63*)—RECITAL OF CONSIDERATION.

A recital in a contract that each party has paid to the other $1 imports no consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 268; Dec. Dig. § 63.*]

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

Action at law by the Velie Motor Car Company against the Kopmeier Motor Car Company. Judgment for defendant, and 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

Following is the opinion of the Circuit Court, by Quarles, District Judge:

This is an action at law to recover damages for alleged breach of an executory contract entered into between the parties in the words and figures following: [Given hereinafter, in statement of facts by Kohlsaat, Circuit Judge.]

A general demurrer has been interposed to the reply, which may be done under the Wisconsin statute.

It is conceded in argument that this demurrer reaches back to the earlier pleadings and in effect challenges the complaint, whose legal sufficiency is the question now raised for decision.

The contention of the plaintiff is that this is a legal contract for the sale by the plaintiff to the defendant of 50 automobiles at a stipulated price; that the plaintiff was ready and willing to deliver such machines, but that the defendant repudiated the contract and subjected itself to liability to respond in damages for the breach. On the other hand, the defendant contends that this is an executory contract whose consideration is mutual promises and benefits and is in reality a contract of agency; that the plaintiff having reserved to itself by the terms of the contract the right to cancel the contract at its pleasure, a corresponding right arose in behalf of defendant; that this right to cancel the contract, arbitrarily conferred upon the plaintiff, destroys the mutuality, whether the contract be one of sale or agency; that until there has been some performance under the contract it was mere nudum pactum and would not sustain the present action.

It becomes our first duty, therefore, to construe the written contract. One may search in vain within the four corners of this agreement for any apt word of purchase or sale. The clause covering the supposed sale of the 50 machines appears to be in the following language: "In consideration of the above it is understood and agreed that the Velie automobiles shall be invoiced to the party of the second part at the following net prices, f. o. b. Moline, Illinois. Velie Touring Car, 50 cars $1,440.00 net f. o. b. Illinois"—and that defendant should order for shipment at least 50 before October 31, 1910. Standing alone the above provisions fall far short of a stipulation to sell 50 Velie machines to the defendant. The language employed is not apt for such purpose. Plaintiff nowhere agrees to sell or invoice a single machine. It is quite as consistent with the other theory that the defendant was to act as exclusive sales agent of the plaintiff, and that its commission would be measured by the difference between the invoice price and the price to be obtained from customers. But when the other provisions of the written contract are read, as they must be, in connection with the provisions above quoted, the conclusion becomes irresistible that this is in essence an agency contract.

(a) Defendant agrees to handle Velie automobiles under the following conditions: What right had plaintiff to impose any conditions as to the 50 machines on the theory that they had been sold outright to the defendant? These limitations and restrictions are inconsistent with the dominion conferred by an actual sale. "The second party agrees to sell these cars to their customers under a guaranty for one year, and to keep such automobiles as sold by them in good repair and satisfy their customers."

In Metropolitan National Bank v. Benedict, 74 Fed. 184, 20 C. C. A. 379, the court say: "The stipulations of the contract are not appropriate to a contract of sale. If it was a sale, and the commission company acquired the absolute title, what concern was it of the Benedict Company when they were sold? When one merchant sells goods to another, the seller never requires the buyer to enter into a covenant that he will sell the goods within a specified period. Such a requirement is inconsistent with the dominion over property which absolute ownership confers."

(b) The contract imposes upon the second party the duty of maintaining a repair shop at its own expense and to receive credit for broken or defective parts.

(c) The plaintiff reserves the right to send an expert to install any parts of such machines, the second party to pay for the time and expense of such expert.

(d) The stipulation binding the second party to maintain certain colors and equipment, would seem entirely inconsistent with the theory that the machines had been sold to defendant.

(e) The sphere of activity of the defendant is limited to a certain territory, and it may under no circumstances sell any automobiles outside of said territory without the permission of the party of the first part.

(f) By this contract the defendant is required to keep at least one Velie automobile in stock for inspection and demonstration, and to order for shipment at least 50 cars before October 31, 1910.

(g) This agreement expires by limitation on the 31st of October, 1910, the party of the first part having the right to return deposits and cancel this contract, and a letter written by them to the party of the second part shall have been sufficient notice. This contract is not transferable.

By the familiar canons of construction, all provisions of a contract must be resorted to, so that effect may be given to all of them if possible; and such construction, in order to arrive at the true meaning of the parties, may have recourse to the situation and circumstances attending the parties at the time the contract was made. U. S. v. Peck, 102 U. S. 64, 26 L. Ed. 46.

A careful analysis of this entire instrument, giving weight to each provision thereof, leaves little doubt that the central thought in the minds of the parties was that defendant was to handle the Velie car manufactured by plaintiff. Three-fourths of the terms and stipulations of the contract are devoted to this point. The term "handle" involves a suitable garage and equipment to keep a Velie car continually on hand for demonstration, to look after repairs and satisfy customers, and to sell the cars to customers at such prices as to reimburse itself for outlays and secure satisfactory profit.

This case is virtually ruled by Willcox et al. v. Ewing, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882, on both branches of the argument here presented. While the facts are not precisely the same, the reasoning of the court seems to cover the contentions here. The courts have often been called upon to construe contracts of this nature, many of which have been cited by defendant's counsel.

No useful purpose would be subserved by a review of these cases in detail. Each case depends on its own facts, and each differs in some particular from the case at bar; but the reasoning of all of them seems to sustain the view we have outlined.

In re Galt, 120 Fed. 67, 56 C. C. A. 470, in an elaborate opinion by Judge Jenkins, such a contract is construed and the distinction pointed out between a del credere commission and an outright sale. Williams Mower & Reaper Co. v. Raynor, 38 Wis. 127; Briggs v. Foster, 137 Fed. 773, 70 C. C. A. 349; John Deere Plow Co. v. McDavid, 137 Fed. 802, 807, 70 C. C. A. 422; Metropolitan Bank v. Benedict, supra.

In Thomas Manufacturing Company v. Knapp, 101 Minn. 432, 436, 112 N. W. 989, the court points out that the right of revocation is entirely inconsistent with the sale of specified goods. See, also, U. S. Rubber Co. v. Butler Bros. (C. C.) 132 Fed. 398.

Considerable stress has been laid in the argument on the provisions of the contract that these machines should be invoiced to the defendant at certain fixed prices, as indicating a sale of a fixed number of machines at stipulated prices. It will be observed, however, that the term "invoice" is not conclusive, and may be as properly used in a contract of bailment.

In Dows v. First National Exchange Bank, 91 U. S. 618, 630, 23 L. Ed. 214, the court say: "An invoice is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quality, and cost or price of the things invoiced, and this is as appropriate to a bailment as it is to a sale. * * * Hence, standing alone, it is never regarded as evidence of title." It is elementary that if this is an agency contract it may be terminated by either party (subject to certain conditions not here present). Moore v. Security Co., 168 Fed. 496, 498, 93 C. C. A. 652.

There is another difficulty with the plaintiff's position. This is purely an executory contract. There appears to be no valid consideration except mutual promises and benefits. The alleged payment of each party to the other of one dollar would not supply this lack of consideration, because, for aught that appears, the parties may have used the same dollar. Certainly such an exchange

would create neither benefit nor burden upon either. It is well understood that, to avail as a good consideration to such a contract, the promise must be absolute and certain.

In an instructive opinion by Dodge, J., in Hopkins v. Racine Co., 137 Wis. 586, 119 N. W. 301, such a contract is held to be a mere offer or option, which has no binding force unless and until the other party has accepted and thus become bound.

Under the clause in this contract providing for a revocation by the plaintiff and the legal consequences that flow therefrom, the consideration cannot be predicated on mutual promises and benefits. Therefore another essential element of a binding contract appears to be wanting.

Whether the contract be one of sale or bailment, while it remains executory there must be mutuality. This familiar doctrine is well set forth in the case of Atlee v. Bartholomew, 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103, and in Lowber v. Connit, 36 Wis. 183, where the court summarizes the law as follows: "The rule is well established that in order to bind defendant the plaintiff must also be bound by like conditions in the contract." The plaintiff has expressly reserved the right to cancel the contract, then defendant had a corresponding privilege to renounce the agreement, and no action lies on that account.

Having arrived at these conclusions, which are fatal to plaintiff's contention, it is quite unnecessary to consider the other point raised by the defendant that the plaintiff was a foreign corporation doing business in the state of Wisconsin without having complied with section 1770b of the Wisconsin Statutes 1898.

For these reasons the demurrer must be sustained.

Plaintiff in error, hereinafter termed plaintiff, filed its verified complaint at law to recover damages for breach of the following contract, made an exhibit to said complaint, viz.:

"This agreement, made and entered into this 23d day of September, 1909, by and between the Velie Motor Car Company, of Chicago, in the state of Illinois, party of the first part, and Kopmeier Motor Car Company, of Milwaukee, in the state of Wisconsin, party of the second part.

Witnesseth: That the parties hereto, in consideration of the mutual benefits to be derived from the faithful performance of this agreement, and of $1.00 each to the other paid, the receipt of which is hereby acknowledged, do hereby covenant and agree to and with each other as follows:

The party of the first agrees and does hereby extend to the party of the second part, the exclusive right of sale during the continuance of this contract for the Velie line of automobiles in the following territory:

Manitowoc, Calumet, Winnebago, Waushara, Sheboygan, Fond du Lac, Green Lake, Marquette, Ozaukee, Washington, Dodge, Columbia, Milwaukee, Waukesha, Jefferson, Dane, Racine, Kenosha, Walworth, Rock and Green Counties in Wisconsin, including Appleton, Wis.

In consideration of the above, it is understood and agreed that the Velie automobiles shall be invoiced to the party of the second part at the following net prices, f. o. b. Moline, Illinois.

Velie Touring Car	.....	50 cars
Velie Tourabout	.....	$1,440 net
Velie Toy Tonneau	.....	f. o. b. Moline.
Velie Runabout for three passengers	.....	
Velie Runabout for four passengers	.....	
Velie Roadster for three passengers	.....	
Velie Roadster for four passengers	.....	
Extras Velie Touring Car Top	.....	Extra
Velie Roadster Top	.....	Extra
Glass Front	.....	Extra

Conditions.

Party of the second part agrees to handle Velie automobiles under the following conditions:

Second party agrees to sell these cars to their customers under a guaranty for one year. Second party agrees to pay all transportation charges to and

from factory, and to keep such automobiles as sold by them in good repair, and satisfy their customers.

It is distinctly understood that second party shall maintain a repair shop for the purpose of doing this work, and that the expense of installing any parts is to be borne by them; the party agreeing to furnish said parts such as are broken, or prove defective, and to give the party of the second part credit for these broken, or defective parts when they are returned to the factory.

In any case where it is necessary for the party of the first part to send a man to install any parts, party of the second part agrees to pay for the mechanic's time, and extire expenses.

In regard to colors, and equipment, second party agrees that such colors and equipment as are standard on Velie automobiles are acceptable to them. and for any special colors, or equipment, there shall be an extra charge.

Party of the second part agrees to sell automobiles strictly within the confines of the territory mentioned in this agreement, and under no circumstances to sell any automobiles outside of said territory without the permission of the party of the first part, and party of the second part agrees to anticipate automobile shipments at least thirty or forty days from the time they expect delivery, and to stick to standard color specifications wherever possible, and it is understood that if the party of the second part expect prompt deliveries, they must have their specifications in ahead of time.

Terms.

Party of the second part agrees to make a deposit of one thousand dollars with contract, $50 on each machine contracted for, and to honor sight draft, bill of lading for balance due when shipment is made. Twenty dollars thereof to be credited on each car as ordered.

Party of the second part agrees to keep at least one Velie automobile in stock for exhibition and demonstrating during the life of this agreement, and to order for shipment at least 50 before October 31, 1910.

The party of the first part guarantees Velie automobiles free from defect in material and workmanship, and will replace defective parts for a period of one year from date of sale; they being the judges as to whether the break is caused by defects, or abuse.

Party of the first part does not guarantee tires, batteries, coils, magneto, lamps, or plugs as we use only standard makes guaranteed by the manufacturers of same.

This agreement expires by limitation the 31st day of October, 1910, the party of the first part having the right to return deposits and cancel this contract, and a letter written by them to the party of the second part shall have been sufficient notice. This contract is not transferable.

In witness whereof said parties hereunto set their hands and seals the day and year first above mentioned.

Velie Motor Car Company,
By H. G. Moore, Secretary,
Party of the First Part.
Kopmeier Motor Car Company,
By W. J. Kopmeier, Secy. Treas.,
Party of the Second Part.

Approved at Chicago, Illinois, this ——— day of ———, 19 ——."

The complaint was afterwards duly amended. In this complaint, it is alleged that plaintiff, upon the execution of the contract, granted and extended to defendant the exclusive right of sale in the territory specified in the contract, and refrained from making any sales therein, and held itself ready and willing to deliver to defendant in error, hereinafter termed defendant, said automobiles as ordered. It is further therein alleged that defendant has neglected and failed to

purchase said automobiles or any of them; that on or about February 21, 1910, defendant, without just cause or excuse, repudiated the contract and all of it, and so notified plaintiff, and refused to purchase said automobiles or any of them; that after receiving such notice, plaintiff advised defendant of its readiness to perform the contract, and demanded that defendant carry out its part of same. Damages are laid at the sum of $9,000.

To this complaint defendant made duly verified answer, setting up the payment by it of $1,000 according to the terms of the contract, admitting its repudiation of the agreement, also admitting its receipt of notice from plaintiff requiring it to perform, and denying all matters not specifically admitted, qualified, or denied. Defendant further, by way of counterclaim, set up its deposit of $1,000, as required by the contract, asking that a return of the same with interest be adjudged, and that the complaint be dismissed. By way of reply, plaintiff admits under oath the receipt of the $1,000, denies the power of defendant to cancel the agreement, claims the right to apply the $1,000 on damages growing out of defendant's breach of contract, and renews its demand for $9,000 damages. Defendant thereupon files a general demurrer, a proceeding permissible under the Wisconsin statute, and which was held to reach back to the complaint. This was sustained by the court and leave was given to amend. Afterwards, said cause coming on to be tried by the court, a jury having been waived, and complainant having failed to amend its complaint within the time specified, and proof being produced as to the counterclaim, the court made its finding of fact and conclusion of law, and on December 21, 1910, proceeded to adjudge that the complaint be dismissed, and that judgment go against plaintiff for said deposit, together with interest at 6 per cent. per annum from February 21, 1910, being the sum of $1,050, together with costs taxed at $10, and that execution issue therefor. Thereupon the cause was brought to this court on writ of error.

The errors assigned are that the court erred: (1) In sustaining the demurrer and entering judgment thereon; (2) in sustaining the objection of defendant to the reception of evidence under the reply; (3) in rendering judgment against plaintiff for the deposit and interest and costs; and (4) in dismissing the complaint.

Jackson B. Kemper, for plaintiff in error.

Henry V. Kane, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). Plaintiff contends that the contract is, in law, an agreement for the sale by plaintiff to defendant of 50 automobiles at an agreed price which plaintiff was willing to perform, and that by repudiating the contract defendant subjected itself to liability to respond as for a breach.

Defendant, on the other hand, contends that the contract is an executory agency contract, the consideration for which rests in mutual

promises; that by reason of the option reserved by plaintiff to terminate it at its pleasure, defendant was entitled to a like option; "and that," in the language of the trial judge:

"This right to cancel the contract arbitrarily conferred upon the plaintiff destroys the mutuality, whether the contract be one of sale or agency; that until there has been some performance under the contract, it was nudum pactum and would not sustain the present action."

In support of its contention that the contract was one of sale, plaintiff cites the following excerpts from said contract, viz.:

"In consideration of the above, it is understood and agreed that the Velie automobiles shall be invoiced to the party of the second part at the following net prices, f. o. b. Moline, Illinois" (giving same).

"Party of the second part agrees to keep at least one Velie automobile in stock for exhibition and demonstrating during the life of this agreement, and to order for shipment at least 50 before October 31, 1910."

Also:

"The party of the first part agrees and does hereby extend to the party of the second part, the exclusive right of sale during the continuance of this contract for the Velie line of automobiles in the following territory:" (Some 21 counties in the state of Wisconsin.)

Plaintiff further contends that defendant held and enjoyed such exclusive right of sale in said territory from the time the contract went into effect, i. e., the fall of 1909, and that defendant thus having received the consideration agreed to be given to it, the contract was in part executed, and therefore not wholly executory.

For defendant the following clauses, in substance, of said contract are cited, in support of the claim that the contract was executory and one of agency. The contract imposes upon defendant certain conditions in the handling of Velie automobiles, in substance as follows, viz.: To sell under a one-year guaranty, to pay transportation charges to and from factory; to keep cars sold by them in good repair and satisfy their customers; and to maintain a repair shop; and also confers on plaintiff the right to return the $1,000 and cancel the contract, giving notice by writing a letter to that effect to defendant.

[1] From the foregoing, it will be seen that plaintiff did not obligate itself to sell and deliver to defendant any automobiles. It virtually reserved the right to do nothing at all. Defendant had the right to sell to its customers, but was entirely at the mercy of plaintiff when it came to filling the order. Whatever automobiles plaintiff might choose to supply to defendant were to be invoiced at a stipulated price. None in fact were ever ordered by defendant.

In Dows v. First National Exchange Bank, 91 U. S. 618, 23 L. Ed. 214, it is said, "An invoice is not a bill of sale nor is it evidence of sale." Unless the defendant received a consideration for its undertakings by being given the exclusive right to sell within the given territory, the contract lacks mutuality. But it will be seen that such right, if any, was made subject to plaintiff's right to arbitrarily, and without assigning any cause, cancel the contract. Defendant might well decline to go to the expense and trouble of advertising and de-

veloping the territory named, when its rights might at any time be terminated.

Whatever construction should be given to the contract, whether it be one of sale or of agency, while it remains executory there must be mutuality. Attel v. Bartholomew, 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103; Lowber v. Connit, 36 Wis. 183.

Can it be said that any exclusive right to sell in the territory named passed to defendant under the facts as here presented? In American Agricultural Chemical Company v. Kennedy (1904) 103 Va. 171, 48 S. E. 868, the court, dealing with this question, says:

"In this case the plaintiff made a proposition to sell, which the defendants accepted, but the plaintiff's offer left it optional with it whether or not it would sell. It did not bind itself to sell. The defendants made no continuing offer to purchase. Their engagment was to purchase upon the terms and conditions stated in the plaintiff's proposition to sell. As that proposition did not bind the plaintiff to sell, there was no consideration for the defendants' promise to purchase, and, as we have seen, neither party was bound at that time. The plaintiff, after that time, never did any act or made any promise which bound it to complete the contract. There never was a time when the defendant had the right to tender the price and demand the fertilizer. In the absence of such obligation on the part of the plaintiff and of such right on the part of the defendants, there never was a binding engagement between the parties which a court of law would enforce."

[2] It is a fundamental rule of law that contracts, in order to be binding, must be mutual. 9 Cyc. 327, and cases cited. The phrase of the contract which reads, "and of $1.00 each to the other paid," etc., imports no consideration. As said by the trial judge, it may well mean the exchange of the same dollar. Taking into consideration the whole contract, we are of the opinion that by reason of want of mutuality the contract is, under the circumstances, unenforceable.

There was no error in the judgment of the Circuit Court, and it is therefore affirmed.

GIBSON et al. v. MANETTO CO.

(Circuit Court of Appeals, Fifth Circuit. March 5, 1912.)

No. 2,219.

SHIPPING (§ 54*)—CONSTRUCTION OF CHARTER—DEMISE OF VESSEL.

A time charter of a small schooner, "including three men," to be used by the charterer in a business stated, for a monthly hire, *held* to constitute a demise of the vessel, which rendered the charterer liable for her loss through its own negligence, or that of the master or crew.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219–221; Dec Dig. § 54.*]

Appeal from the District Court of the United States for the Southern District of Florida.

Suit in admiralty by William H. Gibson and another, as owners of the schooner Emma Eliza, against the Manetto Company. Decree for respondent, and libelants appeal. Reversed.

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

September 18, 1909, William H. Gibson and Joseph H. Gibson, appellants, hired to the Manetto Company, appellee, the Emma Eliza, a small 21 or 22 ton schooner. The contract of hiring was reduced to writing as follows:

"Key West, Fla., Sept. 18th, '09.

"Messrs. Gibson & Bro., Key West, Fla.—Gentlemen: We will pay you for the use of your schooner Emma Eliza, including three men, for use in hauling bark lumber supplies, etc., between Shark River and Key West, the sum of $175.00 per month. You are to keep the boat in repairs. Payment made monthly. The Manetto Co., by A. B. Sanders.

"Accepted: Gibson & Bro."

On September 27, 1909, the said schooner filled with water and sank and became a total loss. Thereupon the Gibsons, appellants, who had not been paid for the vessel, nor for her use, filed a libel against the Manetto Company, praying judgment for the value of the vessel, $2,500, and $175 for her charter for one month. In the libel it was alleged that the loss of said schooner was due solely to the improper manner in which a certain boiler was stowed by the agents or employés of the Manetto Company.

The respondent filed answer, specially pleading that the contract of hiring was in writing and as above set forth, and admitting the loss of the schooner, but denied all negligence and responsibility for the same, and, further answering, said that, at the time it hired or chartered the said schooner Emma Eliza, the said H. E. Bullard was the master of said schooner and placed in command thereof by the libelants; that he, the said H. E. Bullard, was the registered master, as appears by the records of the custom house at Key West, and was such registered master continuously up to the time of the loss thereof, and whose authority as such master was always recognized by this respondent.

On the hearing the libelants proved as follows: Before the Emma Eliza was chartered to the Manetto Company, Sanders, the agent of the company, looked at her with the object of hiring her to take a boiler and bed plate to Shark River; but he and the Gibsons came to the conclusion that she was too small for that purpose. On September 27, 1909, there was, under orders of the Manetto Company, loaded on the deck of said schooner at Shark River, this same boiler and bed plate to be transported to Key West. On the voyage the boiler rolled from the bed and went over the side of the schooner, where it hung by chains, which had been used to secure it to the bed. After ineffectual attempts to release it, the vessel filled with water and sank, and became a total loss. The respondent proved that Bullard, one of the men furnished by the libelants with the schooner, acted and was recognized as master.

On the hearing the District Judge found that under the contract there was no demise of the schooner, and that the libelants' agents were responsible for the bad stowing of the boiler, if there was bad stowing, and that the proximate cause of the loss of the schooner was the negligence of the master of the vessel in failing to note and prevent the slipping and rolling of his cargo, and he further found: "It also appears satisfactorily to the court that it was at the request and desire of the master that the vessel put to sea at night, so as to be in Key West early the next day. The court is satisfied that, had the trip been made in the daytime, and the master watchful and careful about the moving of the chocks and shores, and retained the cargo where it was originally placed, there would have been no trouble, and therefore the proximate cause of the loss was the negligence of the master. The court fails to find the respondent or its agents in any way liable for the loss of the vessel, and the libel must be dismissed; each party paying its own costs."

On the dismissal of the libel, the libelants below sued out this appeal.

Jefferson B. Browne, for appellants.

G. Bowne Patterson, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). Taking the written contract between the parties—and we do not find it materially varied by action of the parties thereunder—we are of opinion that there was such a demise of the schooner Emma Eliza as put the respondent company in complete control of the same and rendered it responsible for damages resulting to the schooner through its negligence. The general rule is that, where the owner parts with the possession, command, and navigation of the ship, the hirer becomes the owner during the term of the contract, and may appoint a master, and ship the mariners.

In United States v. Shea, 152 U. S. 178, 14 Sup. Ct. 519, 38 L. Ed. 403, a suit was brought to recover damages under a contract for hiring which provided, among other things, as follows:

"Article 1. That the said Daniel Shea shall provide and furnish to the party of the first part, whenever called upon during the fiscal year ending June 30, 1887, such vessels of the description hereinafter given as may be required to take the place of the vessels now performing service for the U. S. army between New York City and Governor's Island, New York, Governor's Island and Sandy Hook, and New York Harbor generally, respectively, the steamers Atlantic, Ordnance, and Chester A. Arthur. That the vessels furnished as aforesaid must each have an engineer and fireman, and conform to the following conditions, viz.: The steamer to take the place of the Chester A. Arthur must be of about the size and the character of the Chester A. Arthur, and the steamers to take the places of the Atlantic and Ordnance, respectively, must have the capacity for freight and passengers and be of the size and character of the steamer James Bowen. That all the vessels furnished must be staunch, in first-class order in every respect, well equipped, and conform fully to the requirements of the law. It is fully agreed that the fuel required by said vessels so furnished, while in service under this agreement, shall be supplied by the government, and that this contract shall commence on the 1st day of July, 1886. And it is further agreed that the party of the second part shall furnish, when required, the remainder of the crew, consisting of a captain, a mate, two deck hands, and a fireman."

In passing upon that case the court declared the law as follows:

"This case turns upon the construction to be given to the contract of May 28, 1886, taken in connection with the action of the parties thereunder. Was this a contract of hiring or for service? In Reed v. United States, 11 Wall. 591, 600 [20 L. Ed. 220], it was said by Mr. Justice Clifford, speaking for the court: 'Affreightment contracts are of two kinds, and they differ from each other very widely in their nature, as well as in their terms and legal effect. Charterers or freighters may become the owners for the voyage, without any sale or purchase of the ship, as in cases where they hire the ship, and have by the terms of the contract, and assume in fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, command, and navigation of the ship, and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment, sounding in contract, and not a demise of the vessel, and the charterer or freighter is not clothed with the character or legal responsibility of ownership. * * * Courts of justice are not inclined to regard the contract as a demise of the ship, if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer; but where the vessel herself is demised or let to hire, and the general owner parts with the possession, command, and navigation of the ship, the hirer becomes the owner during the term of the contract, and, if need be, he may appoint the master and ship the mariners, and he becomes responsible for their acts.'

"And subsequently, in Leary v. United States, 14 Wall. 607, 610 [20 L. Ed. 756], Mr. Justice Field thus discussed the question: 'If the charter party let

the entire vessel to the charterer, with a transfer to him of its command and possession and subsequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But, on the other hand, if the charter party let only the use of the vessel, the owner of the same retaining its command and possession and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case the charter party is a contract for the lease of the vessel; in the other, it is a contract for a special service to be rendered by the owner of the vessel. * * * All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command, possession, and control is incompatible with the existence at the same time of such special ownership in the charterer.'"

The court further said:

"No technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command, and control. * * * A demise may be for a day as well as for a year, and may be terminable at the will of the lessor. The pay, by the fourth article, was to be 'for each vessel employed.' Not only this, but the conduct of the parties in the execution of the contract removes all obscurity as to its scope and meaning. As the findings show, the vessel, the James Bowen, was furnished by petitioner, and was accepted and used by the defendants. During the time of its use it was under the exclusive management and control of the defendants. The very condition resulted which is the purpose and effect of a demise—the transfer of the exclusive possession, management, and control. The vessel was not, when injured, returned to the petitioner, but, when the repairs were finished, 'resumed work.' It is insisted by the defendants that there was no demise, because, as claimed, the petitioner did not contract to furnish one vessel for any length of time, and could, if he wished, change vessels. It is doubtful whether that is a correct interpretation of the instrument, and whether it was in the power of the petitioner, after a vessel had been tendered and accepted by the government, to substitute another therefor. But, even if it were so, the substituted vessel would pass into the exclusive possession of the government, the same as the vessel for which it was substituted. We think little significance is to be attached to the provisions in reference to furnishing a crew or supplying fuel. They were matters of detail, affecting the price to be paid, but throwing no particular light on the question of hiring or control."

This decision seems to control this case, where it is undisputed the entire control of the schooner Emma Eliza was in the contract transferred to the respondent. We so far agree with the trial judge that the proximate cause of the loss of the Emma Eliza may have been the failure on the part of the crew of the schooner to watch the chocks, but in the management and sailing of the schooner the crew were the servants of the respondent. Whether the trip should have been made in the daytime, whether the boiler ought to have been carried on board at all, or whether the crew was negligent in watching the chocks, the libelants were not responsible. The proof in the case is to the effect that the Emma Eliza was worth $2,500. Under the pleadings and evidence, the libelants should have had a decree for that amount.

The decree of the District Court is reversed, and the cause is remanded, with instructions to enter a decree in favor of libelants in the sum of $2,500 and for all costs.

BURLEY et al. v. COMPAGNIE DE NAVIGATION FRANCAISE.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1912.)

No. 2,027.

1. INDEMNITY (§ 14*)—JUDGMENT AGAINST INDEMNITEE—CONCLUSIVENESS AGAINST INDEMNITOR.

Where a person is responsible over to another by operation of law or by express contract, and he is fully informed of the claim and that the action is pending and has full opportunity to defend, the judgment, if obtained without fraud or collusion, will be conclusive against him whether he appeared or not; but it does not preclude him from setting up any defense, when sued for indemnity, which he could not have interposed in the former suit.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 41; Dec. Dig. § 14.*]

2. TOWAGE (§ 19*)—ANCHORAGE OF TOW IN ILLEGAL PLACE—COLLISION—LIABILITY OF TUG FOR INDEMNITY.

A tug in charge of a harbor pilot employed to tow a French barque which had loaded at Tacoma to an anchorage, there being a dense fog, anchored her in the channel where it was prohibited by ordinance without special permission from the harbor master, which was not obtained. When she had lain there for 24 hours, during which time the fog lifted but again settled down, another vessel leaving the port came into collision with her and was injured. The barque was held in fault for being anchored in an improper place and held liable in half damages, which she paid. *Held*, that the owners of the tug were liable over to her, it being the tug's duty, even if justified by reason of the fog in anchoring her where it did, to remove her when the weather cleared.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 41; Dec. Dig. § 19.*]

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

Suit in admiralty by the Compagnie de Navigation Francaise as owner of the French barque Amiral Cecille against Thomas S. Burley and Robert McCullough doing business as the Tacoma Tug & Barge Company. Decree for libelant (183 Fed. 166) and respondents appeal. Affirmed.

On November 9, 1904, the French barque Amiral Cecille, owned by the appellee herein, having taken on a cargo at Tacoma, Wash., employed the appellants to tow her to an anchorage in the harbor where she might lie until ready to clear from the port and be taken to sea by an ocean-going tug. About 3 o'clock of that day, the appellant Burley, who was a licensed pilot and manager of the appellant company, and who had handled 99 per cent. of all the ships which had come into the harbor of Tacoma for the preceding 11 years, and was familiar with the anchorage ground and moorings in the harbor, came with a tug to take the barque to anchorage. The captain of the barque made no designation of a place of anchorage. The appellant Burley was familiar with the ordinance of the city of Tacoma, which provided that ships should not be anchored in the harbor inside of a line drawn from the St. Paul & Tacoma Lumber Company's wharf to the Tacoma Warehouse & Elevator Company's elevator, except upon the written permission of the harbor master. He admitted, however, that he had often violated the ordinance, with the apparent tacit consent of the harbor master. The officers of the Cecille knew nothing of the ordinance. The appellant's tug made fast to the Cecille, swung her around, and towed her down the channel. The

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

weather had been very foggy, but when the tug went to the Cecille and commenced towing her, the fog had lifted. Before the anchorage was made, however, a thick fog shut down again. The tug continued with her tow, guided by the sound of a pile driver near by, until they had gone, as was supposed, approximately 200 feet beyond the pile driver, when the appellant Burley directed that the anchor of the Cecille be let go, and, according to his testimony, he directed that her officers pay out not exceeding four shackles of chain, the French measurement being in shackles of 15 fathoms each. The ship was anchored at about 4 o'clock p. m. As soon as the anchor was dropped, Burley left the barque, went on board the tug, returned to Tacoma, and went that evening to Port Townsend or Victoria to pilot an incoming vessel. From 4 o'clock of that day the fog continued very thick until about noon the following day, when for an hour or two it lifted, but about 2:30 p. m. of the 10th the fog closed down and remained dense until 8 o'clock on the following morning. At about 7:45 p. m. on the 10th, the stern wheel steamer Multnomah, running between Olympia and Seattle, by way of Tacoma, having left the dock at Tacoma bound for Seattle, pursuing what she believed to be her course, collided with the Cecille. The collision resulted in litigation, the result whereof was that both the Cecille and the Multnomah were held at fault, and as the Multnomah alone was damaged, the owners of the Cecille were required to pay one-half the damage, mounting to $4,063.13. The decree was rendered on January 10, 1906. The libel of the owners of the Multnomah alleged that the barque was at fault in that she was anchored in the fairway, and directly in the path of vessels bound in and out of the harbor of Tacoma, and at a point forbidden by the ordinance of the city of Tacoma to be used as anchorage for vessels, and in that she was allowed to remain there for a space of 24 hours.

The court found that the pilot, in leaving the barque at the place where she was anchored, knowingly violated a reasonable regulation prescribed by lawful authority, and said: "And for the consequences of his act while in the service of the barque as local pilot, the barque is liable to respond in damages. * * * There is no probability whatever that the accident would have happened if the ordinance had not been violated by anchoring the barque in that part of the harbor which I have referred to as the prohibited zone." On August 13, 1907, the appellee, having paid the amount for which it was so adjudged liable to the owners of the Multnomah, brought this libel against the appellants to recover said amount with costs and interest, on account of the negligent, careless, and wrongful act of the appellant Burley in anchoring the barque in the fairway in the path of vessels bound in or out of the harbor in violation of the ordinance of the city, also to recover demurrage for detention until December 12, 1904, in the sum of $3,500, and expenses of litigation in the sum of $1,670. On the final hearing the court allowed demurrage in the sum of $3,422.39 for the 30 days' detention of the Cecille on account of the collision, $4,339.90, the sum the appellee had paid in satisfaction of the decree against the Cecille, and $1,670.02, the cost of litigation and proctor's fees in that suit, aggregating $9,432.31, but left the question of interest to be determined upon the conclusion of further argument to be had thereon in the future. On May 8, 1911, in view of the fact that the long delay in bringing the case to a conclusion was chargeable equally to both parties, the court allowed interest at the rate of 3 per cent. per annum from the date of the filing of the libel, and decreed that the appellee should have and recover from the appellants $7,317.80, together with interest thereon from that date, and its costs and disbursements in the suit.

James M. Ashton, for appellants.

Hughes, McMicken, Dovell & Ramsey and Otto B. Rupp, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellants had notice of the suit of the owners of the Multnomah

against the Amiral Cecille, and the appellant Burley testified as a witness therein. If the present case were not complicated by the defense of the appellants that, when the Cecille was placed at anchor, those who were in charge of her paid out more chain by 15 fathoms than was directed by the appellants, and that thereafter and before the collision she dragged her anchor, we are of the opinion that the former decision would be res judicata as to the liability of the appellants; for when a person is responsible to another, by operation of law or by express contract, and he is fully informed of the claim and that the action is pending, and has full opportunity to defend or participate in the defense, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not. Washington Gas Co. v. District of Columbia, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712; Oceanic Steam Nav. Co. v. Compagnia Transatlantica Espanola, 144 N. Y. 663, 39 N. E. 360; Robbins v. Chicago, 4 Wall. 657, 18 L. Ed. 427; Lawrence v. Stearns (C. C.) 79 Fed. 878.

But if the appellants had appeared in the former suit, they could not properly have brought within the scope of the investigation the question whether the Cecille disobeyed their instructions as to the length of the anchor chain, or whether, after being moored, she dragged her anchor so as to swing into the fairway. Those questions would have been immaterial to the determination of the liability of the Cecille to the owners of the Multnomah. The judgment, therefore, does not preclude the appellants from setting up any defense which they could not have interposed in that suit. 23 Cyc. 1270, 1271; Bagley v. General Fire Extinguisher Co., 150 Fed. 284, 80 C. C. A. 172.

[2] But the court below held upon the merits of the case, irrespective of the effect of the prior adjudication, that the appellants were liable for the resulting damages for having placed and left the Cecille at the point where she was, and within the prohibited zone. We find from the evidence no ground to disturb that conclusion. Burley, it is true, testified that he habitually disregarded the ordinance; but the evidence of the harbor master was that the ordinance was enforced and that permission was granted to anchor within the prohibited zone only in cases of necessity. In his testimony given five years after the collision, he stated that if permission had been asked to anchor the Cecille where she was anchored, he would have granted it; but the fact remains that no permission was granted.

Spencer, in his work on Marine Collisions, § 106, states the proposition that where a vessel anchors in an unlawful position, it must suffer the consequences attending a violation of the law. And in The Scioto, 2 Ware, 360, Fed. Cas. No. 12,508, Judge Ware held that a vessel ought not to be moored and lie in the channel or entrance to a port except in cases of necessity; or, if anchored there from necessity, she ought not to remain there longer than the necessity continues. That if she does, and a collision takes place with a vessel entering the harbor, she will be considered in default. In The Pennsylvania, 19 Wall. 125, 22 L. Ed. 148, the court said:

"But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

The same was held in Richelieu Nav. Co. v. Boston Ins. Co., 136 U. S. 408, 422, 10 Sup. Ct. 934, 34 L. Ed. 398, and Belden v. Chase, 150 U. S. 674, 699, 14 Sup. Ct. 264, 37 L. Ed. 1218.

It is contended that the appellants were compelled by necessity to anchor the barque where they did, the fog being dense, and further progress being dangerous; and the rule is invoked that where necessity requires a vessel to be anchored in an unlawful place or in an exposed situation, if it uses the utmost diligence to avoid collision by making its situation known to passing vessels by every means at hand, it is not chargeable with fault, the exigencies of the case affording justification for what would otherwise be a fault. But the evidence in the case falls short of showing that the barque was of necessity in the place where she was at the time of the collision. At noon on the 10th, the fog lifted, and the weight of the evidence is that there was ample opportunity to move the barque to a safe anchorage. Until safe anchorage was found, the duty of the tug was continuous. The Printer, 164 Fed. 314, 90 C. C. A. 246. We do not say that the tug was required to stand by the barque until the fog lifted, but certainly it should be held that the tug ought to have been within call and within reach when the fog did lift, and an opportunity was given to complete the towage service. The barque was in a prohibited place, and in a place where she threatened danger to vessels pursuing their ordinary course through the fairway. Conceding that the appellants were not at fault in anchoring her at the place where she was anchored, we are of the opinion that the court below committed no error in holding that they were in fault in not removing her therefrom on the following day.

Counsel for the appellants contend that the finding of the trial court, that the weight of the evidence indicated that the barque did not change her location after anchoring and before the collision, is so clearly contrary to the testimony that it should not be permitted to stand, and asserts that no witness so testified except the first mate of the Cecille when introducing the log, and that the entire weight of the evidence is to the contrary. But we find in the record that not only did the first mate so testify, and the log so indicate, but that the second mate testified that the barque did not drag its anchor at any time before the 15th, and that the third mate testified that the barque dragged the anchor but once, and that was in the morning of the 15th. Also, that Capt. Coffin, the master of the steamer Flyer, which plied between Tacoma and Seattle, making four round trips each day, and who passed the Cecille very shortly after she was anchored on the 9th, testified that her position did not change at all on the 9th or the 10th. The evidence on which the appellants mainly rely is certain testimony as to the location where the ship was left. But we agree

with the court below that the appellant Burley must have been mistaken in determining, in the dense fog, the exact position of the Cecille at the time she dropped anchor, and that he erred when he estimated her distance to be within 200 feet of the government buoy, for it is shown that the government buoy was moored in 22 fathoms of water, and the barque's log states that the barque anchored in 40 fathoms. From the evidence as to the depth of the water in the harbor, it is inferable that the barque, instead of being within 200 feet of the position of the government buoy, was approximately 500 feet further out.

Nor do we find merit in the contention that the court, against the weight of the evidence, found that more anchor chain was paid out on the port anchor of the Cecille than Burley commanded. Her log states that 75 fathoms of chain were paid out. Burley testified that when the anchor was let go, more chain ran out than he wanted, and that after the chain was stopped, he went to the forecastle head and asked how many shackles were out, and that the answer was that there were from five to seven; he was inclined to think it was seven. He testified that he told the officers in charge that he wanted only 60 fathoms, or four shackles, of chain out, and that he told them to heave up two full shackles. Elsewhere he stated that the first mate told him that he had out seven shackles, and his concluding testimony on the subject was:

"When I left it was the understanding that when they got steam they were to heave up two full shackles."

Now, if it were true, as Burley testified, that seven shackles had run out, and that he directed them to heave up two shackles, the result was that under his authority the barque had out five shackles, or 75 fathoms, just what is shown by her log. On the appellant's own testimony, the court below was warranted in reaching the conclusion that with Burley's sanction the barque had out 75 fathoms of chain.

The decree is affirmed.

THE ELMER A. KEELER.

(Circuit Court of Appeals, Second Circuit. February 2, 1912.)

No. 156.

1. COLLISION (§ 125*)—SUIT FOR DAMAGES—REFERENCE TO COMMISSIONER—PROOF OF DAMAGES.

A preliminary survey of a vessel injured in collision, by surveyors chosen by both parties, is not conclusive upon either as to the extent of the injury, on a hearing before a commissioner appointed to ascertain the damages in a suit for the collision; but it is his duty to take proof, although the survey may be received and considered as an admission by agents of the parties.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 266–279; Dec. Dig. § 125.*]

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

2. COLLISION (§ 134*)—SUIT FOR DAMAGES—DAMAGES RECOVERABLE.
The fact that the owner of a vessel injured in collision made temporary repairs, so that she could be used, does not limit his recovery of damages from the vessel in fault to the cost of such repairs.
[Ed. Note.—For other cases, see Collision, Cent. Dig. § 288; Dec. Dig. § 134.*]

3. COLLISION (§ 125*)—SUIT FOR DAMAGES—EVIDENCE—FINDING OF COMMISSIONER.
A finding by a commissioner of the amount of damages recoverable in a suit for collision, confirmed by the District Court, *held* sustained by competent evidence.
[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 266–279; Dec. Dig. § 125.*]

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

Suit in admiralty for collision by Charles E. McWilliams and Adolph Dexheimer, as owners of the barge Daisy, against the steam tug Elmer A. Keeler; Elmer A. Keeler, claimant. Decree for libelants, and claimant appeals. Affirmed.

James J. Macklin and De Lagnel Berier, for appellant.
Herbert Green, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. [1] The only questions involved in this appeal relate to the amount of the damages and the proof relied on by the commissioner in ascertaining the amount. The commissioner says in his report:

"After the collision referred to, a survey of the damages sustained by the barge Daisy was held. Such survey was produced and offered in evidence; it set forth in detail the extent of the damages caused by the collision; it was made and signed by surveyors chosen by the libelants and the underwriters of the claimant; its corrections is in no manner attacked; it must, therefore, be accepted as showing the extent of the damages caused to the barge by the collision."

The claimant insists that this ruling was erroneous and that he was entitled to have the damages established by the testimony of witnesses produced and sworn and subject to cross-examination by him.

After the survey the libelants asked for bids and received four, ranging from $400 to $460, the lowest bid, $400, being claimed by the libelants and allowed by the commissioner. In other words, it is argued, that the commissioner found the survey conclusive as to the extent of the damages and accepted the lowest bid as establishing the amount of the damages.

Assuming the foregoing to be a correct statement of the commissioner's ruling, we are of the opinion that the survey was not conclusive, in the absence of an admission as to its accuracy. It is the duty of the commissioner in these cases to take proof to ascertain what the actual damage is. He is appointed for this purpose.

If the survey and the bid were conclusive, there was no necessity for a commissioner. They furnished all the testimony needed and judgment could have been entered automatically. The question to

be determined was what were the damages occasioned by the collision —what would it cost to place the Daisy in the condition she was in immediately prior to the collision. Upon this question the survey, the bid and the amount paid by the libelants, $45, for temporary repairs might properly be considered by the commissioner in reaching his conclusion, but they did not exempt the libelants from the duty of establishing their claim by common law proof. The ultimate fact to be ascertained was the actual damage, and this may have been $45 or $400 or any sum, between or outside of these two sums, which correctly represented the injury occasioned by the collision.

No case had been cited where a preliminary survey has been held to be conclusive and it seems to us that there is no logical foundation for such a rule. The claimant is entitled to have common law proof of the libelant's damage unless such proof has been expressly waived by his admissions or he is estopped by his acts. We do not think that he is precluded from insisting that the damages which he must pay shall be proved in the ordinary way.

The case of The William E. Ferguson, 108 Fed. 984, 48 C. C. A. 173, is relied on, but from the meager report, does not seem to be an authority for the contention of the libelants. The opinion says:

"The results of the survey, with recommendations, were set down in writing, and the person who made it testified to its accuracy."

Three experts were called to prove what would be the fair and reasonable value of making the repairs, one of them having joined in making the original survey. They differed in their estimate, placing the cost of repair at $465, $630 and $100 respectively. The opinion then proceeds:

"The commissioner found the fair value of necessary repairs to be $524.15. All the witnesses testified before him, and there is no reason shown for rejecting his conclusion."

In other words, the facts in the Ferguson Case were all established by testimony of witnesses.

We have considered the case thus far upon the theory that the appellant is correct in his contention that the commissioner decided the case upon the ground that the survey was conclusive upon the parties. Both parties seem to treat the case as though it were disposed of upon this ground, and that the finding of the commissioner could not have been upheld upon any other theory. We have dwelt upon this aspect of the case because of the statement by counsel that there was a difference of opinion among the members of the admiralty bar and that it would simplify the practice if the question were set at rest.

We are of the opinion, then, that the survey was not conclusive. It was, however, proper to be considered as an admission of the agent of the owner of the tug. It might be controverted and shown to be incorrect, but until this was done the bargeowner had a right to rely upon it as the formal conclusion of two experienced surveyors selected by the parties to ascertain the extent of the injury. The claimant was at liberty to show, if he could, that the survey proceeded upon an erroneous theory, or that injuries were included which were not attributable to the collision or that damages were fixed at

too high a sum. In short, the claimant was not precluded from proving any fact which tended to impeach the case made by the libelants.

A careful examination of this record, however, convinces us that it is not necessary to invoke the conclusiveness of the survey in order to sustain the commissioner's report, and that it can be upheld even if the survey, as such, be disregarded.

[2, 3] There can be no doubt that the libelants were entitled to recover all the damages occasioned by the collision. They were entitled to have the Daisy restored to the condition she was in prior to the collision. The fact that the libelants made temporary repairs is, in our view, immaterial. The theory that they are limited to the amount paid for such repairs would lead to the absurdity that if they had made no repairs at all and had used the barge in her damaged condition, they could recover nothing. The survey proceeded, therefore, upon correct lines, in pointing out the items of injury caused by the collision.

Robert E. Jensen, the libelants' surveyor, was sworn as a witness. He testified that the owner of the tug, Mr. Keeler, was present at the time the survey was made and that it "correctly states the damage which was found." After this testimony, the survey was offered and received in evidence without objection. Mr. Jensen also testified that he had estimated the cost of making the repairs in accordance with the survey and that it was $400.

Ira S. Bushey, a witness called by the claimant, was shown the survey and asked if he had any criticism to make regarding it, and he answered, "It seems correct." He also said, assuming that the survey correctly described the damage, the repairs should be made as stated. Mr. Bushey was one of the parties who put in a bid of $460 for making the repairs on the Daisy, and he swore that the time necessary to complete them would be "six working days."

There is no contradiction of this testimony, the claimant proceeding upon what we think was an erroneous theory, that the libelants, having made temporary repairs to the extent of $45, were precluded by that amount.

The finding of the commissioner was, therefore, amply sustained by proof other than the survey and is not dependent upon a ruling declaring the survey conclusive upon the parties.

The decree is affirmed with costs.

CHICAGO, B. & Q. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1912.)

No. 3,637.

(Syllabus by the Court.)

1. CARRIERS (§ 204*)—28-HOUR LAW—"ACCIDENTAL CAUSE" OR "UNAVOIDABLE CAUSE"—"DUE DILIGENCE AND FORESIGHT"—"WILLFULLY."

The measure of "due diligence and foresight" is that diligence and foresight which persons of ordinary prudence and care commonly exercise

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

under similar circumstances. And the due diligence and foresight which condition the anticipation and avoidance of the other incidental or unavoidable causes specified in the 28-hour law is that degree of diligence and foresight which reasonably prudent and careful men ordinarily exercise under like circumstances.

An "accidental or unavoidable cause" which cannot be avoided by the exercise of due diligence and foresight in the meaning of this law is a cause which reasonably prudent and careful men, under like circumstances, do not and would not ordinarily anticipate, and whose effects under similar circumstances they do not and would not ordinarily avoid.

"Willfully" means "purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 927; Dec. Dig. § 204.*

For other definitions, see Words and Phrases, vol. 1, pp. 62–70; vol. 8, p. 7560; vol. 3, pp. 2223–2225; vol. 8, pp. 7643, 7149, 7468–7481, 7835, 7836.]

2. CARRIERS (§ 37*)—28-HOUR LAW—EVIDENCE—CONCLUSION.

A train load of 17 cars of sheep started at 5 in the morning to make a run which ordinarily requires 11 hours. This train and its drawbars were inspected and found in good condition on the morning it started. In order to unload the sheep in time, it was necessary that this train should make the run in 12 hours. It was delayed about 2 hours by the breaking of a drawbar and chain of a train which met and passed it, by the slipping of a knuckle in the coupler which separated it into two parts and by the pulling out of two drawbars in its cars which made it necessary to draw the two parts of the train upon a side track and recouple them. Upon its arrival the company dragged the sheep out of two of the cars in the dark within the 36 hours, but left 15 of the cars unloaded until the next morning after the expiration of the 36 hours.

Held, there was no substantial evidence that the company willfully violated the law, and there was substantial evidence that it was prevented from unloading the sheep within the 36 hours by accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*

Liability of carrier for failure to feed, water, and rest live stock and for violation of the 28-hour law, see note to St. Joseph Stockyards Co. v. United States, 110 C. C. A. 435.]

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

Action by the United States against the Chicago, Burlington & Quincy Railroad Company. Judgment for the United States, and defendant brings error. Reversed and remanded.

Arthur R. Wells (James E. Kelby, on the brief), for plaintiff in error.

F. S. Howell, U. S. Atty.

Before SANBORN and CARLAND, Circuit Judges.

SANBORN, Circuit Judge. In an action against the railroad company under the 28-hour law, Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. Stat. Supp. 1907, p. 918; Supp. 1909, p. 1178), in which the defenses were that the company did not knowingly and

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

willfully violate the law and that it was prevented from complying with it by accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight, the court below instructed the jury to return a verdict for the plaintiff, and this ruling is specified as error.

Section 1 of the Act of June 29, 1906, provides that no railroad company engaged in the interstate transportation of sheep and other like animals shall confine them in cars more than 28 hours, without a request from the owner or person in custody, and then not more than 36 hours, "unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight." And section 3 declares:

"That any railroad company which knowingly and willfully fails to obey this prohibition shall pay a penalty of not less than $100.00 nor more than $500.00."

[1] The measure of "due diligence and foresight" is that diligence and foresight which persons of ordinary prudence and care commonly exercise under similar circumstances. And the due diligence and foresight which condition the anticipation and avoidance of the other accidental or unavoidable causes described in this law is that degree of diligence and foresight which reasonably prudent and careful men ordinarily exercise under similar circumstances. An "accidental or unavoidable cause" which cannot be avoided by the exercise of due diligence and foresight within the meaning of this law is a cause which reasonably prudent and cautious men under like circumstances do not and would not ordinarily anticipate and whose effects under similar circumstances they do not and would not ordinarily avoid. The Olympia, 61 Fed. 120, 127, 9 C. C. A. 393; United States v. Kansas City Southern Ry. Co. (D. C.) 189 Fed. 471, 477; Southern Pacific Company v. Hetzer, 135 Fed. 272, 281, 283, 284, 68 C. C. A. 26, 35, 37, 38, 1 L. R. A. (N. S.) 288; Chicago Great Western Ry. Co. v. Egan, 159 Fed. 40, 45, 86 C. C. A. 230, 235.

The shipment consisted of 17 double-decked cars of sheep. They had been confined in the cars about 18 hours when, at 5 in the morning on August 7, 1909, they started from Alliance for Aurora, which was 220 miles distant. The time ordinarily required for a freight train to make this run was 11 hours, and if it followed the usual course it would arrive by 6 or 7 in the afternoon. There were feeding pens where these sheep could be unloaded, fed, and rested at Alliance and at Aurora, but none properly equipped for the feeding and resting of this shipment between these stations and as sheep cannot be unloaded with facility on dark nights it was necessary, in order to prevent their confinement beyond the 36 hours during which the owner had requested their confinement, that they should arrive in Aurora by 7 in the afternoon, for it became dark about 8:30 or 9 p. m., and an hour and a half or two hours were required to unload them. This train was unavoidably delayed about two hours by this series of accidents. It was running east and was scheduled to pass freight No. 1918, which was coming west, at Birdsell. Train No. 1918 broke a drawbar at a station east of Birdsell, and when it had been chained

together again it broke the chain, and these accidents delayed its arrival at Birdsell so much that it delayed the sheep train there 30 minutes. At Reno, a station east of Birdsell, the knuckle of one of the automatic couplers in the sheep train slipped by, the train broke into two parts, the train crew were compelled to haul these parts onto a sidetrack, couple them together, permit a passenger train, that was some distance behind them, to pass and were then compelled to wait until this passenger train cleared the block before they proceeded, so that this accident delayed their train about 25 minutes. A quarter of a mile west of the station of Weir the sheep train pulled out two drawbars, one next to the engine and the other farther back in the train, and its crew was compelled to chain the forward part of the train to the engine and to draw it onto a side track at the station and then to go back and haul the rear part of the train to the same place and to couple them together again, and this accident delayed the train 55 minutes.

There is no evidence that any of these delays were caused by the negligence of the company or of its servants. There is undisputed testimony that the sheep train and its drawbars were inspected at Alliance, and that they were in good condition, that drawbars sometimes pull out and knuckles in automatic couplers sometimes slip by, that it is impossible to prevent such occasional accidents, and that the train dispatcher could not, from his practical experience, undertake to calculate when a train would be delayed by reason of the pulling out of drawbars. Such an unusual series of accidents, the pulling out of three drawbars, the breaking of a chain, and the slipping of a knuckle, causing three successive delays, is not the natural and probable effect of running a freight train 11 hours, and hence it is not conclusive proof of a lack of due diligence and foresight for the operators of trains to fail to anticipate it and to run the train on the theory that it will not occur.

There was no negligence in the failure to provide feeding pens between Alliance and Aurora for such loads of sheep or cattle, because only 11 hours were required to make the run.

There were three or four loading and unloading chutes and pens between the stations of Alliance and Aurora into each of which three or four cars could have been unloaded; but there is no evidence that the sheep in these 17 cars could have been unloaded and provided with food, water, and rest in these small pens at the way stations after the delays mentioned had occurred and before darkness fell on August 7, 1909. This was a through shipment, and the failure to unload the sheep under these circumstances at these way stations constituted no lack of due diligence to avoid the causes and effects of the delays.

[2] The conclusion is that the preponderance of the evidence in this case was that the railroad company was prevented from unloading these sheep within the 36 hours by accidental causes which could not be anticipated or avoided by that due diligence and foresight which reasonably prudent and careful men ordinarily exercise in like circumstances, and that there was not only no conclusive, but no sub-

stantial, evidence that it knowingly and willfully failed to comply with the law.

"Willfully" means "purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." St. Louis & S. F. Ry. Co. v. United States, 169 Fed. 69, 71, 94 C. C. A. 437. There is no proof of any such attitude on the part of this carrier. The natural and probable result of sending this train of sheep out of Alliance at 5 a. m. on August 7th was that it would arrive at Aurora and the sheep would be unloaded before dark on the afternoon of that day. Unforeseen and independent accidental causes, which reasonably prudent men under like circumstances do not anticipate and would not have anticipated under the circumstances of this case, turned aside the ordinary and natural flow of events and wrought an unexpected delay of the train. When this delay had occurred, the railroad company rushed it to Aurora at the rate of 28 miles an hour, and when it arrived there spent two hours dragging the sheep out of two of the cars in the dark until its servants became so exhausted that they could not continue the work. It was then suspended until daylight, when in an hour and a half the sheep walked out of the remaining 15 cars. Because there was no substantial evidence in this case of a willful violation of the law by the company, and because there was substantial evidence that it was prevented from unloading the sheep in due time by accidental causes which could not be anticipated or avoided by the exercise of due diligence and foresight, the judgment below is reversed, and the case is remanded to the court below, with directions to grant a new trial.

MOSBY et al. v. UNITED STATES, for Use of PRINTY & JONES.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1912.)

No. 2,167.

1. COMPROMISE AND SETTLEMENT (§ 17*)—CONCLUSIVENESS.

Where a dispute had arisen between a federal contractor and his sureties and certain subcontractors, and they undertook to settle the same, many different items being decided and disposed of on an ample consideration, full effect should be given to the settlement according to its terms.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 66–74; Dec. Dig. § 17.*]

2. COMPROMISE AND SETTLEMENT (§ 12*)—SETTLEMENT AGREEMENT—CONSTRUCTION.

Where a compromise settlement agreement between a federal contractor and subcontractors provided that it should include all debts due from the subcontractors or either of them to the contractor, except the bills of W. and brother, and except cash furnished the subcontractors during November and December, 1908, such contract covered per diem expense of the contractor's teams and freight on the contractor's outfit which he was compelled to transport to the works and to return therefrom by reason of the subcontractors' failure to put on additional teams

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

as required by the engineer officer in charge, though the return expense was not liquidated at the time of the settlement; such claims not being a part of the bills of W. and brother.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 54–74; Dec. Dig. § 12.*]

3. DAMAGES (§ 120*)—BREACH.

Where a federal contractor was required to take over the work let to subcontractors and finish the job, because of the subcontractors' breach of contract, the contractor's measure of damages as against the subcontractors was the difference between the contract price under the subcontract and what it actually cost the contractor to do the work.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291–305; Dec. Dig. § 120.*]

4. DAMAGES (§ 120*)—BREACH.

Where a federal contractor was required to resume a part of the work let to subcontractors and finish the same, he could not recover from such subcontractors expenses incurred in taking over and finishing the work, in the absence of allegation or proof that the work so done cost him more than the price he had contracted to pay the subcontractors, or that he was damaged by their breach.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 120.*]

5. COMPROMISE AND SETTLEMENT (§ 24*)—PARTICULAR ITEMS—QUESTION FOR JURY.

Evidence *held* to authorize a member of a firm, to which certain public improvement work had been sublet, to have submitted to a jury the question whether the contractor should account for $500 received from a note of such member, or whether the contractor should have credit for the amount so paid to the other member of the firm for its benefit.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 95, 96; Dec. Dig. § 24.*]

6. PARTNERSHIP (§ 143*)—PAYMENT TO PARTNER—INDIVIDUAL USE.

Where a federal contractor sublet a part of the work to a firm, receiving the proceeds of a note of one of the firm to be applied to the firm's benefit, and thereafter paid the amount to the other member of the firm for his individual use, the contractor would not be entitled to credit for such payment on an accounting with the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 229–232, 233½; Dec. Dig. § 143.*]

7. PARTNERSHIP (§ 143*)—FUNDS—PAYMENT.

Where a contractor pays money to a member of a firm holding a subcontract as and for a payment or advance to the firm, and without reason to believe that the partner receiving the money is not obtaining it for a legitimate partnership purpose, he is entitled to credit therefor as against the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 229–232, 233½; Dec. Dig. § 143.*]

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

Action by the United States, for the use of Printy & Jones, against W. L. Mosby and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Mosby took from the United States a contract for doing certain levee work on the Mississippi river, and Bruce and Cummings became his sureties on his statutory bond that he would pay all sums for which he became indebted for labor or materials on the job. The contract called for an estimated 175,000 cubic yards of filling at a price of 22 cents per yard, and reserved to the

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

engineer officer in charge power to determine how many men and teams should be kept employed. Having done part of the work, Mosby, in July, 1908, sublet the remainder, estimated at 150,000 yards, at a price of 19 cents per yard, to Printy & Jones. Mosby agreed to advance to Printy & Jones $1,500 to be used to pay their debts at their existing location and to pay freight on their outfit to St. Louis on its way to the new job. They were interested in their partnership in the proportions of two-thirds to Printy and one-third to Jones. Printy gave Mosby his note for $1,000, and Jones gave his note for $500; each note being secured by an individual mortgage. Mosby discounted these notes at a bank, and gave Printy & Jones $1,000 which was used for the debts as agreed. What Mosby did with the $500 is in dispute.

After Printy & Jones had proceeded some time with the work, the engineer officer notified Mosby he must put on 25 more teams. Mosby notified Printy & Jones to the same effect. They did not immediately comply. Mosby then shipped his own outfit of teams to the work, and took up the building of a part of the levee and finished the same so that the entire job was completed, within the time limit, December 31st.

Supplies of all kinds had been furnished to the jobs, and cash expenses of all kinds had been advanced and paid, by Walsh & Bro., of Memphis, who made the charges to Printy & Jones after they took on the work, but who looked ultimately to Mosby for their pay. When the work was about done, disputes arose between Printy & Jones and Mosby, and they attached Mosby's outfit. Thereupon a conference was held and a settlement reached. This settlement contract was put in writing, December 14, 1908, and its presently material parts are as follows:

"The mortgage of said Jones to said Mosby for five hundred dollars is to be kept out of the amount due Printy & Jones, and the records promptly satisfied upon receipt of government estimate. * * * This settlement includes and specifies all the debts due from Printy & Jones, or either of them, to W. L. Mosby, except the bills of * * * Walsh & Bro., of Memphis, Tennessee, and except cash furnished said Printy & Jones by W. L. Mosby during the months of November and December, 1908."

About January 1st, Mosby received from the United States the entire compensation, credited Printy & Jones with the agreed 19 cents for the amount of work which they had done, charged them with the various advances and supplies, and rendered them an account showing that they were indebted to him in the amount of $148. The portion of the work done by him and its cost and the amounts received therefor did not enter into this account, except as hereafter stated. Printy & Jones questioned some of the small items not now material, but denied liability upon three items, or classes of items, with which they had been charged on the account: (1) The $500 received through Jones' note, which Jones denied had ever been advanced to the partnership; (2) the freight cost of shipping Mosby's teams from their location to the levee work, and back again, in September and December, amounting to $1,440; and (3) a per diem charge for the teams while so being shipped back and forth, amounting to $1,484. Thereupon Printy & Jones brought this suit, in the name of the United States, but for Printy & Jones' benefit, against Mosby and his sureties. They defended upon the basis of Mosby's account rendered. Under the instructions of the court upon the various questions involved, it is evident that the jury allowed to Mosby the claimed balance of $148 and allowed to Printy & Jones the items just named, rendering a verdict in favor of Printy & Jones of $3,276, upon which verdict judgment was entered, and to review which Mosby and his sureties bring this writ of error.

Caruthers Ewing, for plaintiffs in error.

R. H. Stickley (Bacon & Stickley, on the brief), for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] The record indicates no reason for not giving full effect according to

its terms to the settlement agreement of December 14, 1908. A dispute had arisen. Mosby and his sureties, on the one side, and Printy & Jones on the other, undertook to make a settlement of the dispute. Many different items were recited and disposed of, and there was ample consideration.

[2] The items for per diem of teams and freight upon outfit amounted to $2,924. About half accrued, if ever, as debts from Printy & Jones to Mosby, in September. On December 14th, the remainder, for the return per diem and freight, if we may judge from the dates upon the account rendered, had not been liquidated. However, the coming expense and the return expense were of the same class; they were both elements of the damage accruing to Mosby because of Printy & Jones' contract default; and we think these charges, as an entity, were, on December 14th, fairly within the descriptive phrase "debts due from Printy & Jones to W. L. Mosby," and that their present assertion is therefore barred by this contract, unless they are within the exception, "bills of Walsh & Bro." It is clear and, indeed, is conceded, that the items for per diem cannot be brought within this exception, because Walsh & Bro. had nothing to do with these items. The freight had been paid by Walsh & Bro. in September, and was paid by them in December, and was later repaid to them by Mosby. Whether this phrase, "bills of Walsh & Bro.," as used by the parties at the time, was intended to cover, and so did cover, their bills against Mosby for what they did for him and charged directly to him, or was intended to be confined to their bills against Printy & Jones for which they looked to Mosby for pay, will be a question of fact for the jury to decide, if there should be another trial and if the pleadings shall be reshaped so as to permit the question to arise.

[3, 4] Upon the present record, these questions are immaterial, because Mosby can have no claim against Printy & Jones for the expenses incurred by Mosby in taking on and finishing up the job, except upon the theory that Printy & Jones breached their contract with him, whereby he was compelled to do the work himself, and that his measure of damages is the difference between his contract price with Printy & Jones and what it did actually cost him to do the work. Upon this theory, he should charge Printy & Jones with the entire cost to him of completing the work, and should credit them with 19 cents per yard out of the price which he received from the government. He did not shape his conduct, his pleadings, or his proofs according to any such theory. The record does not show what the total cost to Mosby was, but does show he appropriated to himself the entire price, 22 cents per yard, received for the part of the work which he did. There is nothing anywhere in the record to indicate that the work cost him more than 19 cents per yard, or that he was damaged at all by any breach of the contract which Printy & Jones may have committed. Under this state of the pleadings and proofs, Printy & Jones would have been entitled to a positive instruction that Mosby could not retain or set off any portion of this sum of $2,924. It therefore becomes unnecessary to consider the errors assigned by counsel for Mosby on this branch of the case. He suffered no prejudice.

[5] The question whether the $500 matter was open to litigation in spite of the compromise settlement is more complicated, but we cannot say that there was no issue upon this matter upon which plaintiffs had a right to go to the jury. By that contract, Jones agreed to pay the mortgage which he had given to secure the $500 note. After receiving the government money on finishing the contract, Mosby paid to the bank $513, the amount due upon this note which he had discounted at the bank. This amount he repaid to himself by charging the same to Printy & Jones in the account rendered which was the basis of this verdict, and that charge was not directly disturbed by the verdict. It therefore follows that Jones' agreement to pay the note has been performed, and that, in the matters which are now to be stated, there is no tendency to vary or modify this part of the terms of this written agreement.

In this account rendered, Mosby gave Printy & Jones no credit for the $1,000 which he had received in July on discounting Printy's note, nor for the $500 which he had received at the same time as the proceeds of Jones' note. He must excuse the failure to make these credits by the fact that he has not charged against them in the account the same $1,000 paid to them at their former location, nor the same $500, paid, as he says, to Printy at St. Louis. The payment of the $1,000 is conceded and so neutralizes the omitted $1,000 credit. As to the $500, Jones (who, at the time of the trial, seemed to be the active party plaintiff, Printy having gone away) claims, in terms or by necessary implication, that it was agreed Mosby should use this retained $500 as if it had been a special deposit with him by the partnership for the purpose of paying certain freight bills amounting to about that sum ($480.90); that such bills were paid by Mosby and stand charged to Printy & Jones in the account rendered; that at the time of the December 14th contract he (Jones) supposed Mosby, in his final account, would charge himself with the $500 received and take credit for this freight paid; that he did not know that any dispute or question existed on this point; and that he never heard of the alleged payment to Printy until he heard Mosby's testimony on the trial. If Mosby's theory is correct, and if he did pay this $500 to the partnership through Printy, that is an end of the question, and he does not need to depend on the December 14th contract. If such payment had not been made, then the partners had a right to assume that Mosby would not, in stating the Walsh bills, take credit for this $480 freight without charging himself with the $500 he received. Not only was Mosby's liability to account for the $500 he received not one of "the debts due from Printy & Jones, or either of them, to W. L. Mosby," but it cannot be supposed Printy & Jones were settling a controversy which they did not know existed.

We conclude, then, that the settlement contract did not prevent Jones from having submitted to the jury the question whether Mosby should account for the $500 he received from Jones' note, or, what is the same thing, whether Mosby should have credit for the $500 he claims to have paid Printy.

[6] Upon this subject it is clear that there was a general partnership and that a loan or advance to either partner for the partnership,

or if Mosby had reasonable belief that it was for the partnership, was, prima facie, a loan to the partnership. If, however, it was true, as was suggested to us by counsel on the argument, that this money was paid to Printy for his individual use, and with knowledge by Mosby that it was asked and received for Printy's then pressing personal needs, and in a way that would make it a fraud by both of them to charge it to the partnership, Mosby would not be entitled to such credit; and, as bearing on such question of fact, it will be material, if true, as Jones claims, that there had been this special agreement by Mosby to retain this $500 and use it himself to pay this freight for the partnership, as this would have some bearing on the good faith of Mosby's claim that he supposed Printy desired the money for that same purpose.

[7] The jury was charged, in effect, that Mosby was not entitled to credit for this item, if it was paid Printy for any other purpose except to pay this freight. This was too narrow a statement of the rule of partnership authority, and gave too much force to the disputed claim that the money had become a specific fund which could be devoted to a specific purpose only. If Mosby paid Printy the $500, as and for a payment or advance to the partnership of Printy & Jones, and having no reason to believe that Printy was not getting it for some legitimate partnership purpose, he should have the credit.

For this error, to which exception was noted, and upon which an assignment is based, the judgment must be reversed, and a new trial ordered, unless the plaintiffs below see fit to remit $500 from their judgment, as of the date of the judgment. If within 30 days they file here the certificate of the clerk of the District Court that such remittitur has been there filed, then such judgment will be affirmed. In either event, plaintiff in error will recover the costs of this court.

SANBORN v. BAY.†

(Circuit Court of Appeals, Eighth Circuit. March 4, 1912.)

No. 3,660.

1. BREACH OF MARRIAGE PROMISE (§ 18*)—EVIDENCE—ADMISSIBILITY.
   In an action for breach of marriage promise, wherein plaintiff relied on services in attending to defendant's business at his request, it was proper to permit her to testify what she received for attending to a third person's matters at defendant's request and for his benefit.
   [Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. §§ 21–25, 48; Dec. Dig. § 18.*]

2. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—EXCLUSION OF TESTIMONY.
   It was not reversible error to exclude a question asked a witness on the ground of indefiniteness, where counsel apparently made the question more definite and it was fully answered.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140–4145, 4151, 4158–4160; Dec. Dig. § 1048.*]

3. APPEAL AND ERROR (§ 1058*)—CURE OF ERROR—EXCLUSION OF TESTIMONY.
   In an action for breach of marriage promise, any error in excluding testimony for defendant that the parties had talked about plaintiff's

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

† Rehearing denied May 17, 1912.

property affairs was cured by defendant's immediately following testimony at length concerning conversations between the parties about her business affairs and property.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200–4206; Dec. Dig. § 1058.*]

4. EVIDENCE (§ 471*)—CONCLUSIONS OF WITNESSES.
In an action for breach of marriage promise, it was not error to exclude testimony by defendant as to what he had in mind in writing certain statements to plaintiff, on objection that the question called for conclusion, unless defendant communicated his intention to plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

5. APPEAL AND ERROR (§ 1058*)—CURE OF ERROR—EXCLUSION OF TESTIMONY.
Any error in excluding a question asked a witness was cured by his immediately following testimony, which fully answered the question ruled out.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200–4206; Dec. Dig. § 1058.*]

6. BREACH OF MARRIAGE PROMISE (§ 21*)—EVIDENCE—ADMISSIBILITY.
In an action for breach of marriage promise, it was proper to permit defendant to be asked: "If you did not intend to marry this girl, by these letters and by your own acts as you have detailed here, were you trying to play her, so as to get her time for your own benefit, and to get her influence to gather your aunt's property for you?"

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. §§ 28–30; Dec. Dig. § 21.*]

7. BREACH OF MARRIAGE PROMISE (§ 31*)—DAMAGES—EXCESSIVENESS.
It was not an abuse of discretion to refuse to set aside a $25,000 verdict for breach of marriage promise as being excessive, where plaintiff showed a pecuniary loss of more than $15,000, and testified that defendant told her he was worth more than $125,000, though he testified he was worth only $55,000.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. § 47; Dec. Dig. § 31.*]

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

Action by Ella R. Bay against James S. Sanborn. From a judgment for plaintiff (189 Fed. 521), defendant brings error. Affirmed. See, also, 194 Fed. 37.

George A. Mahan (Charles P. Bates, Edwin R. Winans, A. R. Smith, and Dulany Mahan, on the brief), for plaintiff in error.

Frank R. Aikens (Joe Kirby and Harold E. Judge, on the brief), for defendant in error.

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

ADAMS, Circuit Judge. This was an action at law to recover damages for a breach of promise of marriage. In addition to the usual and general damages resulting from such a breach, special damages occasioned by plaintiff's abandoning a lucrative business and rendering services and incurring expenses while attending to defendant's business at his request and in reliance upon his promise of marriage are claimed in the complaint. Upon issue joined the cause was tried

to a jury, and a verdict and judgment for $25,000 rendered in favor of the plaintiff. In this writ of error, prosecuted by defendant, no complaint is made of any of the proceedings below, except certain rulings on objections to evidence. Most of these rulings are so manifestly correct or unprejudicial to the defendant that they were disposed of at the hearing, and to them we will not again refer.

[1] It is contended, however, that the court erred in permitting the plaintiff, who was a witness in her own behalf, to answer this question:

"What amount did you as a matter of fact get and receive for your services in Mrs. Carpenter's matters?"

In view of the immediately preceding testimony given by her, to the effect that she had been attending to Mrs. Carpenter's matters at the instance and request of the defendant and for his benefit, this question was clearly material and relevant to the issue created by the pleadings.

[2] Again, it is claimed the court erred in sustaining the plaintiff's objection to this question, put to the defendant when a witness in his own behalf:

"Did you talk with her [plaintiff] in regard to her attempting to sell this Carpenter ranch at the places Miss Bay mentioned in her testimony?"

This question was objected to as "too indefinite," etc. The objection was sustained, and counsel obviously made the question more definite, as the defendant immediately afterward testified in a narrative way quite fully on the subject involved in the question. He said:

"I have no memorandum which enables me to fix the exact times at which I have talked with Miss Bay. I have met her at Chicago, Milwaukee, Toledo, Chamberlin, Parker, and Los Angeles; also in St. Paul and Minneapolis. I am not able to give the exact dates at which I had these talks with her at these different places. We talked about my aunt's [Mrs. Carpenter's] business affairs, and about disposing of the Carpenter ranch and general things, and about the times and conditions."

This seems to be a full answer to the question objected to. If it was not, it was open to defendant's counsel to clear it up by further definite questions; but none appear to have been asked.

[3] Again, after the defendant had testified, in answer to the question whether he and plaintiff had talked about her property affairs, that "they had," the court, on motion of plaintiff's counsel, ordered the answer to be stricken out. We fail to see why this was done. The evidence, if immaterial, was quite inoffensive. But, however this may be, the error, if any, was cured by the defendant's narration immediately following the ruling, in which he testified at length of conversations between himself and plaintiff about her business affairs and property.

[4] Many letters were shown in evidence in which defendant wrote plaintiff that she would not have to work any more, or words to that effect. In view of these letters, defendant, when on the stand, was asked by his counsel this question:

"In these letters received in evidence I notice statements in regard to her not having to work, or she should not work. In writing those statements, what had you in mind?"

This question was objected to as a conclusion, "unless he communicated it to her," and, there being no proffer of any further testimony to make it competent, the objection was sustained. In this we discover no error.

[5] The next question asked of the defendant, and objected to by plaintiff's counsel, and ruled out by the court, was this:

"What, if anything, did you say to Miss Bay, or she to you, regarding the amount she would realize from her profits on the option contracts, Exhibits A and B, if she made a sale?"

It would be useless to explain what was meant by these exhibits. Suffice it to say that, notwithstanding the objection, the question was fully answered in the narrative given by the witness immediately following. The question must have been so modified as to meet with the approval of the court, for the answer seems to be exhaustive.

[6] The next assignment of error is to the order of the court overruling defendant's objection to this question, put to him when on the witness stand on cross-examination by counsel for plaintiff:

"Mr. Sanborn, if you did not intend to marry this girl, by these letters and by your own acts as you have detailed here, were you trying to play her, so as to get her time for your own benefit, and to get her influence to gather your aunt's property for you?"

The court did not err in permitting this question to be asked. In view of the many protestations of love and affection which this record shows Sanborn made to the plaintiff, both in correspondence and personal interviews, we think the question was quite pertinent; and it seems to us that the defendant, instead of objecting to it, should have welcomed the opportunity to explain his conduct, if he had any explanation to make.

[7] Contention is made that the court erred in not setting aside the verdict as excessive. The record discloses that Judge Willard, who heard the motion for a new trial, gave a patient and exhaustive consideration to this contention, and among other things said:

"In the respects above noted this case is very unusual, and it may be doubted if a similar case ever occurred before where the woman, by reason of an engagement being broken, had actually suffered a pecuniary loss of more than $15,000. * * * In considering the damages in these cases, the amount of property which the defendant has can be taken into consideration. He testified that he was worth $55,000. She testified that he stated to her, when he made a will in her favor, that he was worth $125,000 and the value of his interest in the ranch besides. However that may be, the difference between her pecuniary loss of over $15,000 and the amount of the verdict, $25,000, is not, in my judgment, so excessive as to justify the court in interfering with the admitted province of the jury in such a case."

There certainly was no abuse of discretion in this ruling; and this conclusion precludes further consideration of it by us.

Discovering no prejudicial error in the proceedings below, the judgment is affirmed.

STRASSER et al. v. BULKLEY.

(Circuit Court of Appeals, Fourth Circuit. March 15, 1912.)

No. 1,051.

CONTRACTS (§ 226*)—CONDITIONS—OPTION CONTRACT—PERFORMANCE.

Plaintiffs, having obtained an option on certain coal land, obtained its extension on giving certain trustees a positive assurance in writing that the coal field would be accepted, and depositing $10,000 with a trust company as a forfeit. Thereafter plaintiffs entered into a contract with decedent and another, whereby they agreed to cancel their option and extension so as to enable decedent and his associate to obtain a direct option on the field, in consideration of which surrender decedent and his associate agreed that, in the event they "exercised" their option, they would pay plaintiffs $4 an acre for the land taken thereunder. The new option was entered into and extended, and thereafter plaintiffs entered into a new agreement with decedent that, if he "elected to purchase" from the trustees or owners of the coal land in accordance with the extension, plaintiffs were to have the same compensation provided for in the original contract. *Held*, that such latter agreement by which plaintiffs were entitled to compensation in case defendants "elected to purchase" was not the same as the former one requiring an "exercise" of the option, and hence, decedent and his associate having entered into a contract to purchase the land, plaintiffs were entitled to recover, though such contract was never in fact accomplished.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1033–1037; Dec. Dig. § 226.*]

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

Action by L. S. Strasser and others against Ella R. Bulkley, executrix of Henry D. Bulkley, deceased. Judgment for defendant, and plaintiffs bring error. Reversed.

Some time prior to June, 1902, the control of a field of the lower Freeport veins of coal, underlying some 105 different tracts of land, belonging to as many different parties, situate in Alleghany and Westmoreland counties, Pa., had been secured to James McJunkin, George W. Reiter, John McMahon, Thomas E. Mallisee, and Albert Pahlman as trustees, and on June 23, 1902, these trustees, by written agreement, optioned this coal field to L. S. Strasser and T. C. Watkins, two of the plaintiffs herein, for a certain period and upon terms and conditions set forth. On October 3, 1902, this option was extended until April 1, 1903, provided on or before December 1, 1902, "positive assurance in writing" was given the trustees that the coal field would be accepted, and $10,000 was deposited in a Pittsburg Trust Company as a forfeit. On October 11, 1902, Strasser, Watkins, with Robert Heerlein, whom they had manifestly, in the meantime, joined in interest with them, holding this option, entered into a contract with H. D. Bulkley and J. Wilcox Brown, of Baltimore, whereby it was in substance agreed that Strasser, Watkins, and Heerlein should surrender and cancel this option and its extension; that Bulkley and Brown should take from the trustees direct an option for the field (under somewhat different and more liberal and explicit conditions as to mining rights), and, in consideration of such surrender by Strasser, Watkins, and Heerlein of their option, Bulkley and Brown should, in the event that they "exercised" this new option from the trustees to them, pay Strasser, Watkins, and Heerlein the sum of $4 per acre "on each and every acre so taken by them" thereunder. This new option between the trustees and Bulkley and Brown was entered into on this same 11th day of October, 1902. It was to run to April 1, 1903, but Bulkley

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

and Brown on or before January 2, 1903, were to deposit, as evidence of good faith, $1,000 in the trust company's hands, and, in case they should "exercise" the option, notice was to be given the attorney for the trustees on or before April 1st, and, after such "exercise" of the option, if the trustees were not able to convey at least 8,000 acres, Bulkley and Brown were not required then to take the field. The trustees extended this option to May 1, 1903, and subsequently to September 1, 1903, and thereupon, on March 12, 1903, Strasser, Watkins, and Heerlein and Bulkley and Brown entered into a further agreement whereby it was stipulated that "if said second parties hereto (Bulkley and Brown) elect to purchase from said trustees or owners the coal lands contemplated by the agreements heretofore made and referred to, under the options now outstanding or any extensions thereof, or new agreement relative thereto," then Strasser, Watkins, and Heerlein were to have the same compensation provided for by the original contract between them.

Bulkley and Brown had a complete technical examination of the coal field made by McRoberts, a civil engineer, who reported favorably to the purchase thereof by them, and on August 31, 1903, the day before the option, as extended, was to expire, a memorandum of agreement was made between Bulkley and Brown and the trustees which was next day embodied into a formal contract by the attorney for Bulkley and Brown and duly executed by them and the trustees, whereby, after reciting the option agreement and the extensions thereof, it is set forth: "Now the said H. D. Bulkley and J. Wilcox Brown, the said parties of the second part, hereby exercise their option and accept the coal covered by the option and agree to pay for the same under the terms and conditions of said agreements before referred to, subject to the revision of J. M. McRoberts, Eng., who is to determine what coal shall be paid for in pursuance of the various tests made in the field covered by said options. This being intended for and agreed upon by the respective parties hereto as an acceptance of the coal under the agreements and options above referred to. And it is further agreed by the said parties hereto that in the event of the failure of the said second parties to successfully finance and carry through the purchase of the said coal under said options hereby accepted, that they, the said first parties, will and do hereby release the said second parties from any claims, demands, actions or suits for damages or specific performance of contract." It is admitted that Bulkley and Brown entirely failed in successfully financing and carrying through the purchase of the coal, and did not, in fact, purchase an acre of it.

Strasser, Watkins, and Heerlein, for the use of Reinhardt and Brooks, instituted action at law in the court below based upon their demand of $4 per acre for 10,000 aggregate acres claimed under their contracts, above referred to, against Bulkley's executrix. A jury trial was had, and, by direction of the court, a verdict was rendered for the defendant and judgment was entered thereon in her favor, to which this writ of error has been sued out.

Edward M. Hammond (N. Rufus Gill & Sons, on the brief), for plaintiffs in error.

William S. Bryan, Jr. (A. De R. Sappington, on the brief), for defendant in error.

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

DAYTON, District Judge (after stating the facts as above). The decision of this case must practically be based upon the construction to be given the terms of the original and supplemental contracts between Strasser, Watkins, and Heerlein and Bulkley and Brown and the last contract (that of alleged acceptance) between the trustees and Bulkley and Brown.

The learned judge who tried the case below directed a verdict for defendant upon the theory that this last contract by its terms was in-

consistent and, that by reason of its last clause, in practical effect constituted the agreement to be an indefinite extension of the option.

Without discussing whether or not this construction is correct as between the parties to it, we must not overlook the fact that Strasser, Watkins, and Heerlein were not parties to it, and therefore it is only pertinent, as regards their rights and interests, in so far as it may, or may not, be held to be an "exercise" or acceptance under their contracts with Bulkley and Brown by which, alone, they are bound. Turning to these two contracts, we must concede, in fact it is not denied, that at the time the first one was executed they had, for a limited period, a vested right in and to the coal field in controversy, and that, in consideration of the surrender of this right and the agreement on their part that Bulkley and Brown might secure at once from the trustees a new option direct to themselves, Bulkley and Brown agreed that, in the event they should "exercise" their option, they would pay to them $4 per acre for each and every acre "so taken" thereunder.

It might well be a matter for discussion as to the construction to be placed upon the words "exercise" and "so taken" if they were subject to no further explanation than that afforded by their use alone in this contract, but it is vital in this connection to bear in mind that by the subsequent agreement, entered into March 12, 1903, the parties have removed all question as to their meaning in the use of these terms, for, in this last contract, the language is, "if said second parties hereto elect to purchase from said trustees or owners the coal lands," then Strasser, Watkins, and Heerlein were to have their compensation. To "exercise" the option might be held to require a complete purchase and full taking over of the title, but the words "elect to purchase" can be given no such meaning. To elect to do a thing and to actually do it are entirely distinct processes. We are to bear in mind that this contract, providing for election only, was the last and final one between the parties. Did Bulkley and Brown "elect to purchase" these coal lands? We think clearly so by their contract of August 31, 1903. They over and again say so therein, and the clause which the court below held to be inconsistent with such election only relieved them from claim for damages on the part of the trustees in case they financially failed in ability to do what they thereby elected to do. There was no release by Strasser, Watkins, and Heerlein of this right to demand compensation upon their election to purchase.

It necessarily follows that the court below erred in directing the verdict and entering the judgment complained of and that such judgment must be reversed and the case remanded with directions to set aside the verdict and award a new trial.

As this case is remanded for further proceedings therein to be had, we deem it proper to call the attention of the court below to the contract dated August 24, 1909, between L. S. Strasser, Thomas C. Watkins, and Robert Heerlein and O. E. Reinhardt and Matthew R. Brooks, with the suggestion that it is worthy of consideration as to whether or not the same is champertous in character.

Reversed.

CHESTERFIELD MFG. CO. v. LEOTA COTTON MILLS.

(Circuit Court of Appeals, Fourth Circuit. February 20, 1912.)

No. 1,061.

1. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.

The error, if any, in rejecting the testimony of a witness when offered in chief, is immaterial, where the witness is allowed to give the testimony in rebuttal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200–4204, 4206; Dec. Dig. § 1058.*]

2. EVIDENCE (§ 99*)—COLLATERAL FACTS—ADMISSIBILITY.

Whether evidence of collateral facts relevant to the issue shall be admitted is largely, if not altogether, within the sound judicial discretion of the trial judge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 123, 137–143; Dec. Dig. § 99.*]

3. EVIDENCE (§ 114*)—COLLATERAL FACTS—ADMISSIBILITY.

Where the issues were whether lots of cotton dyed by defendant for plaintiff had been dyed fast to scouring, or, if not, whether the fault was in the cotton supplied by plaintiff or in the dyeing, and samples of the cotton which plaintiff claimed was the material dyed were in defendant's possession, and there was no question but that defendant could dye properly, evidence that defendant had, during the period, dyed cotton fast to scouring for third persons was irrelevant, in the absence of proof that plaintiff's cotton was put in the same bath with the cotton of the third person.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 125–132; Dec. Dig. § 114.*]

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Greensboro.

Action by the Chesterfield Manufacturing Company against the Leota Cotton Mills. There was a judgment for defendant, and plaintiff brings error. Reversed.

David Stern (Stern & Stern and Rouse & Land, on the brief), for plaintiff in error.

E. S. Parker, Jr., and William P. Bynum (Parker & Parker, on the brief), for defendant in error.

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

ROSE, District Judge. The plaintiff in error was the plaintiff below. It will be called the plaintiff. The defendant in error will be referred to as the defendant. In August, 1906, the defendant began to dye cotton for the plaintiff. By their agreement, it was to be dyed sulphur black. The color was to be fast to scouring and cross-dyeing. For more than a year defendant's work was satisfactory. Plaintiff says, however, that the cotton dyed about the end of the year 1907 or the beginning of 1908 was not fast to scouring. Hence this suit.

To prove its case, the plaintiff examined practical men, who had seen the cotton complained of scoured in the ordinary course of manufacture, and theoretical experts, who had scoured it in their laboratories. Both classes said that it had not been dyed fast to scouring. Defendant put on the stand witnesses to say that they had examined and tested the cotton in controversy, and that its color was in the commercial sense fast to scouring. The defendant also offered testimony tending to prove that the trouble was due to the poor quality of the cotton sent by the plaintiff to be dyed, and not to any lack of care or skill in the dyeing. Had the evidence stopped at this point, there would have been nothing to call for our consideration. Defendant, however, went further. It put on the stand three managers of as many different cotton mills other than that of the plaintiff. It offered to prove by them that in the years 1906, 1907, and 1908 the defendant had dyed cotton for them. Two of them said that the cotton had been dyed sulphur black and was fast to scouring. The other said that by his direction his cotton had been dyed sulphur blue. He had heard no complaint about it from any of his customers. He assumed in consequence that the color had been fast to scouring. All this evidence was admitted over the objection of the plaintiff.

[1] The sole question before us is: "Did its admission constitute prejudicial error?" It is true that the plaintiff says that the court erred in rejecting some testimony of one of its experts. It is immaterial whether it did or not. The witness was in rebuttal allowed to give the evidence which had been excluded when he was under examination in chief.

[2] It is not easy to lay down any hard and fast rule as to when evidence as to what are sometimes rather loosely called collateral facts is admissible and when it is not. If these facts are relevant to the issue, it has been well said that the shortness of life is the only real reason why they should not be proved. Reeve v. Dennett, 145 Mass. 28, 11 N. E. 938. Whether evidence of such facts shall be admitted depends largely, if not altogether, upon the sound judicial discretion of the trial judge. Bemis v. Temple, 162 Mass. 342, 38 N. E. 970, 26 L. R. A. 254; 1 Chamberlain's Modern Law of Evidence, § 59.

[3] If the matters to which the three mill managers testified were in fact relevant to the issue between the parties, the admission of their evidence did not constitute reversible error. What was the issue? It was whether certain lots of cotton dyed by the defendant for the plaintiff had been dyed fast to scouring, or, if not, whether the fault was in the cotton or in the dyeing. There was no question that defendant could dye properly. It was admitted that for more than a year it had dyed plaintiff's cotton fast to scouring. The evidence under consideration was not offered to show the ability of the defendant to do what it had undertaken to do. If that had been an issue in the case, such evidence might well have been relevant. Reeve v. Dennett, supra.

Had it been proved, first, (a) that the plaintiff's cotton in controversy and that of the other three mills had been dyed in the same

baths, or (b) even that they had been in process of dyeing during the same period, that is to say, if it had been shown that part of plaintiff's cotton in dispute had been dyed first, then some cotton from one or more of the other mills, then some more of plaintiff's cotton, then some of that of the other mills, and so on, and, second, there had been evidence that the plaintiff had supplied a different, and for the purposes an inferior, cotton to that furnished by the other mills, we should hesitate to say that there had been error in admitting the testimony now complained of. Bradford v. Boylston Fire & Marine Ins. Co., 11 Pick. (Mass.) 162.

The record shows, however, that none of the plaintiff's cotton was ever put in the same bath with the cotton of anybody else. There is no clear evidence that at any time during the period in which the cotton in controversy was dyed for the plaintiff any cotton was dyed for any of the three mills. Unless that fact was affirmatively shown, we do not think that the matters testified to by the witnesses in question are relevant to the controversy. It is true that the defendant has offered evidence to show that during the three years 1906, 1907, and 1908, its methods of dyeing were uniform. It asks why, under such circumstances, the testimony in dispute is not admissible under the rule laid down in Ames v. Quimby, 106 U. S. 347, 1 Sup. Ct. 116, 27 L. Ed. 100.

If the jury believed that, during the entire three-year period, every lot of cotton had been dyed by defendant substantially like every other lot, the controverted testimony was superfluous. It was admitted that, during more than a year of that time, plaintiff's cotton had been well dyed. If that was true, and the jury believed that the dyeing had been done in the same way during the latter part of 1907 and the earlier part of 1908 as in the latter months of 1906 and earlier portion of 1907, there was an end of the case. The verdict would necessarily have been for the defendant. If they did not believe that every dye bath during that time had been in all material respects like every other dye bath, and that every other step of the dyeing process had at all times been carried on in substantially the same way, the evidence excepted to should not have been considered by them. It follows that it could not have aided them to find the solution of the problem before them. It might readily have confused them in seeking the answer.

From another standpoint there was no occasion for this evidence. The record shows that samples of the very cotton which plaintiff said was improperly dyed were in defendant's possession. It may sometimes happen that a party may, without fault of his own, in a case like this, be unable to subject the thing in dispute to the examination of his own experts, theoretical or practical. In such cases courts may be reluctant to say to him that he may not offer any evidence, because he cannot offer the best. We have no such case before us.

Was the cotton, samples of which were in possession of both parties, and some of which had been shown to the jury, dyed fast to scouring? was the question to be answered. The evidence to which the plaintiff objected was substantially of the same kind as that which

the Supreme Court, in the case of Albany & Rensselaer Company v. Lundberg, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. Ed. 982, held to be inadmissible. The rule is not a new one. It was applied more than a century ago. Holcombe sold Hewson beer. Hewson did not pay for it. Holcombe sued for the price. Hewson said the beer was bad. Holcombe offered to prove that he sold good beer to other people. Lord Ellenborough said that he could not do it. He might deal well with one, and not with the others. "Let him call some of those who frequented the defendant's house and drank the beer which he sent in, or let him give any other evidence of the quality of this beer." Holcombe v. Hewson, 2 Campbell, 391.

Reversed.

MERCHANTS' & MINERS' TRANSP. CO. v. ROBINSON-BAXTER-DISSOSWAY TOWING & TRANSPORTATION CO. et al. GENERAL CHEMICAL CO. v. MERCHANTS' & MINERS' TRANSP. CO. et al. MERCHANTS' & MINERS' TRANSP. CO. v. GILDERSLEEVE et al.

(Circuit Court of Appeals, First Circuit. February 8, 1912.)

Nos. 920-922.

1. COURTS (§ 405*)—FEDERAL COURTS—APPEAL—REHEARING.

The strict practice in the federal appellate courts permits a petition for rehearing to contain only a brief suggestion of the points sought to be raised without argument. Public Schools v. Walker, 9 Wall. 603, 19 L. Ed. 650.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1103; Dec. Dig. § 405.*]

2. ADMIRALTY (§ 118*)—REVIEW—QUESTIONS OF FACT.

An appellate court in an admiralty case, while required to give effect to its own judgment on questions of fact, where the evidence is conflicting, or where it is necessary to determine the preponderance to be given to one series of facts over another, may nevertheless give weight to the opinion of the District Court, and follow it when it is impossible to say that a contrary finding would be more likely to be correct.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758-775, 794; Dec. Dig. § 118.*]

On petitions for rehearing. Denied.

For former opinion, see 191 Fed. 769.

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

PUTNAM, Circuit Judge. In two appeals growing out of the collision between the Powhatan and a barge, in which our opinion was passed down on November 29, 1911, there have been two petitions for rehearing, one by the Powhatan in No. 920 and No. 922, and one by the Towing & Transportation Company in No. 921.

[1] The practice with reference to such petitions is clearly pointed out in Public Schools v. Walker, 9 Wall. 603, 604, 19 L. Ed. 650, in the following language:

"Where the court does not on its own motion order a rehearing, it will be proper for counsel to submit without argument, as has been done in the pres-

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

ent instance, a brief written or printed petition or suggestion of the point or points thought important. If upon such petition or suggestion any judge who concurred in the decision thinks proper to move for a rehearing, the motion will be considered. If not so moved, the rehearing will be denied as of course."

Thus the practice requires and only permits a brief suggestion of matters in which the court may have erred or which it may have overlooked, and where, on mere presentation, the court desires further consideration. The rehearing, properly speaking, occurs only after the petition has been filed and allowed, and the rehearing directed. The parties have in these cases anticipated and submitted briefs which are proper only after a rehearing is allowed, consisting on one appeal of 47 pages and on the other of 7 pages, going over practically the main questions involved in the original hearing.

[2] We have discovered two matters in the petition of the Powhatan which seem desirable to notice, although there is nothing in either of them which renders it necessary that we should do so. The petition undertakes to give special effect to the observations in the opinion in The Ariadne, 13 Wall. 475, 479, 20 L. Ed. 542, as to the weight to be assigned to the decisions of courts appealed from. These observations are in no sense a surprise; they were fully considered and explained by us in The Columbian, decided on April 12, 1900, 100 Fed. 991, 996, 41 C. C. A. 150. We have several times since considered the rule to which The Ariadne relates, and the modifications of it in later expressions of the Supreme Court, to the effect that it is only when two tribunals below concur that there is a strong presumption in favor of the combined authority.

Nevertheless, with qualification, the old rule always stands. This is illustrated in The Columbian by implication by the statement that a finding by the District Court alone will be followed by us, when "it is impossible to say" that a finding contrary to that of the District Court would be more likely to be correct. It is absurd to say that the decision of the District Court has no weight whatever on appeal, where the case is one of disputed facts, or one of the preponderance to be given to a series of facts on each side, even though there is no dispute as to their existence, and cannot be, but only a difference of opinion as to which mass of facts should preponderate. In our principal opinion we weighed the facts against each other; and the result certainly is that we cannot say that we are more likely to be satisfied with a conclusion, if we should reach it, different from that of the District Court. We carefully weighed the whole case; and it is nonsense to maintain that we abdicated the performance of the duty which the law imposed on us by declining to give our own opinion judicial effect.

The other proposition made by the petition in behalf of the Powhatan relates to marshaling the damages between the Powhatan and the tug. We confess that we do not know what is meant by the petitioner. It is true, as it says, that "it may be possible to subject the owners of the Powhatan to the payment of the entire damages occasioned by this collision." That necessarily arises out of the settled rule of law that an innocent person injured is entitled to full damages

from each of several tort-feasors until full compensation is received. All we did was to undertake to protect the Powhatan, so far as possible, in accordance with the rule laid down in The Sterling, 106 U. S. 647, 1 Sup. Ct. 89, 27 L. Ed. 98.

The only point in the cross-petition for rehearing is a new attempt to make some use of Wager v. Providence Insurance Company, 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013. Whether that case merely affirmed some preceding cases, or merely redecided what had before been decided, is of no particular consequence, and is purely a verbal criticism, although the court so far explained the law of the previous cases that it may be well to regard it as something more than a mere reaffirmation. We made no use of the case, and only laid it aside. We could not have laid it aside if the court had affirmed the decision in the Second Circuit to which it referred, or gone beyond holding that, as an appeal had not been perfected, that decision was conclusive for certain purposes. At any rate, it would take a very positive decision of the Supreme Court, squarely in point, to satisfy us that, with regard to the law of insurances, a person was not the insured who has expressly paid for insurance indorsed in any way on a policy to whom it might concern; although it is no doubt true that there may be cases where the insurance is covered into the freight in such a way that positive rights cannot be ascertained as clearly as they are ascertainable here. We will simply add further that, on propositions so clear as those before us to which this petition relates, we are concerned only with what the Supreme Court did in fact decide, and are not concerned with what it might have decided, if it had gone further than it did.

Ordered in each case that the petition for a rehearing is denied, and that the mandate issue forthwith.

ST. LOUIS & S. F. R. CO. v. UNDERWOOD.

(Circuit Court of Appeals, Fifth Circuit. March 5, 1912.)

No. 2,291.

1. APPEAL AND ERROR (§ 928*)—REVIEW—INSTRUCTIONS—PRESUMPTION.
   It will be presumed that a case was submitted to the jury on proper instructions, where the charge was not excepted to and it does not appear in the record.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.*]

2. NEGLIGENCE (§ 39*)—PLACE ATTRACTIVE TO CHILDREN—LUMBER PILE.
   The piling of lumber in an exposed situation and easily accessible to children of tender years constitutes actionable negligence.
   [Ed. Note.—For other cases, see Negligence, Cent. Dig. § 55; Dec. Dig. § 39.*]

3. NEGLIGENCE (§ 95*)—IMPUTATION OF NEGLIGENCE OF PARENT TO CHILD.
   The negligence of a parent is not imputable to a child in an action brought in the child's behalf.
   [Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 151-156; Dec. Dig. § 95.*
   Negligence imputed to infant, see note to Chicago G. W. Ry. Co. v. Kowalski, 34 C. C. A. 4.]

*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 Mississippi.

Action at law by Mary M. Underwood against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The material allegations of the plaintiff's declaration appear in the following statement of the case as prepared by counsel for the railroad company:

"Defendant in error recovered judgment against plaintiff in error on December 7, 1910, in the Circuit Court of the United States for the Northern District of Mississippi, in the sum of $2,500, on account of personal injuries sustained on September 19, 1907, while getting over a pile of lumber of plaintiff in error on its premises at Holly Springs, Miss. The negligence specified in the declaration is that plaintiff in error [hereinafter referred to as "defendant"] and its agents and employés stacked, near the residence of defendant in error [hereinafter referred to as "plaintiff"] 49 heavy pieces of oak timber, 4x10 inches by 16 feet, and that defendant and its agents and employés, in using said lumber, 'negligently, carelessly, and recklessly allowed said tiers to become loose and unsafe, and negligently, recklessly, and carelessly permitted said stack of timber aforesaid to become dangerous, unsafe, and liable to topple and fall at any time; that said defendant and its agents and employés negligently and carelessly allowed said large lot of lumber, stacked and piled in a public place, to become unsafe and dangerous, and negligently, carelessly, and recklessly used pieces from said stack of lumber in a dangerous and unsafe manner, thereby permitting said stack to become dangerous and unsafe and likely to topple and fall.' The declaration further charges that plaintiff, six years of age, and other children, were accustomed to play on said pile of lumber, and that on the 19th day of September, 1907, while plaintiff was so playing around said lumber, the same fell upon her, breaking both of her legs and permanently injuring her, and that defendant and its agents and employés knew that the pile of lumber was calculated to attract and entice children of a tender age to play thereon. Defendant's plea was, 'Not guilty,' and the pleas of the negligence of plaintiff's father, defendant's section foreman in charge of the pile of lumber, and the negligence of plaintiff's father and mother in allowing their daughter to play on the lumber in question. A further plea was the negligence of plaintiff in trying to cross and slide from the pile of lumber in a negligent and careless manner."

The cause was submitted to the jury under appropriate instructions, and a verdict was rendered in favor of the plaintiff. Judgment was duly entered upon the verdict, to reverse which the defendant prosecutes error.

W. F. Evans, E. T. Miller, J. W. Buchanan, Wm. C. Dufour, and H. Generes Dufour, for plaintiff in error.

Binford Watkins, James Stone, and T. B. Watkins, for defendant in error.

Before McCORMICK and SHELBY, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge (after stating the facts as above). [1] The issues of the case were submitted to the jury, and it must be presumed upon proper instructions, since the charge was not excepted to and it does not appear in the record.

[2] Examination of the testimony makes it evident that the material allegations of the declaration are supported by the proof. That the

conduct of the defendant, in placing the lumber in an exposed situation and easily accessible to children of tender years, constitutes actionable negligence, plainly appears by reference to the following authorities: Union Pacific Railway Company v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434; Spengler v. Williams, 67 Miss. 1, 6 South. 613; City of Vicksburg v. McLain, 67 Miss. 4, 6 South. 774; Mackey v. City of Vicksburg, 64 Miss. 777, 2 South. 178; Temple v. McComb City Electric Light & Power Company, 89 Miss. 1, 42 South. 874, 11 L. R. A. (N. S.) 449, 119 Am. St. Rep. 698, 10 Ann. Cas. 924. In the McDonald Case, 152 U. S. at page 277, 14 Sup. Ct. at page 625, 38 L. Ed. 434, Mr. Justice Harlan quotes the following language used by Chief Justice Cooley in Powers v. Harlow, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154.

"Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken."

[3] But it is insisted by counsel that if the father, who had charge of the lumber as section foreman of the defendant, was negligent, either in failing to keep the pile of lumber in a safe condition, or in permitting the child to play on it, that his negligence was imputable to the child. It should be borne in mind that this suit is brought, not for the benefit of the parents, but in behalf of the child, for injuries by her sustained. In such case the better rule, which is supported by the decided weight of authority, is that the negligence of the parents should not be imputed to the child. 1 Thompson's Com. Law. Neg. §§ 292, 293, 294; Westbrook v. Railroad Company, 66 Miss. 560, 6 South. 321, 14 Am. St. Rep. 587; Railway Company v. Hirsch, 69 Miss. 126, 13 South. 244.

The admission of the testimony objected to by the defendant was not prejudicial error. The moderate amount of the verdict rebuts any presumption of prejudice on the part of the jury.

Finally, it is objected that the court erred in permitting the witness Keel to testify that the pile of lumber was dangerous to children playing on it. We perceive no error in admitting the testimony. The question was one of fact, about which any one of ordinary intelligence might have testified. Besides, the evidence was merely cumulative, since the witness Wells had testified without objection to the same fact.

We find no reversible error in the record, and the judgment is therefore affirmed.

BELL et al. v. UNION PAC. R. CO.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1912.)

No. 3,525.

1. TRIAL (§ 420*)—INSTRUCTED VERDICT—MOTION—DENIAL—WAIVER.
Where defendant moves for an instructed verdict, or a judgment in his favor, at the close of plaintiff's case, and after a denial of his motion proceeds to introduce evidence in his own behalf, any exception to the adverse ruling is waived, unless the motion is repeated at the close of all the evidence, again denied, and an exception saved.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 983; Dec. Dig. § 420.*]

2. APPEAL AND ERROR (§ 671*)—ASSIGNMENTS OF ERROR—RECORD.
Assignments of error cannot be reviewed, where they call in question certain alleged erroneous rulings not shown by the record.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867–2872; Dec. Dig. § 671.*]

3. APPEAL AND ERROR (§ 719*)—RULINGS ON EVIDENCE—ASSIGNMENTS OF ERROR—NECESSITY.
Exceptions saved to rulings on the admission or rejection of evidence cannot be reviewed, where they are not made the subject of an assignment of error.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968–2982; Dec. Dig. § 719.*]

4. APPEAL AND ERROR (§ 273*)—EXCEPTIONS—SCOPE.
Where conflicting evidence is heard in an action at law tried by the court, and a general finding only made thereon, an exception to such finding, or to the judgment rendered, presents nothing for review on a writ of error.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1620–1630, 1764; Dec. Dig. § 273.*]

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

Ejectment by the Union Pacific Railroad Company against Frank O. Bell and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Eugene J. Hainer, Jerome H. Smith, and Stephen S. Abbott, for plaintiffs in error.

Dorsey & Hodges and E. I. Thayer, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was an action in ejectment, instituted by defendant in error to recover possession of a tract of land in Logan county, Colo. After issue was joined, a jury was duly waived, and the cause tried to the court. Evidence was heard, and after plaintiff rested the defendants moved for a judgment in their favor. This motion was denied, and exceptions were duly saved. Defendants, instead of resting their case and standing on their motion, proceeded to introduce evidence in their own behalf of a contradictory character to that offered by plaintiff; but no further or additional motion

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

for a judgment on all the evidence in favor of defendants was afterwards made, and, of course, there was no exception to a refusal to grant such a motion. The record reads thus:

"And thereupon the plaintiff rested its case" (in rebuttal). "And the above and foregoing is all the evidence given, offered, or received upon the trial of said cause. And thereupon, and on the same day, the court, being fully advised in the premises, renders judgment in favor of the plaintiff and against the defendants for possession of said property and for costs. To which judgment of the court, and to the entry thereof, the defendants, by their counsel, separately, then and there duly excepted, and an exception is allowed, and sixty (60) days from this day is allowed within which to tender bill of exceptions."

The assignment of errors is as follows:

I. "That the court erred in not granting a nonsuit in above-named case at the close of plaintiff's evidence, inasmuch as the plaintiff had not shown immediate right of possession to said premises."

II. "The court erred in not giving judgment for the defendants, on the ground and for the reason that an action in ejectment and for possession is a possessory action, and no right of possession follows from the proving or establishing of a title."

III. "The court erred in holding that the plaintiff had not waived the default alleged, proved, and under which plaintiff attempted to rescind a contract of sale from plaintiff to defendants herein."

IV. "The court erred in holding that the defendants had not the equitable right of paying the money into court, or to the plaintiff herein, for each and every amount due plaintiff under contract of sale, and retain possession of the land."

V. "The court erred in holding that a default, once acquiesced in, could be used for a forfeiture of contract, without personal notice to the parties in default under such waiver."

VI. "The court erred in holding, in substance, that the plaintiff was not required to pursue its remedy by strict common-law foreclosure of the premises involved, including the right of redemption."

VII. "The court erred in holding that defendants did not have right of redemption under the law, facts, and evidence of this cause, and the right to pay up all defaults and remain in possession of the land."

VIII. "That the verdict, findings, and judgment order and decree were against the law."

IX. "That the verdict, findings, and judgment order and decree were against the evidence."

X. "That the verdict, findings, and judgment order and decree were against both the law and the evidence."

[1] It has been invariably held by this court that when a defendant, at the close of plaintiff's case, moves for an instructed verdict or a judgment in his favor, and after a denial of his motion proceeds to introduce evidence in his own behalf, any exception to the adverse ruling is waived, unless the motion is repeated at the close of all the evidence, again denied, and due exception saved. As none of these things occurred in this case, the first assignment of error cannot be sustained.

[2] The second, third, fourth, fifth, sixth, and seventh assignments call in question certain alleged erroneous rulings of the trial court; but the record fails to disclose any such rulings, or any exceptions taken to them, if made. There was no finding of facts by the trial court, or no declarations of law embodying the legal propositions spec-

ified in these assignments, either given or refused, and necessarily no exception was taken to any adverse ruling thereon.

[3] There were several exceptions saved to rulings on the admission or rejection of evidence, by the defendant; but no such rulings are made the subject of an assignment of error, hence they are not reviewable.

[4] The remaining assignments are to the general effect that the finding and judgment, as rendered, were against the law and the evidence. It is settled by a long line of decisions that where evidence of a conflicting character is heard in an action at law, and a general finding only made thereon, an exception to such finding alone, or to the judgment rendered thereon, presents nothing for review. The cases in this court where each and all of the foregoing propositions are laid down are Barnard v. Randle, 49 C. C. A. 177, 110 Fed. 906, Mutual Life Ins. Co. v. Kelly, 52 C. C. A. 154, 114 Fed. 268; York v. Washburn, 64 C. C. A. 132, 129 Fed. 564, United States Fidelity & G. Co. v. Board of Com'rs, 76 C. C. A. 114, 145 Fed. 144; and School District No. 11 v. Chapman, 82 C. C. A. 35, 152 Fed. 887.

The judgment must be affirmed.

COURTENAY MERCANTILE CO. v. FINCH, VAN SLYCK & McCONVILLE et al.

(Circuit Court of Appeals, Eighth Circuit. March 7, 1912.)

No. 3,604.

BANKRUPTCY (§ 60*)—ACT OF BANKRUPTCY—"GENERAL ASSIGNMENT FOR THE BENEFIT OF CREDITORS."

An assignment of all of a debtor's property to an assignee, to convert into money and apply to the discharge of debts owing to such creditors as assented thereto and agreed to accept the dividend thereunder in full of their claims, was a "general assignment for the benefit of creditors," such as constitutes an act of bankruptcy under the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

Appeal from the District Court of the United States for the District of North Dakota.

In the matter of the Courtenay Mercantile Company, bankrupt. From a judgment adjudging bankruptcy (186 Fed. 352), said bankrupt appeals, adversely to Finch, Van Slyck & McConville and others. Affirmed.

George H. Stillman, for appellant.

A. E. Boyesen and H. H. Flor, for appellees.

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

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

WM. H. MUNGER, District Judge. The Courtenay Mercantile Company, a corporation, becoming insolvent in November, 1910, executed and delivered the following instrument:

"Minneapolis, Minn., March 3, 1911.

"Assignment, Courtenay Mercantile Co. to P. S. Preston.

"This agreement, made this 10th day of November, 1910, by and between Courtenay Mercantile Company, a corporation, of Courtenay, in the county of Stutsman, state of North Dakota, party of the first part, and Percival S. Preston, of the city of Minneapolis, county of Hennepin, and state of Minnesota, party of the second part, witnesseth: That the party of the first part, in consideration of the premises and the mutual promises herein contained and the sum of one dollar to it in hand paid by the party of the second part, has granted, bargained, sold, conveyed, and assigned, and by these presents does bargain, grant, sell, convey, and assign, unto said party of the second part, his successors and assigns, forever, all and singular its stock of goods, wares, and merchandise, book accounts, notes and all claims demands, and choses in action, with all evidences thereof and securities thereto pertaining, and all its lands, tenements, and hereditaments, wherever situate, to have and to hold the same unto the said party of the second part, his successors and assigns, forever, in trust, nevertheless, for the uses and purposes following, which the second party agrees to fulfill, to wit:

"(1) To take possession of said property, and to sell and dispose of same at public or private sale, with all reasonable diligence, and to convert the same into money; also to collect all claims, demands, and bills receivable hereby assigned, or to settle, compromise, and compound any thereof that are doubtful, or to sell and dispose of the same and reduce them to money as soon as may be, and with and out of the proceeds of such sales and collections:

"(2) To pay and discharge all the just and reasonable expenses, costs, and charges of executing and carrying into effect the trust hereby created, including reasonable compensation to the party of the second part for his services and expenses paid or incurred (including counsel fees) in executing the same.

"(3) To pay and discharge in full, if the residue of such proceeds be sufficient, all the debts and liabilities due or owing by the party of the first part, including interest thereon, to those of his creditors who shall become parties hereto by signing this agreement or copy thereof, and who shall in consideration of the premises undertake and agree, upon payment made, whether in whole or in part, as herein provided, to fully release, discharge, and absolve the party of the first part from and of all indebtedness to them, or either of them, now due or owing.

"And if the residue of said proceeds shall not be sufficient to pay said debts and liabilities and interest in full, then to apply the same so far as they will extend pro rata to the payment of said debts and liabilities and interest. And if, after payment as aforesaid, there shall be any surplus, to pay such surplus to the party of the first part, his executors, administrators, or assigns. The words 'party of the first part' herein shall be construed to mean parties of the first part.

"In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

"Courtenay Mercantile Co.,

"[Corporate Seal.] By J. B. Durkee, President."

This instrument was duly acknowledged and filed for record. Thirty-eight creditors, whose claims aggregated a little over $7,000, accepted the terms of the instrument. Twenty-four creditors, whose claims aggregated a little over $40,000, either refused or failed to signify their acceptance. On the 30th of January, 1911, certain creditors filed a petition in bankruptcy, praying that the said Mercantile Company be adjudged bankrupt, charging as the act of bankruptcy that on the 10th day of November, 1910, it made a general as-

signment for the benefit of its creditors to one Percival S. Preston, being the instrument heretofore mentioned. The Courtenay Mercantile Company filed its answer to the petition in involuntary bankruptcy, denying that it committed the act of bankruptcy alleged, or that it was insolvent. The case came on for trial, and was heard upon a stipulation as to the facts—the stipulation showing that, by the instrument above mentioned, the Courtenay Mercantile Company conveyed to Preston all of its property of every kind and nature; that the above-mentioned instrument was executed by the Courtenay Mercantile Company and delivered to Preston pursuant to a resolution of the board of directors of the Courtenay Mercantile Company; that Preston accepted the trust, and entered upon the discharge of his duties as trustee. The court held that the foregoing instrument was a general assignment within the meaning of the bankrupt law, and hence an act of bankruptcy, and adjudged the company a bankrupt. The Courtenay Mercantile Company brings the case here on appeal, and the single question is presented as to whether the above agreement was a general assignment within the meaning of the bankrupt law.

It is first to be observed that the instrument conveyed all of the property of the alleged bankrupt to a trustee, who was not a creditor, and for the benefit of creditors. No right of redemption remained, and bankrupt retained no interest, excepting to receive whatever property, if any, should remain after the entire payment of its indebtedness. In re Thomlinson Company, 154 Fed. 834, 83 C. C. A. 550, this court, passing upon the question as to what was a general assignment within the meaning of the bankrupt law, said:

"The 'general assignment' there contemplated is to be taken in its generic sense, and embraces any conveyance at common law or by statute by which the parties intend to make an absolute and unconditional appropriation of the property conveyed to raise funds to pay the debts of the vendor, share and share alike. Appolos v. Brady, 1 C. C. A. 299, 49 Fed. 401; Bartlett v. Teah (C. C.) 1 Fed. 768; In re Gutwillig (D. C.) 90 Fed. 475; Id., 34 C. C. A. 377, 92 Fed. 337; In re Sievers (D. C.) 91 Fed. 366; Davis v. Bohle, 34 C. C. A. 372, 92 Fed. 325. Such a conveyance inevitably thwarts operation of the bankruptcy act. * * * The instrument in question does not contain any of the elements of a mortgage, as insisted upon by bankrupt's counsel. The idea that it was intended as a security for the ultimate payment of the debts of the vendor, or that a reservation of a right to redeem whenever the vendor shall pay its debts was intended, is not remotely suggested by any of the terms of the instrument; in other words, there is no right of redemption reserved. The provision at the end of the instrument, requiring a surplus, if any, to be paid to the vendor, cannot be regarded as such reservation. It is nothing more than an expression of what the law implies. If, after all the property had been disposed of, and all the creditors had been fully paid, and all the expenses satisfied, any surplus remained, it belonged as a matter of law to the debtor, and no formal statement to that effect can change the legal and obvious import of the instrument from a general assignment for the payment of debts to a provision for their security in the nature of a chattel mortgage."

The rule thus announced is entirely applicable to the instrument executed by the Courtenay Mercantile Company; the only difference between the two being that, in the instrument of the Courtenay Mercantile Company, there was a provision that the proceeds should be distributed among the creditors who accepted the terms of the instru-

ment. This certainly did not change its character. So far as the Courtenay Mercantile Company was concerned, they conveyed all their property to the trustee for the benefit of their creditors, and the instrument speaks of the date of its execution and delivery. It could not be known at that time but that all of the creditors would accept its provisions. Had all the creditors accepted, it certainly would have operated as a general assignment. We do not think that the question as to whether an instrument of that character constitutes a general assignment or a mortgage is dependent upon the subsequent event of its acceptance by each and all of the debtor's creditors. In Griffin v. Dutton, 165 Fed. 626, 91 C. C. A. 614, the Court of Appeals of the First Circuit, said:

"Nor is it necessary that the assignment should be valid for all purposes; as, for instance, that the creditors should assent thereto. The language of the bankruptcy act is general. It makes no distinction between strictly valid instruments and those which may be invalid for certain purposes. To limit its operation to those assignments which are in all respects valid would be contrary to the intent and purpose of the act."

To the same effect, see In re Meyer, 98 Fed. 976, 39 C. C. A. 368.

It is established by the foregoing authorities that a general assignment for the benefit of creditors, within the inhibition of the bankrupt law, need not necessarily be one which is valid according to the state law. If its legal effect is a transfer of all the debtor's property to a trustee for the benefit of all creditors, share and share alike, who shall come in and prove their claims, and thus accept its terms, it constitutes a general assignment.

We are cited to the case of Joas v. Jordan, 21 S. D. 379, 113 N. W. 73, where the Supreme Court of South Dakota, construing a similar instrument, held that it was not an assignment, but a mere security, as it was for the benefit only of those creditors who assented to its conditions. The court in that case was construing an instrument with reference to the statutory laws of that state, and was not dealing with the question of an assignment under the bankrupt law. Our attention has not been called to any case by the Supreme Court of North Dakota holding that such an instrument is a security in the nature of a chattel mortgage.

We are clearly of the opinion that the instrument in question was a general assignment for the benefit of creditors, within the purview of the bankrupt law, and the decree is affirmed.

CHICAGO, B. & Q. R. CO. v. UPTON.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1912.)

No. 3,593.

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—RAILROADS—EXPLOSION OF LOCOMOTIVE—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a brakeman by the explosion of a locomotive, whether the engineer was negligent in permitting the water in the

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

boiler to get so low as not to cover the crown sheet, the natural result of which would be to cause an explosion, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010–1050; Dec. Dig. § 286.*]

2. APPEAL AND ERROR (§ 1059*)—EXCLUSION OF EVIDENCE—PREJUDICE.

Where, in an action for injuries to a servant by the explosion of a locomotive, the question of the defective condition of the boiler was withdrawn from the jury, defendant was not prejudiced by the exclusion of evidence to show that the engine itself was in proper condition, and that the explosion must have been caused by a lack of water.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4208; Dec. Dig. § 1059.*]

3. TRIAL (§ 260*)—INSTRUCTIONS—REQUEST TO CHARGE.

It is not error to exclude requests to charge substantially covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

4. EVIDENCE (§ 359*)—X-RAY PLATES.

X-Ray plates, the correctness of which had been verified by competent evidence, are admissible to show the extent and character of an injury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1509–1512; Dec. Dig. § 359.*]

5. APPEAL AND ERROR (§ 1004*)—QUESTIONS REVIEWABLE—EXCESSIVE VERDICT.

An objection that the amount of a verdict is excessive cannot be considered by the Circuit Court of Appeals on a writ of error.

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

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

Action by Morris H. Upton against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Byron Clark, B. L. Green, and James E. Kelby, for plaintiff in error.

Lionel C. Burr, Robert J. Greene, and Philip F. Greene, for defendant in error.

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

WM. H. MUNGER, District Judge. Morris H. Upton was an employé of the Chicago, Burlington & Quincy Railroad Company, as head brakeman on a freight train upon defendant's road. As such head brakeman, he was authorized to ride, when not actively engaged in his duties, in the cab of the engine. On the 18th day of November, 1909, while in the cab of an engine, drawing a train of freight cars upon which he was engaged as such head brakeman, the boiler of the engine exploded, causing injury to him, for which he brought this action.

Various acts of negligence on the part of the defendant and its employés were alleged in the petition; but the court in its instructions

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

to the jury eliminated all acts of negligence but one, submitting the question of negligence to the jury in the following language:

"The only question as to the defendant's negligence which you will consider is as to whether or not the engineer of this locomotive was negligent. All other questions of negligence are withdrawn from your consideration. As to the allegation that the negligence of the engineer caused this explosion, you are further instructed that the only question relating to his negligence which you can consider is whether or not the engineer was negligent in allowing the water to get so low as not to cover the crown sheet of this boiler at and immediately preceding the explosion. Unless the engineer was negligent in so allowing this, the plaintiff cannot recover in this action. * * * If you believe from the evidence that the conditions which resulted in the explosion of which plaintiff complains were created by accident, or other reasons which could not have been prevented or foreseen by the engineer while exercising the usual and ordinary care which a reasonably prudent engineer would exercise while using and operating said engine, considering the nature of the business in which he was engaged, then you will find for the defendant. * * * Before you can return a verdict in favor of plaintiff and against defendant, you must find some act of negligence or negligent failure to act on the part of the engineer in the use and operation of engine No. 2046, which was the proximate cause of there not being sufficient water in the boiler to prevent the explosion of which plaintiff complains."

A verdict and judgment was rendered in favor of the plaintiff, to reverse which this action is brought.

[1] It is first assigned as error that the court refused to direct a verdict for the defendant, based upon the theory that the evidence was insufficient to show negligence on the part of the company. The evidence discloses that the engine was equipped with a water gauge to indicate the quantity of water in the engine; that it frequently happened that this water gauge would be obstructed by a small particle of scale from the boiler, and there were three cocks for the engineer to use, which would determine with accuracy the quantity of water in the boiler. On the day of the explosion the hostler in the roundhouse started the fire and steamed up the engine, took it out of the roundhouse, and delivered it to the engineer. The engine was taken to a water tank and coal chute, and equipped with water and fuel, then attached to the train, and started upon its journey. It clearly was the duty of the engineer, before starting, to exercise ordinary care to ascertain if the engine was properly supplied with water. After it had proceeded some nine minutes, the explosion took place. The evidence, including the evidence of defendant's experts, we think, clearly established the fact that the explosion was caused because of the insufficiency of water in the boiler of the engine, and that the natural result of such deficiency would cause an explosion. The evidence was of a character sufficient to submit to the jury the question whether the engineer, having charge of the engine, had he exercised reasonable care under the circumstances, would not have known that the boiler was not sufficiently supplied with water. We think the court properly refused to direct a verdict for the defendant.

[2] It is further urged that the court erred in striking out and excluding certain evidence offered on the part of defendant. This evidence only tended to show the engine itself was in proper condition, and that the explosion must have been from lack of water. The ques-

tion as to the defective condition of the boiler, as we have seen, was taken by the court from the jury. Hence the exclusion of this evidence was in no way prejudicial.

[3] Exceptions were taken to the refusal to give certain requested instructions. Those applicable, however, were all substantially given to the jury in the instructions given by the court upon its own motion.

[4] It is further objected that the court admitted in evidence X-ray plates taken, showing the extent and character of plaintiff's injury. Their correctness had been verified by competent evidence, and were, we think, properly admitted. City of Geneva v. Burnett, 65 Neb. 464, and note, 91 N. W. 275, 58 L. R. A. 287, 101 Am. St. Rep. 628; Carlson v. Benton, 66 Neb. 486, 92 N. W. 600, 1 Ann. Cas. 159; Mauch v. Hartford, 112 Wis. 40, 87 N. W. 816. But it is said that, while prints taken from the plates may be admitted, the plates themselves are inadmissible. The contrary was held in De Force v. N. Y., N. H. & H. R. Co., 178 Mass. 59, 59 N. E. 669, 86 Am. St. Rep. 464.

[5] Again, it is urged that the amount of the verdict is excessive. That question cannot be considered by this court on error. Illinois Cent. R. Co. v. Davies, 146 Fed. 247, 76 C. C. A. 613; Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co., 154 Fed. 545, 83 C. C. A. 431; Nelson v. Bank of Fergus County, 157 Fed. 161, 84 C. C. A. 609, 13 Ann. Cas. 811, and case therein cited.

The judgment is affirmed.

DAVIS v. MOBILE & O. R. CO.

(Circuit Court of Appeals, Fifth Circuit. March 5, 1912.)

No. 2,179.

CARRIERS (§ 202*)—EXCESSIVE RATE—REPARATION—RECOVERY.

Under the rule that the only person damaged by a carrier's charge of an excessive rate is the person actually compelled to pay such rate, a complaint by a shipper to recover reparation, alleging that his business had been injured by the charge of the excessive rate, in that the price and value of his lumber shipped was reduced and diminished to the extent of the excess of the rate, but failing to allege that he paid the freight on the shipment made by him, or that it was paid by any one for him, or on his account, was demurrable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906–915; Dec. Dig. § 202.*]

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

Suit by B. B. Davis against the Mobile & Ohio Railroad Company. From a judgment of dismissal on demurrer, plaintiff brings error. Affirmed.

. The plaintiff in error, plaintiff below, brought suit against the defendant in error, defendant below, to recover damages growing out of an excessive freight charge of 2 cents per hundred pounds on yellow pine lumber in car

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

load lots. The increased rate of 2 cents per hundred pounds over the old rate was held to be unreasonable by the Interstate Commission. The contest between the millowners, the shippers, the consignees and the railroads was prolonged and vigorously prosecuted. See Southern Pine Lumber Company v. Southern Railway Company, 14 Interst. Com. R. 195; Nicola, Stone & Myers Company v. L. & N. R. R. Co., 14 Interst. Com. R. 199; Central Yellow Pine Ass'n v. Illinois Cent. R. Co., 10 Interst. Com. R. 505; Tift v. Southern R. Co., 10 Interst. Com. R. 548; Illinois Central Railroad Company v. Interstate Commerce Commission, 206 U. S. 441, 27 Sup. Ct. 700, 51 L. Ed. 1128; Southern Railway Co. v. Tift, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124, 11 Ann. Cas. 846, to which reference is made for a history of the litigation. In the present case the defendant demurred to the declaration of the plaintiff. The demurrers were sustained and the suit was dismissed, and plaintiff prosecutes a writ of error to review the judgment.

G. Q. Hall, Hall & Jacobson, for plaintiff in error.
S. R. Prince, for defendant in error.

Before McCORMICK and SHELBY, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge (after stating the facts as above). We assume, without deciding, in view of the facts of the case, that the plaintiff had the right to resort to the courts to enforce his alleged claim for damages without first applying to the Interstate Commission for reparation. The question, however, is involved in doubt as will readily appear by referring to the cases of Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 440, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, and Robinson v. Baltimore & Ohio Railroad Company, 32 Sup. Ct. 114, 56 L. Ed. —, 222 U. S. 506. The latter case was decided by the Supreme Court, January 9, 1912, and has not been officially reported.

Conceding the jurisdiction of the Circuit Court, the only important question submitted for our consideration is whether the plaintiff is entitled to recover because the defendant illegally increased its freight rate on yellow pine lumber. That the increase of the through rate of two cents per hundred pounds was illegal is clearly disclosed by the cases to which reference has been made in the foregoing statement. It, however, does not follow that the plaintiff has been damaged by the illegal charge. The declaration alleges that he was a millowner and manufacturer of lumber and owner of the lumber shipped, but there is a significant absence of allegations showing that he paid the freight on the shipments, or that it was paid by any one for him and on his account. Lest injustice be done the plaintiff, the contention of his counsel is reproduced in their own words, appearing on page 45 of their brief:

"In the instant case, the declaration alleges, as the wrong done, the extortion of two cents per hundred pounds more than was reasonable, and that his business was thereby injured to that extent, that is to say, the price and value of his lumber so shipped was reduced and diminished to the extent of two cents per hundred pounds, and that the wrong and injury so inflicted was in pursuance of an agreement, conspiracy, contract, and combination between plaintiff and connecting lines to advance the rates on yellow pine lumber two cents per one hundred pounds, or $10.00 per car, over and above the rate theretofore charged and collected as a reasonable and legitimate rate."

It is thus observed that the plaintiff does not base his right to recover on the ground that he paid the excessive rate charged, or that he was in any manner liable for its payment. But he proceeds upon the theory that the increased freight rate "reduced and diminished" the price and value of his lumber to the extent of two cents per hundred pounds, and hence that he suffered damage to that extent. To such contention we are unable to yield assent. The damages claimed are too remote, contingent, and speculative to form a basis for a judgment. To authorize a recovery, the damages must be the natural and proximate consequence of the act of which complaint is made. Thus in the language of the Supreme Court:

"'The damage to be recovered must always be the natural and proximate consequence of the act complained of,' says Mr. Greenleaf (volume 2, par. 256); and 'the test is,' adds Chief Justice Beasley in Crater v. Binninger, 33 N. J. Law, 513, 518 [97 Am. Dec. 737], 'that those results are proximate which the wrongdoer from his position must have contemplated as the probable consequence of his fraud or breach of contract.'" Smith v. Bolles, 132 U. S. 130, 10 Sup. Ct. 40, 33 L. Ed. 279.

The rule was clearly stated by the court, speaking through Mr. Justice Matthews, in Western Union Tel. Co. v. Hall, 124 U. S. 455, 8 Sup. Ct. 580, 31 L. Ed. 479:

"In Griffin v. Colver, 16 N. Y. 489, 495 [69 Am. Dec. 718], the rule was stated to be that 'the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, they must be such as might naturally be expected to follow its violation, and they must be certain both in their nature and in respect to the cause from which they proceed. The familiar rules on this subject are all subordinate to these. For instance, that the damages must flow directly and naturally from the breach of contract is a mere mode of expressing the first, and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last.' In Booth v. Spuyten Duyvil Rolling Mills Co., 60 N. Y. 487, page 492, the rule was stated to be that 'the damages for which a party may recover for a breach of a contract are such as ordinarily and naturally flow from the nonperformance. They must be proximate and certain, or capable of certain ascertainment, and not remote, speculative, or contingent.' In White v. Miller, 71 N. Y. 118, 133 [27 Am. Rep. 13], it was said: 'Gains prevented, as well as losses sustained, may be recovered as damages for a breach of contract, when they can be rendered reasonably certain by evidence and have naturally resulted from the breach.'"

See, also, McGuire v. Gerstley, 204 U. S. at page 501, 27 Sup. Ct. 332, 51 L. Ed. 581.

Our view of the question is that the party who pays the freight or who is liable for its payment, whether he be the millowner, manufacturer, shipper, or consignee, is the one injured by an excessive freight charge and in him alone is vested the right to recover because of the illegal exaction. The Interstate Commission has so held in several cases, and we concur in the ruling thus made. Nicola, Stone & Myers Co. v. L. & N. R. R. Co., 14 Interst. Com. R. 207, 208, 209; Gamble Robinson Commission Company v. St. L. & S. F. R. R. Co., 19 Interst. Com. R. 116.

We are of the opinion that the demurrers were properly sustained, and the judgment is therefore affirmed.

AUSTRIAN UNION S. S. CO. OF TRIESTE, AUSTRIA, et al. v. CALAFIORE et al.

(Circuit Court of Appeals, Fifth Circuit. February 13, 1912.)

No. 2,234.

SHIPPING (§ 125*)—LIABILITY FOR INJURY TO CARGO—CONSTRUCTION OF BILL OF LADING.

A provision in bills of lading giving the ship the right to call at any ports before or after proceeding to the port of destination "in any order, backwards or forwards, for the purpose of receiving and for delivering coals, cargo or passengers, or for any other purpose; and all such ports, places and sailings shall be deemed within the intended voyage"—must be construed with reference to the voyage contemplated by the shipowner and shipper at the time the bill of lading was issued, and be restricted in allowing deviation to the business and necessities of the ship pertaining to that voyage. And where the bill of lading was for carriage of a cargo of lemons from Italy to New Orleans, such provision gave the ship no right to stop at Tampa, Fla., several days to take on cargo for a succeeding voyage before proceeding to New Orleans, and such stopping rendered her liable for damages resulting to the fruit from such delay.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 459, 460, 466; Dec. Dig. § 125.*]

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

Suit in admiralty by Salvatore Calafiore and others against the Austrian Union Steamship Company, of Trieste, Austria, and others. Decree for libelants, and claimants appeal. Affirmed.

This proceeding was commenced by a libel in rem filed on behalf of Salvatore Calafiore against the Austrian steamship called the Gerty. In that libel it was alleged, in substance, that in May, 1909, certain named persons shipped by the Gerty from Palermo, Italy, for New Orleans, certain boxes of lemons, receiving therefor bills of lading to their own order, which were thereafter indorsed to Calafiore. The bill of lading was attached. The libel alleged that the ship arrived at New Orleans about June 16, 1909, with the lemons in a badly damaged condition.

The causes of the damage are alleged as follows: That it was the duty of the master to proceed directly to New Orleans; that, instead of doing so, the master, while upon said voyage to the port of New Orleans with said steamship, wrongfully diverted it to the port of Tampa, Fla., where the ship was detained over six days in tropical heat loading phosphate, which, the evidence shows, was for return cargo after full discharge at New Orleans; that the lemons were damaged thereby by hot weather, and "Said ship had no means of ventilation, except by opening the hatches and by the usual ventilators upon such ships"; and that the lemons, in addition to the damages from heat, were damaged by "the dust from phosphate" laden at Tampa. Intervening libels were filed for other merchants, making substantially the same allegations.

Claim was duly filed by the Austrian Union Steamship Company, of Trieste, Austria (appellant), and bond given, and the ship was released on such bond. Exceptions were then filed to the libel and intervening libels on the ground that they stated no cause of action. These exceptions were overruled, and the company then filed its answers to the libel and intervening libels. These answers admitted the shipments and the voyage and the stop at Tampa; averred that the ship was properly equipped, manned, etc.; averred that the damages were greatly exaggerated, and demanded full proof; averred that during the delay at Tampa the market price of lemons rose to an extent suf-

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

ficient to offset the actual damages to physical condition; and finally claimed that, if any loss or damage occurred, it was "simply due to the unavoidable circumstances and conditions of a voyage which the shippers agreed by their bills of lading should be made, in consideration to the advantages to themselves given by such contracts."

In support of this position the defendant referred to the following clause to be found in the bills of lading:

"Shipped in apparent good order and conditioned by ——— in and upon the Austrian steamship called the *Gerty*, whereof ——— is master for the present voyage, or whoever else may go as master in the said ship, now lying in the port of Palermo, and *bound for New Orleans but with liberty*, either before or after proceeding towards that port, to proceed to and stay at, any ports or places whatsoever (although in a direction contrary to, or out of, or beyond, the route to said port of discharge), once or oftener, in any order, backwards or forwards, for the purpose of receiving and for delivering coals, cargo or passengers, or for any other purpose; *and all such ports, places and sailings shall* be deemed within the intended voyage."

The lower court found against the ship on the ground that the clause in question was invalid as covering the visit to Tampa. The matter of damages was referred to a commissioner, who reported his findings, on which a decree in favor of libelants and interveners was rendered. From that decree an appeal by claimant and its surety was taken.

George Denegre, J. P. Blair, and Victor Leovy, for appellants.

J. D. Rouse, Wm. Grant, and W. B. Grant, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). "The first thing which is always settled between a shipowner and a shipper of goods is the voyage." Lord Esher, in Margretson v. Glynn, 1 L. R. (Q. B. Div. 1892).

The reservation in the bill of lading on which the claimant relies to relieve itself from liability for delay and detention at Tampa must be construed with reference to the voyage in contemplation of the shipowner and the shippers at the time the bill of lading was issued, and therefore be restricted in allowing deviation to the business and necessities of the ship pertaining to that voyage. See Swift v. Furness, Withy & Co. (D. C.) 87 Fed. 345; Liverpool Steamship Co. v. Phœnix Ins. Co., 129 U. S. 441, 9 Sup. Ct. 469, 32 L. Ed. 788; Pacific Coast Co. v. Yukon Independent Transport Co., 155 Fed. 35, 83 C. C. A. 625; Leduc v. Wood, 20 Q. B. D. 482; Glynn v. Margretson (Appeal Cases) L. R. 1893, p. 355.

In all the cases cited, stress is laid upon the voyage in contemplation, and in Scrutton on Charter Parties (Ed. 1910) 235, note, it is said:

"All these clauses must be construed in the light of the commercial adventure undertaken by the shipowner. Thus, a clause giving leave 'to call at any ports' will only allow a shipowner to call at ports which will be passed in the ordinary course of the named voyage in their geographical order; the words 'in any order' will allow the shipowner to depart from geographic order; but, even when there are general words giving liberty to call at ports outside the geographic voyage, these will be cut down by the special description of the voyage undertaken *to ports in the course of that voyage.*" (The underscoring is mine.)

The voyage in this particular case, as stated in the bill of lading, was from Palermo to New Orleans. Tampa was a port near to the

route and to be passed in the voyage contemplated. Under the reservation in the bill of lading, the ship probably had a right to stop at that port "for the purpose of receiving or delivering coals, cargo or passengers or for any other purpose," all in case the same was proper and necessary to that voyage. See Amsinck v. Insurance Co., 129 Mass. 185, 186. The ship did stop at Tampa, not for the purposes of the voyage, but for the purpose of another voyage to be undertaken after New Orleans should be reached. This stoppage and the delay resulting was unquestionably beyond the contemplation of the shippers at the time the bill of lading was signed. Such delay and detention undoubtedly caused the damage the lemons suffered through heat and lack of ventilation, and some of the damage to the boxes of lemons was undoubtedly caused by phosphate dust resulting from loading phosphate.

The method of ascertaining the damages in the court below was by taking the evidence with regard to a quasi arbitration, in which both the ship and the shippers were represented, and which resulted in an estimate of 75 cents loss on each box of lemons contained in the cargo.

This average loss is fairly sustained by the evidence. Libelant's witnesses establish it and claimant's witness Richards, who examined the cargo, testified as an expert that "the lemons ran between 20 and 30 per cent. damage; it might have been 20 and 25." Twenty-five per cent. damage of lemons worth $3 per box would amount to 75 cents per box. The damage from phosphate dust may have been slight, but it must be conceded that where it settled on the boxes of lemons it had to be removed before sale. The contention that no allowance was made for normal damages is not sustainable under the evidence.

The decree of the District Court was correct under the facts developed on the evidence, and it is affirmed.

KRESGE v. TAYLOR.

(Circuit Court of Appeals, Third Circuit. March 4, 1912.)

No. 1,571.

SALES (§ 1*)—ACTION ON CONTRACT—TRIAL.

Defendant executed a written contract by which he agreed to pay plaintiff cost price of the salable merchandise of a bankrupt, dollar for dollar, "damaged, soiled, or out of date" at a price to be agreed on, to be figured as of the date when the store was taken over, and in addition $15,000 cash for fixtures, good will, and surrender of lease. In an action on the contract, there was evidence that there were no damaged, soiled, or out of date goods in the stock tendered. *Held* that, the jury having so found, defendant's claim that no contract was ever consummated, because no price was ever agreed on for the damaged, soiled, or out of date goods, and that the minds of the parties therefore never met, was unsustainable.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1, 3–5; Dec. Dig. § 1.*]

*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.

Suit by David Taylor, as trustee in bankruptcy of the Titus Company, against Sebastian S. Kresge. Judgment for plaintiff, and defendant brings error. Affirmed.

McDermott & Fisk, for plaintiff in error.

Pitney, Hardin & Skinner, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Taylor, the trustee in bankruptcy of the Titus Company, a merchandising concern, brought suit against Sebastian S. Kresge on an alleged accepted offer made by him on March 22, 1909, wherein he agreed—

"to pay for the Philadelphia store the cost price of the salable merchandise, dollar for dollar, damaged, soiled, or out of date at a price to be agreed on, to be figured as of the date when the store is taken over, and in addition thereto the sum of fifteen thousand dollars ($15,000) cash, in full payment for the fixtures, good will, and surrender of the lease. It is understood that the offer is made conditional on my part on my obtaining the lease for ten (10) years on satisfactory terms from the landlord, and on your part on your being able to obtain the approval of the court to the acceptance of my offer."

Acceptance of the offer by the trustee was alleged to have been made orally on April 14, and in writing May 7, 1909. Kresge defended, on the ground that his offer was declined by the creditors, that he withdrew it, and that, as to the second item, viz., "damaged, soiled, or out of date at a price to be agreed on," the minds of the parties had never met, that that item was open to future negotiations, and therefore no contract was consummated.

The testimony bearing on the alleged action of the creditors in rejecting Kresge's offer, on his alleged withdrawal, and on the establishment of the conditions in the last clause by him procuring a lease and the trustee obtaining approval, was all submitted to the jury. It decided in favor of the plaintiff. Unless, therefore, the court below should have held that no enforceable contract existed between the parties, the judgment should stand. It will be noted the contract covered three separate items: First, "the cost price of the salable merchandise, dollar for dollar;" second, the merchandise, "damaged, soiled, or out of date, at a price to be agreed on;" and, third, "the sum of fifteen thousand dollars ($15,000) cash, in full payment for the fixtures, good will, and surrender of the lease." Both the first and second items were "to be figured as of the date when the store is taken over." The verdict was based on the first item, which the jury found was $3,729.58, being the inventory price of $8,935.85, less $5,206.27 realized on sale, and the third, which the contract fixed at $15,000. As to the second item, which had been interlined into the offer as originally contemplated, the judge, in his charge, said:

"Inasmuch as it was contemplated that the business was to be carried on by the trustee until it was turned over to the purchaser, and as the price to be paid for the goods was to be ascertained as of the date when the property was turned over, the application of these interlineations depended upon there being such class of goods to turn over when the sale was consummated. If none was to be turned over, such interlineations have no application. The

trustee testified that at the time that the inventory was made no such goods were included, and no such offer of such goods was contemplated. As before the date of such inventory, which was made the last three or four days of May, and which bears date June 1, 1909, the defendant had repudiated his offer and declined to accept the goods and business, the question whether there were any goods contained in the inventory which would properly fall under the classification of damaged, soiled, or out of date has only a relation to the question of damages, if you should reach that question in this case. So far as they might, under some circumstances, present the question whether, as a result of such interlineations, the minds of the parties had not definitely met, my view is that, under the facts in this case, any such question does not arise; but for the purposes of the case, and the submission of the question of fact to you, it must be held that the offer was in sufficiently definite form to constitute a contract, if it was accepted."

In view of the instructions that, if such goods as the second item contemplated existed, the jury were to make allowance for them in their verdict, and the jury having made no such allowance, and therefore found that there were no such goods when the contract matured, we must assume, as indeed, the proofs warrant us in doing, that, while such a provision existed in the contract, the intent of the parties when they were contracting was that the contract contemplated no further negotiations in that regard. As bearing on that matter the affirmative proof was that, when the interlineation was inserted, Taylor, the trustee, said to Kresge, "We will let that go; that won't amount to anything, because there won't be any of that kind of goods when the store is turned over to you;" that he immediately gave orders to the manager to get rid of such articles; that by the latter part of May there was "less than two hundred dollars worth * * * stuff to be thrown aside as trash." It was shown by the letter of defendant's witness Taylor that on May 19th the unsalable goods were reduced to about $200, and as no items of unsalable goods as such were carried into the inventory, and as the verdict of the jury has adopted the summary of the inventory, and has settled as a fact that all the inventoried goods were salable and fell under the first item, we are constrained to conclude the trial judge did the defendant no harm or wrong when, in passing on the validity of the contract, he said, in the connection noted above:

"So far as they might, under some circumstances, present the question whether, as a result of such interlineations, the minds of the parties had not definitely met, my view is that, under the facts in this case, any such question does not arise; but for the purposes of the case, and the submission of the question of fact to you, it must be held that the offer was in sufficiently definite form to constitute a contract, if it was accepted."

Indeed, such a course of submitting the case to the jury would suggest itself to a trial judge. The defendant contended, and his proof was to the effect, that 20 per cent. of the inventory was damaged, soiled, or out of date merchandise, and therefore fell under the second item. This was denied by the plaintiff. The method adopted by the judge was such as to submit this question to the jury, and, if its verdict was that no damaged, soiled, or out of date goods were involved, then it would not be necessary to pass on the legal question that might have arisen, had the articles been of that nature and been embraced under clause 2. The outcome proved the wisdom of that course, for

it has eliminated the necessity of passing upon that interesting, but wholly immaterial, question, as the facts have been settled by the jury's verdict. The case stands as though there were no damaged, soiled, or out of date goods involved.

Finding no error in the case, the judgment below is affirmed.

SALINGER v. MASON, Clerk of the Circuit Court, et al.†

(Circuit Court of Appeals, Eighth Circuit. March 4, 1912.)

No 3,596.

1. ATTORNEY AND CLIENT (§ 144*)—CONTRACT OF EMPLOYMENT—CONSTRUCTION.
A proceeding to assess damages for the condemnation of certain land having been removed to the Circuit Court of the United States, the owner employed petitioners to conduct the case pursuant to a written contract entitled in the name of the proceeding, followed with the words "pending before" the judge of the Circuit Court, and reciting that as full compensation for all attorney's fees therein it was agreed that the landowner should pay actual expenses and one-half of what he might recover above $5,700. *Held*, that the contract was unambiguous, and covered compensation for all services, not only in the Circuit Court, but also on appeal to the Circuit Court of Appeals and to the Supreme Court.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 332, 333; Dec. Dig. § 144.*]

2. ATTORNEY AND CLIENT (§ 144*)—ATTORNEY'S FEES—COUNSEL FEES.
Where a contract provided that, as full compensation for all attorney's fees in a certain proceeding, it was agreed that the client should pay actual expenses and one-half of what was recovered above $5,700, and the attorneys employed counsel to assist in the litigation, the counsel fees should have been charged to the attorneys, to be paid out of the attorney's fees payable under the contract, and no part thereof taxed against the client.

[Ed. Note.—For other cases, see Attorney and Client; Cent. Dig. §§ 332, 333; Dec. Dig. § 144.*]

3. ATTORNEY AND CLIENT (§ 192*)--ATTORNEY'S LIEN—ENFORCEMENT—PLEADING.
Where a proceeding was instituted to enforce an attorney's lien on funds in the hands of the clerk of the court for the amount due the attorney, the court properly allowed only such sum as the attorney was shown by the proofs to be entitled to receive, regardless of the fact that the amount alleged to have been paid by the client was less than the actual amount paid.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 425–427; Dec. Dig. § 192.*]

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

Application by B. I. Salinger, individually and as surviving and managing partner of the firm of Salinger & Korte, to impose a lien on certain funds in the possession of Edward R. Mason, Clerk of the Circuit Court of the United States for the Southern District of Iowa, and others. From an adverse decree, petitioner appeals. Affirmed.

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

† Rehearing denied June 4, 1912.

L. H. Salinger (B. I. Salinger, on the brief), for appellant.
Edward P. Smith (Constantine J. Smyth, on the brief), for appellees.

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

WM. H. MUNGER, District Judge. One Charles D. Boynton, a resident and citizen of St. Louis, Mo., was the owner of certain real property in the state of Iowa. The Mason City & Ft. Dodge Railway Company instituted certain proceedings of condemnation against said land, pursuant to the laws of Iowa. The sheriff's jury awarded Boynton $4,700 as his damages by reason of such condemnation. Boynton took an appeal from said award to the proper state court, and the case was removed to the Circuit Court of the United States for the Southern District of Iowa. Boynton employed the firm of Salinger & Korte as his attorneys to represent him in the conduct of said case. In April, 1904, Mr. Salinger went to St. Louis to confer with his client, Mr. Boynton, and a contract was there entered into between Salinger & Korte and Boynton, in words and figures as follows, to wit:

"St. Louis, April 27, 1904.

"In re Boynton v. Mason City & Fort Dodge Ry. Co., pending before Judge McPherson. As full compensation for all attorney's fees herein, it is agreed that C. D. Boynton shall pay actual expenses and one-half of what he may recover above $5,700.00. [Signed] Salinger & Korte.
"C. D. Boynton."

Subsequently the case was tried to the court, Judge McPherson presiding; a jury being waived. The court found Boynton's damages to be $10,000, and rendered judgment therefor. The case was appealed to this court, and subsequently to the Supreme Court, and the judgment affirmed, whereupon the railroad company paid the amount of said judgment of $10,000, with interest thereon, into the court. In the meantime, the firm of Salinger & Korte was dissolved; complainant, B. I. Salinger, succeeding to the rights of the partnership. After the employment of Salinger & Korte by Boynton, Salinger & Korte employed the firm of Baldwin & Wright to assist them in the trial of the case, agreeing to pay Baldwin & Wright a sum contingent upon their success in the case. A disagreement arose between Salinger and Boynton as to whether or not the contract above set forth covered the attorney's fees on appeal to this court and in the Supreme Court; Salinger claiming that the contract in question simply covered compensation for the case in the Circuit Court before Judge McPherson, and that he was entitled to receive, in addition to the compensation provided for in the contract, the sum of $3,000, for his services on appeal to this court and the Supreme Court, and this action was brought to enforce his lien upon the moneys which had been paid in by the railroad company to the clerk of the court. The trial court found that the compensation provided for in the contract in question was for all services which Salinger rendered, not only in the trial court, but upon appeal, and denied his claim for extra compensation on the appeal. The trial court also found that Baldwin & Wright were entitled to the sum of $1,000,

one-half of which was to be paid by Salinger, and the remaining half by Boynton. The trial court also found that Salinger had been paid by Boynton, on account of said attorney's fees and expenses incurred by Salinger, the sum of $500. A judgment was rendered in accordance with such findings, from which judgment Salinger has prosecuted an appeal to this court.

[1] We think the contract for attorney's fees unambiguous, and that its recital "In re Boynton v. Mason City & Fort Dodge Ry. Co., pending before Judge McPherson," was simply a designation of the case and the court in which it was then pending; that the agreement to pay as full compensation for all attorney's fees one-half of what Boynton should recover above $5,700 was intended by the parties as full compensation for the services of Salinger & Korte until a final judgment was obtained. Mr. Salinger was an attorney, and consequently familiar with the law which gave the right to have a judgment obtained in the trial court reviewed in this court, and under certain conditions by the Supreme Court, and, had it been intended to limit the compensation to the trial court, he would have so expressed it in drawing the agreement. As before said, the mere statement that the case was pending before Judge McPherson was but a designation of the court in which the case was then pending, and was not a limitation that the services for which compensation was agreed upon was limited to such as would be rendered in the trial court before Judge McPherson.

[2] The evidence clearly discloses, we think, that Salinger & Korte employed the firm of Baldwin & Wright upon their own responsibility, agreeing to give Baldwin & Wright a portion of their contingent fee; that the trial court should have taxed the entire amount of the compensation allowed to Baldwin & Wright to Salinger, and no part to Boynton; but Salinger cannot complain that the court taxed half only of such fee to him. Boynton has not appealed from the judgment assessing one-half of the fee to him.

[3] Again, it is said that Boynton, in his answer, alleged payment to Salinger of $300 only, and the court erred in finding and adjudging that he had paid Salinger $500. The testimony is clear and undisputed that Boynton did pay to Salinger the sum of $500, and, as this was an action brought by Salinger to enforce a lien upon the fund in the hands of the clerk for the amount due him, we think the court was right in allowing him only such sum as was shown by the proofs he was entitled to.

The court below committed no error of which Salinger can complain, and the judgment is affirmed.

ÆTNA INS. CO. OF HARTFORD, CONN., v. BANK OF BRUNSON.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1912.)

No. 1,046.

1. EVIDENCE (§ 158*)—BEST EVIDENCE—INSURANCE LOSS—NOTICE.
Where, in an action on a fire policy, plaintiff's cashier testified to giving written notice of loss to defendant's agent, parol evidence of notice without production of the writing or accounting for its loss, was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 471–526; Dec. Dig. § 158.*]

2. INSURANCE (§ 669*)—INSTRUCTIONS—INCONSISTENCY.
The court charged that one of the defenses was that the policy was void because no notice of loss was given, that the requirement was reasonable, and that prompt notice of loss should be given. After stating the testimony of plaintiff's cashier as to the giving of notice, and the agent's reply, the court charged that it was for the jury to say whether that was sufficient, and whether the agent's statement was a waiver of formal proof of loss. The court also confirmed defendant's request that under the policy the jury could not consider the question of waiver, except such as might be in writing and attached to the policy, and then charged that another defense was that there were no appraisers appointed, that the policy provided that in case of disagreement as to the amount of the loss there should be an appraisement, but that if defendant's agent was satisfied that the loss was total, and the jury believed the building was of the value of $2,500 and that it was totally destroyed, and the use did not increase the hazard, and the company was notified promptly of the loss, then they should find for plaintiff; otherwise, for the defendant. *Held*, that such instructions were inconsistent and erroneous, as calculated to mislead on the question of waiver.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1771–1784; Dec. Dig. § 669.*]

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

Action by the Bank of Brunson against the Ætna Insurance Company of Hartford, Conn. Judgment for plaintiff, and defendant brings error. Reversed.

This is an action at law instituted in the Circuit Court of the United States for the District of South Carolina by the Bank of Brunson against the Ætna Insurance Company of Hartford, Conn. Suit was instituted upon an insurance policy issued by the plaintiff in error on a dwelling originally belonging to J. C. Langford, dated July 7, 1905, and expiring July 7, 1910. It appears from the testimony that the interest of J. C. Langford in the policy was, with the consent of the Ætna Insurance Company, assigned to the Bank of Brunson, who at the time of the fire was the owner of the policy. The policy was a valued policy; the value of the building being fixed in the policy at $3,500, and the total amount of insurance to be carried thereon at $2,500. The dwelling was totally destroyed by fire on the 28th day of October, 1908. Testimony was introduced by both plaintiff and defendant. At the close of the testimony, the defendant requested the court to direct a verdict. This motion was refused. The jury found a verdict for the plaintiff, and from the judgment thereon writ of error has been taken to this court.

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

Donald McKay Frost (Smythe & Frost, on the brief), for plaintiff in error.

W. B. De Loach and George H. Moffett, for defendant in error.

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

PRITCHARD, Circuit Judge. [1] The first bill of exceptions in this case relates to the admission of testimony of the witness Agnew, who was cashier of the Bank of Brunson. The witness was permitted, among other things, to testify as follows:

"Q. After this fire state to the jury what you did? A. Soon after, a day or two, I notified W. H. Dowling & Son, at Hampton, the agents for this company, in writing, and I also called W. H. Dowling, the senior member of the firm of W. H. Dowling & Son, agents there, called them over the 'phone. Mr. Moore, the president of the bank— Q. You can't say what Mr. Moore told you? A. Well, I called him up over the 'phone, and told him I would be glad for him to come up there and satisfy himself with regard to the fire, that it was a total loss, and to be satisfied; and he said there was no use, that he was satisfied that it was a total loss, that there was no use for him to go to the trouble of coming up there, and that he would attend to the matter and report it."

This testimony was objected to by the defendant in the court below upon the ground that the fact of notification in writing should be proven by the writing itself and not by oral testimony. This witness was permitted, over the objection of the defendant, to testify that he notified the company in writing without producing the writing or accounting for its loss. Counsel for the plaintiff could have secured an order requiring the company to produce the writing in court, but for some cause or other this course was not pursued.

Under the well-established rule of evidence, it was incompetent under the circumstances for the witness to testify as to the written notification to the company without producing the same in evidence. It was sought by this evidence to show that the company had been notified as to the destruction of the property of the insured. We think the court below erred in this respect.

[2] Our attention has also been called to the charge of the lower court, which, in our opinion, was contradictory and calculated to confuse the minds of the jury in arriving at a verdict. The court's instruction to the jury on the question of waiver is in the following language:

"Another defense is that the policy is void because there was no notice of the loss. It is a stipulation in any insurance that the company should have notice of the loss. They might want to inquire as to how the fire occurred, whether it was a bona fide loss, whether the property was really burned. There are various good reasons why it is reasonable and necessary that the company should be notified promptly of the loss, so that they could make inquiry. The testimony is that the cashier of the bank, immediately after the fire, wrote to the insurance agent, who lived in the adjoining town, about six miles off, giving notice of the fire, and that he thereafter called him up over the telephone, and informed him of the fire, and asked him to come up; that the agent replied that he knew of the loss, and that he knew that it was a total loss, and that he would attend to it. It is for you to say whether that was sufficient notice to comply with the terms of the policy,

whether the knowledge of the agent, his agreement to attend to it, was a waiver of the formal proofs of loss that the policy required."

At this point counsel for the defendant made the following statement:

"Will your honor charge them that on the law of waiver, under the terms of this policy, that under the terms of this policy the jury cannot take into consideration the question of waiver in any way whatever, except such waiver as may be in writing and attached to the terms of the policy itself; in other words, that they cannot consider the action of the agent as waiving any requirements of the policy?"

It will be observed that the court assented to the proposition of law there announced by counsel for the defendant. However, the court further instructed the jury as follows:

"Another defense is that there were no appraisers appointed. The policy provides 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,' etc., and that there shall be no suit unless such appraisers were appointed. The object of having appraisers is a reasonable one, that if there was any dispute as to the amount of loss, and question as to the amount of loss, that it could be determined by disinterested parties; but where the agent of the company is satisfied that the loss is a total one, there was no object in having appraisers. Therefore to appoint appraisers under the terms of the policy would be a mere futile act. If you believe that this building was of the value of $2,500, and that it was totally destroyed by fire, and that the use to which it was put did not increase the hazard, and that the company was notified promptly of the loss, then you will find for the plaintiff; otherwise, you will find for the defendant."

These statements are inconsistent, and calculated to confuse the minds of the jury, and, without passing upon the question as to whether there was a waiver of the conditions of the policy which relate to the notice of proof of loss, we are of the opinion that the court, in the trial of the case below, inadvertently failed to instruct the jury so as to enable them intelligently to pass upon the facts as shown by the evidence in this case.

For the reasons stated, we think that the verdict should be set aside, a new trial granted, and the judgment of the lower court reversed.

Reversed.

JOPLIN & P. RY. CO. v. PAYNE.

(Circuit Court of Appeals, Eighth Circuit. March 7, 1912.)

No. 3,625.

1. APPEAL AND ERROR (§ 237*)—MOTION AT TRIAL—NECESSITY—SUFFICIENCY OF EVIDENCE.

On review of a judgment for plaintiff, the Circuit Court of Appeals cannot determine the sufficiency of the evidence to sustain the recovery, where defendant made no motion for a directed verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1386–1388; Dec. Dig. § 237;* Trial, Cent. Dig. §§ 228–252.]

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

2. APPEAL AND ERROR (§ 1004*)—REVIEW—EXCESSIVE DAMAGES.
On review of a judgment for plaintiff in a personal injury action, the Circuit Court of Appeals cannot determine whether the verdict was excessive.

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

3. DEATH (§ 31*)—ACTION BY HUSBAND — RIGHT TO MAINTAIN—"NEXT OF KIN."
A husband is his wife's "next of kin," where she dies intestate and without children or direct descendants, within Code Civ. Proc. Kan. § 422a, providing that certain actions for wrongful death may be brought by deceased's "next of kin."

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35–46, 48; Dec. Dig. § 31.*

For other definitions, see Words and Phrases, vol. 5, pp. 4798–4804; vol. 8, p. 7732.]

4. COURTS (§ 366*)—FEDERAL COURTS—CONCLUSIVENESS OF STATE DECISIONS.
A construction of a state statute by the highest court of the state, rendered before the accrual of a particular cause of action, is binding upon 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.]

5. COSTS (§ 260*)—APPEALS FOR DELAY—DAMAGES—RIGHT TO.
On affirmance of a judgment for personal injury, plaintiff is not entitled to assessment of 10 per cent. damages, under Circuit Court of Appeals rule 30 (150 Fed. XXXV, 79 C. C. A. XXXV), on the theory that the writ of error was sued out merely for delay, where the Circuit Court of Appeals had given a different construction to a statute involved from that given in a subsequent decision of the Supreme Court of the state, which must now be regarded as binding on the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983–996, 1002, 1003; Dec. Dig. § 260.*]

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

Action by Robert H. Payne against the Joplin & Pittsburg Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Edward C. Wright (John P. Curran, on the brief), for plaintiff in error.

C. A. McNeill (E. V. McNeill, on the brief), for defendant in error.

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

WM. H. MUNGER, District Judge. Robert H. Payne brought this action against the Joplin & Pittsburg Railway Company to recover damages which he sustained on account of the death of his wife, who was a passenger upon the defendant road and lost her life in the state of Kansas through the negligence of the defendant. A trial was had, resulting in a judgment for plaintiff, and the railroad company seeks to have that judgment reversed.

There are three assignments of error: First, that the petition does not state a cause of action; second, that judgment was given for plaintiff, when it should have been for defendant; third, that the judgment under the evidence is excessive.

[1] As no request was made for a directed verdict at the close of all of the evidence, we cannot inquire as to the sufficiency of the evidence. Western Coal & Mining Co. v. Ingraham, 70 Fed. 219, 17 C. C. A. 71; Consolidated Coal Co. v. Polar Wave Ice Co., 106 Fed. 798, 45 C. C. A. 638; Oswego Township v. Travelers' Ins. Co., 70 Fed. 225, 17 C. C. A. 77.

[2] This court is also precluded from considering the question as to whether the verdict was excessive. Illinois Cent. R. Co. v. Davies, 146 Fed. 247, 76 C. C. A. 613; Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co., 154 Fed. 545, 83 C. C. A. 431; Nelson v. Bank of Fergus County, 157 Fed. 161, 84 C. C. A. 609, 13 Ann. Cas. 811, and cases therein cited.

[3] The only error which we can consider, and the one chiefly argued, is whether the petition stated a cause of action. This action was founded upon a state statute. Section 422 of the Civil Code of Kansas, supplemented by section 422a, reads as follows:

"Sec. 422. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

"Sec. 422a. That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in section 422 of chapter 80, Laws of 1868, is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section 422 may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

The petition alleges that deceased died intestate, and left no children or direct descendants; that plaintiff, as the surviving husband, was the next of kin; and that no administrator or personal representative of her estate has been appointed. It is argued that the term "next of kin" means blood relation, and hence does not include the husband. The above statute provides that the damages recovered shall be distributed in the same manner as personal property of the deceased, and under the Kansas statute the husband inherits personal property of his deceased wife.

This statute was, before the cause of action in this case arose, fully considered by the Supreme Court of the state in Atchison, T. & S. F. Ry. Co. v. Townsend, 71 Kan. 524, 81 Pac. 205, 6 Ann. Cas. 191, and in that case it was said:

"It is first contended that, under section 422 of the Code, Townsend was not entitled to recover damages for the wrongful death of his wife. It provides that 'the damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.'

It is insisted that a husband is not 'next of kin' of his wife, and that kinship means relationship by blood, and not by marriage. The reference in the section itself to the statute of descents and distributions furnishes the rule for interpreting the phrase 'next of kin.' Under that statute the husband and wife inherit from each other, and it has already been held, in Railway Co. v. Ryan, 62 Kan. 682, 64 Pac. 603, that the phrase, as used in the statute for the recovery of damages for wrongfully causing a death, means those kin who inherit from the deceased under the statute of descents and distributions. See, also, Steel v. Kurtz, 28 Ohio St. 191; Lima, etc., Co. v. Deubler, 7 Ohio Cir. Ct. R. 185; Pinkham v. Blair, 57 N. H. 226."

[4] This being a construction of the statute by the highest court of the state, and having been rendered before the right of action in this case accrued, that construction is binding upon the federal courts. This court, also, in Omaha Water Co. v. Schamel, 147 Fed. 502, 78 C. C. A. 86, sustained the holding that a minor child, who had been adopted by deceased under the provisions of the state statute, which entitled her to inherit as a natural child, could recover damages for the loss of the adopted parent.

In the case before us, the question as to whether the husband could maintain the action as next of kin being the only objection urged against the petition, the judgment is affirmed.

[5] Defendant in error has filed a motion to have 10 per cent. damages assessed under rule 30 of this court (150 Fed. xxxv, 79 C. C. A. xxxv). In view of the fact that this court, in Western Union Telegraph Co. v. McGill, 57 Fed. 699, 6 C. C. A. 521, 21 L. R. A. 818, before the Supreme Court of the state had construed the statute, reached a different conclusion, we do not think it can be said that the writ of error was sued out merely for delay.

Hence the motion is overruled.

COLONIAL TRUST CO. OF WATERBURY, CONN., v. THORPE.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1912.)

No. 1,044.

BANKRUPTCY (§ 140*)—PROPERTY OF BANKRUPT—LEASE WITH OPTION TO PURCHASE—RESERVATION OF TITLE.

Plaintiff's decedent leased a bankrupt a cigarette machine, with an option to purchase on making specified payments, the title to remain in decedent until paid for. Thereafter decedent and plaintiff's president met and agreed on certain other terms of payment, whereupon decedent wrote the bankrupt a letter referring to such new terms of payment as a "remodification" of the terms of payment in the lease contract. In replying, the bankrupt, without objection, sent a check for $500 and notes as agreed. *Held*, that the change of the terms of sale did not constitute an abandonment of a provision of the written contract retaining title, and amount to a sale without reservation, so that on the buyer's bankruptcy decedent was entitled to recover the machine or its proceeds from the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 221, 225; Dec. Dig. § 140.*]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk, in bankruptcy.

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

Action by the Colonial Trust Company of Waterbury, Conn., as executor of Frank H. Ludington, deceased, against R. T. Thorpe, receiver of the Ware-Kramer Tobacco Company, bankrupts, to recover a cigarette machine, or its profits, alleged to have been sold to the bankrupt under a contract of sale, reserving title until paid for. Judgment for defendant, and plaintiff appeals. Reversed.

G. Tayloe Gwathmey, for appellant.

Nathaniel T. Green, for appellee.

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

PRITCHARD, Circuit Judge. On May 19, 1908, Frank J. Ludington and the Ware-Kramer Tobacco Company entered into a written contract whereby the former leased to the latter a cigarette machine, with an optionary right on the part of the lessee to purchase the machine. In so far as is now material, this contract reads as follows:

"The lessor hereby covenants and agrees that he will sell the said Columbia cigarette making machine No. 61 to said lessee at the termination of this lease for the sum of seventy-five hundred dollars ($7,500.00) provided said lessee shall notify said lessor in writing on or before the 15th day of December, 1908, of its intention to make such purchase.

"It is hereby covenanted and agreed between the parties hereto that, in the event of the lessee electing to make such purchase, the payment therefor shall be made in the following manner: The lessor will allow a discount of ten per cent., viz: seven hundred fifty dollars ($750.00) on the purchase price, and also credit the lessee with the installments of rental theretofore paid to the lessor in accordance with this lease, not exceeding six hundred dollars ($600.-00); the balance of the purchase price, viz: sixty-one hundred and fifty dollars ($6,150.00) to be paid by the lessee in cash to the lessor on the first day of January, 1909; *whereupon the title* to said Columbia cigarette making machine No. 61 *will vest in the lessee, and the lessor will upon request of the lessee render to the latter a bill of sale for such machine.*"

Some correspondence, not set out in the record, passed between Ludington and Ware, the president of the tobacco company, in January and February, 1909; but it was not until February 26, 1909, that a purchase of the machine was agreed upon. Ware's account of the agreement then made is, so far as is material, as follows:

"A. We met there, and over the dinner Mr. Ludington said: 'Look here, Ware, you are a curious man. You made a contract with me and agreed to take a machine the 1st of January, and here it is the 1st of March and you haven't taken it. I don't know where I am at.' I said: 'I'll tell you where you are at. I came up to buy your darned old machine;' and he said, 'Are you here to pay for it?' I said, 'I am here to give you my notes for it;' and he says, 'Just tell me what you want, and, if it is in the realm of possible, I'll do it.' I told him that I wanted to give him notes for the machine. I explained certain conditions with regard to the company, and that we expected to have the capital increased about that time, and it would be an accommodation to me to let me pay for the machine with the notes. He said he was perfectly willing, but that he thought we ought to pay some money, and named the amount of $500. I then told him I would give him my check for $500 and give him notes for the balance, and that would close the incident. That was the conversation as near as I can tell it, boiled down.

"Q. Was anything said about retaining title to the machine until the notes were paid?

"A. That did not come up between us at all."

On February 27, 1909, the following letter was sent from Ludington's office to the tobacco company:

"Waterbury, Conn., U. S. A., Feby. 27, 1909.

"Ware-Kramer Tobacco Co., Norfolk, Virginia.

"Gentlemen: The writer is instructed by Mr. Ludington to confirm the conversation held between your Mr. Ware and Mr. Ludington at Hotel Belmont, yesterday remodification of terms of payment contained in your contract of May, 1908, covering Columbia cigarette machine No. 61 now in your works and which Mr. Ware reported you have decided to purchase. Would say that the understanding is as follows:

"You to make a cash payment of $500.00 immediately and deliver to me your eight promissory notes for $800.00 each, all dated March 1/09, the first one to become due and payable on June 1/09, the second one on September 1/09, and the remaining notes in like order, i. e. one every three months, the last falling due on Mar. 1/11,—$6,400.00 in notes, plus cash $500.00, and the amount of rental already paid, $600.00, making the total amount of purchase price $7,500.00. I am enclosing the notes herewith, which, if you find in order, kindly sign and return together with your check for the $500.00.

"It is understood that if you at any time wish to take up the notes I will allow you 10% discount on any of them that have not by their terms become due.

"Kindly give this your prompt attention and oblige,

"Very truly yours, F. J. Ludington, by Shaw.

"Dictated V. M. S."

The answer thereto follows:

"March 15th, 1909.

"Mr. F. J. Ludington, P. O. Box 885, Waterbury, Conn.

"My Dear Sir: This refers to your favor of the 27th inst. Enclosed please find the notes properly signed, and our check for $500.00 as per agreement. The writer wishes to apologize to you for his tardiness in taking this matter up, but on his return home, found himself laid up with a terrible case of his eye trouble; in other words, can sympathize with your Mr. Ludington. * * *

"Yours very truly, Ware-Kramer Tobacco Company, by ———."

After the bankruptcy of the tobacco company, the executor of Ludington filed a petition in the trial court, asserting retention of title to the machine, and praying that the receiver be required to deliver it to the petitioner. Subsequently, by agreement, the machine along with other property was sold and the claim transferred to $3,000 of the fund derived from the sale. The referee in bankruptcy ruled against the petitioner, the trial court affirmed the referee, and this appeal brings to this court for decision the question whether or not Ludington reserved title to the cigarette making machine until payment in full.

We are unable to agree to the conclusion reached by the learned trial court. Ware's statement of his conversation with Ludington in New York strongly tends to prove that the parties intended a sale under the conditions stated in the contract of May, 1908, varied only as to the time and manner of payment. The letter from Ludington's office dated February 27, 1909, bears quite convincing testimony to the same effect as to Ludington's intention. This letter was written to confirm the conversation between Ludington and Ware of the day previous "remodification of terms of payment in your contract of May, 1908." The language of this letter leaves in our minds no serious doubt but that Ludington intended to modify the written con-

tract only as to the terms of payment. The provision of the written contract retaining title was not abandoned, and was by Ludington certainly intended to remain in full force. In Ware's answer to the letter above mentioned, he tacitly accepts it as a correct statement of the verbal understanding. Under these circumstances, we are unable to hold that Ludington ever agreed to sell the machine, except under an agreement, in effect, that he should retain the title until payment in full. We are constrained to reverse and remand.

Reversed.

UNION PAC. R. CO. v. McMICAN.

(Circuit Court of Appeals, Eighth Circuit. March 7, 1912.)

No. 3,622.

1. EVIDENCE (§ 555*)—EXPERTS—HYPOTHETICAL QUESTION.

Where a physician had been employed to examine plaintiff, to testify as a witness for him, and not to treat him, a hypothetical question, based in part on plaintiff's history given by him to the witness, was improper, under the rule that, where a physician is called to give testimony, he can only testify to objective symptoms, and not with reference to self-serving declarations made by plaintiff to him, not under oath.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2376; Dec. Dig. § 555.*]

2. EVIDENCE (§ 553*)—EXPERTS—HYPOTHETICAL QUESTION—FACTS NOT PROVED.

Plaintiff testified that on the evening of his injury he noticed that his abdomen was a little bit puffed up, but that it did not swell up enough to make much difference in his size until about the fifth or sixth day after his injury; there being no testimony that within 24 hours after the accident the abdomen was in a badly swollen condition. *Held*, that a hypothetical question, assuming that immediately after the injury plaintiff suffered intense pain in the abdomen and the region of the liver, that it began to swell, so that within 24 hours it was in a badly swollen condition, and within two weeks it became hardened, which condition continued to the present time, was improper, under the rule that a hypothetical question should not embrace facts not proved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369–2374; Dec. Dig. § 553.*]

3. DAMAGES (§ 170*)—RELEVANCY—FAMILY.

In an action for injuries, a question as to whether plaintiff had a family, to which he replied that he had a wife and one child, was improper.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 496, 497; Dec. Dig. § 170.*]

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

Action by Telie G. McMican, as administratrix, etc., against the Union Pacific Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

S. C. Douglass (R. W. Blair and Douglass & Watson, on the brief), for plaintiff in error.

J. E. McFadden and S. G. Magee (O. Q. Claflin, Jr., on the brief), for defendant in error.

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

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

WM. H. MUNGER, District Judge. In this case plaintiff, in August, 1909, was a passenger upon a mixed train of the defendant in the state of Kansas. The train consisted of some 22 freight cars, a baggage car, and a coach. The engine and some of the cars were detached when plaintiff took passage. He entered the coach, and while standing in the aisle at the end of a seat, making some memoranda, the engine, with some of the cars, backed up to the coach, the cars coming together, as claimed, with such a sudden jar as to throw him off his feet down in the aisle; that a lady with a child, standing in the aisle some few feet from him, was also thrown down, falling upon him, from which he sustained, as alleged, internal injuries. A trial was had resulting in a verdict for the plaintiff. Defendant brings the case here for review.

[1] Among the errors assigned is that permitting a hypothetical question to be submitted to a doctor, called as a witness for plaintiff, who examined the plaintiff at the time of the trial, not for the purpose of treating him, but for the purpose of testifying in the case. The doctor had testified that plaintiff, at the time of the examination, gave to him a history of himself prior to the time he received his injuries, also a history of the injury (but did not testify what such history was), and that he made a physical examination of plaintiff. Thereafter plaintiff submitted to the doctor a hypothetical question, starting as follows:

"Now, Doctor, taking into consideration the history that Mr. McMican gave you of himself— But before I ask that, I will continue the question. Prior to the date of the injury, that is the history he gave you of himself prior to the date of this injury, and the history he gave you of the injury, and the history he gave you of his condition and feelings subsequent to the date of the injury, and assuming that at the time of the injury."

The question then continued with a statement of facts based upon evidence given in the case. The close of the question was:

"I will ask you to state, taking all these facts into consideration, whether or not the probability is that the condition you found existing at the time you made your examination, as you found it, could be or might be caused by the injury which he stated he had received?"

Counsel for defendant objected to the question, on the ground that it was not a proper hypothetical question, because it stated facts not in evidence, and asked the witness to base his answer on what the plaintiff told him at the time of the examination, which statements were not made under oath; also, upon the further ground that hypothetical questions should be based upon the sworn statement of witnesses as offered in evidence. The court, before ruling upon the question, inquired of the witness if the question fully covered the statements made:

"Does it fully cover and represent statements made in evidence, and the history of the case at the time the injury was sustained, or at the time of your examination? Does it fully and fairly represent the statement made to you and the history given to you by Mr. McMican at the time you examined him?"

The witness answered:

"Yes; I think it does."

The court thereupon permitted the witness to answer the question, which answer was as follows:

"Well, I can only say, as I said before, that it may have been due to the injury."

This evidence was clearly inadmissible, for the reason that it was based, in part at least, upon what plaintiff told the doctor at the time of the examination relative to his previous history and how the injury occurred. The rule is well settled that, where a physician is called to professionally treat a party, he may give his opinion, based upon subjective as well as objective symptoms; but where he is called, not for the purpose of treating the party for the ailment, but for the purpose of giving testimony in the case, he can only testify to objective symptoms. Statements made by the plaintiff at such examination are mere self-serving declarations, not made under oath. Shaughnessy v. Holt, 236 Ill. 485, 86 N. E. 256, 21 L. R. A. (N. S.) 826; Keller v. Gilman, 93 Wis. 9, 66 N. W. 800; Penn. Co. v. Files, 65 Ohio St. 403, 62 N. E. 1047; McKormick v. City of West Bay, 110 Mich. 270, 68 N. W. 148; Lawson on Exp. and Op. Ev. (2d Ed.) 162, rule 30. When a hypothetical question is submitted in such a case, it should only embrace facts which have been given in evidence. Such rule was clearly violated in this case, and for that reason a new trial must be granted. The fact that the witness, when interrogated by the court, stated that in his opinion the question fully covered and represented statements made in evidence and the history of the case as stated to him by plaintiff, did not remove the vice. It was for the court primarily, and the jury finally, to determine whether the question embraced a proper statement of the facts as shown by the evidence, and not for the witness to base his opinion upon partly undisclosed statements.

[2] Objections were made to other hypothetical questions to other doctors on the ground that they included facts which were not embraced in the evidence which had been given—one to Dr. Somerville, which, after stating that the plaintiff had fallen upon the floor and the woman with a child upon him, embraced the following:

"That immediately thereafter severe and intense pains were present in the abdomen of Mr. McMican, in the region of the liver; that the abdomen began to swell so that within 24 hours it was in a badly swollen condition, and within about 2 weeks from the date of that accident or injury I have described the abdomen became hardened, and that hardened condition continued from that time to the present."

The plaintiff's testimony was as follows, in answer to a question:

"How long after the injury was it that you noticed this swelling began? A. I noticed that evening that I seemed to be a little bit puffed there, the same evening that I was hurt; but it did not swell up enough to make much difference in my size until about— I began to swell more along about the fifth or sixth day after the injury."

There was nothing in the testimony that indicated that within 24 hours after the accident the abdomen was in a badly swollen condi-

tion. Hypothetical questions should not embrace facts not in evidence. While counsel may base a hypothetical question upon his theory of the correctness of conflicting evidence, it is error to embrace facts which are not disclosed by the evidence.

[3] Again, plaintiff was asked, "Have you a family, Mr. McMican?" to which he answered, "I have a wife and one child." This testimony was admitted over the objection of the defendant. It was clearly inadmissible under the authority of Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141.

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

CORNHILL S. S. CO., Limited, v. WEST INDIA S. S. CO.

(Circuit Court of Appeals, Second Circuit. February 2, 1912.)

No. 170.

SHIPPING (§ 51*)—CHARTER—WAIVER OF PROVISION BY CHARTERER.

A time charter of a steamer to be delivered in a Cuban port required her to have on board coal sufficient for 12 days' steaming, which was to be taken over and paid for by the charterer. On her arrival she had only sufficient for 11½ days' steaming, of which fact the master advised the charterer, but was instructed not to buy more in Cuba. She was kept in Cuban ports for 3 weeks, and then ordered to New York, although the master notified the charterer that she had coal for only 6½ days, and she was compelled to put in to Savannah for more. *Held*, that the requirement for full 12 days' coal in the charter was waived by the charterer, by accepting her notwithstanding the slight deficiency, and in view of its subsequent direction of her movements, without supplying her with sufficient coal to complete her voyage, it was not entitled to deduct the expense of the stopping in Savannah from the charter hire.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 203–210; Dec. Dig. § 51.*]

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

Suit in admiralty by the Cornhill Steamship Company, Limited, as owner of the steamship Venus, against the West India Steamship Company, for charter hire. Decree for libelant, and respondent appeals. Affirmed.

On appeal by the respondent, the West India Steamship Company, time charterer of the steamship Venus from a final decree directing the West India Company to pay to the libelant the full amount of the charter hire as stated in the charter. The West India Company had paid various sums for coal and for other expenses which it asserts were made necessary by reason of the vessel's deviation to Savannah, due to the exhaustion of her supply of coal. The amount of these items, aggregating $675.38, was deducted by the charterer from the charter hire due the libelant as owner of the Venus.

The opinion of the District Court is as follows: "In my opinion there was no justification for the deduction by the respondent from the charter hire of any of the items making up the amount sued for. Judgment for libelant for $675.38 with interest and costs."

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

Ferdinand E. M. Bullowa and Ralph J. M. Bullowa, for appellant.
Convers & Kirlin and Charles R. Hickox, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The Venus was chartered by her owner, the Cornhill Steamship Company, the libelant, to the West India Steamship Company, the respondent. The charter contained the following:

"On delivering in Cuba, steamer is to have at least sufficient coal on board for 12 days' steaming which charterers are to take over at $3.50 per ton, 2,240 lbs."

In other words, the owner agreed to deliver the steamer at a designated port in Cuba with coal enough on board to enable the boat to steam for 12 days. On paying the charter hire, the West India Company deducted $675.38 from the amount due, giving as a reason for its action, the alleged failure of the owner to have the agreed amount of coal on board when the Venus was delivered to the charterer at Manzanillo on April 1, or 2, 1910.

The charterer justifies its failure to pay this amount upon the theory that the Venus when delivered did not have sufficient coal to carry her to a port north of Hatteras, and that therefore the libelant should pay the damage and expenses occasioned by the deviation to Savannah, including time lost, pilot and harbor fees, the price of extra coal and other expenses.

The principal question is—did the Venus when she reached Manzanillo, the designated port, have coal sufficient to enable her to steam for 12 days? When she reached there she had coal enough for 11½ days and notified the charterer of the slight deficiency, who cabled the master not to get coal there as it was too expensive. We think, in view of the charterer's undoubted right to furnish the additional coal required to make up for the extra half-day that this was a waiver of the terms of the charter for coal enough for 12 days' steaming. When the vessel was delivered she had the requisite amount of coal, except for half a day, and this deficiency was waived by the charterer. If the ship had then started on the northward voyage, she would have had ample coal to reach ports north of Hatteras or even New York. Instead of this, the ship was sent along the coast of Cuba for three weeks, burning coal in steaming, loading and for other purposes. When, then, she was ordered from Jucaro to New York, she had coal on hand for 6½ days only, and this was known to the charterer.

The master of the Venus was fully justified in heeding the charterer's advice not to take coal at Manzanillo, but to wait till he reached a future loading port. At Jucaro, where he was sent, no coal could be obtained. From this port the master of the Venus telegraphed the charterer as follows:

"Venus has only 6½ days' coal, not sufficient to take steamer Norfolk. No coal here."

As the charterer ordered him to New York with knowledge of the situation, we think the master was justified in exercising his judgment that the best course for him to pursue was to stop at Savannah

for coal on his way to New York. We are unable to discover any breach of the charter party by the owner.

The deviation to Savannah was occasioned by the action of the charterer in using the coal in Cuba, and sending the Venus north from a Cuban port where it was impossible to procure coal.

The decree should be affirmed with costs, less the amount which the charterer paid for provisions, etc., for the crew at Savannah, amounting to $40.88.

TOMASELLI v. SACCO.

SACCO v. TOMASELLI.

(Circuit Court of Appeals, First Circuit. March 8, 1912.)

Nos. 943, 944.

MASTER AND SERVANT (§ 278*)—INJURY TO WORKMAN—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence in an action for injury to a workman while digging a ditch in a street *held* to warrant a finding that his employer was negligent in failing to warn him against a defective condition of the soil, known to the employer, but unknown to the workman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954–972, 977; Dec. Dig. § 278.*]

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

Action by Raffaele Sacco against Antonio G. Tomaselli. From the judgment, both parties bring error. Affirmed as to defendant's petition in error; plaintiff's petition dismissed.

Patrick P. Curran (John E. Canning and Comstock & Canning, on the brief), for plaintiff.

Alexander L. Churchill (Walter B. Vincent, Henry M. Boss, Jr., Ralph T. Barnefield, and Vincent, Boss & Barnefield, on the brief), for defendant.

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

ALDRICH, District Judge. In this case the plaintiff below sought to recover for personal injury received while engaged in the work of digging a ditch for sewer purposes in East Providence. The work was under the general management of Tomaselli, who was carrying it forward under a contract.

It appeared from the evidence that some years before a ditch had been dug through the same street for water pipes, and the new ditch being dug by the workmen at the time the plaintiff was injured was running parallel to it and within a very few feet of it. The evidence tended to show that its fill was of such a character as to render the new ditch more likely to cave in, and the evidence was such as to warrant the jury in finding that Tomaselli knew about its existence, and

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

that the injured workman had no knowledge of it. Tomaselli furnished lumber for shoring the new ditch, something which is often used in ditches to prevent their caving in; but none had actually been used in the new ditch at the place of injury. The evidence also tended to show that dirt replaced in a ditch never resumes its original conditions of solidity and strength, and the fact of the existence of the old ditch so near the one which was being dug presented an element of hazard, because the earth between the two was liable to topple over, and the evidence tended to show that the caving in occurred because there was only a narrow strip of solid, virgin earth between the old ditch and the new. All questions under the first, second, and third counts were ruled against the plaintiff, and the single point saved to him was founded upon an alleged duty to warn the workmen in respect to the old ditch. Under the evidence we think such conditions were described as would entitle the plaintiff to recover, provided the facts were found in accordance with that theory of danger. The instructions to the jury were full and comprehensive, and all questions about the shoring and the failure to use the shoring, and all fellow servant questions, were expressly removed from the case, and the simple question submitted to the jury was whether the defendant should have warned the workman of the hidden danger, to the end that he might have seen for himself and have guarded against the danger as the new excavation proceeded. We perceive no error in the statements of the learned judge in respect to what was said about the duty, and he left it to the jury to say whether under all the circumstances the master fully discharged his duty to the laborers by informing them of the hazard which he knew, and which was not within the knowledge of the workmen.

The only legal proposition involved in what was submitted had reference to the duty upon the employer to tell the employé of the hazard not visible, but which he knew about, and that proposition was made to depend upon the facts whether there was danger, whether the superintendent knew it, whether the employé did not know it, and whether warning would have safeguarded him. We see no error in the legal proposition, and under the instructions the facts must have all been found against the defendant, in order that a verdict for the plaintiff should have been reached.

In No. 943, the judgment of the Circuit Court is affirmed, with interest and costs.

In No. 944, the plaintiff's right of recovery having been established in No. 943, there is no necessity for reviewing the questions ruled against him in respect to the first, second, and third counts, and the writ of error in No. 944 is dismissed, without costs, as it has become a moot case.

STANDARD FIRE EXTINGUISHER CO. v. HELTMAN.

(Circuit Court of Appeals, Sixth Circuit. March 13, 1912.)

No. 2,149.

1. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—EVIDENCE.
In an action by an employé for injuries claimed to have been caused by failing to guard a machine with a substantial railing, as required by Rev. St. Ohio 1908, § 4364—89c, an offer to prove that more than eight months after the injury the inspector examined the machine and did not require any additional safeguards was properly denied, as it was only an offer to show a vague and indefinite declaration of opinion, not upon the witness stand.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913–927, 932; Dec. Dig. § 270.*]

2. EVIDENCE (§ 506*)—EXPERT OPINION—ADMISSIBILITY.
So far as the offer might have contemplated an opinion from the inspector as an expert on the witness stand, it called only for his conclusion as to the ultimate fact in issue before the jury, and could not be received.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. § 506.*]

3. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—INSTRUCTIONS.
In an action by an employé for injuries claimed to have been caused by failing to guard a machine with a substantial railing, as required by Rev. St. Ohio 1908, § 4364—89c, which provides that ordinary care shall be taken to prevent injury to persons coming in contact with machinery, and that in certain cases substantial railing shall be provided, an instruction that, in determining whether the inclosing device used was the substantial railing required by the statute, the jury should consider whether the device was such as ordinary care required, was properly given.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148–1161; Dec. Dig. § 293.*]

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

Action at law by Robert Heltman against the Standard Fire Extinguisher Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Alfred Mack (Cohen & Mack and Milton Hurtig, on the brief), for plaintiff in error.

C. C. Benedict (Darby & Benedict, on the brief), for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. We are asked to reverse a judgment for damages suffered by Heltman through having his hand caught in the cogs of the driving mechanism of a pipe-cutting machine, in the operation of which he was employed. The recovery depends upon whether this machine was one of those contemplated by the second clause of section 4364—89c of the Ohio Revised Statutes, and so was required to be

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

surrounded by a "substantial railing." Counsel urge that this section does not relate to this machine. We do not feel at liberty to consider the merits of this contention, because we cannot effectively distinguish this case from Republic, etc., Co. v. Yanuszka, 166 Fed. 684, 92 C. C. A. 280, where this statute was, by this court, deliberately applied to a machine and a situation essentially similar to those now involved. The statute having now been amended so that the precise question cannot arise again, and having been once considered by this court, we think inadvisable a detailed discussion of the suggested possible distinctions between the present and the former case. The inclosing device here present did not prevent the injury, and there was room for the jury to say that it was not the statutory "substantial railing."

[1, 2] The company (defendant below) also complains because it was not allowed to prove that the inspector examined this machine and did not require any additional safeguards, as he might have done pursuant to one of the provisions of the statute above referred to, and insists that, under this and other statutes, it is the theory of the Ohio laws that the inspector had discretion in determining the proper safeguards required under the general language of the statute, and that, when he has passed upon and approved a machine, the owner may rely upon such approval as an administrative application of the statute. This question, also, we do not consider, because it appears that the inspection in question was made November 30, 1909, while plaintiff's injury was received during the previous March. Defendant's offer to prove that the inspector did not require anything further on this machine was, therefore, only an offer to show a vague and indefinite declaration of opinion, not upon the witness stand, and, so considered, was obviously inadmissible. So far as the offer might have contemplated an opinion from the inspector as an expert on the witness stand, it called only for his conclusion as to the ultimate fact in issue before the jury, and, under familiar rules, could not be received.

[3] The jury was told that, in determining whether this inclosing device was the substantial railing required by the statute, it should consider whether the device was such as ordinary care required. Counsel say that this instruction put upon defendant a burden not imposed by the statute, in that a structure which was really a substantial railing might not satisfy the jury's view of ordinary care. This complaint overlooks the earlier part of the same statute, by which the duty of ordinary care is declared; and the requirement of a substantial railing is a specification under this general provision. The two parts must be construed together; and, so construed, the substantial railing must be of such a character as would be dictated by ordinary care to insure the object sought by the statute.

We find no error; and the judgment is affirmed, with costs.

THE WHITE SEAL.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1912.)

No. 1,986.

SEAMEN (§ 26*)—WAGES—WRONGFUL DISCHARGE.

Evidence considered, and *held* to sustain a finding that libelant was discharged without cause from his position as chief engineer of a steamer before the end of his contract term, and entitled to recover wages to the end of the term, less his earnings.

[Ed. Note.—For other cases, see Seamen, Dec. Dig. § 26.*]

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

Suit in admiralty by A. D. Smith against the steamer White Seal; G. P. Sproul, owner, claimant. Decree for libelant, and claimant appeals. Affirmed.

The appellee in his libel alleged that on March 16, 1909, he and the claimant, who was the managing owner of the steamer White Seal, entered into a written contract, whereby the appellee was to act as chief engineer of that steamer for a period of six months, commencing at the date of his departure from Seattle; that his salary was to be $1,500, payable in six equal monthly installments of $200 each, the balance of $50 per month to be paid him at the expiration of the six months; that on March 26, 1909, he entered upon the discharge of his duties under the contract, and on August 1, 1909, he was discharged without cause, and was paid $1,050. He alleged that from the 1st to the 28th of August he was out of employment, and was compelled to expend the sum of $81 for board and lodging; that under the contract the claimant agreed to pay him $100 per month from the close of the six-month period of service to the date of his arrival at Seattle, November 14, 1909, amounting to $170, as well as the transportation expenses from Fairbanks to Seattle, which in all, according to the libel, amounted to $248. The appellee demanded $949, less $204, which latter sum of money he alleged he had been able to earn by work performed by him on the steamer Martha Clow. The answer denied that the appellee was wrongfully discharged, and alleged that he had failed to perform his duties, that he worked against the best interests of the steamer, and was guilty of insubordination and was insolent to the claimant, who was the owner and mate of the boat, and for those reasons he was discharged. The court below found that the appellee had in all respects complied with the contract, and had been discharged without sufficient cause, and awarded him $450, the difference between the $1,500 agreed upon and the $1,050 paid him, and the further sum of $125, which would have been the cost of his transportation to Seattle at the expiration of the six months, the period of service agreed upon in the contract.

William Thomas, Robert H. Frick, Louis S. Beedy, and James Lanagan, for appellant.

H. W. Hutton, for appellee.

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

GILBERT, Circuit Judge (after stating the facts as above). We find no ground for disturbing the conclusion reached by the court below that the appellee was wrongfully discharged. That conclusion was reached upon the consideration of testimony which was taken in open court, and the record does not sustain the contention that the

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

court erred in so finding. The appellee, it is true, on one or two occasions, used rough language, and was insolent toward the owner of the boat, who was also the mate, but the offense so committed does not seem to have been seriously considered at the time, and when the appellee was discharged some six weeks later, at the time when all the other employés of the boat were discharged, and the boat was laid up, the controlling reason for his discharge is found in those facts, rather than in his insubordination and breach of duty, which occurred six or seven weeks before.

It is contended that the court below committed error in finding the amount due the appellee. It is not denied that, if he was wrongfully discharged, he was entitled to $450, the unpaid balance of the agreed upon compensation for six months' service, less any sum he could have earned in the period between August 1st and September 25th. Under the contract, he was entitled to his wages at $100 a month from September 25th to the date of his arrival at Seattle, and also to the cost of his transportation to Seattle. He testified, and there is no evidence to the contrary, that from the 1st to the 28th of August he could find no employment, and that the expense of his maintenance during that period was $81, and that he worked on the Martha Clow from the 28th of August to the 2d of October, and earned $204. When to the $450 admitted to be due under the contract there is added $125, the cost of transportation to Seattle, together with the wages which were due the appellee for the time engaged in returning to Seattle, and when from the sum of these amounts there is deducted the proportion of the net earnings of the appellee between the date of his discharge and September 25th, it will be found that the result is almost exactly that which was reached by the court below.

We find no error. The decree is affirmed, with interest and costs to the appellee.

PIRVITZ v. PITHAN.

(Circuit Court of Appeals, Eighth Circuit. March 7, 1912.)

No. 3,599.

BANKRUPTCY (§ 408*) — DISCHARGE — OBJECTIONS — TRANSFER OF PROPERTY — FRAUD.

Facts *held* to justify denial of a bankrupt's petition for discharge, on the ground that within four months prior to the filing of his petition in bankruptcy he had transferred and disposed of specified property with intent to hinder, delay, and defraud his creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732–736, 759, 762, 763; Dec. Dig. § 408.*]

Appeal from the District Court of the United States for the Southern District of Iowa.

In the matter of bankruptcy proceedings of John Pirvitz. From an order sustaining objections of John Pithan to the discharge, the bankrupt appeals. Affirmed.

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

George H. Mayne, for appellant.
Jacob Sims, for appellee.

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

WM. H. MUNGER, District Judge. This case comes to this court upon appeal from the judgment of the District Court for the Southern District of Iowa, refusing to grant a discharge in bankruptcy to John Pirvitz, bankrupt.

The record discloses that one John W. Pithan, the objecting creditor, commenced an action in the state court, in August, 1908, against Pirvitz, to recover damages which he alleged he had sustained by the running away of a team of said Pirvitz in the month of June preceding. John Pirvitz was the owner and possessed of personal property of the value of approximately $3,500, and on September 7th, a little more than a week after said suit was commenced by John W. Pithan against him, he conveyed by bill of sale to one H. C. Pithan, a relative by marriage, all of his property not exempt from execution, for a recited consideration of $3,100. No consideration was paid, nor was there any change in the possession of the property. On November 30th the trial of the case was commenced, and on that day H. C. Pithan executed a bill of sale covering the same property described in the bill of sale from Pirvitz to Pithan to one Herman Garbe, for a recited consideration of $3,400. There was no consideration for said sale, and the possession remained in Pirvitz. A verdict was returned December 2d against Pirvitz in the action for $2,700, and on the following morning Pirvitz went to one Marshall, a neighbor of his, and solicited him to buy his corn, hogs, and other personal property, and Marshall bought all of Pirvitz's property exempt from execution, excepting one span of horses, for the agreed sum of $1,668, and Pirvitz, on the same day, sold one span of horses to a neighbor by the name of Peters for the sum of $150. On this same day Garbe reconveyed the property to Pirvitz. By these two sales to Marshall and Peters, Pirvitz disposed of all of his property not exempt from execution. Marshall retained out of the amount which he was to pay the sum of $480, which Pirvitz was owing to another party for the rent of the farm upon which he was living, and Marshall paid that amount to Pirvitz's landlord. Within a day or two after receiving the money, Pirvitz went to Greeley county, Neb., purchased, as he claims, 80 acres of land at $20 an acre, and paid thereon the sum of $800. He paid to his attorney, who defended the action brought by John H. Pithan, for attorney's fees and expenses in that case, the sum of $500, and in December he filed his petition in bankruptcy, scheduling only such assets as he claimed exempt, and in February, 1909, petitioned for a discharge. John H. Pithan, having proved his claim in the bankruptcy proceedings, filed objections to the discharge; one of the grounds being that Pirvitz, the bankrupt, had, within the four months preceding the filing of his petition in bankruptcy, transferred and disposed of certain of his property (describing it), with the intent to hinder, delay, and defraud his creditors. Upon the final hearing

the court sustained this objection and denied the discharge, from which Pirvitz has appealed to this court.

It would serve no useful purpose to attempt to give a detailed recital of the evidence, the reading of which presents to our minds but one conclusion; that is, that the object, purpose, and intent of Pirvitz, in making the several bills of sale, and the transfers of all of his property exempt from execution, in the manner and under the circumstances in which it was done, was to hinder and delay, if not entirely to defraud, John H. Pithan in the collection of his judgment, and the District Court rightly refused a discharge.

The decree is affirmed.

THE ERIN.

THE NORTH AMERICA.

(Circuit Court of Appeals, Second Circuit. January 30, 1912.)

No. 155.

COLLISION (§ 95*)—TUGS WITH TOWS MEETING—NEGLIGENCE.

A tug, with a tow, which had just passed around the Battery and started up East River, *held* solely in fault for a collision between her tow and that of a meeting tug, a little on her starboard, in that, after she had properly given a signal to pass starboard and starboard, which was agreed to, she did not change to port as much as she should, in view of the fact that the other tug could turn out of her course very little, because of another vessel to the east of her.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

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

Suit in admiralty by the New York, Susquehanna & Western Coal Company against the steam tug Erin (the Shamrock Towing Company, claimant) and the steam tug North America. Decree for libelant against the Erin alone, and her claimant appeals. Affirmed.

This cause comes here upon appeal from a decree holding the Erin solely in fault for a collision between libelant's barge Susquehanna, in tow of the North America, and the barge Ethel, in tow of the Erin. The collision occurred about 11 a. m. in the East River. Briefly stated, the sequence of events is as follows: The Erin rounded the Battery into the East River, and when straightened up was somewhat to the westward of mid-river, bound generally upstream. There was a steamer going upriver to the Brooklyn side of the Erin. Another vessel passed the Erin on the same side, and when far enough ahead swung over to the westward across the Erin's bow, in order to dock at Pier 32, Manhattan. While this steamer, called the docking steamer, was crossing the Erin's bow, she obscured her lookout's forward view, and also cut off the Erin from the view of any lookout above the steamer. When the steamer had swung sufficiently to the westward to remove this obstruction, the lookouts of the Erin and of the North America sighted each the other's vessel. Future movements all took place between the course of the so-called Brooklyn steamer, to the eastward, and the course of the docking steamer, to the westward.

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

The North America, bound down about mid-river, had seen the Brooklyn steamer before the Erin came in sight, and exchanged with her a one-whistle signal. Upon sighting the North America, the Erin blew her a two-blast signal, which was responded to with a like signal. The tugs passed each other starboard to starboard not far apart—50 to 75 feet, at the most. The tow of the North America, 250 feet astern of her, consisted of three barges, lashed side by side, with a total width of 100 feet. The starboard quarter of the single barge in tow of the Erin struck the starboard bow of the starboard barge in the North America's tow.

Jas. J. Macklin (De Lagnel Berier, of counsel), for appellant.

Wallace, Butler & Brown (J. K. Symmers, of counsel), for the North America.

Herbert Green, for appellee New York, Susquehanna & Western Coal Co.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). We find no fault in the two-whistle signal of the Erin, which initiated a starboard to starboard passing. They were on substantially parallel courses and meeting head to head, or nearly so; but the Erin was to the westward of the North America, and it might well seem wiser to undertake to pass her on that side, rather than to cross over her course and get to eastward of her, with the Brooklyn steamer so near, in an effort to pass port to port.

The presence of both the interfering steamers was known when the tugs sighted each other and exchanged their signals, and it was known that their navigation would be affected accordingly. Thus the Erin knew that, unless the Brooklyn steamer got beyond the North America before the tugs came to the passing point, the North America could not shift herself substantially to the eastward, and therefore it behooved the Erin to shift herself as much to the westward as possible. On her own testimony we are satisfied that she did not do so. Her master says he starboarded his wheel "a spoke or two," which involved a very slight change. Maybe thereafter he straightened up again. But he says he blew the two-blast whistle when he was off Catherine street, and that the North America was then about a quarter of a mile further up. The Erin was then to the westward of the North America—the lowest estimate is 30 feet. When the tugs passed each other they were only 50 to 75 feet apart, as the Erin admits; less than that, as the North America contends. Manifestly, in the time during which the quarter-mile was covered by both, the Erin had not shifted substantially to the westward. She could have done so promptly on giving the signal, because the docking steamer was then some distance above her ("way up by me, way up clear when she began to turn"), and, having got further to the westward, could have waited until the docking steamer passed in towards her berth. The Erin did not fulfill the whole obligation she assumed when she gave the two-blast signal.

It is contended that the North America was not herself free from fault. Having responded with a two-blast whistle, it was her duty to do what she could to assist a passing starboard to starboard. Of

course, so long as the Brooklyn steamer remained a factor in the situation, she could do but little. Her master starboarded his wheel slightly before he reached the steamer, and then straightened, passing the steamer "about 50 feet clear." He could do no more until after he had passed her sufficiently to be free to move further to the eastward.

Counsel for the Erin insists that the North America had passed the Brooklyn steamer before the tugs passed each other, and that she was free to swing to starboard, which concededly she did not do. The evidence, however, is not clear upon this branch of the case, and we are not prepared to differ from the conclusion reached by the district judge, who saw and heard the witnesses.

Decree affirmed, with interest and costs.

REICHERT et al. v. LONG ISLAND R. CO.

(Circuit Court of Appeals, Second Circuit. January 29, 1912.)

No. 83.

NAVIGABLE WATERS (§ 20*)—INJURIES TO VESSELS BY OBSTRUCTIONS—DEFECTIVE BRIDGE.

A finding affirmed on the evidence that the sinking of libelants' tug was due to injuries received on the afternoon before she sank in the morning, by coming in collision with the abutment of respondent's railroad bridge over Flushing creek, Long Island, which respondent had negligently permitted to become and remain out of repair and dangerous.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 73–99; Dec. Dig. § 20.*]

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

Suit in admiralty by Jacob Reichert and George W. Kidd, owners of the steam tug Mischief, against the Long Island Railroad Company. Decree for libelants, and respondent appeals. Affirmed.

This cause comes here upon appeal from a decree holding respondent liable for certain injuries to libelant's tug Mischief, alleged to have been caused by a collision between the Mischief and respondent's railway bridge over Flushing creek. The evidence showed quite convincingly that a condition of disrepair had existed for some time, where the wing or smoothing iron contacted with the pin abutment, and that the wing itself gave way excessively under pressure of boats running along to reach the abutment. All the witnesses but two were examined in open court.

Burlingham, Montgomery & Beecher (William S. Montgomery and Roderick Terry, Jr., of counsel), for appellant.

Foley & Martin (William J. Martin and Frank A. Spencer, Jr., of counsel), for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. We think the conclusions of the District Judge, who heard the principal witnesses and believed them, should be accepted upon the disputed questions of fact. There is nothing im-

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

probable about their story, which fully accounts for what happened. It appears that the tug did come in contact with the abutment, and there is evidence to warrant the finding that she caught in the lower loosened planks. She sank the morning after, and the only adequate explanation of her sinking is the fact of the injury of the afternoon before. It would have been rather remarkable if some other injury had intervened to sink the vessel at this particular time.

We are not impressed by the testimony as to a slight opening on the starboard quarter. Nor are we impressed by the circumstance that the injuries to the port side were not discovered till she sank the next morning. During the rest of her navigation that day, about two hours, only one of the started seams was under water, possibly not so badly started as the others. It is quite probable that whatever water came in through that seam was not more than the bilge pump would discharge. Therefore, until that pump ceased to act, when the engines stopped, there would be nothing to indicate damage. Shortly after she was tied up for the night, all on board left her, siphoned out and dry. Thereafter the water would accumulate, the bilge pump having stopped, slowly at first, until it brought another seam below the water level, which would double the intake, and thereafter, as each of the other three got to water level, the intake would increase still further. Light as she was, with empty tanks, we find nothing improbable in the circumstance that she did not actually sink until the morning after the injuries were received.

We are not satisfied that there was any negligence on the part of the master of the Mischief.

The decree is affirmed, with interest and costs.

UNITED STATES ex rel. PERELMAN v. INTERNATIONAL MERCANTILE MARINE CO. et al.

(Circuit Court of Appeals, Third Circuit. March 20, 1912.)

No. 1,544.

ALIENS (§ 54*)—EXCLUSION—FINDINGS OF BOARD OF INQUIRY.

A finding of the Board of Inquiry that an alien was likely to become a charge, and hence should be excluded, will not be disturbed, though a different conclusion might be reached.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

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

Habeas corpus proceeding by the United States of America, on relation of Henry Perelman, against the International Mercantile Marine Company and others. From the judgment, relator appeals. Affirmed.

Bernard Harris, for appellant.

J. W. Thompson, U. S. Atty., and J. Y. Brinton, Asst. U. S. Atty., for appellee.

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

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

YOUNG, District Judge. We are all of the opinion that this case is covered by the decision in the case of United States v. Rodgers, 191 Fed. 970, decided by this court. The Board of Inquiry had all the persons, brothers and sisters of Henry Perelman, and his father, before them. They were refused admission by the Board of Inquiry. We, on an examination of the evidence, might arrive at a different conclusion; but it cannot be said that there was no evidence from which it might be concluded that the petitioner had become indebted in England, had readily fallen in with a plan by which Klein got ahead of the other creditors, and left, owing at least $1,000, so that there was evidence both of debt and of willingness to cheat. The Board, therefore, having had the persons before them, the evidence of their failure abroad, and of Henry's willingness to cheat, had the means of judging whether or not they were likely to become a charge. As was said in the case of United States v. Rodgers, supra:

"We are not at liberty to set aside such determination, because on the record we think we might or would have reached a different conclusion. We have only to find that the inspectors acted within the scope of their authority and that the integrity of their proceedings is not impeached. We have no jurisdiction to correct their mistakes, if any, in finding as a fact that all the relators belonged to classes which, by section 2 of the Immigration Act of 1907 [Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 447)], are excluded from admission into the United States."

The judgment of the United States District Court must therefore be affirmed.

ATLANTIC COAST LINE R. CO. v. CONNOR.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1912.)

No. 1,049.

TRIAL (§ 419*) — CONCLUSIONS OF LAW OR FACT — MOTION FOR NONSUIT — WAIVER.

Denial of a motion for nonsuit at the close of plaintiff's case was waived by defendant's introduction of evidence on its own behalf.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 982; Dec. Dig. § 419.*]

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

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

Douglas McKay (Barron, Moore, Barron & McKay, on the brief), for plaintiff in error.

W. Boyd Evans (Lawson D. Melton, on the brief), for defendant in error.

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

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

PRITCHARD, Circuit Judge. This is an action at law instituted by the defendant in error (the plaintiff below) in the Circuit Court of the United States for the District of South Carolina against the plaintiff in error (the defendant below) to recover damages on account of personal injuries alleged to have been sustained by reason of the negligence of the plaintiff in error. The allegations relating to negligence were denied, and the defendant also pleaded contributory negligence as a further defense to the action. The case was tried at the November term, 1910, resulting in a verdict in favor of the plaintiff for the sum of $1,000. From this verdict and judgment the plaintiff sued out a writ of error to this court, on the ground that the presiding judge erred in refusing the defendant's motion for nonsuit upon the trial of the case.

For the purpose of convenience, the plaintiff in error will hereafter be referred to as the defendant below, and the defendant in error as the plaintiff below, that being the relative position of the parties in the lower court. It appears from an examination of the record that all of the assignments of error are based upon exceptions which relate to the refusal of the court below to grant the motion for nonsuit made by the defendant at the close of the testimony in chief of the plaintiff. However, it appears that the defendant, after having made this motion, introduced testimony in its defense. Therefore the question arises as to whether the defendant did not thereby waive any exception it may have taken to the refusal of the court below to direct a verdict.

In the case of Union Pacific Railroad Company v. Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597, Chief Justice Fuller, in speaking for the court, said:

"At the close of the plaintiff's evidence, the defendant moved to dismiss the complaint, which motion was denied, and defendant excepted. Thereupon the defendant proceeded with its case and adduced evidence on its part. This waived the exception, and the action of the court in overruling the motion to dismiss cannot be assigned for error. Columbia & Puget Sound Railroad v. Hawthorne, 144 U. S. 202 [12 Sup. Ct. 591, 36 L. Ed. 405]; Brown v. Southern Pacific Co., 7 Utah, 288, 291 [26 Pac. 579]."

Also the following cases are in point: Northern Pacific Railroad Company v. Mares, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296; Insurance Company v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740.

There being no other assignments of error, except those which relate to the refusal of the lower court to grant the defendant's motion for nonsuit, it necessarily follows that there is nothing before the court for our consideration except the motion to penalize the plaintiff under section 2, rule 30, of this court (150 Fed. xxxv, 79 C. C. A. xxxv). The section in question reads as follows:

"In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment."

After a careful consideration of the facts upon which this motion is based, we are impelled to the conclusion that the same is without merit, and it is therefore refused.

The judgment of the lower court, for the reasons herein stated, is affirmed.

Affirmed.

AMERICAN AGRICULTURAL CHEMICAL CO. et al. v. BRINKLEY.

(Circuit Court of Appeals, Fourth Circuit. February 12, 1912.)

No. 1,060.

1. BANKRUPTCY (§ 68*)—BANKRUPT'S OCCUPATION—DETERMINATION.
   In determining whether one sought to be adjudged an involuntary bankrupt is chiefly engaged in the exempt occupation of farming, all his pursuits must be considered as a whole, though he is merely a partner as to some of them.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 18, 86, 87; Dec. Dig. § 68.*]

2. BANKRUPTCY (§ 91*)—BANKRUPT'S OCCUPATION—EVIDENCE—SUFFICIENCY.
   In an involuntary bankruptcy proceeding, evidence *held* to warrant a finding that the debtor was chiefly engaged in the exempt occupation of farming.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137–139; Dec. Dig. § 91.*]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

Involuntary bankruptcy proceeding by the American Agricultural Chemical Company and others against W. H. Brinkley. From a decree denying an adjudication of bankruptcy, petitioners appeal. Affirmed.

James H. Corbitt, for appellants.

John N. Sebrell, Jr., and R. H. Rawles (E. E. Holland, on the brief), for appellee.

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

ROSE, District Judge. The appellants are creditors of the appellee. They will be called the creditors. He will be styled the debtor. They are asking to have him adjudicated an involuntary bankrupt. He resists the adjudication.

[1] There is only one question in the case. Was he at the time he committed the alleged act of bankruptcy chiefly engaged in farming? If he was not, it is admitted that an adjudication must be made. On this issue the court below decided in favor of the debtor. The creditors ask us to reverse that ruling.

The debtor was carrying on three country stores. By himself, or in partnership with others, he tilled five farms. He was a member of four distinct partnerships. Each of these cultivated a separate farm. In the conduct of one farm he had no associate. There is no question

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

that his mercantile business far exceeded in importance the agricultural operations conducted by him individually. This proceeding is against him as an individual. No one of the firms of which he was a member is a party to it. The creditors say that the so-called entity theory requires that, in determining whether the debtor was engaged chiefly in farming, we must exclude from consideration anything he did in connection with any of the partnerships. We cannot assent to this contention. Whether a debtor is or is not chiefly engaged in farming or tilling the soil is a question of fact, to be determined in each case in which it is sought to have him individually adjudicated. In passing upon that question, all the debtor's activities and pursuits must be considered as a whole. No part of them may be ignored merely because they concern themselves with the affairs of copartnerships of which he was a member. Doubtless a firm may be adjudicated an involuntary bankrupt when it is engaged in a nonexempt business, in spite of the fact that the principal occupation of some of its partners protects them from individual adjudication. Dickas v. Barnes, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654.

[2] Such is not the case before us. The creditors, however, insist that the evidence shows that the mercantile business of the debtor exceeded in importance all the agricultural operations in which he was engaged, whether severally or in copartnership with others. The case in this aspect is undoubtedly close. The learned judge below had the witnesses before him. He saw and heard them testify. He was of opinion that the debtor was chiefly engaged in farming. We do not see any sufficient reason for coming to a different conclusion.

Affirmed.

CITY OF CLARKSDALE v. WILLIAMSON et al.

(Circuit Court of Appeals, Fifth Circuit. March 5, 1912.)

No. 2,243.

APPEAL AND ERROR (§ 1236*)—AFFIRMANCE—JUDGMENT ON SUPERSEDEAS BOND—WHEN ENTERED.

Judgment on a supersedeas bond, given under rule 13 of the Circuit Court of Appeals (150 Fed. xxviii, 79 C. C. A. xxviii), and Rev. St. § 1000 (U. S. Comp. St. 1901, p. 712), on suing out a writ of error to review a judgment for money not otherwise secured, will not, on affirmance, be entered in the appellate court; the proper practice being to enter such judgment on motion in the trial court after remand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4778–4784; Dec. Dig. § 1236.*]

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

Action at law by S. M. Williamson and others against the City of Clarksdale. Judgment for plaintiffs, and defendant brings error. Affirmed.

John W. Cutrer, for plaintiff in error.

Julian C. Wilson, for defendants in error.

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

Before McCORMICK and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. The right of trial by jury was waived by stipulation in writing, and the court, on the facts, rendered judgment for the plaintiffs (defendants in error here). The facts disclosed by the record fully sustain the judgment. None of the assignments of error are well taken, and the judgment must be affirmed.

The judgment was for money not otherwise secured, and, on suing out the writ, a supersedeas bond was given under rule 13 of this court (150 Fed. xxviii, 79 C. C. A. xxviii). R. S. U. S. § 1000 (U. S. Comp. St. 1901, p. 712). The defendants in error in the brief request the court to enter judgment here on the supersedeas bond. The practice heretofore prevailing has been to enter such judgment on the bond on motion in the trial court, after the mandate goes down from this court. Gordon v. Third National Bank, 56 Fed. 790, 6 C. C. A. 125. We see no reason in this case for departing from the usual course.

Affirmed.

GENERAL ELECTRIC CO. v. ALLIS-CHALMERS CO. et al.

(Circuit Court of Appeals, Third Circuit. February 6, 1912.)

No. 1,548.

APPEAL AND ERROR (§ 79*)—APPEALABLE ORDERS—DISMISSAL AS TO ONE DEFENDANT.

An appeal will not lie from an order dismissing a bill as to one of two defendants prior to the rendition of final decree in the cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 484–493; Dec. Dig. § 79.*]

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

Suit in equity by the General Electric Company against the Allis-Chalmers Company and others. From the judgment of dismissal (190 Fed. 145) as to certain defendants, complainant appeals, and defendants move to dismiss appeal. Motion sustained.

See, also, 194 Fed. 414.

Edwards, Sager & Wooster, for Allis-Chalmers Co.

Betts, Sheffield, Bentley & Betts, for General Electric Co.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

PER CURIAM. This is a motion to dismiss the appeal of the General Electric Company from that part of the decree of the court below which dismissed the bill as to the Bullock Electric Manufacturing Company of New Jersey. Such motion is based on the ground that no final decree has been entered in the cause. After argument and due consideration had, the motion is granted, on the au-

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

thority of Hohorst v. Hamburg Co., 148 U. S. 262, 13 Sup. Ct. 590, 37 L. Ed. 443, and Ex parte National Enameling Co., 201 U. S. 158, 26 Sup. Ct. 404, 50 L. Ed. 707.

ALLIS-CHALMERS CO. v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, Third Circuit. February 6, 1912.)

No. 1,548.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ELECTRICAL TRANSLATING DEVICE.

The Armstrong & Woodbridge patent, No. 726,391, for an electrical translating device, *held* not anticipated, valid, and infringed.

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

Suit in equity by the General Electric Company against the Allis-Chalmers Company and others. Decree for complainant (190 Fed. 145), and defendant Allis-Chalmers Company appeals. Affirmed.

See, also, 194 Fed. 413.

Edwards, Sager & Wooster, for Allis-Chalmers Co.

Betts, Sheffield, Bentley & Betts, for General Electric Co.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case the General Electric Company, owner of patent No. 726,391, granted April 28, 1903, to Armstrong and Woodbridge, for means for varying delta-connected voltages, brought suit against the Allis-Chalmers Company charging infringement of the first claim thereof. The case was heard on full proofs, and a decree was entered holding said claim valid and infringed. The lower court, in its opinion reported at 190 Fed. 145, exhaustively described and discussed the device involved, its relation to the prior art, and an alleged prior use. No principles of law are involved, and the decisive questions turn on findings of fact. The case has again undergone full examination by this court, aided by the enlightening arguments of counsel. As we have found no error in the lower court's disposition of the case, we are of opinion that a restatement by this court in a second opinion would serve no useful purpose, and would unduly burden the reports, digests, and profession.

The decree is therefore affirmed, on the opinion of the court below.

NEENAN v. OTIS ELEVATOR CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1912.)

No. 123.

1. PATENTS (§ 202*)—CONTRACT OF ASSIGNMENT—CONSTRUCTION.

Under a contract by which complainant assigned certain patents relating to elevators to defendant, a builder of elevators, which required defendant to test the patented apparatus with reasonable diligence, and if such test proved satisfactory "within such further reasonable time as

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

is convenient to put such apparatus into practical use" and to pay royalties thereon, the test having proved satisfactory, complainant was entitled to have the inventions exploited during the life of the patents and within a reasonable time.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 281–289; Dec. Dig. § 202.*]

2. PATENTS (§ 202*)—CONTRACT OF ASSIGNMENT—RESCISSION IN EQUITY.
The failure and refusal by defendant, although continuously building and installing elevators, to make any practical use of such invention for five years after the making of the contract, was a violation both of its spirit and letter which entitled complainant to its rescission in equity; there being no rational rule of damages which would afford an adequate remedy at law.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 281–289; Dec. Dig. § 202.*]

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

Suit in equity by Michael C. Neenan against the Otis Elevator Company. Decree for complainant, and defendant appeals. Affirmed.

See, also, 180 Fed. 997.

The following are the statement of the case and the opinion of the court below:

This cause now comes up for final hearing after the taking of more testimony by both sides designed to show the extent of the defendant's default. The original facts as contained in the testimony first taken are set forth in the opinion of this court filed on June 2, 1910. 180 Fed. 997. The complainant took advantage of the leave granted him at that time to submit further evidence designed to show that the defendant's default extended to the whole consideration. It appeared upon the first hearing that the defendant had paid the sum of $8,000 mentioned in the seventh article of the contract on April 11, 1907, and that this constituted an election, after the test prescribed in article tenth, to accept the patents and to continue to manufacture elevators under them, although under article eighth the company might cancel the agreement at any time. It now appears that, besides the four buildings which were considered in the first opinion, the defendant between April 11, 1907, and August 1, 1910, by 27 different contracts installed Otis Drum, Traction, or Worm Gear, elevators in 22 buildings in the city of New York, in each of which the complainant claims his own device would have been more practicable and better suited for the use. Of these 27 contracts, 18 were made before February 5, 1909, when suit was brought, and 16 before January 1, 1909, which was the date at which Neenan served his notice upon the defendant that he rescinded the contract and demanded a reconveyance of the patents.

His proof in regard to the suitability of his own device consists of the testimony of one Ryno, who has had a long experience in the city of New York inspecting elevators, and who testifies that in the case of all of the 22 buildings the Neenan device would have saved space either in sectional area through all the floors or at the top where the motor had in fact in some cases been installed. The complainant himself, who went about with Ryno looking at the elevators, corroborates his judgment and enumerates the changes necessary to put in his own device in place of the Otis elevator. These consist of certain eliminations and certain additions the detail of which it is not necessary to state. This testimony is not answered by any of the defendant's witnesses. The complainant also presented the evidence of an expert electrical engineer, Hanchett, who had had much experience in regard to elevators. In his judgment the Neenan device was superior to the Otis Traction, Worm Gear, or Drum elevators in seven particulars: First, in regard to

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

the application of traction on the ropes; second, in its elasticity and ability to survive shocks; third, the longer life of the cables; fourth, greater safety; fifth, economy of power; sixth, cheaper maintenance; seventh, cheaper installation. The president of the defendant was called and testified that he had submitted bids for Neenan's device upon only one of the 27 contracts, the Hendrick Hudson building. He also stated that the fact that the complainant had not yet had a commercial test of the device in actual service was one reason for not submitting a bid upon Neenan's device, that he had never advertised the device, and that the defendant did a yearly business of between $1,500,000 and $1,800,000 in the direct traction drive type of machine, but that this figure did not represent the business done in Worm Gear and Drum elevators. This was the complainant's case.

The defendant, in answer to this testimony, put on two witnesses—its sales agent, Charles; and the chief of its estimating department, Hollander. Hollander's testimony contradicts that of Hanchett in respect of the cost of installation, which he believes to be about 12 per cent. greater than for the Otis traction one-to-one equipment. He does not fix the difference in expense between the Neenan system and the Otis Drum, or Worm Gear, elevator, except to say that it is much more expensive. Upon cross-examination Hollander's figures did not work out to an exact percentage; that is, he did not succeed, when called on to give details, in making out an exact percentage of 100 from his several items.

Charles testified to three efforts made to install Neenan's device. The first was in the Park Row building, in which the defendant offered informally to install one elevator for $5,000. Subsequently they gave to Neenan a bid for ten machines on the same building; $17,500 for the first, and $16,000 for each of the other nine, and last they made a formal proposal to install one machine for $10,000. The negotiations continued after January 1, 1909, and were dropped by the owners themselves. The second proposition was to install the Neenan device in 42 Wall street. The defendant told the owner that they would be willing in this case also to install a machine for $5,000, but nothing was ever done by the owner. The third offer was for the Hendrick Hudson building, in which the defendant formally proposed to put in two Neenan elevators for $22,000, all being high speed, or two Worm Gear low speed elevators for $10,000. The owners accepted the lower offer. In the case of many buildings the architect expresses some desire for one type, or even actually specifies a given type, though ordinarily the matter is open for discussion between the elevator builder and the architect. The defendant hesitates in recommending any type of elevator which has not been tried in actual service, and in this case was looking for a place in which to install one elevator and try it out. This would be preferably in an old building in which one could be installed alone, and taken out without too much loss. Upon none of the other contracts did the defendant make any proposal, nor would it have been willing to do so.

HAND, District Judge. It now appears that the defendant has been waiting before putting the elevators into actual operation for an actual service test, in addition to the factory test mentioned in the contract. Nothing of the sort was stipulated, and indeed I have already held that the defendant was in default in failing to put "said apparatus into practical use" after the test resulted satisfactorily. However, in my view of the case it may be assumed that the defendant had the right to make a service test before offering the device for general commercial use. It must be remembered, nevertheless, that, if so, this became a condition precedent of its own creation upon which the whole exploitation of the patent depended and that it was bound to active diligence to fulfill it. How has it discharged that obligation? There were 18 opportunities before bill filed besides 3 mentioned in the original opinion, and the defendant has not succeeded in installing the first service elevator in a single case. In saying that there were 18, I do not forget the contention that as to 2 contracts let between January 1st and February 5th the complainant's notice put them in risk of an infringement; but I think that their fear of such an infringement was not controlling, as is shown by the fact that they made a new offer to put in the elevator in 42 Wall street after January 1st and continued their negotiations on the Park

Row building after the same date, and also because they actually entered into a contract to manufacture the Neenan device in December, 1910. At that time the case had by no means been decided against the complainant. In regard to those contracts let after February 5, 1909, while it is true that the cause of action must be complete when suit is brought as well in equity as at law, still the actual intention and attitude of the defendant which is the subject of dispute can be tested by what occurred afterwards as well as by what occurred before. It appears therefore that in all 27 contracts were let, in each of which Neenan's device could have been installed. This, indeed, is not disputed by the defendant so far as the physical adaptation of the device to the buildings goes. Of course, I recognize that no one could say in how many of these they could have succeeded in installing the preliminary and service test elevator; but it had not even installed one, until it learned that the court might hold it to some action. So much, therefore, for its actual discharge of the obligation to put the apparatus to practical use. It has certainly failed in a large number of cases where the patent could be used.

What, however, as to the efforts it has made, for it may well be that mere failure would not be ground for rescission, if the defendant had done what it could. Not only did they not succeed, but they tried in only 4 out of more than 30 contracts, and, perhaps most significantly of all, in one of those 4 succeeded without any difficulty, so far as appears, in December, 1910, in actually letting a contract, not long after they had been put under some pressure. This does not seem to me to be the whole-hearted good faith to which the complainant was entitled. The very existence of his property was limited in time to December 24, 1918, so that when the choice was made in April, 1907, it had only 11½ years more to run, which was the only period in which to profit by his discovery. Moreover, it was only from the latter part of that period that the great gains would be likely to come, for we all know that the early years, which introduce an invention, are apt to be lean. Every year of delay means a year's loss at the end which is the best part of the patent, if it should turn out to be successful, and cuts off the greatest harvests, if there be a future harvest at all. It is not, therefore, a question merely of a proportionate loss to Neenan from each year's delay. If time be ever of the essence, it is in a case of this sort. Nor is it an answer to say that Neenan is too sanguine; that may well be true, though it hardly lies in the defendant's mouth, after being so languid in ascertaining whether or not his hopes are too high. In any case he bargained for active exploitation in good faith, and I must say it does not seem to me that he has had that. Had the defendant met his proof by showing that they had tried in all the contracts to put in the device, or at least in all those in which there were not good reasons against it, I should perhaps think differently, even though they were in formal default; but is it tolerable that they should let contract after contract without any effort to put in the mere service test, contracts which they now do not try to show Neenan's device could not mechanically have filled? Every allowance ought to be made for a reasonable difference of business judgment and for the necessities of their own manufacture. Neenan was subject to those, when he went in with them; but under the excuse of a reasonable business opportunity, the defendant could not remain indefinitely passive. Their undertaking involved action by them, and Neenan had the right to have them treat his device on an equality with their own. While they were not formally in a fiduciary relation to him, the scope of their obligation is fairly to be interpreted with an eye upon the fact that his profits would come from their use of the property he had conveyed. At least he had a commercial interest in the property, nor did the guaranty in the least change the obligation to exploit the patent.

I must therefore conclude that the defendant has shown no adequate excuse for the delay of nearly two years in putting in the experimental elevator, and that such efforts as they made were not a sufficient compliance with the obligations of the contract. That delay has been followed by a further delay of nearly two years more, and is corroborative of their disposition towards the patent. A delay of two years goes, as I have shown, to the very heart of the consideration, for, though it amounts to little now, it lops off two years

upon the end of the monopoly, which, if it is successful, are its very cream. I think Neenan was not obliged to wait any longer and could sue when he did.

The defendant urges that it has taken long to exploit several of its own machines, and that it can have no motive to discriminate against Neenan. As to the length of time in other cases, I can only say that it might well have been different, if there they had tried and failed, or had even given a reason for not trying; but they have done neither. Charles does say that in a few instances he believes the type of elevator was prescribed by the architect; but those cases are at most four, and it is extremely doubtful whether in two of those four the situation did not justify at least a suggestion of Neenan's device. As to motive, it is indeed a circumstance in the defendant's favor and I try to remember it. While it is not in the least necessary to find a motive, it is quite apparent that if a competing device be safely out of the way, as here, the stimulus for active and aggressive efforts to introduce it does not exist. There is no powerful motive to initiate a new development which is still tentative, when experience has proved the present devices quite satisfactory. Such an experiment certainly involves expense and possibly involves failure, with an attendant incidental injury to the whole business of him who brings it out. Moreover, while the royalties are very small, and could hardly be a determining factor in case of success, they were at least an added burden of 2 or 3 per cent., which, if competition be sharp, might be an inducement. In any case there appear to be possible motives for slackness of action.

However that may be, the fact is here that the defendant did not fulfill its obligation, and the right to rescind is made out.

The question of terms can in all probability be settled as well now as after a reference. It must speak as of the time of compliance with the decree and must try to put the parties in statu quo as of that date. Since the defendant has received nothing, it has no profits to account for. On the other hand, the complainant has received all told $13,000 which he must account for. The real question is as to how much of this sum the damages due to the defendant's default can constitute a set-off, and it is so clearly impossible to prove that as to make it idle to direct a reference to ascertain them. Should the defendant be charged with some sum for enjoyment of the patent? There is trouble in assuming that the minimum value to the defendant was at least equal to the guaranty; for it is possible that the royalties were themselves fixed at a lower sum than would have otherwise been the case just because of the guaranty, and, if so, the defendant was pro tanto paying in advance for royalties yet unearned. That is, however, an extremely unlikely supposition, because it was perfectly impossible to estimate even approximately what the future royalties would be, so that one could have any assurance that more than the guaranty would ever be earned at all. Besides the usual way, as in mining royalties, where the intention is that suggested, is to provide that so much of the guaranty as is not earned in one year may be set off against future royalties in any year in which the royalties exceed the guaranty. As there is no such provision here, it is less likely that the intention was that the guaranty was in any part payment for future royalties. While the matter is undoubtedly not free from doubt, some means must be struck which will effect substantial justice, and that most nearly in accord with the probable intention of the parties is to say that to value the yearly enjoyment of the patent at no less than $3,000. While this may turn out to be less than the value of the last years of the monopoly, if fruitful, of which Neenan has been deprived, it is all that can now be ascertained. On the other hand, it would be obviously unjust to make him repay the whole sum he has received, because the defendant has failed to receive what it ought to have tried to get.

The initial payment of $2,000 I regard as paid for an option on the patents, involving as it did their retention for three years. The complainant therefore need not be charged with that. The account will therefore charge Neenan with $8,000 with interest from April 11, 1907, and with $3,000 with interest from January 1, 1908. Against that he may credit himself with the value of the patent to the defendant from April 11, 1907, at the rate of $3,000.

I do not think that any interest can be added to the credits, since the allowance is neither for profits received, nor for damages suffered. It is rather upon a quantum meruit based upon the estimated value to the defendant of possession of the patents during the period in question. In such cases it is not generally the rule to award interest. Either party against which the account goes will pay to the other the balance due, and the defendant will reconvey the patents.

Complainant will have costs.

POST SCRIPTUM.—Counsel for the defendant has very kindly called to my attention a mistake in this opinion arising from the fact that paragraph 10 of the contract of May 24, 1904, covers only the patent not then issued, and indeed only issued on February 9, 1909, after the suit was brought. I can hardly see, however, that this in any sense changes the reasoning, or the result, for it is as though the patent, instead of having only 11 years, had 19, to run from April 11, 1907. My theory was that as the patent might be commercially successful, or at least as Neenan had the right to assume so, the last years would be the most fruitful, and that every year of delay in starting to exploit it would cut off a corresponding year of high returns. With this in mind, it makes no difference that the years cut off were at the end of 19 years instead of at the end of 11 years, so far as I can see. Indeed, the longer the term of the monopoly after the device becomes profitable, the higher the returns. What might have made a difference would have been for the defendant to stipulate that it might defer manufacture after acceptance till the patent had issued; but this they did not do, and they were therefore bound, before accepting the patent, to satisfy themselves that it would issue. This they apparently did, and in any case they were entirely protected by the cancellation clause. Besides, there was no commercial reason why the defendant should have waited after 1907 until the patent issued, nor does it urge that as a reason for inaction. There was small likelihood during those two years of the need of an actual patent to protect their rights, for infringements do not generally arise at the outset; indeed, the delay of issuance in the Patent Office, which was uncommon under the circumstances, was all to the advantage of both parties.

Ewing & Ewing (George H. Gilman and Thomas Ewing, Jr., of counsel), for appellant.

Knight Bros. (Harry E. Knight and Martin A. Ryan, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The facts are so fully set out in the opinions delivered by the Judge of the Circuit Court and filed, respectively, June 2, 1910, May 22, 1911, and June 2, 1911, that it will not be necessary to restate them in detail.

[1] The dilemma in which the defendant is placed by the proofs is this: The Neenan patents are either for valuable inventions or they are not. If worthless, the defendant will not be injured, but on the contrary will be benefited, by re-assigning them on receiving the amount it has paid. If, on the other hand, the patents cover valuable inventions, the inventor is entitled to have them exploited during the lives of the patents. The gains, profits and advantages which may accrue from the patents the complainant is entitled to receive, either under the contract or as owner. It seems evident that no substantial gains will accrue to him under the contract. The defendant has had the right to install elevators embodying the patented inventions since May 24, 1904, nearly five years prior to the filing of the bill and has not installed a single one or earned a dollar for the

complainant under the contract. The intention of the parties, at least the intention of Neenan was to exploit the inventions as soon as possible. It was the duty of the defendant to test the apparatus with reasonable diligence and if the tests were satisfactory to install it within such reasonable time as was convenient. It did test the apparatus and found it satisfactory, but has wholly neglected to put it into practical use. Its conduct in this regard seems to indicate a purpose not to use the patented improvements but to prevent rivals in business from acquiring them. Manifestly, the defendant does not intend to push the introduction of the inventions in an enthusiastic and energetic manner such as the complainant has a right to expect. The eighth clause of the contract gives the defendant a right to cancel it at any time. The tenth clause must have a reasonable construction; otherwise the complainant is left at the mercy of the defendant and the contract is wholly unilateral. After the successful tests of the apparatus were made the defendant had such further reasonable time as was convenient in which to begin practical work. The tests were made in February and March, 1906, and the bill was filed February 5, 1909. There were then three years of idleness when no efforts were made to put the invention into practice, although several opportunities offered themselves. After the interlocutory hearing additional testimony was taken with the permission of the court and with the apparent consent of the defendant, to show further defaults continuing from April 11, 1909, up to August 1, 1910, a year and a half of this period being subsequent to the filing of the bill. Recent litigation has impressed upon the courts the difficulty of formulating in advance a rule by which to determine what is or is not reasonable, but, in a given case, we can say that we think the delay shown is unreasonable to such an extent as to justify the injured party in terminating an agreement. In the present case it is unnecessary to point out within exact limits what would have been a proper period in which to test and install the apparatus, but we are clearly of the opinion that the delay and supineness of the defendant, as shown by the testimony, justify the complainant in putting an end to the contract. It is not too much to say that the defendant, after it proved the invention to be a valuable one, wholly neglected to put it into practical use. This was not what the contract contemplated and was contrary to its spirit and letter as well.

[2] The complainant has no adequate remedy at law. No rational rule of damages can be formulated upon the facts as shown; any verdict rendered would have nothing but speculation and guesswork to support it. In such cases the right of the injured party to rescind is well recognized.

The complainant complains because the court did not require the defendant to pay interest upon the sum of $3,000 per annum which the defendant was required to pay. The complainant has not appealed or filed an assignment of errors, but, assuming that the question is before us we are not at all persuaded that there was error in the ruling of the court in this respect.

The decree is affirmed with costs.

CLARK BLADE & RAZOR CO. v. GILLETTE SAFETY RAZOR CO.†

(Circuit Court of Appeals, Third Circuit. February 1, 1912.)

No. 1,520.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SAFETY RAZOR.
   The Gillette patent, No. 775,134, for a razor having a detachable blade of such thinness and flexibility as to require external support to its cutting edge, was not anticipated, and covers a device both original and generic; also, *held* infringed.
2. PATENTS (§ 107*)—VALIDITY—PROCEEDINGS IN PATENT OFFICE.
   The withdrawal of an application for a patent and the substitution of another is proper procedure where the inventions claimed are identical, and the second is merely an amplification of the first.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 150; Dec. Dig. § 107.*]
3. PATENTS (§ 101)—VALIDITY—SUFFICIENCY OF CLAIMS.
   A claim of a patent is not invalid because the thing claimed is not in itself an operative device, but only an element of one.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 141; Dec. Dig. § 101.*]

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

Suit in equity by the Gillette Safety Razor Company against the Clark Blade & Razor Company. Decree for complainant (187 Fed. 149), and defendant appeals. Affirmed.

McCarter & English, for appellant.

M. B. Philipp and James Q. Rice (Thomas W. Pelham and Clifford E. Dunn, of counsel), for appellee.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. [1] In the court below the Gillette Safety Razor Company, owner of patent No. 775,134, granted November 15, 1904, to King C. Gillette, for a razor, filed a bill against the Clark Blade & Razor Company, charging infringement of certain claims thereof. In an opinion reported at 187 Fed. 149, that court held the patent valid and the claims in question infringed. From a decree to that effect the respondent appealed to this court. The opinion of the lower court is so thorough and exhaustive that an extended discussion of the questions involved could be but a restatement.

Making, then, the opinion of that court by reference the basis of our own, we content ourselves with briefly stating the conclusions to which a study of the record leads. In doing so, we take, for illustration, as did the court below, claim 2, as embodying the crux of the case. These conclusions are: First, the invention of Gillette is substantially set forth in claim 2, viz., "as a new article of manufacture, a detachable razor-blade of such thinness and flexibility as to require external support to its cutting edge"; second, the proofs carry Gillette's invention to 1895; third, Gillette's device was generic, original, and not anticipated in the razor art; fourth, the proceedings in the

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

† Rehearing denied.

Patent Office whereby Gillette substituted a second application for his first were lawful and the subject-matter of the two was substantially the same; and, fifth, claim 2 is valid and infringed.

In support of the second proposition nothing need be said save to refer to the lower court's opinion. The facts cited therein justify such conclusion.

As to the third proposition, we may say that a careful study of the razor-making art satisfies us that a ribbon or wafer razor-blade, so thin as to require external support of its cutting edge, was original with Gillette, and a like study of the art of making razor steel, its chemical qualities, its tempering and the blade contour obtained to aid honing, satisfy us that the Gillette blade was a radical departure from the whole teaching, practice, and trend of the prior art. As to such prior art not anticipating Gillette's device, we can add nothing to the thorough examination and discussion in the opinion below.

[2] A study of the file-wrapper and the proceedings in the two applications shows that Gillette, while he abandoned his first application and substituted therefor a second, did not abandon his invention. This substitution was proper procedure. Godfrey v. Eames, 1 Wall. 324, 17 L. Ed. 684; Corrington v. Westinghouse (C. C.) 173 Fed. 76. We also find the substance of the second application had been embodied in the first. In that respect we have the action of the Patent Office, which, with full knowledge of the previous application, allowed such substitution and based its grant of the patent on the basis of the substantial identity of the two applications. The presumption that arises in such case must, as in a reissue, be overcome "only," as said in Smith v. Goodyear, 93 U. S. 499, 23 L. Ed. 952, "by showing from a comparison of the original specification with that of the reissue that the former does not substantially describe what is described and claimed in the latter." A critical examination of the file-wrapper satisfies us that the first application contained a full disclosure by Gillette of his invention, and the additional matter in the second was a mere amplification of the disclosures of the first. It is contended that the word "thinness," as a characteristic of Gillette's blade, was a new feature added in the second application. In the mere use of that particular word this is true, but the implied thinness of Gillette's blade runs through the first application so plainly that no one can read it without having that characteristic of his blade inferentially brought to his attention. And substantial disclosure, such as enables one skilled in the art to practice, fulfills the requirements of the patent law. The mere form the disclosure takes, whether in express words or by necessary implication, is a matter of words, but the substantial feature, the statutory requisite, is that the patentee shall really disclose to those versed in the art the information that enables such a one to practice it. It is clear that no skilled razor maker would, or indeed could, have made the blade of Gillette's original application without producing the thinness indicated in the substituted one. Thus the original application speaks of the adjustable character of the blade which is stamped from sheet steel of uniform thickness, which "adjustment is carried out by reason of the natural spring of the cast sheet steel blade by mechanism for springing it to give different spaces between

the edge of the blade and the guard." It will thus be clear that, where there is spring and flexibility in small sheet steel stampings, thinness is an accompaniment of such flexibility.

[3] As to our fifth conclusion, we note it should be added that claim 2 is not invalid because not for an operative device, for, if such were the law, patentability must have been denied to Elias Howe for "the grooved and eye-pointed needle" which constituted his seventh claim (Howe v. Williams, 2 Fish. Pat. Cas. 395, Fed. Cas. No. 6,778), and of which it was said in Deering v. Winona, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153:

"The invention of a needle with the eye near the point is the basis of all the sewing machines used, but the methods of operating such a needle are many; and, if Howe had been obliged to make his own method a part of every claim in which the needle was an element, his patent would have been practically worthless."

On the question of infringement, we agree with the conclusion of the court below, which we restate, viz.:

"The flat backing of the holder as used by the defendant is manifestly a mechanical equivalent for the curved backing adopted by the complainant in its commercial form of razor. The curved form would seem, as the patentee has suggested, to be the better form, but the defendant cannot escape infringement by simply substituting a flat backing which obviously performs the same function as the curved backing, and in substantially the same way. There are other differences between the devices of the complainant and the defendant, but they are so slight and unimportant as scarcely to require consideration. For instance, the complainant's blade has two positioning holes which engage positioning studs formed near the ends of the back of the razor, and a central hole for engaging the threaded stud which secures the clamping holder in place; while defendant's holder has two projections on the guard, and the blade is provided with a long slot through which the clamping screw passes, while the ends of the slot fit over the guard projections. This slot of the defendant's blade when it is applied to the complainant's commercial form of holder exactly fits it. Indeed, the defendant advertises its blade as adapted to be used in the complainant's holder. There is, as already intimated, no real difference between the two devices, and any apparent differences are purely mechanical and evasive, and possibly designed to circumvent the claims of the patent in suit."

The decree of the court below will therefore be affirmed.

DE LAVAL SEPARATOR CO. v. IOWA DAIRY SEPARATOR CO.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1912.)

No. 3,492.

(Syllabus by the Court.)

1. PATENTS (§ 62*)—ANTICIPATION—SUFFICIENCY OF EVIDENCE.

The existence and use of an unpatented anticipating device prior to the invention patented may be established by oral testimony only by clear and satisfactory evidence sufficient to prove the facts beyond a reasonable doubt.

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

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

2. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS OF CHANCELLOR PRESUMPTIVELY RIGHT.

When the chancellor has considered conflicting evidence, and made his finding and decree thereon, they must be taken to be presumptively right; and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, they must be permitted to stand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. § 1009.*]

3. PATENTS (§ 328*)—PATENT NO. 892,999 TO LJUNGSTROM VOID.

Claims Nos. 4, 5, 6, 7, and 8 of letters patent No. 892,999, for improvements in liners for centrifugal bowls for separating cream from milk, issued to Fredrik Ljungstrom July 14, 1908, on an application filed January 18, 1905, were anticipated by a bowl that was made, tested, and found satisfactory by Wilbur W. Marsh, and put into actual use in the autumn of 1903.

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

Bill in equity by the De Laval Separator Company against the Iowa Dairy Separator Company. From a decree dismissing the bill, complainant appeals. Affirmed.

Frank S. Busser (Harding & Harding and Lacy, Brown & Lacy, on the brief), for appellant.

Frank T. Brown (Arthur L. Sprinkle and Brown & Hopkins, on the brief), for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree which dismissed a bill for the infringement of claims Nos. 4, 5, 6, 7, and 8 of letters patent No. 892,999, for improvements in liners for centrifugal bowls for separating cream from milk, issued to Fredrik Ljungstrom on July 14, 1908, upon an application filed January 18, 1905. The complainant claimed that Ljungstrom was entitled to the date of the filing of his application for a Swedish patent for the same invention, which was January 27, 1905. The defenses were: First, that in the fall of 1903 three centrifugal bowls, which were introduced in evidence as exhibits, and which embodied the improvements specified in the claims of the patent in suit, were made, tested, and found to work satisfactorily by Wilbur W. Marsh, and that one of them went into actual use to separate cream from milk in the autumn of 1903, and prior to December 1st of that year; second, that the Ljungstrom patent is anticipated by certain Swedish and United States patents of earlier dates than the date of his application for his Swedish patent; and, third, that his Swedish application is not for the same inventions as his patent in suit, and consequently his inventions are not shown to have been made earlier than January 18, 1905, when he filed his application for a patent from the United States, and that this patent is anticipated by earlier patents, notably by patent No. 792,529, for liners for centrifugal liquid separators, issued to Wilbur W. Marsh on June 13, 1905, upon an application filed September 26, 1904. The court below sustained the first defense. Whether its decision was

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

right or wrong is a question of fact, answered by hundreds of printed pages of testimony and by the three Marsh bowls which have been brought to this court.

[1] The existence and use of an unpatented anticipating device prior to the invention patented may be established by oral testimony only by clear and satisfactory evidence, sufficient to prove the facts beyond a reasonable doubt. The Barbed Wire Patent, 143 U. S. 275, 284, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; Mast, Foos & Co. v. Dempster Mill Mfg. Co., 82 Fed. 327, 332, 27 C. C. A. 191, 196; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 703, 45 C. C. A. 544, 554; American Bank Protection Co. v. Electric Protection Co. (C. C.) 181 Fed. 350, 357. This is an established rule of law, which was familiar to the judge below, and in the light of which he must have read this testimony, and have found that there was no reasonable doubt that Marsh's bowl was made, tested, found satisfactory, and put into actual use before Ljungstrom made his invention. That finding rests upon a great mass of conflicting evidence.

[2] When the chancellor has considered conflicting evidence, and made his finding and decree thereon, they must be taken to be presumptively right; and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, they must be permitted to stand. Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Evans v. State Bank, 141 U. S. 107, 11 Sup. Ct. 885, 35 L. Ed. 654; Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649; Warren v. Burt, 58 Fed. 101, 106, 7 C. C. A. 105, 110; Paxson v. Brown, 61 Fed. 874, 883, 10 C. C. A. 135, 141; Stuart v. Hayden, 72 Fed. 402, 408, 18 C. C. A. 618, 624; Coder v. Arts, 152 Fed. 943, 946, 82 C. C. A. 91, 94, 15 L. R. A. (N. S.) 372.

[3] A careful reading and deliberate consideration of all the evidence in this case relating to the issue of fact determined below has failed to persuade that any error of law or mistake of fact intervened in the consideration or decision by the chancellor of the questions presented to him. To recite or review the evidence upon this subject would be a futile task, for it is so unique that it could not be drawn into precedent, and so voluminous that no one not interested in this case would read it. Suffice it to say, in our opinion it sustains the finding of the Circuit Court, and renders all other questions in this case immaterial.

The decree below is accordingly affirmed.

LOUIS METZGER & CO. v. BERLIN et al.

(Circuit Court of Appeals, Second Circuit. February 6, 1912.)

No. 169.

PATENTS (§ 317*)—SUIT FOR INFRINGEMENT—INJUNCTION.

An order refusing to limit an accounting in an infringement suit, which had been extended by the master to new structures, and directing an injunction, although the interlocutory decree, under which the accounting was proceeding, which was still in force and not appealed from, granted a similar injunction, *held* improvidently entered; its only apparent purpose and effect being to enable the parties to present the questions of infringement by the different devices to the appellate court piecemeal.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 559–565; Dec. Dig. § 317.*]

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

Suit in equity by Louis Metzger & Co. against Samuel N. Berlin and Bernhard Trosky. From an order granting an injunction, defendants appeal. Reversed.

Appeal from an order in a suit to restrain the alleged infringement of letters patent No. 964,476, issued on July 12, 1910, to David Metzger for an improvement in feather plumes. On December 28, 1910, an interlocutory decree was entered in this cause, finding the patent valid and infringed, and ordering the issuance of a perpetual injunction and an accounting before a master. On February 3, 1911, an injunction was issued against the defendants as provided in the interlocutory decree. No appeal was taken from the interlocutory decree. Between the entry of the interlocutory decree and October 4, 1911, the accounting proceedings went on before the master, and in such proceedings various structures made by the defendants, which were not before the court at the time of the entry of the interlocutory decree, were presented, and questions were considered in various forms as to whether such structures constituted infringements of the patent. On October 4, 1911, an order was entered, upon consent, vacating and setting aside said injunction of February 3, 1911, but not purporting to vacate or set aside said interlocutory decree, or any part thereof. On October 5, 1911, an order was entered reciting the proceedings in the cause, and the acts of the master in extending the accounting to include structures made before and since the entry of the interlocutory decree, and refusing to stay or limit the accounting, and also containing an order for an injunction to restrain the infringement of the patent in substantially the same terms as the order for the injunction in the interlocutory decree. This order of October 5, 1911, did not purport to vacate any part of said decree, and the present appeal is from such order.

J. Edgar Bull, Edmond Congar Brown, and Herman A. Brand, for appellants.

William E. Warland, for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Whatever may have been the purpose of the parties, no provision of the interlocutory decree in this cause has been vacated, so that at the time the order appealed from was granted there was outstanding an injunction order, which was as effective as the present one, to restrain the defendants from manufacturing any and all devices infringing the patent. And while the parties may have prepared the vacating order in the existing form through a failure to

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

distinguish between an order for an injunction and the writ, we are not satisfied, viewing the matter in a broader aspect, that the court below intended to or did review the correctness of the interlocutory decree in the light of the testimony subsequently offered before the master.

The order in question is, strictly speaking, appealable, and the appeal cannot be dismissed. But the granting or withholding of an order for an injunction rests in the sound discretion of the court, and it is our duty to determine whether this order was providently entered.

The master is bound to pass upon the question of infringement as to all devices brought before him on the accounting, and when his report is filed the court can review his finding, and all the devices presented to him which are claimed to infringe can then be passed upon by the court. And after the final decree an appeal can be taken to this court, and a review of the findings of the court and master obtained. So the question of the infringing character of new structures can be presented to the court below upon contempt proceedings.

The present appeal seems to be an attempt to bring the questions before this court piecemeal, and to have each device passed upon separately. We cannot approve this practice, and think the second injunction order an improvident exercise of the court's power. Consequently we reverse it, without costs, and without passing upon the merits, with leave to the parties to test the question of infringement in the court below by proper proceedings, and in this court on appeal from final decree, and with leave to the complainant to apply to the court below to reissue the vacated writ of injunction.

WESTINGHOUSE ELECTRIC & MFG. CO. v. CONDIT ELECTRICAL MFG. CO.

(Circuit Court of Appeals, Second Circuit. December 11, 1911.)

No. 68.

1. PATENTS (§ 328*)—INVENTION—ELECTRIC SWITCH.
   The Wright & Aalborg patent, No. 633,771, for a switch for electric circuits, is void for lack of invention.

2. PATENTS (§ 160*)—CONSTRUCTION—PROCEEDINGS IN PATENT OFFICE.
   As a general rule, and unless limitations are imposed by acquiescence in the rejection of broader claims than those allowed the interpretation to be placed on the claims of a patent is to be determined by the language of the grant, and the proceedings of the Patent Office are immaterial.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 234, 235; Dec. Dig. § 160.*]

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

Suit in equity by the Westinghouse Electric & Manufacturing Company against the Condit Electrical Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

Appeal from a decree of the Circuit Court, Southern District of New York, in a suit to restrain the alleged infringement of letters patent No. 633,771

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

issued September 26, to the complainant as assignee of Gilbert Wright and Christian Aalborg for an improvement in switches for electric circuits.

The patent in suit is a separate patent for switch mechanism. The companion patent No. 633,772, granted at the same time to the same inventors, is for an automatic circuit breaker containing switch mechanism and was sustained by this court in another suit between these same parties, our decision being reported in 167 Fed. 546, 93 C. C. A. 224. The circuit breaker patent was also sustained by the Circuit Court of Appeals for the Third Circuit in cases reported in 143 Fed. 966, 75 C. C. A. 152, and 169 Fed. 634, 95 C. C. A. 162.

The patentees in the present patent thus state the object of their alleged invention:

"Our invention relates to switches for electric circuits; and it has for its object to provide a switch of such construction that its movable contact member may be readily brought into operative position, locked in such position, and released and separated from its stationary member by an expenditure of power that shall be substantially independent of the current-carrying capacity of the switch and much less than that exercised in opening and closing switches of the types heretofore employed.

"Manually-operated switches heretofore in use have generally been of knife-blade and jaw construction, the structures being variously modified in order to increase the current-carrying capacity and facilitate the opening and closing of those of large size. The opening and closing of knife-and-jaw switches having large current-carrying capacity can be effected, however, only by the application of a considerable amount of power by reason of the fact that the jaws must contain so much material that they will yield to only a very limited degree. We are enabled by our invention to entirely dispense with gripping engagement between the contact-terminals of the switch, and thereby obviate deterioriation by reason of frictional wear."

The first and second claims which are in issue, read as follows:

"1. A switch for electric circuits comprising stationary terminals having contact blocks or plates the contact-faces of which are in substantially the same plane, a supporting-base therefor, a laminated member having beveled ends for engagement with the faces of said terminals, a supporting-arm pivoted at one end to the base and attached to the laminated member at substantially the middle point of the latter and at a considerable distance from the axis of movement of said arm, and an actuating-lever pivoted to the base and having a movable connection with the supporting-arm."

"2. In a switch for electric circuits, the combination with a base having stationary contact-terminals, of a laminated contact member having beveled ends adapted to engage the plane faces of said contact-terminals, a supporting-arm pivoted at one end to the base and attached to the laminated member at substantially the middle point of said member, and an actuating-lever having operative connections with the base and with the supporting-arm for the laminated member."

The defenses are:

(1) That the claims are invalid;

(2) That the defendant's device does not infringe.

The Circuit Court after hearing the cause dismissed the bill and the complainant has appealed. The decision of the Circuit Court is reported in 194 Fed. 430.

Kerr, Page, Cooper & Hayward (Thomas B. Kerr and John C. Kerr, of counsel), for appellant.

Edwards, Sager & Wooster (Clifton V. Edwards, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). [1] Our decision in the circuit breaker patent case has little application here. We regarded the question of invention in that case as doubtful but resolved it in favor of the patentees by reason of especial advantages in

the structure, none of which, except perhaps the form, had any reference to the switch element. Besides we think that the claims of this patent cover something more than the switch of the other. This case also differs from that in that there it appeared that the circuit breaker had gone into extensive use, while it is not shown that this switch has had any substantial use. It seems to have failed entirely to supplant the old knife-blade switch.

The primary question then is whether invention is to be found in the present claims of which we may take claim 1 as typical, the elements being:

(a) Stationary terminals with contact faces in substantially the same line and with a supporting base;

(b) A laminated member having beveled ends for engagement with the faces of the terminals;

(c) A supporting arm pivoted at one end to the base and attached to the laminated member at substantially the middle part of the latter and at a considerable distance from the axis of movement of said arms;

(d) An actuating lever pivoted to the base and having a movable connection with the supporting arm.

The advantages of this construction urged by the complainant in its brief may thus be summarized:

(1) It is said that by the adoption of the beveled laminated contact member perfect contact is obtained and the binding friction of the old switches obviated. Indeed as shown by the specification this seems to have been regarded by the patentees themselves as the principal change from the prior art. It is also pointed out in the brief that the scraping action of the laminae keeps the surfaces bright and secures good contact.

(2) It is contended that by mounting the movable contact upon a swinging arm a wide break is secured to interrupt the arc.

(3) It is also urged that the movement of the swinging arm is such that a minimum of lateral space is required.

Much stress is placed upon the presence and action of a toggle lever, but we find no reference to that form of construction in the claims in issue nor do we think the presence of such a lever necessarily to be read into the claims by reason of anything in the drawings or specification. Indeed one of the drawings shows a form of connection other than a toggle lever.

Now, the record shows clearly that at the date of this alleged invention, the use of a laminated contact member with beveled ends was old in the art of electrical switches. The departure from the gripping engagement of the old knife-contact and the substitution therefor of face to face contacts, are shown by several patents older than this one. So pivoted supporting arms, actuating levers and various forms of connections for bringing the movable member into contact with the stationary members and for breaking the arc are shown in earlier patents. It is unnecessary to seek precise anticipations. It is sufficient to say that with the structures in the prior art shown by the record, we think that mechanical skill was quite sufficient to obtain any advantages disclosed by the patent. In our opinion, the elements of the claims considered separately are old, and we find nothing in their combination disclosing invention.

[2] We have reached the conclusion of invalidity without referring to the proceedings in the Patent Office because we fail to see that those proceedings have any bearing upon the questions arising in this case. Sometimes such proceedings are of importance, especially where a matter of estoppel is involved. Thus a patentee who, in order to avoid a rejection of his application, inserts limitations in his claims is estopped from contending that the patent as issued should be construed as if such limitations had not been made. But, as a general rule, the interpretation to be placed upon the claims and specification of a patent is to be determined from the language of the grant, and the proceedings in the Patent Office are quite immaterial. Such is the situation in the present case. Original claims were rejected in the Patent Office. Thereupon the applicants, instead of limiting their claims, substituted broader ones which were accepted. Presumably the examiner changed his mind. But whatever be the explanation of his position, nothing whatever is shown to work an estoppel against the patentees. Instead of surrendering something which they now claim to obtain that which was allowed, they claimed something more and got it.

The decree of the Circuit Court is affirmed with costs.

WESTINGHOUSE ELECTRIC & MFG. CO. v. CONDIT ELECTRICAL MFG. CO.

(Circuit Court, D. Massachusetts. December 28, 1911.)

No. 327.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CIRCUIT-BREAKER FOR ELECTRICAL DISTRIBUTION SYSTEM.

The Wurts patent, No. 570,416, for a circuit-interrupting means for systems of electrical distribution, claims 3 and 4, which cover a combination in one system of an automatic circuit-closing device actuated by an excessive current in the main or distribution circuit with remote control devices for closing local circuits at the will of the operator, are not for a mere aggregation, but a true combination of substantial utility and disclose invention; also *held* infringed.

In Equity. Suit by the Westinghouse Electric & Manufacturing Company against the Condit Electrical Manufacturing Company. On final hearing. Decree for complainant.

Richardson, Herrick & Neave, for complainant.

Edward P. Payson, Edwards, Sager & Wooster, and C. V. Edwards, for defendant.

HALE, District Judge. This suit in equity raises the question of validity and infringement by defendant of claims 1, 3, and 4 of letters patent No. 570,416, issued October 27, 1896, to the complainant as assignee of A. J. Wurts. The patent relates to circuit-interrupting means for systems of electrical distribution. The claims in issue are as follows:

"1. In a multiphase system of distribution, the combination with a circuit-interrupter common to all the phases of the system, a normally open local

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

circuit and a controlling-magnet included therein, of circuit-closers for the local circuit, one for each phase of the system, an overload upon any one of the main circuits serving to actuate its circuit-closing device and thus close the local circuit."

"3. The combination with a plurality of systems of electrical distribution provided with circuit-interrupting devices, controlling-magnets and normally open local circuits therefor fed by an independent source of current, of means actuated by an excessive current in any one of the main circuits for closing the corresponding local circuit, and a plurality of circuit-closing devices located at a distant point and each operated at will to close the corresponding local circuit.

"4. The combination with a plurality of systems of multiphase electrical distribution provided with circuit-interrupting devices, one for all of the phases of each system, and controlling-magnets therefor, of a local circuit for each of said magnets, means actuated by an excessive current of any phase to close the corresponding local circuit, and a plurality of switches independently operated at will to close any one of said local circuits."

In the specification the inventor, Wurts, describes the scope of his invention:

"My invention relates to circuit-interrupting means for systems of electrical distribution, and has particular reference in some of its more important features to multiphase circuits, though not in all respects limited to use in such relations. The objects of my invention are, first, to provide an actuating or controlling means included in a normally open local circuit which is closed by the action of an overload in the main or distribution circuit, and preferably at a suitable predetermined interval after the occurrence of such overload; second, to provide a circuit-interrupter common to all the phases of a multiphase system, with a controlling or actuating magnet included in a normally open local circuit, which will be automatically closed by the action of an excessive current in a conductor for any one of the phases and preferably at a predetermined interval after the occurrence of such excess of current, and, third, to provide a means, located at a point more or less remote from the circuit breaker or breakers, whereby any one of a plurality of such circuit-breakers may be electrically controlled at will."

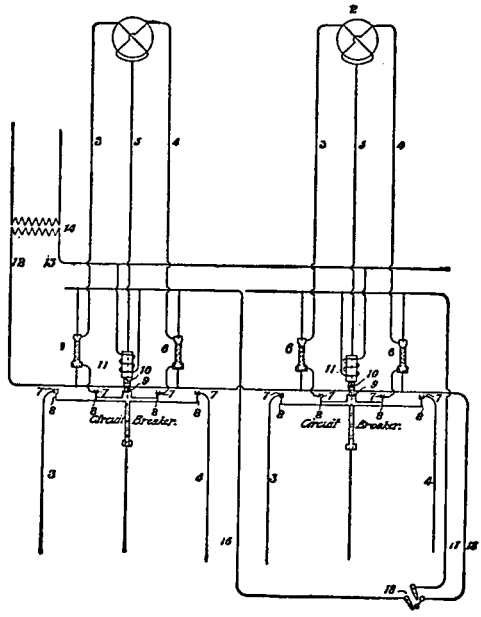
The inventor then proceeds by diagrams to illustrate the details of his apparatus, and then states in general the results which he has sought to obtain:

"It is obvious from the illustration and foregoing description that, whenever the current in any one of the conductors exceeds a predetermined limit, all of the circuits from that particular generator will be automatically interrupted. It will also be understood that any number of generators and circuits may be connected with the local circuit in the manner shown. It will also be understood that this use of a local circuit for energizing the controlling-magnet for the circuit-breaker may be employed in connection with a single-phase system of distribution, if desired, and hence I do not limit my invention to use in connection with multiphase circuits, as shown in the drawing. It being often desirable in large power-houses to open any one of several circuit-breakers from a given point, which may be more or less remote from such circuit-breakers, I extend the local-circuit conductors to the point from which it is desirable to actuate the circuit-breakers and locate at this point suitable circuit-closing devices, one for each circuit-breaker. These circuit-closing devices may be push-buttons or any other desired form of hand-operated means whereby the local circuit may be closed through any one of the controlling-magnets when it is desired to open the circuit-breaker with which such magnet is connected."

In his testimony, the expert, Prof. Clifford, points out some elementary facts which relate to the art, and are important in the study of the case. He shows that the generation, transmission, and distribution of power electrically may be accomplished by either direct or by

alternating currents. A direct or continuous current maintains unchanged the direction of its flow in the electric circuit. In a direct current system, therefore, we are concerned with a sensibly steady flow of electrical energy already established. An alternating current alters its strength and reverses its direction in the circuit periodically with the passage of time, these variations of the current taking place according to a definite law. He further points out that alternating current systems are usually classified as either single-phase (monophase) or polyphase (multiphase). A single-phase system generates, transmits, and distributes a simple or single alternating current. A polyphase system generates, transmits, and distributes two or more such currents which may be combined in a number of different ways. The polyphase system is characterized as two-phase, three-phase, etc., according to the number of such simple alternating currents as are combined for purposes of utilization. The phase difference between two simple alternating currents is determined by the difference in time at which corresponding values of the currents in question occur.

It is further pointed out as a result of this well-known property of three-phase currents that, instead of having three complete circuits for the three phases of the current, what is called a "three-wire" system may be employed. Under this system, the current may flow outwardly over two wires and return through the third wire, or it may pass outwardly through one line and return through the other two lines; the outgoing and incoming currents being always equal. In a two-phase system, three wires may also be used instead of two complete circuits, the two currents flowing out on two of the wires and both returning by a third or "common return" wire.



By means of the foregoing diagram illustrating the Wurts patent, the learned counsel for complainant points out the leading elements of the patent, substantially as follows: The Wurts patent shows diagrammatically at *1*, and also at *2*, a "two-phase generator" provided with two conductors, *3*, *4*, for the two phases of current and a common return conductor *5*; so that in each of the two systems of distribution illustrated one current or phase flows round the circuit *3*, *5*, and the other current around the circuit *4*, *5*. The conductors are shown as broken off at the bottom of the diagram, after passing through circuit-closers *6* and circuit-breaker contacts *7*, *8*, to be referred to, and the circuits are then supposed to be completed through the lamps, or whatever other objects are used as "translating devices" in the circuits.

The Wurts patent is concerned with means for interrupting or opening all the phases of any one of the multiphase systems involved (two are shown, but there may be any number), either automatically upon the occurrence of an "overload" on any main line, or through an operator at some remote point who moves a switch or equivalent device—what is called "remote control."

Each "circuit-breaker" is diagrammatically shown as carrying four contacts *8*, two on each side, for bridging the two contacts *7* in the wire *3* and in the wire *4*, respectively. Thus, when the circuit-breaker moves downwardly, it breaks each of the two circuits, leaving a gap on each side between the two contacts *7*. It is not necessary to break the third wire *5*, to open the circuits; and that wire is continuous and not affected by the circuit-breaker, as illustrated. The circuit-breaker is held in its closed position by means of a catch *9*, diagrammatically shown, which is connected to an armature *10* governed by the "controlling-magnet" *11*. When this magnet is energized by an electric current, it attracts its armature, raises the latch, and releases the circuit-breaker, which interrupts the circuits for each "phase." The energizing of this magnet is brought about by closing the normally open local circuit from the source of electric power *14* (shown as a transformer) through this magnet. This closing is accomplished automatically by means of one of the circuit-closing devices *6*, shown diagrammatically, which, on the occurrence of an overload or excessive current (in the line *3*, for example), closes the local circuit through the magnet; that is to say, the local circuit goes from the source of power *14* along the conductor *12*, through the circuit-closer *6*, around to the right and then down, then up around the magnet *11* to the wire *13*, and back to the transformer. This local circuit, with its own source of energy, is open at *6* until the occurrence of the overload in the line *3*, as above stated.

But this is not the only means of closing the local circuit through the magnet *11* to actuate the circuit-breaker. A remote-control switch *18*, shown at the lower right-hand corner of the drawing is connected by the lines *15*, *16* in the same local circuit, embracing the same source of power *14* and the same magnet *11*. On closing the lower of the two switches shown, the local circuit is completed over the wires *15* and *16* through the controlling-magnet *11*, as before, thus releasing

the circuit-breaker. Thus, there are combined with the normally open local circuit, containing the magnet *11* and the source of power *14*, two alternative devices, the automatic circuit-closer *6* and the remote-control switch *18*, either one of which may be operated to close the local circuit, and thereby actuate the multiphase circuit-breaker, and open simultaneously all the phases of the main circuit in question, the circuit-closer *6* being operated automatically, and the switch *18* being operated at the will of the attendant. The above is a substantial statement of the combination, brought before the court, and claimed as the invention in the patent in suit. I have already quoted the most material portion of the specification showing the objects of the invention, and the three claims involved in the suit. The drawing shows two systems of multiphase electrical distribution. In actual practice it is pointed out that there may, of course, be any number of them, each having its circuit-closers as shown at *6* in the drawing, its controlling-magnet as shown at *11*, and the multiphase circuit-breaker, each magnet being energized from one and the same source of power (shown at *14*) upon closing its local circuit; and in each system the closing of the local circuit may be brought about either automatically by the circuit-closer *6*, or at the will of the attendant by the switch *18*. If there were a number of such multiphase systems, there would be a number of such switches; but only one source of current *14*, would be needed for all the local circuits. It is evident that by means of small hand switches as shown at *18*, all located at one point, the operator may at once open any or all of the circuit-breakers, no matter where or how far from each other they are located. It is further shown that the occurrence of an overload in any phase of any one of these multiphase systems would automatically close the appropriate local circuit, and throw open all the phases of that system through the circuit-breaker, while the attendant could close the same local circuit, and thereby open the same circuit-breaker by manipulating the appropriate switch.

Mr. Rowe, an electrical engineer called by the complainant, sets forth the practical value of the Wurts invention as follows:

"Automatic overload circuit-breakers are of great importance under many conditions of operation. For instance, if electrical energy is being supplied to a street railway system and the trolley lines should drop on the rails, or if any of the apparatus on the cars became deranged so as to cause what is termed a short circuit, it is of the utmost importance that means be provided at the generating station so that the particular electrical circuit which is in trouble shall be automatically cut off from the system so as to prevent the burning up of generating apparatus in the power station, or doing much damage to the cars themselves. It is also essential that the individual line which is in trouble be disconnected from the station in order that the entire system be not shut down on account of the trouble at this particular point. An automatic circuit-breaker will relieve the system, and prevent interruption of service. Correspondingly, if the wires transmitting power for polyphase distribution should be blown together by storms, so that the uninsulated conductors of separate phases are in contact, or if large birds connect the wires together by flying through the wires of a transmission system, it is obviously necessary for the same reason as described previously that alternating circuits be provided with automatic protection to the lines."

Mr. Rowe was also asked to give a practical illustration of the importance of providing for opening the circuit-breaker at will from a

distant point by means of electrical connections, and upon that subject gave the following testimony:

"In a large power-house in which great quantities of energy are distributed through numerous circuits, and in cases where a large number of generating units are employed, it is frequently necessary that the circuit-breakers and switching devices be located in the most convenient place with respect to the machines, transformers, and electrical circuits to be controlled, which involves their distribution in various remote points in the power station. Besides this, the switching devices are often very large and sometimes built in masonry cells, so that they cannot be collected together in a small area. Under these conditions, it is of great importance that the means of opening the circuit-breakers at will be placed at a point convenient to the operator, and at the same time that the entire control be placed in as small a space as possible, as it is obviously impossible for an operator under such conditions to run about from one switch or circuit-breaker to another in times of emergency to open a circuit. Very often these circuits carry dangerously high potentials, and under some conditions an operator has been known to get confused and to lose his head in cases of emergency where he has been obliged to go to a switch or circuit-breaker and open it. For this reason, in some power stations the control of this apparatus is removed to a separate isolated point, where the noises from arcs and the distracting incidents due to the flashes and burning of enormous short circuits are not perceived by the operator, and he is able to perform his duties intelligently."

In reference to the utility of the alleged combination, Mr. Rowe further testified, as follows:

"Upon the failure of any part of the apparatus to act properly by means of the automatic relay, such as sticking or derangement in the relay, it is possible for the operator to trip the device by hand.

"In the case of the failure of the circuit-breaker to open the circuit from any cause, or when in opening the circuit a circuit-breaking should become badly damaged so that it was unable to perform its function, or if an arc should start, short circuiting any part of the system directly connected to these circuit-breakers, such as an accidental ground connection, it is possible with this system for the operator to immediately open all circuits supplying power to the system by means of the hand-tripping devices, and often prevent enormous damage and serious interruption of service."

Upon the same subject Prof. Clifford testified:

"The ability to control the opening of the various individual circuits in an extended installation of apparatus from a central point possesses distinct advantages so far as the arrangement of apparatus is concerned, and also so far as the concentration of the operator on the particular thing which he is to accomplish is concerned. This system of centralized control has come, therefore, to be very generally adopted; indeed, is adopted almost without exception, in the large power-houses.

"I may give as an instance of the advantage of its use the opening of the circuit in case it is desired to make repairs on some particular line under conditions in which the relation of that line to the other lines of the system must be definitely known. The possibility of opening the line which is to be repaired from a central control board under the supervision of an operator who may have immediately before him the layout of the entire station obviously results in much greater safety both to life and to the apparatus."

1. The learned counsel for defendant urge that the Wurts device is a mere aggregation, and does not involve invention; that all the features in it are old, and that, put together, they produce no new and useful result; that there is no novelty in devices which cause the overload upon an electric system to interrupt the circuit that is overloaded; that there is no novelty in providing means whereby any one

of the plurality of circuit-breakers may be electrically controlled at will; and that there can be nothing new or useful in putting together these two elements; that, given the two old devices, it required nothing more than the work of a mechanic skilled in the electrical art to unite the two in a machine; and that the two devices, so united, are not employed simultaneously, but at different times, and do not constitute an electrical combination, but a mere aggregation. They insist that the file wrapper of the patent in suit shows that Wurts admitted lack of novelty in reference to the several features of the patent; that, when Wurts made his application in the Patent Office, he originally had certain other claims, designed to cover the use of a local circuit common to a plurality of systems of distribution, also the use of a local circuit common to a plurality of systems of multiphase circuits, and also a distribution circuit, each of the above in combination with hand operated means for closing the local circuit; that all these claims were rejected by the examiner upon reference to patent No. 396,940 to Knowles, and No. 313,091 to May, and upon a certain English patent; that the examiner in rejecting these claims held that the plurality of systems was simply a duplication of the number of main lines; that Wurts thereupon abandoned the subject-matter involved in the three claims to which I have referred. The defendant argues that Wurts must be held to have acknowledged that there was no novelty in the application of the hand control closing means to multiphase electrical distribution systems, and that he must be held further to have acknowledged that there was no invention in adding the hand operated closing means to the automatically operated closing means. The defendant reasons that, in view of this record, Wurts is now estopped from claiming that his showing of a plurality of systems is anything more than duplication of the system, that there is any invention in applying the circuit-interrupting devices in a direct current system, or systems employing currents of other character, to a multiphase or polyphase system, or that there is any invention in providing both a hand operated device and a device operated automatically on overload to close a normally open electric circuit, and thus cause the operation of the circuit-breaker; but the sole ground upon which the claims in suit must stand, if upheld, is that Wurts provides a circuit-closer in each and every circuit, or phase, to be opened, whereby upon excessive current flow in any of said circuits all will be opened. The defendant further cites as anticipatory in the prior art the Ahearn patent, No. 252,859.

After a careful study of the action of the Patent Office in the matter of the Wurts patent, I am of the opinion that the defendant's contention is not sustained. I find that claims 3 and 4, the distinct combination claims of the patent in suit, were allowed by the examiner, after the citation of the Knowles and May patents, although these two patents are now relied upon by the defendant as the leading references for invalidating claims 3 and 4. The three claims rejected by the Patent Office were for combinations which embraced less than the Wurts combination as covered by these two claims. It seems clear that the Patent Office regarded the combination set out in claims 3 and 4, which are now the leading claims in controversy, as being clearly patentable,

over anything produced in the prior art. It appears that, after examining the references now relied upon by the defendant, the Patent Office found the combination set forth in claims 3 and 4 to be a patentable invention; such combination producing a device wherein the automatic circuit-closers and the switch operated at will for each system are arranged and connected in such manner as to co-operate with one and the same local circuit, also with the same controlling magnet and the same source of current.

Upon examination of the references in the prior art, it appears that the Knowles patent was for an automatic electric cut-out. The apparatus invented by Knowles has a normally open local circuit, closed upon the occurrence of an overload in the main circuit, so as to energize a magnet and operate a simple circuit-breaker. There is no combination in his patent. There is no suggestion of combining in one system an automatic circuit-closing device with the circuit-closing device to be operated at will and located at a distance. The Knowles patent presents no combination which is even suggestive of claims 3 and 4 of the patent in suit.

The May patent is for an automatic grounding apparatus for a number of electric wires entering a telegraph station, telephone exchange, or such other place as may need protection. It does not show the use of a plurality of systems of distribution with a plurality of magnets and local circuits, and with a single source of power. It does not present a combination of automatic circuit-closing devices with remote control device for closing a local circuit at the will of the operator.

The Ahearn patent also shows means for automatically grounding the line on the occurrence of an overload, and is not concerned with circuit-interrupting devices. There is no suggestion in this patent of any combination of means for automatically closing a local circuit with the equivalent circuit-closing device located at a distant point to be operated at will to close the local circuit. The patent presents only one local circuit and magnet with no suggestion of the organization of a plurality of such circuits, and makes no combination with a single source of current, together with switches to be operated at will to close local circuits. The patent is not a combination patent, and cannot be held to present any anticipation of the patent in suit. There is nothing requiring discussion in any other patent cited in the prior art.

Claim 1 of the patent in suit makes no mention of the element of remote control switches, and does not refer to a plurality of systems. It is called by the learned counsel for the complainant a "subcombination" claim. It does not state a combination which presents the real controversy in this case. The principal question before the court is whether claims 3 and 4 set out a combination of elements producing a new and useful result. Should these claims be sustained as presenting a combination entitled to the protection of a patent? It is clear that we find the separate elements of this combination in various old patents. In view of the prior art, are these elements now combined in claims 3 and 4 so as to produce such new and useful result as entitles the inventor to the benefit of protection?

Upon a careful examination of the testimony of Dr. Duncan, it will be seen that he finds in certain patents of the prior art all the elements

which are brought together in the Wurts patent; but his testimony does not lead me to the conclusion that it would have occurred to the mere mechanic skilled in the electrical art to put all these different elements together, and make a practical combination. I do not find anything in his interesting and learned statement which defeats the idea of a combination patent, although his own conclusion is that the result shows a mere addition, and not a combination. In speaking of the inventive idea found in the Wurts combination, Prof. Clifford says:

"It is true, as Dr. Duncan suggests, that the patents of May and Ahearn disclose devices for automatically grounding certain lines. He might well have added that the patent of Knowles discloses a device for automatically breaking a circuit. All three of these patents make use of a local circuit which is normally open. No one of them, however, sets forth the extremely valuable combination of automatic opening of a circuit-breaker and the opening at will from a remote point by means of a local circuit supplied by a single independent source of energy which acts upon the same tripping magnet, either for the automatic opening of the breaker, or opening it by hand from a remote point.

"It is this combination of automatic and remote tripping in which I find the broadly novel idea of Wurts."

And, further, in speaking of the combination of the automatic circuit-closer and the remote-control switch, he testifies:

"The two are used in a true combination such that there suffices for the securing of both the desired results a single course of energy, a single tripping coil, and substantially a single local circuit."

The question of the novelty and usefulness of this combination presents an interesting study, and one which I have found to be not altogether free from difficulty. While it is the duty of courts to promote the progress of the useful arts, it is also a duty to be careful that monopoly is not unduly extended. Every alleged combination, brought before the courts, presents a new field of inquiry. This case presents nothing unusual so far as the application of the rules of law is concerned. Upon a careful examination of the whole case, I think the devices brought together under this patent present a combination whereby a new and useful result is produced, and where a more efficient method of practical operation is shown. It is true that the two devices do not act simultaneously, but they co-operate with respect to the work to be done, and in furtherance of it. Each switch and each corresponding automatic circuit-closer are organized in parallel branches of the same local circuit; so that either one may control the same magnet by closing that local circuit through the same source of energy. It cannot, I think, be properly said that Wurts has merely added a remote control system to an automatic system. He has combined the two elements, so that the local circuits are fed by a single source of energy, and operate upon a single controlling magnet. After the system has been effected and placed in operation in an exchange, everything about it seems easy and obvious; but it does not need to be stated that the apparent simplicity of a device, especially of a combination, cannot be held to determine the question of invention. So far as has been pointed out, the mere mechanic, however skilled in the electric art, never did combine the several elements found in use, and make the practical system which is now brought before the court.

In my opinion there was invention in the combination described by claims 3 and 4. This combination is shown to be of substantial utility, and to have attained a result which, so far as anything has been pointed out to me, has never before been reached in the art. I find that claims 3 and 4 are valid claims, and are entitled to the protection of a patent.

2. Has defendant infringed claims 3 and 4 of the patent in suit? The case shows that the defendant has manufactured, sold, and installed certain electrical apparatus which has been exhibited to the court. This apparatus shows only a single multiphase system with a single remote control switch. It is stipulated, however, that the defendant has sold and installed a plurality of circuit-breakers, with a plurality of remote control switches located at a distant point, each governing its own local circuit through the direct current generator, which is the source of current for the local circuits. Defendant's system is a three-wire system. Wurts also illustrates a three-wire system connected up with a two-phase generator. In claim 1 he has described the circuit-closers as "one for each phase of the system"; but he does not make such description in claim 3 or 4. In my opinion the argument of the defendant is unfounded whereby he seeks to show in reference to claims 3 and 4 that each one of these claims presumes the use of one circuit-closer "for each phase of the system." In the Wurts system, as complainant suggests, there is never at any one moment more than two complete circuits. The defendant, like Wurts, required circuit-closers only in two of the three wires; since an overload occurring on any wire would necessarily affect one or the other of these circuit-closers. Consequently the excessive current in any phase will act to close the local circuit. The defendant operates under the Elden patent, No. 756,344, issued in April, 1904, some years after the patent in suit. Upon examination of the file wrapper of the Elden patent, it will be seen that the Patent Office refused to allow Elden's claims on the alleged novelty of locating an electro magnet in each circuit combination instead of each circuit. It appears that Elden had endeavored to obtain claims for this arrangement of circuit-closers; but such claims were rejected by the Patent Office in view of the prior art; and Elden was obliged to take a patent with specific claims for his particular construction, his claim being limited to a "plurality of independently operative armatures." I cannot sustain the defendant's contention that the Patent Office allowed Elden the broad claim of a coil in each circuit combination, instead of a coil in each circuit. Without discussing the details of this technical matter, I am satisfied that Elden's patent cannot be held to have made any new addition to the art with respect to placing a circuit-closer in each circuit combination, instead of in each circuit. In this regard, it does not appear from the testimony that he did anything more than Wurts had done in his patent, or than Wurts did in actual practice. In the three-wire two-phase system used by Wurts there was no necessity of having a circuit-closer in the third wire, because anything that happened on that wire would always affect a circuit-closer in one of the other two wires. It seems to me that the complainant is correct in saying that precisely the same thing is true of the three-wire three-phase system, for reasons

which were thoroughly understood in the art prior to the Wurts patent. In claims 3 and 4, in dealing with circuit-closing devices, there is no limitation "one for each phase of the system." There is no limitation, express or implied, that there must be a separate circuit-closer for each phase. All that is required is that the excessive current in any phase actuates means to close the local circuit. The case shows that the defendant employs the Wurts combination of the plurality of systems of electrical distribution, each consisting substantially of a circuit-breaker, controlling-magnet, and a normally open local circuit; also automatic means for closing the local circuit upon excessive current, and a remote control-switch which may be operated at will to close the same local circuit. I am satisfied that the defendant must be held to have infringed claims 3 and 4 of the Wurts patent.

After a full examination and study of the record, and of the very able arguments of counsel, I conclude that the patent in suit discloses invention; that claims 3 and 4 are valid claims, and must be sustained as producing a valid combination under the patent law; and that claims 3 and 4 have been infringed by the defendant. A decree may be entered for the complainant, upon claims 3 and 4, for an injunction and for an accounting. The bill may be dismissed as to claim 1. The complainant may recover its costs.

PEELLE CO. v. RASKIN et al.

(District Court, E. D. New York. January 17, 1912.)

1. PATENTS (§ 129*)—SUIT FOR INFRINGEMENT—ESTOPPEL TO DENY VALIDITY.
A patentee is estopped to deny the validity of the patent as against an assignee when sued for its infringement, even though facts which render the patent invalid were known to the assignee at the time the assignment was made.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½-186; Dec. Dig. § 129.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ELEVATOR DOOR.
A preliminary injunction against infringement of the Raskin patent, No. 871,735, for an elevator door, granted as against the patentee, but denied as against a second defendant.

In Equity. Suit by the Peelle Company against Tillie Raskin and Joseph Raskin. On motion for preliminary injunction. Granted as to defendant Joseph Raskin, and denied as to Tillie Raskin.

Fred H. Bowersock, for complainant.
Charles F. Dane, for defendants.

CHATFIELD, District Judge. This is a motion for a preliminary injunction upon a complaint and affidavits alleging infringement of four claims of patent No. 871,735, granted November 19, 1907, upon application filed June 14, 1905, to Joseph Raskin, one of the defendants in this suit. Upon the record on this motion, the defendants do not deny infringement by the device operated at the time of the beginning of this action, and for which suit is brought. They express readi-

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

ness to avoid infringement in future, and make the statement that they are no longer infringing. They rely upon alleged invalidity of the patent in suit and attack the complainant's title. It would appear that the complainant has acquired whatever interest it has in this and other patents as successor to a company which obtained by assignment certain rights from one J. W. Peelle, which rights have been augmented or perfected by the assignment of a one-third interest by his widow. Whether or not upon proof it may be shown that the complainant has not complete legal title need not be discussed here, because the allegation is to the effect that these assignments were properly executed and recorded so as to convey a complete title, and there is no evidence to show that they do not, beyond a denial of the conclusion.

As to the validity of the patent, it is shown by the papers that the patent was properly issued by the Patent Office. It was usual in form, and was granted upon an application complying in all respects with the law and the regulations of the Patent Office. In other words, it was valid upon its face and presumptively granted rights to a valid invention.

The complaint and answer set up the usual allegations for the patent and defenses against the patent, but, with one exception, none of these enter into this motion.

One of the defendants is the person who took out this and other patents while he was in the employment of the father of J. W. Peelle, or the company which that Mr. Peelle then managed. The other defendant is the inventor's wife, who is now conducting a business under the name of the New York Safety Fire Proof Door Company, of which her husband is the manager, and which actually installed the device as to which infringement has not been denied.

[1] The sole question beyond that of title is raised by the objection of the complainant to the availability of certain alleged facts, put forth by the defendants, with reference to the manner of obtaining the patent in question, and tending to show a use of the patented device some five years before the application. It seems to be undisputed that a door like the patented article was manufactured, sold, and put in use, and has been in continuous use since 1900, in New York City. The affidavits also tend to show that other doors were similarly installed more than two years prior to the application.

It appears that the defendant, who then understood little English, thought of taking out a patent, and consulted an attorney, who knew nothing of the prior installation, but who drafted a patent from a model and sketches; that C. M. Peelle, who subsequently acquired the right to use the patent by purchase, advised with the inventor and was a party to all steps actually leading up to the taking out of the patent; that the patent was used by Peelle's company, and subsequently, the Peelles and the inventor not agreeing about salary, the entire rights of the inventor in this and the other patents were purchased under contract, thus terminating all royalties. The inventor then for a short interval again went to work for the elder Peelle in another concern, and ultimately terminated that employment after the younger Peelle's death. He and his wife, the codefendant, have taken up the business of manufacturing this patented device, with

knowledge (of which the inventor at least was possessed before the time he finally sold his rights to Peelle's company) that his patent was invalid, and could not be successfully defended, in Peelle's opinion, against any one who brought up the prior use as a defense.

It may be assumed that, as in the case of real estate, the assignment of letters patent for a consideration, by an inventor will estop him from subsequently attacking the validity of the patent in the hands of the assignee. Onderdonk v. Fanning (C. C.) 4 Fed. 148; Underwood v. Warren (C. C.) 21 Fed. 573; American Paper Barrel Co. v. Laraway (C. C.) 28 Fed. 141; Rogers v. Riessner (C. C.) 30 Fed. 525; Adee v. Thomas (C. C.) 41 Fed. 342; National Conduit Mfg. Co. v. Connecticut Pipe Mfg. Co. (C. C.) 73 Fed. 491; Frank v. Bernard (C. C.) 131 Fed. 269; Walker on Patents, § 469, and cases cited.

As between Raskin and the Peelle Company, Raskin should not be allowed to set up as a defense invalidity of the patent which he applied for in good faith, unless he can show some reason for being freed from that estoppel.

Two suggestions or grounds for this action are presented: First, that Peelle himself knew of the invalidity of the patent, and that he was responsible for allowing the patent to be taken out; and, second, that both Peelle and Raskin knew or should have known or disclosed facts sufficient to have made it impossible for Raskin to take out the patent, and that, therefore, the complainant, standing in Peelle's shoes by assignment, has not a good title, and cannot come into equity with clean hands.

In Burdsall v. Curran (C. C.) 31 Fed. 919, estoppel of the patentee as against the assignee was further complicated with the question of a reissue, the person accepting an assignment of the reissued patent knowing that the new claims were void. In that case the original patentee was held estopped as to validity of the claims of the reissue. Even though the assignee had knowledge of the defect in the original patent before the reissue was obtained, the patentee and his successors could not set up invalidity in the reissued patents. This doctrine of estoppel arises from the position of the patentee who retains the proceeds of the assignment, and has caused the giving up of rights by the assignee for the assignment; or, in other words, is profiting by his own wrongdoing. Other innocent parties would not be estopped, even though they were aided by or received information from the patentee, but the successors in title to the assignee of such patent are entitled to claim estoppel as a defense against the patentee, and the patentee could not attack his own assignment by operating under the cloak of a corporation or individual who was his alter ego. Alvin Mfg. Co. v. Scharling (C. C.) 100 Fed. 87.

On the present record it would appear that Raskin has for several years had sufficient knowledge of English and of matters relating to patents to put upon him the responsibility of having assumed to hold out as valid a patent which he now says he had no right to obtain, and there seems to be ground for supposing that the elder Peelle knew that this patent or certain claims thereof might be invalid. In the present action we have only to do with the claims covering the device as to which infringement is not denied, and we can, therefore, dis-

regard whether any other and valid claims were included in this patent, or whether any of the patents assigned by Raskin were valid. The issue as to estoppel narrows down to the exact issue as to infringement and validity of the claims infringed. Nor does the question of prior art actually unknown to the patentee enter in here. The patentee is seeking to set up his own acts as ground for challenging validity, and the doctrine of estoppel surely applies thereto.

As was said in the leading case of Chambers v. Crichley, 33 Beav. 374, the defendant "sold and assigned that patent to the plaintiffs as a valid patent," and the question of validity, that is, the representation of validity, is made the basis of the estoppel. In the National Conduit Co. v. Connecticut Pipe Mfg. Co., supra, the injunction again is made to depend upon the element of misrepresentation on the faith of which the position of the assignee was changed.

In Ewart on Estoppel, p. 140, it is said:

"There will be no estoppel if, notwithstanding the existence of misrepresentation, the estoppel-asserter had knowledge of the truth"—[citing cases].

The defendant Joseph Raskin at the time of his final assignment, if not at the time of taking out the patent, had knowedge that in the complainant's opinion the claims of the patent in question were invalid because of long prior public use. He does not deny that these claims would thus be rendered invalid, nor does he deny that he understood, from the time that the point was called to his attention, how this invalidity could be shown. In the face of this he attempted to assign these claims for what they might be worth.

Although the complainant may not have a right to claim validity against an innocent party, there would seem to be no lack of equity in leaving the defendant Joseph Raskin in the position in which he placed himself, namely, of assigning something which he held out as valid, and not being allowed to say that he was free to infringe because he purposely perpetrated or attempted to perpetrate a fraud. The contract which Joseph Raskin entered into, restricting his further manufacture of elevator doors, even though it was incapable of enforcement, as seems to be admitted by both parties upon the argument, and the fact that many elements of unfair competition seem to enter into this case, do not alter the proposition that, if Joseph Raskin has no defense which can be urged by him to the cause of action presented, there is no reason why he should not be enjoined.

The complainant by its affidavits seems to have feared the installation by the defendants of what are called Peelle Safety Doors under architect's specifications. Into this the element of unfair competition enters, and such devices do not seem to depend alone upon the claims involved in this patent. The statement of the defendants that they have ceased to manufacture the doors in question, and the fact that the doctrine of estoppel is brought up, not by way of demurrer or replication and on preliminary injunction, instead of final hearing, makes the action of the court almost academic, as all of the questions of fact are left uncontradicted, and a question of law is presented which may determine nothing as to the final decision.

[2] As to the defendant Tillie Raskin, she seems to have been no

party to any of the transactions. She is now competent to conduct business, and if she has the right to manufacture the doors in question, she would have the right to attack the validity of the patent, and upon the showing made it would seem that even if an injunction as to her may ultimately be obtained, yet on the present record it must be denied. This, of course, would carry with it her right to operate the business conducted under the name of the New York Safety Fire Proof Door Company. But her husband should be enjoined from personally committing any further acts of the sort previously considered and herein admitted to be infringements as an individual or as manager of the business, if it be conducted by him in his wife's name. He is not in a position to object to the doctrine of estoppel being urged against him, and the attitude of the defendants is such that an alleged cessation from infringing acts does not remove the necessity for injunction against the patentee. The defendants are evidently solvent, but their financial responsibility is not so great as to make the certainty of collecting any damages which may be recovered an adequate remedy without the interposition of equity.

Hence a decree enjoining Joseph Raskin from individual infringement by his own acts or through his own agents may be entered.

EXCHANGE SCRIP BOOK CO. v. RAND, McNALLY & CO.

(District Court, N. D. Illinois, E. D. March 12, 1912.)

No. 29,270.

PATENTS (§ 328*)—INFRINGEMENT.

The Richardson and Langston patent, No. 669,489, for an improvement in railroad tickets, *held* not infringed, in view of the limitations imposed upon its scope by the prior art.

In Equity. Suit by the Exchange Scrip Book Company against Rand, McNally & Co. On final hearing. Decree for defendant.

Banning & Banning, for complainant.

L. M. Hopkins and J. H. Peirce, for defendant.

KOHLSAAT, Circuit Judge. This cause is before the court on final hearing for the second time. On appeal from the former order of the court on final hearing decreeing validity and infringement of the patent in suit, the decree was affirmed. 187 Fed. 984, 110 C. C. A. 322. Thereafter, in pursuance of the terms of the remanding order, this court directed that the writ of injunction and the accounting remain in abeyance until the further order of the court, and that—

"defendant be allowed to reopen said cause as it may be advised for the purpose of taking additional testimony therein, directed to a certain excess baggage ticket bearing a money strip or scrip piece alleged to have been made and supplied by defendant for the Burlington & Missouri River Railroad in Nebraska, about March, 1895, such testimony to be closed not later than May 1, 1911, with leave for complainant to take reply testimony thereafter by June 30, 1911, and for defendant to proceed next in rebuttal by July 15, 1911, with final hearing later on full printed record at such date as the court may assign."

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

In pursuance of that order, defendant proceeded to and did take evidence upon the said money scrip, from which it appears that, prior to the date of the invention of the scrip herein, formerly and now in suit, there was in public use by the said railroad an excess baggage money slip or scrip of the kind described in the patent in suit, save that it pertained to excess baggage rather than to passenger rates.

In its entirety, this baggage scrip book differs from that of the patent in suit, in that it does not contain anything corresponding to "certificates or stubs having appropriately-designated spaces to receive descriptions of such tickets respectively and the signatures of successive conductors honoring each ticket and ownership certificates having appropriately-designated spaces for successive signatures of the passenger, * * *" as called for in the claim. In other words, it provides for no means to check up by the railroad to prevent use by some one other than its original purchaser.

The problem of preventing assignment of the ticket by the original purchaser was an old one. There is no doubt that the Thrall patent contained a practicable solution. It seems very clear that the use of identification slips similar to those of the Thrall patent with the excess baggage ticket would require no more than the ordinary ingenuity and skill in the selection and adaptation of old devices, to be commonly expected of those devoted to the practice of the art.

Any argument that the use of the scrip strip of this excess baggage ticket to pay fare is not an analogous use seems untenable. There is little difference between paying excess baggage charges and paying railroad fare. Both tickets are bought and sold by the same persons that deal in and use railway tickets. The advantages attending the use of the money coupon strip to pay carriage of baggage are exactly the same as those secured by its use to pay for carriage of the passenger. The problems attending the successful use of the strip for either purpose are not materially different.

In its opinion upon affirmance, the Court of Appeals lays great stress upon the novelty and utility of the adaptation of the scrip strip of the patent in suit for use as money (as did this court on the former hearing), and seems to base its decision as to validity principally upon this dissimilarity of the book of the patent in suit to prior art structures, refraining from expressing an opinion upon the question of whether other physical differences between the ticket of the patent in suit and those of the prior art were sufficient to confer patentability. Thus the court says:

"Apart from the main idea of the patentees, that the unit in their patented ticket should be expressed in money instead of miles, we do not see anything in the patent that the defendants have infringed; for whether the physical differences introduced by the patentees are patentable invention, or not, they are so narrow, and make the patent so limited, that the alleged infringing device (differing also in form) does not seem to us to be included."

This excess baggage ticket very clearly contains what is termed by the Court of Appeals as "the main idea of patentees." Substitute the money strip of this baggage ticket for the mileage strip of the Thrall patent, and we have everything in the patent in suit, except those physical differences which (if patentable) the Court of Appeals say are "so narrow," and "make the patent so limited, that the alleged in-

fringing device (differing also in form) does not seem * * * to be included."

Even, therefore, if we assume that the substitution of the money strip of the excess baggage ticket in evidence for the mileage strip of the Thrall patent, and its integrality with the certificates or stubs and ownership certificates, amounts to invention, and presents a patentable combination, we are met with the clearly expressed opinion of the Court of Appeals that defendant does not infringe.

It is therefore ordered that the decree entered herein be vacated and held for naught, and that the bill be dismissed for want of equity.

ROWELL v. WILLIAM KOEHL CO.

(District Court, W. D. New York. March 2, 1912.)

No. 469.

PATENTS (§ 292*)—SUIT FOR INFRINGEMENT—REQUIRING DISCLOSURE BY DEFENDANT.

A showing that an alleged infringer makes a device in all essentials similar to that produced by complainant's patented machine, and inferentially made by the same machine or its equivalent, where defendant refuses to permit an inspection of his machine, or to disclose the contents of his application for a patent thereon, is sufficient ground for an order of the court compelling such disclosure, or permission to make such inspection.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. § 292.*]

In Equity. Suit by E. N. Rowell against the William Koehl Company. On application for an order directing the president of defendant to produce a copy of his pending application for a patent, and for an inspection of defendant's machine. Granted.

Briesen & Knauth, for complainant.

Arthur C. Wade and Frank Keiper, for defendant.

HAZEL, District Judge. This case comes before the court upon an application for an order directing William Koehl, president of the defendant corporation, to produce a copy of his pending application for patent, and for an inspection of defendant's machine for making pill boxes. Complainant's affidavits show that the defendant used in its factory a machine for making the various parts or body portions of the box, and then automatically assembled them to make a completed box; that the boxes of the defendant have three parts, the cardboard cylinder, the cardboard disk, and the gummed paper; and that when such parts are united by the machine they are similar in appearance, size, and form to the boxes made by the patented machine of the complainant. From the appearance of the defendant's product, and from the testimony of its president, complainant's expert witness testified that he formed the opinion that in its principal operating parts the machine of the defendant was similar to that described in the patent in suit, and that the defendant employed either the identical mechanism

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

or mechanical equivalents to achieve the result. It further appears that the defendant, in the year 1907, built and used a machine concededly not unlike the complainant's, and upon receiving notice of infringement abandoned its use. Defendant's machine is secretly operated, and defendant declines to produce the same for inspection, on the ground that an application for a patent covering it in all its details has been filed in the Patent Office.

Concededly the court has power in a proper case to compel disclosure of the application for a patent or the inspection of the machine. But the defendant contends that no prima facie showing of infringement has been made, and that as the machine of the defendant embodies trade secrets the application should not be granted. The contention is without merit. The concealment by the defendant of its machine and method of making boxes, its declination to furnish a description of the essential parts, the similarity of the boxes and the parts thereof, indicating that such boxes were made by a machine such as the specification of the Rowell and Little patent describes, are sufficient grounds for suspicion of infringement. If the defendant does not infringe the claims in suit, an inspection of its machine, or a particular description of it, would quickly establish the fact. While it is true that the burden of proof rests upon the complainant to show by proper evidence that the defendant infringes, yet it is also true that, when an asserted infringer declines to exhibit the machine or article which is the subject of the action, there is a presumption that identity exists between such machine or article and that covered by the patent. 3 Robinson on Patents, 305. And when additional evidence is produced tending to show that the patented article was inferentially made by machinery such as described in the patent, there is reasonable cause for believing that the claim of infringement is well founded.

The course of the defendant in declining to produce its machine, or drawing thereof, or to give a description of it, on the ground that the complainant will duplicate the same, or in some way obstruct the course of proceedings in the Patent Office, does not meet with the favor of the court. The questions of invalidity or limitation of claims, priority, anticipation, and noninfringement are not germane to the point under consideration. Nothing tangible has been adduced to show that this application is prosecuted in bad faith, or that it originated in idle or prying curiosity, or in a desire to interfere with the customers of the defendant or the issuance to it of a patent. The application for disclosure falls within the rule laid down by Judge Lacombe in Edison Electric Light Co. v. United States Electric Lighting Co. (C. C.) 44 Fed. 294, and within the following cases: Diamond Match Company v. Oshkosh Match Works (C. C.) 63 Fed. 294; Dobson v. Graham (C. C.) 49 Fed. 17. See, also, Wigmore on Evidence, vol. 3, § 2212.

Hence an order may be entered directing the defendant to deliver to the examiner, or the complainant's solicitor, within 10 days from the date of the order, a copy of the papers or drawings forming the application for letters patent filed by it, or in lieu thereof defendant may give complainant's solicitor power of attorney entitling him to inspect and procure a copy of such application from the Patent Office, or, if the defendant so prefers, a master will be appointed by the court to inspect the defendant's box-making machine at its factory,

and make a full and complete report to this court regarding the device employed by the defendant and the manner in which it operates.

So ordered.

Upon receiving such report, the court will determine whether complainant is entitled to disclosure.

WEED CHAIN GRIP CO. v. ATLAS CHAIN CO.

(District Court, S. D. New York. March 6, 1912.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CHAIN TIRE GRIP.

The Parsons patent, No. 723,299, for a chain tire grip for automobile wheels, discloses novelty and invention, and covers a highly meritorious device; also *held* infringed, on a motion for preliminary injunction.

In Equity. Suit by the Weed Chain Grip Company against the Atlas Chain Company. On motion for preliminary injunction. Granted.

Duncan & Duncan, for complainant.

Gifford & Bull, for defendant.

LACOMBE, Circuit Judge. Ever since my attention was first called to the opinion of Judge Sanborn in the Excelsior Case, 179 Fed. 232, the study given to this patent and to the others constituting the prior art convinced me that it was a highly meritorious one, that the concept of a moving or creeping chain ladder was something distinctly new and extremely useful, and that any chain grip of substantially the same type which does in fact creep when in use, whether slowly or rapidly, would infringe such patent. The great weight of judicial authority seems in accord with these views, and it was quite a surprise to learn that the Court of Appeals in the Seventh Circuit had reversed Judge Sanborn. Reading their opinion, it seemed to me they had given too much effect to the English patent on which they relied, and eventually they reached the same conclusion, finding the patent, upon reargument, to be valid and infringed. 192 Fed. 35.

It is contended here that the second opinion of that court holds that infringement of the Weed patent cannot be found unless the device of defendant, not only creeps when in use, but is also applied with such great looseness that the cross-chains are a part of the ground and not a part of the wheel, at the instant they are in action. I doubt whether the Court of Appeals meant to impose this limitation; but, if they did, I prefer to range myself with the other judges, who have given the patent a construction broad enough to secure the improvement which the inventor disclosed.

The testimony shows that chain grip of defendant in this suit does creep when it is in action running on the roadbed. It creeps very slowly when all the devices employed to tighten it on the wheel are applied with all the strength the user can apply; more rapidly, when he does not take the trouble to exert himself. Moreover, there is no particular reason why he should exert himself. The grip is quite as efficient, whether it creeps fast or slow. There is no real controversy as to these propositions, and it seems unnecessary to inquire whether centrifugal force does or does not operate to loosen its hold on the tire. The motion for injunction is granted.

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

ATLANTIC COAST LINE R. CO. et al. v. INTERSTATE COMMERCE COMMISSION (UNITED STATES et al., Interveners).

(Commerce Court, December 5, 1911.)

No. 3.

1. COMMERCE (§ 93*)—INTERSTATE COMMERCE COMMISSION—SUITS TO ANNUL ORDERS—PARTIES.

Interstate carriers who, although not parties to proceedings before the Interstate Commerce Commission, nor named in an order made by the commission fixing rates on a commodity between certain points, are competitors of the carriers named therein in such traffic and therefore necessarily affected by the order, have such an interest therein as entitles them to maintain a suit to enjoin its enforcement, and, while they may properly apply to the commission for a rehearing, such action is not a necessary condition precedent to such a suit.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 144; Dec. Dig. § 93.*]

2. COMMERCE (§ 93*)—INTERSTATE COMMERCE COMMISSION—SUIT TO ANNUL ORDERS—PARTIES.

Any party against whom an order fixing rates is made by the Interstate Commerce Commission may petition the court for redress without joining other parties to the order; such suit being plenary, and the injury, if any, being several and not joint.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 144; Dec. Dig. § 93.*]

3. COMMERCE (§ 94*)—INTERSTATE COMMERCE COMMISSION—SUIT TO ANNUL ORDER—PLEADING.

In a suit by carriers to annul an order of the Interstate Commerce Commission fixing rates on the ground that such rates are confiscatory and unconstitutional, in that they are not "reasonably compensatory," and would not produce enough revenue to pay the actual cost of the service and a "reasonable profit," the bill should allege facts in support of such conclusions, such as the amount of revenue derived from the traffic affected, and so far as possible the cost of the service, or other facts from which the court can determine for itself whether the rates fixed are reasonably compensatory, and would produce a reasonable profit.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 94.*]

4. COMMERCE (§ 85*)—INTERSTATE COMMERCE COMMISSION—POWERS—FIXING RATES.

Under Interstate Commerce 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), which requires the Interstate Commerce Commission "whenever, after full hearing upon a complaint made * * * it shall be of the opinion that any rates or charges whatsoever demanded, charged or collected by any common carrier or carriers subject to the provisions of this act * * * are unjust or unreasonable * * * to determine and prescribe what will be a just and reasonable rate," it is only when the "opinion" of the commission results from the full hearing that it can be used as the basis of further action; and, while it is the duty of the members of the commission to call to their aid their expert knowledge and experience in forming their opinion, they have no authority to make a finding that an existing rate is unjust or unreasonable, except on evidence of which the carrier is apprised, and has been given an opportunity to meet.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85.*]

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

5. COMMERCE (§§ 94, 97*)—INTERSTATE COMMERCE COMMISSION—SUIT TO ANNUL ORDER—PLEADING.

In a suit by carriers to annul an order of the Interstate Commerce Commission declaring an existing rate unjust and unreasonable and establishing a lower rate, an allegation in the bill that there was no evidence before the commission to show the unreasonableness of the existing rate or the reasonableness of the one prescribed is an allegation of fact and sufficient as a matter of pleading, but whether or not there is at the close of a final trial any evidence to sustain the findings of the commission is a question of law, which the court has jurisdiction to determine.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. §§ 94, 97.*]

Petition by the Atlantic Coast Line Railroad Company and others against the Interstate Commerce Commission, respondent, the United States, the M. C. Kiser Company, and the J. K. Orr Shoe Company, interveners. On demurrer to bill and motion to dismiss. Motion to dismiss and general demurrer overruled. Special demurrer sustained in part.

For report of Interstate Commerce Commission, see 17 Interst. Com. R. 430.

Alfred P. Thom, R. Walton Moore, Frank W. Gwathmey, and John K. Graves, for petitioners.

James A. Fowler and Blackburn Esterline, for the United States.

P. J. Farrell, for Interstate Commerce Commission.

William A. Wimbish, for M. C. Kiser Co. and J. K. Orr Shoe Co.

Before KNAPP, Presiding Judge, and ARCHBALD, HUNT, CARLAND, and MACK, Associate Judges.

CARLAND, Judge. March 31, 1910, petitioners filed their bill in the United States Circuit Court for the Eastern District of Virginia against the Interstate Commerce Commission for the purpose of having an order of said commission, dated November 27, 1909, and effective April 1, 1910, wherein it was found that the rail and water rate of Central of Georgia Railway Company, Southern Railway Company, Seaboard Air Line Railway Company and the receivers thereof, Atlantic Coast Line Railroad Company, Ocean Steamship Company, and Merchants' & Miners' Transportation Company of $1.05 per 100 pounds for the transportation of less than car load shipments of boots and shoes from Boston and New York to Atlanta, Ga., to the extent that it exceeded 95 cents per 100 pounds, was unreasonable, unjust, and unduly discriminatory, suspended, and annulled. The order also required the said companies to cease and desist on or before April 1, 1910, and for a period of not less than two years thereafter abstain from charging, collecting, or receiving the rate so held to be unlawful, and to establish on or before April 1, 1910, and maintain for a period of two years thereafter, a charge for the transportation of less than car load shipments of boots and shoes by water and rail from Boston and New York to Atlanta, Ga., a rate which should not exceed 95 cents per 100 pounds.

The commission answered the bill in the United States Circuit

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

Court, and the M. C. Kiser Company and the J. K. Orr Shoe Company, having been allowed to intervene, filed their several demurrers in said court. Subsequently the case was transferred to this court, and the United States, having here been allowed to intervene, filed its motion to dismiss under the statute. The case is now, after argument, submitted for decision upon the demurrer of the M. C. Kiser Company and J. K. Orr Shoe Company, and the motion of the United States to dismiss. The motion to dismiss so far as it goes covers the same grounds as the demurrer. The demurrer, however, being both general and special, specifies as grounds of demurrer other matters not specifically mentioned in the motion to dismiss. It would seem proper, therefore, to consider the motion to dismiss and the demurrer together.

Speaking in a general way, the bill presents two grounds of attack upon the order of the commission: First, that the rate of 95 cents per hundred pounds established by the order for the transportation of boots and shoes from Boston and New York to Atlanta is so unreasonably low as to deprive petitioners of a right guaranteed to them by the fifth amendment to the Constitution of the United States in that their property will be taken for a public use without just compensation; and, second, that said order, while in form within the powers of the commission, was such an irregular and unreasonable exercise of authority as to render it void. The demurrer being special and directed to particular paragraphs of the bill, it will be necessary to consider the grounds of the demurrer separately.

[1] It is specified as a ground of demurrer that the Georgia Railroad, the Norfolk & Western Railway Company, Clyde Steamship Company, and Old Dominion Steamship Company were not parties to the proceeding before the commission which resulted in the making of the order complained of, and that, therefore, there is a misjoinder of petitioners. It is alleged, however, in paragraphs 4 and 11 of the bill that the petitioners are and have been for at least 10 years participating in the rail and water transportation of boots and shoes from Boston and New York to Atlanta, and the manner in which this traffic moves is pointed out. It is also alleged that the volume of traffic to which the reduction of rates required by the order complained of, if enforced, will by the terms thereof apply, is very large, and will necessarily and inevitably cause corresponding reductions not only by such of the petitioners as are named in said order, but by the other petitioners as well, in all such less than car load rail and water rates on boots and shoes from all the other New England and Eastern ports to Atlanta and practically to all other Southeastern points, and that the volume of such traffic to which such reductions will necessarily apply is tremendous in amount, and that the revenues of all of the petitioners will be greatly and seriously impaired if the order is allowed to remain in effect.

From these allegations admitted by the demurrer it appears that the petitioners last above named have sufficient interest in the rail and water rate to be made parties to the suit. Peavy v. Union Pacific Company (C. C.) 176 Fed. 409, affirmed by Supreme Court November 13, 1911, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. ——.

[2] Another ground of demurrer is that the Ocean Steamship Company of Savannah and the Merchants' & Miners' Transportation Company were parties defendant to the complaint and proceedings before the commission which resulted in the making of the order complained of, and therefore this court can grant no relief without their presence.

It is a sufficient answer to this contention to say that this case is not an appeal or writ of error where all parties against whom the decree or judgment is rendered must join in the appeal or writ, or in lieu thereof a summons or severance must be had, but it is a plenary suit in equity, and certainly any party against whom an order establishing rates is made may petition this court for redress without joining other parties to the order; the injury, if any, being several, and not joint. Peavy v. Union Pacific Company, supra.

Paragraph 10 of the bill is demurred to upon the ground that the petitioners therein named, to wit, the Georgia Railroad, Norfolk & Western Railway Company, Clyde Steamship Company, and Old Dominion Steamship Company were not necessary parties to the complaint before the commission; and if they, as carriers participating in the traffic affected, have any just cause of complaint, such complaint may and should be presented to the commission, which is authorized by law to grant rehearings and to modify its orders. While we think it is entirely proper for parties against whom an order has been made to apply to that body for a rehearing, we know of no rule that makes it a condition precedent to the bringing of a suit in this court for the purpose of setting aside the order. Peavy v. Union Pacific Company, supra.

Paragraph 11 of the bill is demurred to upon the ground that it fails to state the volume of the traffic affected, the revenues derived therefrom, and to what extent these revenues will be affected by the enforcement of the order complained of, and upon the further ground that the bill fails to state what reductions in other rates will necessarily and inevitably follow the enforcement of the order, by what carriers, and between what points such reductions would be made, and the extent of such reductions. The only purpose of paragraph 11 is to show that the carriers which are complainants in this proceeding and which were not parties before the commission have such an interest in the controversy as entitles them to be made complainants, and we think the paragraph is sufficiently specific for that purpose.

Paragraph 13 of the bill is demurred to upon the ground that no facts are stated to support the conclusion that in establishing the rates and charges condemned in the order complained of the complainants were not making or giving any undue or unreasonable preference or advantage to any shipper, locality, or description of traffic, or subjecting any special locality or description of traffic to any undue or unreasonable prejudice or disadvantage.

As the commission condemned the rates which were complained of only because they were unreasonably high, the allegations in paragraph 13 would seem to be irrelevant, and for this reason we do not stop to consider whether it is sufficiently specific or not, but will sustain the demurrer thereto.

Paragraph 16 is demurred to upon the ground that a mere conclusion of law is pleaded, and no facts are alleged showing wherein the enforcement of the order in question will deprive the complainants or either of them of any right guaranteed by the Constitution of the United States. An inspection of said paragraph shows that it is mere argument and therefore is bad on demurrer.

Paragraph 18 is demurred to upon the ground that it is hypothetical, and upon the further ground that in order to support the general conclusion therein pleaded the bill should show the amount of revenue necessary and sufficient for the maintenance of complainants as common carriers in the discharge of their duties to the public, and to what extent such revenue would be affected by the readjustment of rates upon a basis as low as that prescribed by the order complained of. We think the demurrer is well taken, as there is nothing to show the extent to which the carrier would be compelled to construct and apply its other rates upon the basis of the rates named in the order complained of.

Paragraphs 20 and 21 are demurred to upon the ground that no facts are alleged in support of the general conclusion therein pleaded. An examination of said paragraphs has convinced us that the demurrer as to these paragraphs should be overruled.

Paragraph 22 of the bill is demurred to upon the ground that the facts therein alleged do not support the allegation that the order complained of is based upon an erroneous theory. We think the paragraph is sufficient as against the demurrer. We do not now, however, decide whether it is material or not.

Paragraph 23 is demurred to upon the ground that the facts therein pleaded are immaterial to any issue in the case. An inspection of said paragraph convinces us that the demurrer is well taken.

Paragraphs 24, 25, and 26 are demurred to upon the ground that the facts therein alleged do not support the conclusions reached. As paragraph 24 is clearly irrelevant and immaterial, the demurrer thereto will be sustained. It is held in Interstate Commerce Commission v. Chicago, Rock Island & Pacific Railway, 218 U. S. 88, 30 Sup. Ct. 651, 54 L. Ed. 946, that railroads can complain of rates which affect their revenue, but not as to how they affect shippers and places. The demurrer to paragraphs 25 and 26 is overruled for the reason that, assuming said allegations to be material, they sufficiently set forth facts with reference to the matters therein pleaded.

[3] Assuming, but not deciding, that a violation of the fifth amendment to the Constitution of the United States may be based upon an order which establishes a rate on a single article or commodity, we proceed to examine the allegations of the bill upon which it is sought by the pleader to found such a violation. If a case of confiscation is charged at all in the bill, it is contained in paragraphs 12, 14, 15, 17, and 19, which paragraphs are as follows:

"(12) Complainants allege that their rates and charges filed with said commission and now in effect applying to the transportation by rail and water of boots and shoes in less than car load quantities from Boston and New York to Atlanta are just and reasonable charges for the service rendered within the meaning of the act to regulate commerce."

"(14) They show that said rates and charges are not more than reasonably compensatory—that is to say, that the revenue therefrom is not more than sufficient to pay the actual cost of the service rendered in the transportation of said traffic and a reasonable profit.

"(15) Complainants show that none of their rates or charges, as aforesaid, are unjust, unreasonable, unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of said act, within the meaning of section 15 of said act."

"(17) Complainants show that the rates sought to be established by said order are not just and reasonable rates or charges for the transportation of the property aforesaid, but, on the contrary, are unjust and unreasonably low rates or charges; and complainants allege that the establishment of such rates is in excess of the power and authority of the said defendant commission under the said act to regulate commerce, more particularly section 15 thereof, and that said order is in violation of said act and in contravention of the Constitution of the United States, more particularly the fifth amendment thereof, the benefit and protection of which said act and said amendment the complainants specially claim."

"(19) Complainants show that the rates ordered to be established are less than reasonably compensatory, affording them revenue not sufficient to pay the actual cost of service rendered in the transportation of said traffic and a reasonable profit, thereby violating said act and said amendment to the Constitution of the United States, the benefit and protection of which said act and said amendment the complainants specially claim."

Paragraph 12, above quoted, is demurred to upon the ground that the bill states no facts upon which to found a general allegation that the rates in effect prior to the making of the order complained of were just and reasonable charges for the service rendered and that said paragraph states a mere conclusion without supporting it with allegations of issuable facts.

Paragraph 14 is demurred to upon the ground that the complainants fail to allege the actual cost of the service rendered in the transportation of the traffic affected, or to show the revenue actually derived from such traffic, and also fails to show the amount of the profit derived by the complainants, respectively, from such traffic, or what constitutes a reasonable profit for the service performed.

Paragraph 15 is demurred to upon the ground that no facts are stated upon which to found the conclusion pleaded that none of the rates or charges upon the traffic affected are unjust, unreasonable, unjustly discriminatory, or unduly preferential or prejudicial.

Paragraph 17 is demurred to upon the ground that no facts are pleaded tending to show that the commission in making the order complained of exceeded its power and authority.

Paragraph 19 is demurred to upon the ground that the bill fails to show the cost of the service rendered and the revenue derived therefrom, together with the profit earned thereon, and hence fails to show beyond a doubt that the enforcement of the order complained of will necessarily amount to the taking of petitioners' property without compensation and without due process of law.

We think the demurrer in some of its specifications as to the paragraphs mentioned must be sustained. In determining this question, we must remember that the petitioners are asking this court to enjoin and suspend an order of the commission fixing rates for the future, in the making of which the commission exercises a legislative function. The importance of the judgment we are asked to render

in the matter must not be overlooked. Before we may annul the order, we must be clearly satisfied it is our duty to do so. In view of the character of the order and the importance of our action in reference thereto, we believe that this court is entitled to, and must require of the petitioners, a full and fair statement of all the facts upon which they rely for relief. It is only in rare instances that conclusions of fact or law may be rightly pleaded. The court ought to be permitted so far as possible to draw its own conclusions from the facts stated by the pleader. In the present case we think the pleader should inform the court as to what is meant by the words "reasonably compensatory." What may be "reasonably compensatory" in the opinion of the pleader may not be so in the opinion of the court. Likewise, we think the court should be informed as to what the pleader means by the words "reasonable profit." Perhaps if the pleader should state what he would regard as a "reasonable profit" the bill would be bad on its face. Again, it is alleged that the revenue derived from the transportation of boots and shoes from Boston and New York to Atlanta under the old rate was not more than sufficient to pay the actual cost of the service rendered and a reasonable profit. We think we are entitled to some showing as to what the revenue derived from the traffic is, and, if possible, the cost of service. If the cost of transporting a single commodity cannot be shown, and it seems to be conceded that it is rarely possible to do so, then such other facts in lieu thereof as may make out a violation of the fifth amendment to the Constitution should be stated. We do not say that in cases where cost of service cannot be shown a violation of the fifth amendment may not be made out in other ways, but, when petitioners undertake to plead the items of revenue, cost of service, and profit, we are entitled to more information concerning them than is contained in the bill in this case. Whatever information exists bearing upon the contentions of petitioners is largely in their possession, and in cases of this kind no material information should be withheld, consistent with the rules of good pleading. We are sustained in these views by the decisions in L. & N. Ry. Co. v. Siler (C. C.) 186 Fed. 190, and Southern Pacific Co. v. Campbell (C. C.) 189 Fed. 182.

We now come to consider the second general ground of attack upon the order of the commission, namely, the exercise of power in such an unreasonable manner as to render the order void.

Paragraph 27 is demurred to upon the ground that none of the facts therein alleged tend to support the conclusions pleaded. Said paragraph alleges that the commission took into consideration in making its order certain factors which it is alleged could have no influence with the commission in reaching a proper decision. While we do not wish to be understood as now deciding that the facts set forth in paragraph 27 would render the order complained of void, they are of such persuasive force if true as to cause us at this time to overrule the demurrer as to this paragraph.

Paragraphs 28 and 29 are mere arguments, and as to them the demurrer is sustained.

Paragraphs 30, 31, 32, and 33 are demurred to upon the ground that the commission, being an expert tribunal, appointed by law and

informed by experience, is not limited in its consideration of questions presented to the evidence formally offered and introduced by the parties, but in the exercise of its administrative function it may and should have recourse to all sources of pertinent information, and should apply its expert knowledge and accumulated experience to the determination of the question whether particular rates are or are not just and reasonable.

The paragraphs last above mentioned are as follows:

"(30) Complainants show that the said defendant commission exceeded the authority delegated to it by the said act and erred as a matter of law in the following particular also: They allege that no evidence was introduced before said defendant commission tending to show that a rate of 95 cents per hundred pounds from Boston and New York to Atlanta for the carriage of the traffic involved in the proceeding before said commission was, is, or would be a fair, just, reasonable, or nondiscriminatory rate, or a rate fairly compensatory for the service rendered; and complainants show that the ascertainment of such rate was based, not upon any competent evidence nor upon any evidence, but was the result of mere conjecture, and that said order, based on conjecture, as aforesaid, is in excess of the authority of said commission, and will, if enforced, violate the rights of said complainants under the said act to regulate commerce.

"(31) Complainants allege that the said finding and said order of said commission is unauthorized and erroneous in the following respect: In that it appears from the report of the commission which accompanied the said order that the commission in arriving at its conclusion misapprehended the evidence which was introduced in the said proceeding. The commission was apparently controlled by its belief that complainants and other carriers had voluntarily established and applied for a long period a rate of 85 cents on boots and shoes in less than car loads, whereas complainants aver that said rate of 85 cents was never voluntarily established; that, independent of the action of a court which compelled its application, it was never in force except for a few days; and that its enforcement for a long period was required by a judicial decree which restrained the complainants from charging any higher rate.

"(32) The complainants further show unto your honors that the rates now in effect are just and reasonable rates in themselves. They show that at the hearing before the defendant no evidence was offered, heard, or introduced tending to show that said rates were unreasonable, unjust, or unlawful in and of themselves; that there was no such evidence of the cost of the actual service for which such rates were charged, the value of such service, or as to the various elements which are properly to be considered in determining whether or not a given rate is reasonable in and of itself. Your complainants therefore show that the said order is not based upon evidence tending to show the unreasonableness of the rates in effect, and that in such respects the order is unjust, unreasonable, unlawful, in excess of the authority of said defendant under said act to regulate commerce, and in violation of the Constitution of the United States, more particularly the fifth amendment thereto.

"(33) Complainants show that said order is not based on any finding or conclusion of said defendant that said rates are unjust or unreasonable in themselves for the service involved in said transaction, and complainants show that in this respect said order exceeded the authority of said defendant, and is in violation of said amendment to the Constitution of the United States."

[4] It will be observed that the allegations of the bill are to the effect that there was no evidence offered, heard, or introduced tending to show the existing rates to be unjust, unreasonable, or unlawful in and of themselves, or that a rate of 95 cents per hundred pounds from Boston and New York to Atlanta for the carriage of the traffic

involved would be a fair, just, and reasonable rate. If the contention raised by the demurrer goes so far as to say that the Commission may rely wholly upon their expert knowledge and accumulated experience to condemn an existing rate and establish a new rate for the future in its place, we must hold that the demurrer should be overruled. The commission, in the investigation of any question, may bring to its solution the accumulated experience and expert knowledge of its members, and it would be its duty to do so, but before an existing rate may be condemned there must be a finding of some sort that it is unjust and unreasonable (Interstate Commerce Commission v. Stickney, 215 U. S. 105, 30 Sup. Ct. 66, 54 L. Ed. 112), and this finding must be based upon evidence of which the carrier is apprised so that it may meet the case brought against it if it so desires. Further if it shall be claimed in support of the demurrer that the commission may condemn an existing rate whenever it is of opinion that it is unjust and unreasonable, and that this opinion may be based merely upon the expert knowledge and accumulated experience of its members, then, indeed, is a carrier not only deprived of the equal protection of the law, but of the protection of all law. Certainly the carrier is entitled to some proceeding which may in truth be called due process of law before its property rights may be invaded. The importance of the question raised requires an examination of the statute under which the Commission acts when it decides to establish a rate for the future. Section 15 of the act to regulate commerce, as it stood when the order in this case was made, provided as follows:

"* * * That the commission is authorized and empowered and it shall be its duty whenever after full hearing upon a complaint made as provided in section 13 of this act * * * it shall be of the opinion that any rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property as defined in the first section of this act * * * are unjust or unreasonable, or unduly 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 such case as the maximum to be charged."

By the plain language of the law the power of the commission to prescribe a rate for the future cannot be exercised unless after full hearing on complaint made it shall be of the opinion that any of the rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of the act, for the transportation of persons or property as defined in the first section of the act, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of the provisions of the act. The word "opinion" must be interpreted with reference to the connection in which it is used in the law. It is only after full hearing upon complaint made that the law gives any weight or significance to the opinion of the commission; that is, it is only when the opinion results from the full hearing that it can be used as the basis of further action by the commission. It is true that in making up the opinion of the commission its members may

and it is their duty to call to their aid their knowledge and experience, but, if Congress had intended that the commission could make up its opinion from the knowledge and experience of its members independent of any evidence in the particular case, then it was idle to provide for a full hearing, as an opinion of the commission could be formed as well without as with the full hearing. A full hearing not only means an opportunity to be heard by the carrier, but an investigation by the commission itself of the lawfulness of the rate in question.

It is distinctly alleged in the language above quoted from the bill, which is admitted by the demurrer, that at the hearing which resulted in the making of the order complained of in this case no evidence was offered, heard, or introduced tending to show that the existing rates were unreasonable or unjust, but that said order was the result of mere conjecture and speculation.

[5] The allegation that there was no such evidence offered, heard, or introduced is an allegation of fact so far as the question of pleading is concerned, but whether or not there is at the close of a final trial any evidence to sustain a finding of fact made by a judicial or quasi judicial tribunal is always a question of law, which in a case like the one at bar this court has jurisdiction to determine. Ward v. Joslin, 186 U. S. 142, 147, 22 Sup. Ct. 807, 46 L. Ed. 1093; United States Fidelity & G. Co. v. Board of Com'rs, 145 Fed. 144, 151, 76 C. C. A. 114, 121; Laing v. Rigney, 160 U. S. 531, 540, 16 Sup. Ct. 366, 40 L. Ed. 525; Southern Pacific Co. v. Pool, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; The Francis Wright, 105 U. S. 381, 387, 26 L. Ed. 1100; Clement v. Insurance Co., 7 Blatchf. 51, 53, 54, 58, Fed. Cas. No. 2,882; Fisher v. Scharadin, 186 Pa. 565–569, 40 Atl. 1091; Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 472, 11 Sup. Ct. 569, 35 L. Ed. 213; Howe et al. v. Parker et al. (C. C. A. Eighth Circuit, opinion filed October 12, 1911) 190 Fed. 738.

The demurrer therefore, so far as it is general, will be overruled. So far as it is special it will be overruled as to paragraphs numbered 10, 11, 20, 21, 22, 25, 26, 27, 30, 31, 32, and 33, and sustained as to paragraphs numbered 12, 13, 14, 15, 16, 17, 18, 19, 23, 24, 28, and 29. It results that the motion to dismiss will also be denied. Leave to amend petition within 30 days is granted. The United States is granted permission to answer the original petition within 10 days, and to plead to the amended petition if one is filed within 10 days from the date of the service of a copy thereof.

RUCKLE v. AMERICAN CAR & FOUNDRY CO.

(Circuit Court, M. D. Pennsylvania. March 12, 1912.)

No. 282.

1. NEW TRIAL (§ 6*)—DISCRETION OF COURT.
   While it is true that motions for new trial are addressed to the conscience and the sound discretion of the trial judge, they are not to be regarded as an opportunity to be seized for the satisfaction of the whims or caprices of such judge.
   [Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

2. NEW TRIAL (§ 44*)—MISCONDUCT OF JURY—HARMLESS ERROR.
   Although three jurors testified that, while deliberating, reference was made that defendant had all its men insured against accident, and that the insurance company would be required to pay any damages arising from accident, and not defendant, a new trial would not be granted for that reason, as they further stated that this did not influence them in finding their verdict.
   [Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 80–85; Dec. Dig. § 44.*]

3. NEW TRIAL (§ 143*)—VERDICT—IMPEACHMENT BY JURORS.
   The deliberations of jurors are conclusively merged in their verdict, so far as they are concerned, unless misconduct in reaching it is shown from other sources than from jurors themselves.
   [Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 290–296; Dec. Dig. § 143.*]

At Law. Action by Charles C. Ruckle against the American Car & Foundry Company. On defendant's motions for judgment non obstante veredicto and for new trial. Motions denied.

Paul J. Sherwood, for plaintiff.
Sprout & Cupp, for defendant.

WITMER, District Judge. The defendant comes with two motions; one for judgment non obstante veredicto, and one for new trial. The latter is urged for two reasons:

"First, because of the false testimony of the plaintiff in respect to the injuries resulting from his falling into the ditch; and, second, because the jury had received information that the defendant was indemnified by an insurance company, which doubtless prejudiced their minds and overwhelmed their judgment."

[1] In considering these reasons it will not be amiss to recall that, while it is true that motions for a new trial are addressed to the conscience and the sound discretion of the trial judge, they are not to be regarded as an opportunity to be seized for the satisfaction of the whims or caprices of such judge. The granting of new trials depends upon well-established and fundamental principles of the law. It is the purpose of the courts to bring litigation to an end as speedily as possible, and this should not now escape us at a time when much complaint is made of the law's delays. The object to be attained, no doubt, is responsible for the rule that the granting of new trials is

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

not a matter of right, but of discretion, to be exercised only for sound reason.

It is not for the court to say whether the narrative of the plaintiff is unworthy of belief. His testimony, together with that of the witnesses contradicting him, was in issue at the trial and submitted to the jury; and, judging of its weight and effect, the jury gave him their verdict, from which may be inferred their view of it. Since the trial, testimony was collected to contradict the plaintiff. Some of the witnesses who testified were in attendance upon the trial; in fact, all could have been secured by due diligence. It is, however, very doubtful whether the result would have been different, had they then testified, nor is it likely that the result would be different upon a new trial, judging from the result of a trial of the defendant who has since been prosecuted, regarding his testimony, for willful perjury, and acquitted; all of the witnesses having been called and testified.

[2] The second reason assigned would deserve more serious consideration on competent proof that through the statement of counsel, the offers of proof, or by questions asked witnesses or jurors, it was brought to the attention of the jury that the defendant was insured by an employer's liability company, which influenced the jury in reaching a verdict. It was, however, not made to appear that the jury was influenced in manner; and, furthermore, the proof relied on is far from satisfactory. Three of the jurors testified that, while deliberating, reference was made that the defendant had all of its men insured against accident, and that the insurance company would be required to pay any damages arising from accident, and not the defendant. They furthermore stated that this did not influence them in finding their verdict.

[3] The deliberations of jurors are conclusively merged in their verdict, so far as they are concerned, unless misconduct in reaching it is shown from other sources than from jurors themselves. If it were different, there would be absolutely no stability to verdicts.

This question was passed upon in this state at a very early day, by the Supreme Court in Cluggage v. Swan, 4 Bin. (Pa.) 150, 5 Am. Dec. 400, where Justice Yeates expressed the conclusion of his sound reasoning there employed that:

"The settled rule in New York and Virginia, as well as the most modern English authorities, are averse to the receiving of such testimony, and I cannot discover why we should be more inattentive to the reputation and feelings of our own jurors. Upon the whole, after the fullest consideration, I am of the opinion that the testimony of jurors ought not to be admitted to invalidate their verdict."

Since then, down to Stull v. Stull, 197 Pa. 243, 47 Atl. 240, this has been, and is to-day, the ruling of the state courts. The early cases of the federal courts hold that juror's affidavits cannot be read to show mistake, miscalculation, or misconduct on the part of the jury. Ladd v. Wilson, 1 Cranch, C. C. 305, Fed. Cas. No. 7,977; Cherry v. Sweeny, 1 Cranch, C. C. 530, Fed. Cas. No. 2,641; Holmead v. Corcoran, 2 Cranch, C. C. 119, Fed. Cas. No. 6,627. And to this effect appears Kelley v. Pennsylvania R. R. Co. (C. C.) 33 Fed. 856. Chief Justice Taney, in United States v. Reid et al., 12 How. 361,

13 L. Ed. 1023, while doubting the propriety of laying down a general rule upon this subject, states that:

"Unquestionably such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice. It is, however, unnecessary to lay down a rule in this case, or examine the decisions referred to in the argument, because we are of the opinion that the facts proved by the jurors, if proved by unquestioned testimony would be no ground for a new trial."

Both of the jurors had sworn that they were not influenced in their verdict, as in the case under consideration.

Finally, this is clearly a case for a jury. Accepting the testimony of the plaintiff, which the jury did, the defendant was guilty of negligence, resulting in the injury of the plaintiff, to which he was not contributory. The issues of fact were carefully and clearly stated, and the jury found for the plaintiff.

The motions for judgment non obstante veredicto and for new trial are denied. The clerk is directed to enter judgment on the verdict for the sum of $5,472.22, with interest from June 16, 1911. To which an exception is noted for the defendant.

YOUNG et al. v. UNITED ZINC COS. et al.

(District Court, D. Massachusetts. February 15, 1912.)

No. 242 (835).

CORPORATIONS (§ 457*)—POWERS—CONTRACTS—ULTRA VIRES.

Defendant was organized and empowered by its charter to acquire mines, mining rights, and lands, to mine, refine, and prepare for market mineral substances and ores of all kinds, and in connection therewith carry on any other operations necessary or incidental thereto, including the purchase and sale of all mining supplies, with the privilege of doing a general merchandise business at the place or places where the mining business is conducted or elsewhere. Defendant, having acquired certain mining claims in Missouri from which it expected to produce large quantities of zinc ore, contracted in good faith to sell certain quantities of zinc ore at stated periods to B. & Co., but, being unable to mine all the ore from its own mines, except at a cost greater than the price at which it could purchase ore from others, bought more ore than its own mines produced in order to fulfill the contract. *Held*, that defendant had incidental power to procure such ore to comply with its contract, and that its act in so doing was not ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1808, 1809; Dec. Dig. § 457.*]

In Equity. Bill by Royal Bosworth Young and others against the United Zinc Companies and others. Bill dismissed.

Walter H. Foster, E. Irving Smith, and Charles S. Hill, for complainants.

Charles A. Digney, Samuel Williston, and Hollis R. Bailey, for defendants.

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

Facts.

ALDRICH, District Judge. This is a suit in equity by certain stockholders of the United Zinc Companies, a corporation organized under the laws of the state of Maine. The purposes of the corporation were declared as follows:

"To purchase, lease, or otherwise acquire mines, mining rights, and lands.

"To mine, excavate, quarry, smelt, refine, and prepare for market, in any way that may be necessary or suitable, metal and mineral substances and ores of all kinds.

"In connection with the foregoing, to carry on any other operations that may be necessary or incidental thereto, including the purchase and sale of all mining supplies, and with the privilege of doing a general merchandise business at the place or places where its mining business is conducted, or elsewhere."

Not long after its organization, the United Zinc Companies entered into a contract with Beer, Sondheimer & Co., whereby it was to deliver under the terms of the contract certain quantities of Joplin ore at stated periods. The Zinc Companies was then opening and operating a mine or mines of its own in the Joplin territory, and had mining rights in other mines in that territory.

I find as a fact that the contract was entered into in good faith by the contracting parties, and that the Zinc Companies at the time had an expectation that it might soon, if not at the beginning, produce sufficient ore from its own mining properties and mining rights to enable it to fulfill the contract. It unfortunately resulted, however, as sometimes happens in mining enterprises, that its particular properties could not be made to produce ore in sufficient quantities, except at a very much larger expense than was at first supposed; and it was found that it could buy in the open market Joplin ore, produced from mines more favorably situated, at a very much less cost than it could be produced from its own mines, and the Zinc Companies proceeded to do this, buying considerably more than its own mines produced in order to fulfill the contract.

The plaintiffs, who bring their proceeding in equity as stockholders, are seeking an injunction against further performance of the contract, and for an accounting as to past profits, and perhaps for other incidental relief.

Statement, and Ruling, of Question of Law.

The case of the stockholders in all its phases depends upon whether the contract was ultra vires. On the facts it does not seem to me the situation is one to be controlled by the ultra vires doctrine.

In the first place, the contract, at its inception, did not contemplate such a departure from the purposes of the organization as would be involved in entering upon an original scheme of purchase and sale. Again, it was not a transaction in the nature of buying and selling, in the sense of dealing in such a business as an independent branch. The relations were contractual, and the general object of the Zinc Companies was to provide through a specific and certain contract for the disposition of the ore which it expected to produce from its own

mines and mining rights. So it would seem that the contract at its inception contemplated business within the reasonable scope and purposes of the Zinc Companies' enterprise.

It is true the parties understood at the time the contract was made that what its mines were then actually producing was not sufficient to enable them to meet the requirements of the contract in respect to delivering the quantity named; but upon the facts it appears there was a reasonable expectation that they would soon be able to produce the Joplin ore in sufficient quantities, and under the contingency of unexpected failure of production—an unexpected contingency arising subsequent to the contract—the Zinc Companies went into the market and bought ore which, together with its own production, enabled it to comply with its contract engagements to deliver.

The transactions of purchase were for the pecuniary benefit of the Zinc Companies and its stockholders, and, without elaboration in respect to the reasons for the nonapplication of the ultra vires doctrine to the situation in question, it seems to me that there was not such a clear and distinct departure from the scope of the original purposes of the corporation as to warrant the application of its principles here. The facts do not present a case where there was a plain and independent departure from the purposes of the corporation, but rather a situation in which an exigency arose in respect to its main business (after contractual relations within the scope of the organization had been created), where resort was had to incidental means in order to meet the exigency and conserve the rights of the corporation and its stockholders.

I think the bill should be dismissed, and it is so ordered.

MANCHESTER LINERS, Limited, v. VIRGINIA-CAROLINA CHEMICAL CO.

(District Court, E. D. North Carolina. Jan. 29, 1912.)

1. SHIPPING (§ 39*)—CONSTRUCTION OF CHARTER PARTY.
   A charter party is to be construed in the light of the nature and details of the adventure contemplated by the parties, giving to the terms their plain ordinary or popular meaning, unless they have generally in respect to the subject-matter, as by the known usages of trade or the like, acquired a peculiar sense, distinct from their popular sense.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 141–148; Dec. Dig. § 39.*]

2. SHIPPING (§ 45*)—CONSTRUCTION OF CHARTER PARTY.
   Where a charter party contains a provision, "Captain to sign bills of lading as presented to him without prejudice to this charter party," its language cannot be controlled by the terms of the bill of lading.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 177–181; Dec. Dig. § 45.*]

3. SHIPPING (§ 47*)—CONSTRUCTION OF CHARTER PARTY—"PORT OF DISCHARGE."
   Where the "port of discharge" designated in a charter party is one at which there is a customhouse, the word "port" is to be construed in its ordinary and commercial sense, as meaning the particular place named,

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

and not any place within the boundaries of the revenue port or the district for which such place is the port of entry.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 182, 183; Dec. Dig. § 47.*

For other definitions, see Words and Phrases, vol. 6, pp. 5456–5457.]

4. SHIPPING (§ 47*)—CONSTRUCTION OF CHARTER PARTY—PORT OF DISCHARGE.
Under a charter for the carriage of a cargo of manure salt used in the manufacture of fertilizers from a German port to Wilmington, N. C., at and near which city there were large fertilizer works having landing docks, the vessel was not authorized to demand discharge at a point 30 miles below Wilmington where there were no such works, merely because the term "port of Wilmington" was used elsewhere in the charter and in the bill of lading.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 182, 183; Dec. Dig. § 47.*]

5. SHIPPING (§ 34*)—CHARTER PARTY—LAW GOVERNING CONSTRUCTION.
A charter of an English ship owned by an English company to a German company for the carriage of a cargo from Germany to the United States, made in Germany, but in the English language, *held* governed as to its construction by the law of Germany where the general presumption that such was the intention of the parties was strengthened by an express provision to that effect in the bill of lading.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 120; Dec. Dig. § 34.*]

6. EVIDENCE (§ 541*)—COMPETENCY OF EXPERT—LAW OF FOREIGN COUNTRY.
A practicing attorney, graduated from the law department of a German university, and who practiced and acted as judge in the German courts for a number of years, during which time he had occasion to take up and decide cases involving the admiralty law, *held* competent to testify as an expert as to the maritime law of Germany upon a question to which he had given special study.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2354; Dec. Dig. § 541.*]

7. SHIPPING (§ 47*)—CONSTRUCTION OF CHARTER PARTY—COST OF LIGHTERAGE—GERMAN LAW.
According to the maritime and admiralty law of Germany and the construction by the German courts of a clause in a charter party requiring the ship to discharge at a port named, or "as near thereunto as she may safely get," the master is relieved from proceeding with his ship and cargo to the port where the water is not of sufficient depth, but not from his obligation to deliver the cargo at his expense in the port of destination unless a contrary intention appears, and is liable for the expense of necessary lighterage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 182, 183; Dec. Dig. § 47.*]

In Admiralty. Suit by the Manchester Liners, Limited, owner of the steamship Manchester Miller, against the Virginia-Carolina Chemical Company. Decree for respondent.

J. P. K. Bryan, for libelant.
Rountree & Carr, for claimant.

CONNOR, District Judge. The libel, answer, and report of the commissioner disclose the following facts, material to the decision of the controversy:

The libelant, Manchester Liners, Limited, a corporation created and organized under the laws of the kingdom of Great Britain, was on and

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

prior to May 27, 1908, the owner of the steamship Manchester Miller, and on said day, through the interposition of Robert M. Sloman, Jr., of Hamburg, Germany, entered into a contract of affreightment or charter party, partly printed and partly written, executed at Hamburg, with the Hamburg American Liner of Hamburg, Germany, whereby it was agreed that said steamship should receive on board at Hamburg from the charterers a cargo consisting of 2,855 tons of manure salt, etc., and that:

"The steamer being so loaded, after being dispatched by charterers, shall therewith proceed immediately to Wilmington, North Carolina, or so near thereunto as she can safely get and, on right and true delivery of the cargo, according to the bills of lading signed by the captain, be paid freight," etc.

The other provisions in the charter party material to be considered are:

"The steamer to be discharged at port of discharge at not less than an average of 300 tons per working day."

"The steamer to be discharged at one or two wharves at her expense, as ordered by consignees, within 24 hours after the steamer has been entered at customhouse, consignees guaranteeing sufficient depth of water, if at Wilmington, North Carolina, including factories outside of city limits."

By an indorsement in writing, on margin of charter party, steamer is authorized to fill up with 3,395 tons for Pensacola.

In compliance with the charter party, the charterers furnished to said steamer the cargo and R. M. Sloman, Jr., for the captain, signed bills of lading, dated June 30, 1908, and delivered them to the charterers, whereby he acknowledged receipt of said cargo from Kalisyudakat, G. B. M. H. Filiale, Hamburg, in apparent good order and condition. "Discharge of all other conditions as per charter party dated Hamburg, 27 May, 1908. To be delivered in like good order and condition at any place within the jurisdiction of the customhouse of Wilmington, North Carolina, unto G. Ansewerie & Company, or to his or their assigns, freight to be paid at Wilmington, North Carolina. * * * All questions arising under this bill of lading are to be governed and decided by the laws of the empire of Germany, as administered in Germany."

Soon thereafter the steamer sailed from Hamburg and proceeded on her voyage, until the night of July 23, 1908, when she reached the outer bar or mouth of the Cape Fear river; here she came to anchor, and waited until the following morning at 5 o'clock, when she crossed the bar of said river at high tide, proceeded up the river, and anchored off the town of Southport, near the mouth of the river, about 30 miles below Wilmington. The draft of said steamer at that time in salt water was 24 feet, 5 inches, and, off Southport, where the water is partly fresh, 24 feet, 8 inches. The pilot stated to the captain that he could not take the ship higher up with safety until she was lightened. The captain came to Wilmington, leaving the steamer in the river off Southport, and entered her at the customhouse at Wilmington on July 24, 1908, having previously given consignees of said cargo, the Virginia-Carolina Chemical Company, claimants, notice that the said ship had arrived at Southport and offered to deliver it there, as it was as near Wilmington as it could safely get, which notice con-

signees refused to accept, and again when he got to Wilmington, which consignees accepted. Said consignees refused to accept the cargo at Southport, and demanded that the captain bring the ship to Wilmington, and deliver the cargo at Smallbone's wharf, in the upper part of the city, and the wharf at Navassa, the factory of said company, outside the city limits, and within the port of Wilmington. This the captain declined to do, because it was impossible for a ship drawing 24 feet to proceed up the river from Southport to said wharves, without being lightened some 17 or 18 inches. After consultation with the ship's agent at Wilmington, it was agreed between the captain and the agent of consignees that it was necessary to lighten the ship to avoid demurrage, and leave the question of liability for the cost and expense incurred to subsequent adjustment. Pursuant to this arrangement, tugs, lighterers, and laborers were employed by the ship's agent, and she was lightened by the removal of about 660 tons of her cargo, whereupon, on July 26th, the ship proceeded up the river to Smallbone's wharf, in the city of Wilmington, the average depth of water between Southport and Wilmington being about 21½ or 22 feet. After taking out a part of the cargo and delivering same to consignee at Smallbone's wharf, the ship went to the Navassa wharves, discharged, and delivered to consignee the remainder of the cargo. The consignee received the portion of the cargo, lightened from Southport to Wilmington, from the lighters at their own wharves. It was necessary in going up the river from Southport to Wilmington that the ship should have the assistance of a steam tug. The Sea King was employed by the ship's agent for that purpose, and performed the service. The cargo was entered at the customhouse in Wilmington on the 24th day of July, 1908, by the Virginia-Carolina Chemical Company, as the owner thereof, under the written declaration of Mr. B. S. Reynolds, the agent of said company, producing the bill of lading, and depositing the same with consular invoice in said customhouse, where they are now of record. The captain of the Manchester Miller, Robert S. Robertson, had never been in Wilmington, though he knew of the port as laid down on the chart of the Cape Fear river, which he had before leaving Hamburg. The expense of lightening the steamer, $1,071.82, found by the master to be reasonable and fair, was paid by the ship's agent and due notice given by the captain to consignee that it would be held responsible for said expense. The captain of the ship also paid for towing the steamer from Southport to Wilmington $100, and from Wilmington to Navassa and return $150. The commissioner finds that these amounts are fair and reasonable, but were not paid for lightening. The captain charges consignees with said amounts, also $10 amount paid for cost of bond in this suit, and $25 deposited with the clerk of this court. Demand was duly made on the Virginia-Carolina Chemical Company for these several amounts and payment refused, for that it was not liable therefor. Thereupon this libel was filed, the cargo attached, etc.

Upon the foregoing findings of fact, the commissioner finds, as a conclusion of law, that the libelant is not entitled to recover of the claimant the amount expended for lightening, towage, or the other expenditures. The libelant filed a number of exceptions to the re-

port of the commissioner. It is not necessary to note the exceptions separately. Many of them are directed to the failure of the commissioner to find specifically certain provisions of the charter party and the bill of lading. It is sufficient to say in regard to these exceptions that both papers are in evidence, and their provisions are open to the parties for such argument, inferences, or conclusions as they may be thought to sustain.

The first contention urged by libelant is that by a correct construction of the charter party and the bill of lading the ship had completed her voyage when she crossed the bar and anchored in the mouth of the river off Southport, that she was then "in the port of Wilmington," the point to which, by the charter party, she was under obligation to come. It will be observed that by the terms of the charter party:

"The steamer being so loaded, after being dispatched by charterers, shall thereupon proceed immediately to Wilmington, North Carolina."

The learned counsel for libelant insists that, in the light of other provisions in the charter party, the words "Wilmington, North Carolina," should be interpreted, "the port of Wilmington, North Carolina," and that this term includes any point within the jurisdiction of the customhouse of the port of Wilmington as laid off and designated by the Statutes of the United States. He calls attention to the provision in the charter party that "any difference in freight, if in charterer's favor, to be payable ten days after arrival at port of destination," and "the steamer to be discharged at port of discharge," and that the steamer is "to employ the charterers or their agents, stevedores, at the usual lowest rate at the port of loading and port of discharge." The learned counsel in his brief says:

"All through the charter, after the word 'Wilmington' has been mentioned, it is referred to in express terms as the 'port of destination,' 'the port of discharge,' and therefore the word 'Wilmington' means in the charter party the port of Wilmington."

Attention is called to other language found in the charter party, as tending to show that the port of Wilmington is the point of destination prescribed for the voyage, such as, "lay days to commence the day after the steamer has been entered at the customhouse and is ready to discharge." He further insists that the conduct of the captain in entering the steamer at the customhouse and notifying the agent of the consignees that the steamer, when off Southport, was ready to discharge her cargo, and that on July 24th the agent of the consignees, in entering the cargo in the customhouse in the port of Wilmington by written declaration and filing the bill of lading, shows that they so construed the charter party.

[1] The rule for construing charter parties is thus laid down:

"Charters and bills of lading are to be construed in the light of the nature and details of the adventure contemplated by the parties to them. The construction to be given them is not an unnecessarily strict one, but such a one, as with reference to the context and the object of the contract, will best effectuate the obvious and expressed intent of the parties. They are to be construed according to their sense and meaning, as collected in the first place, from the terms used in their plain, ordinary, and popular sense, unless they

have generally, in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense, distinct from their popular sense, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some special and peculiar sense." Scrutton, Charter Parties and Bills of Lading, p. 10.

When contracts are partly printed and partly written, the written clause should usually prevail as clearly expressing the intention of the parties. Id. 22. It is an equally well-settled rule, applicable to such contracts, that, if possible, the written and printed provisions should be construed together, and, so far as possible, harmonized. 7 Am. & Eng. Enc. 188.

Taking judicial notice of the commercial and geographical conditions and location, it is found that the city of Wilmington, N. C., is situate on the north bank of the Cape Fear river, about 30 miles from its mouth; that it is the chief seaport and commercial city of the state, containing about 30,000 inhabitants, and engaged in considerable import and export trade. It is in evidence that the Virginia-Carolina Chemical Company has wharves at Navassa, several miles above the city. The character of the cargo, manure salt, or kainitt, indicates clearly the use for which it is imported. Southport is a small town lying near the mouth of the Cape Fear river. There is nothing in the language used by the parties in the evidence, or in the conditions, of which judicial notice can be taken, to indicate, or even suggest, that Southport was the "port of destination" or "port of discharge" of the ship or its cargo. If libelants' contention is sustained, it must, of necessity, be based upon the proposition that "Wilmington, North Carolina," written in the charter party, fixing the destination of the ship, is so controlled by the printed terms as to make the point of destination anywhere within the limits of the "port of Wilmington" as laid out and prescribed by the federal government for the purpose of collecting custom duties and regulating pilotage. By reference to 2 Fed. Stat. Anno. p. 544, we find that the "district of Wilmington comprises all the waters and shores south of the district of Beaufort to the southern boundary of the state of North Carolina." By further reference to the boundaries of the district of Beaufort and the southern boundary of the state, it appears that, if libelants' contention be correct, her captain might select any point within a distance of many miles along the coast for discharge. This certainly was not the intention of the parties when they made the contract. Any doubt as to what constitutes the "Port of Wilmington" for the purpose of making entry, etc., is removed by the statute, which, after defining the limits of the "district of Wilmington," concludes "in which Wilmington shall be the port of entry."

[2] The bill of lading states that the "steamship Manchester Miller is bound to Wilmington, North Carolina," and contains the words, in writing, after describing the cargo, "Each lot to be delivered separately by itself. Discharge of all other conditions as per charter party, dated Hamburg, 27 May, 1908;" and printed, "to be delivered * * * within the jurisdiction of the customhouse of the aforesaid port of Wilmington, North Carolina." The charter party contains the words:

"Captain to sign bills of lading as presented to him without prejudice to this charter party." These words cannot control the language of the charter party.

[3] In Sailing Ship Garston v. Hickie (1885) 15 Q. B. D. 580, it is held that the term "port" is to be taken in its business, popular, or commercial sense, and not in its legal definition for revenue or pilotage purposes. Willes, J., says:

"When there is a legal port, what is meant by the use of the expression 'popular sense' or 'commercial sense' of the word 'port'? One can well understand that the revenue port is not the thing to be looked at, because the boundaries of a revenue port have been established merely for the sake of the convenient collection of customs, and have nothing to do with the mercantile or nautical meaning of the word 'port,' as applied to a particular place. * * * I think that, when a port exists in the true acceptation of the term, the popular or commercial sense is identical with the legal sense."

Brett, J., on appeal, says:

"It is not to be the fiscal port; the parties are not contracting with regard to that. The fiscal port, the limits of which are always fixed by the act of Parliament, is never in fact taken into consideration by shippers or merchants employing ships. We all know that. We know also as a fact that the limits of many pilotage authorities extend far beyond anything which would be called in the ordinary sense 'the port' of a particular place. Therefore, the word 'port' in a charter party does not necessarily mean an act of Parliament 'pilotage port,' or, which is a better word, 'pilotage district.' * * * What do they intend? They intend the port as commonly understood by all persons who are using it as a port; that is, for sailing to or from it with goods and merchandise."

Bowen, L. J., says that it is a question of fact "what the word 'port' means in a charter party. The destination of the ship, with her cargo, is fixed by the charter party as 'Wilmington, North Carolina.'" The references in the printed part of the charter party to "port of discharge," "port of destination," etc., may easily be reconciled with the word "Wilmington, N. C.," fixing the place to which she is to come. Any apparent conflict disappears when it is noted that Wilmington is made by the statute the "port of entry" of the Fourth district.

[4] The conclusion from any port of view is irresistible that the steamship Manchester Miller had not completed her voyage when she anchored in the mouth of the river off Southport—that the charter party obliged her to proceed "to Wilmington, North Carolina." The act of the captain in entering her in the customhouse in Wilmington, while she was anchored 30 miles below the city, could not change, or in any manner affect, the terms of the contract; nor could the act of the agent of the consignees do so. This conclusion disposes of the exception to so much of the report as pertains to this phase of the controversy.

[5] Conceding that the ship was under obligation to proceed to Wilmington, N. C., claimant is confronted with a limitation expressed in the contract, upon this obligation by the clause "or as near thereunto as she can safely get." This clause is usually found in charter parties. Its construction has been the subject of much discussion, it seems, with differing conclusions in the admiralty courts of different countries. This charter party is made at Hamburg, Germany. The charterer is a German company. The owner is a British corporation.

The Manchester Miller is a British ship. The charter party is in the English language. The ship takes on her cargo in a German port to be delivered in an American port. It is conceded that, to ascertain what effect the limiting clause has upon the rights and liability of the parties for the expense incurred in lightening the ship to enable her to complete the voyage, we must ascertain to what country we shall go for a construction of the clause. It is conceded that, by reason of the depth of the water in the Cape Fear river and the draft of the Manchester Miller, she could not, with her cargo, "safely get" beyond the point at which she anchored and at which she was lightened of a part of her cargo. Libelant insists that, while by the general rule the law of the place where the contract is made controls, the facts in the record bring the case within the exception recognized by the courts; that the clause limiting the obligation of the ship to proceed to Wilmington, N. C., must be construed by the law of England, as found in the decisions of the courts of that country. There is no evidence or finding by the commissioner as to the law of England applicable to the facts in this case. Decisions of English courts are cited in the brief of libelants' counsel. Claimant insists that the clause in controversy must be construed in the light of the law of the German Empire as decided by the courts of that country. Evidence is introduced, and the commissioner finds as a fact, what the law of the German Empire is. It is well settled that, when a contract is made in one country and its enforcement sought in the courts of another country, the law of the loci contractus must be shown by competent evidence and found by the court as a fact. In the absence of such evidence, the court will apply the law of the forum. Liverpool Steam Co. v. Phœnix Insurance Co., 129 U. S. 397, 446, 9 Sup. Ct. 469, 32 L. Ed. 788. The exception noted in The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126, does not affect the question presented here. Unless, therefore, the claimant has sustained its contention that the law of Germany controls the construction of the clause, resort must be had to the law of this country.

The Supreme Court in Liverpool Steam Company v. Phœnix Insurance Company, supra, quotes with approval the following:

"The general rule is that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subject of the power then ruling or, as temporary residents, owe it a temporary allegiance; in either case equally they must be understood to submit to the law then prevailing and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms. It is equally an agreement in fact presumed de jure, and a foreign court interpreting and enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations." Lord Justice Turner in Peninsular & Oriental Company v. Shand, 3 Moore, P. C. (N. S.) 272, 290.

"The presumption is in favor of the place of the contract. He who asserts the contrary has the burden of proof." Mutual Life Insurance Co. v. Cohen, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181.

The learned counsel for libelant contends that it is an English contract, and to be interpreted by English law. For this purpose he relies upon the fact that the owner of the ship—The Manchester Liners, Limited—is an English company, that the Manchester Miller is an English ship, and that the charter party is printed and written in the

English language. It must be conceded that these facts are pertinent and proper to be considered in arriving at the intention of the parties in respect to the law by which their contract is to be governed. On the contrary, it appears that the charterer, the Hamburg American Liner, is a Hamburg company; the charter party is signed, for the owner, by R. M. Sloman, Jr., of Hamburg; the cargo is to be taken on at Hamburg. The bill of lading is signed for the captain by R. M. Sloman, Jr., and contains the following clause:

"All questions arising under this Bill of Lading are to be governed and decided by the law of the empire of Germany as administered in Germany."

It is conceded that this clause applies only to the bill of lading, and cannot be invoked to the prejudice of the parties under the charter party, but it is executed pursuant to the terms of the charter party, and is relevant upon the inquiry as to the law of the country which the parties had in view, and in respect to which they were contracting. The libelant stresses the case of Lloyd v. Guibert, 6 B. & S. 100; s. c., L. R. 1 Q. B. 515. There a French ship owned by a Frenchman was chartered by the master, in pursuance of his general authority as such, in a Danish West India island to a British subject, who knew her to be French, for a voyage from St. Marc in Hayti to Havre, London, or Liverpool, at the charterer's option, and he shipped a cargo from St. Marc to Liverpool. On the voyage the ship sustained damage from a storm which compelled him to put into a Portuguese port. There the master lawfully borrowed money on bottomry and repaired the ship, and she carried her cargo safe to Liverpool. The bondholder proceeded, in an English Court of Admiralty, against the ship, freight, and cargo, which being insufficient to satisfy the bond, he brought an action at law to recover the deficiency against the owners of the ship. They abandoned the ship in such a manner as, by the French law, absolved them from liability. It was held that the French law governed the case. After making the foregoing statement, Mr. Justice Gray, in Liverpool Steam Co. v. Phœnix Insurance Co., supra, says:

"The decision was, in substance, that the presumption that the contract should be governed by the law of Denmark in force when it was made was not overcome in favor of the law of England by the fact that the voyage was to an English port and the charterer an Englishman, nor in favor of the law of Portugal, by the fact that the bottomry bond was given in a Portuguese port; but that the ordinary presumption was overcome by the consideration that French owners and an English charterer making a charter party in the French language of a French ship in a port where both were foreigners," etc.

The distinguishing feature between that case and this is in the fact that here the charterer was a German company and the agent executing the charter party was a resident of Hamburg, Germany. The general rule is stated by Mr. Justice Willes:

"It is generally agreed that the place where the contract is made is prima facie that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention."

Lord Justice Lindsey says:

"The intention of the parties is the crucial test."

Mr. Justice Gray in the Phœnix Insurance Company Case, supra, after an exhaustive review of the authorities, says:

"The review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence of authority, the general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties, at the time of making it, have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof and the performance of which begins there to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country."

After giving due consideration to the status of the parties to this contract, the place at which it was executed, and all other relevant facts, it does not sufficiently appear that either the English or American law was in the contemplation of the parties to rebut the presumption that they were contracting with reference to the German law as the rule for its interpretation. While not controlling, it is persuasive, that such was their intention when they expressly so provide in the bill of lading which should be construed with the charter party. It would be a strained conclusion to hold that they intended that the English law should control in respect to the terms of the charter party and the German law as to the bill of lading.

[6] This conclusion brings us to the inquiry, What is the German law in regard to the clause in controversy, or what interpretation does the German law give to the words, "Or as near thereunto as she can safely get"? The answer to this question involves the inquiry whether there is any competent evidence in that regard, and, if so, what does it show? Claimant recognizing that it was incumbent upon it to show, as a fact, the German law, introduced Paul C. Schnitzler, of whom the commissioner finds that:

"He was an attorney and counselor at law practicing in New York City, and had practiced there for 15 years; that he was familiar with the laws of Germany, had studied law at the universities at Heidelberg and Leipsic for 3½ years, had obtained the degree of doctor of laws from the University of Leipsic, practiced law in Germany for five years, had held various positions, among others clerk of the Appellate Division of the Supreme Court of Karlsruhe, was acting district attorney at Heidelberg and acting judge of the District Court at Lahn, Baden, and since coming to this country had made a specialty of advising in matters involving German law; that he had also studied the maritime law of Germany and the decisions of German courts in connection therewith, and during his practice as lawyer and judge in Germany had on various occasions to decide and take up matters involving the admiralty law; that he is also familiar with the judicial construction of the clause, 'As near thereunto as she may get' in bills of lading, etc., and made a special study of the construction given the clause by the courts of Germany in connection with this case and had examined a number of German books treating of the German law of admiralty and a number of decisions treating of said clause. I find the said Paul C. Schnitzler to be an expert."

To this finding libelant especially excepts. Tested by any of the standards prescribed for the qualification of a witness in such cases, there can be no doubt that the conclusion of the commissioner is correct. Wigmore, Ev. §§ 564–690. There was no contradictory evidence.

[7] The commissioner found, from the uncontradicted evidence, as a fact, that:

"According to the maritime and admiralty law of Germany, and the construction of the clause 'as near thereunto as she may safely get.' by the courts of Germany, the master is only relieved from proceeding with his ship and cargo to the port, but not from his obligation to deliver the cargo at his expense in the port of destination, unless a contrary intention appears in the agreement between the master and consignee; for instance, 'Lighterage, if any, to be at the expense of the receiver.'"

This finding is based upon and sustained by the evidence of Mr. Schnitzler. He says that the construction of this clause by the German court is at variance with the English jurisprudence, and the German court in various decisions does so expressly state; that he has examined a number of German books treating of the Law of Admiralty and a number of decisions treating on this clause, some of which he has before him. The witness read from the decision of the Appellate Division of the Supreme Court of Hamburg as to the master of the ship in the case of Glenfarg v. Siemers & Co., reported in the Hanseatic Law Gazette, No. 11, March 30, 1892, in which it is said, that "the German practice is at variance with the English rule," and it cites a number of decisions under which the cost of lighterage was imposed on the master. The decision, following a decision of the German Imperial Court of Appeals, reported in volume 14, page 116, of the published decisions of the said German Imperial Court, holds that in case the port of destination is agreed upon—that is to say, named in the papers—the clause "so near thereunto," etc., makes it obligatory for the master to go as near the port of destination as possible, but confers upon the master the right to forward to the place of discharge of the cargo or part thereof in lighters, instead of in the ship, but, in such event, the court holds that the right of the master to be reimbursed for the cost of such lighterage cannot be presumed. Such right to be reimbursed must be especially agreed upon; as for instance, by the clause, "Lighterage, if any, for risk and expense of the receiver of the cargo." The witness cited the case of Dansfuss & Co. v. S. G. Olsen, Master of the ship Elplingstone, reported in the Hanseatic Law Gazette, No. 50, dated December 10, 1894, in which language of the charter party was: "Proceed to Cuxhaven, or so near thereunto as she may get, always afloat." The court said:

"This clause did not bind the plaintiff to receive the cargo on the river instead of in the port, or to pay the expense of lighterage, but it only entitled the master to decline, in this case, to proceed to the port with the ship, without affecting thereby his obligation to deliver the goods at his expense at the port of destination."

The witness produces and attaches to his deposition two copies of the Hanseatic Law Gazette, a publication issued for the purpose of publishing decisions of the German Hanseatic cities, containing the decisions referred to in his testimony. This being the only evidence before the commissioner in regard to the decisions of the German

court, construing and applying the clause in the charter party, he could not have reached any other conclusion than—

"that under the facts of the case and the law governing the charter party it was the duty of the master of the steamer Manchester Miller to proceed to and deliver his cargo at the city of Wilmington, N. C., to the consignee thereof, and that, when he found upon his arrival in the Cape Fear river that the depth of the water in the river between Southport (off which place he anchored) and Wilmington was insufficient to permit his taking the ship as loaded and cargo to Wilmington, it was his further duty to have lightened his ship by discharging so much of the cargo into lighters as was necessary to reduce the draft of his ship sufficiently to enable him to proceed up the river to Wilmington, sending a part of the cargo in lighters and taking the balance in the steamer, and deliver the whole cargo to the consignees at Wilmington, and that the expense incurred in lightening the steamer and taking her to Wilmington in order to complete the voyage and delivery should be borne by the steamer or her owners."

Whatsoever opinion may be entertained in respect to the reasonableness of the differing constructions to the clause by the English and German courts, the fact that, as found by the commissioner, in accordance with the general rule and the uncontradicted testimony, that the parties intended to contract in view of the German law, is conclusive upon this court. It will be observed that, as shown by the notes in Scrutton on Charter Parties (page 82), the English authorities are not altogether uniform. The fact that the captain of the Manchester Miller had the chart of the Cape Fear river showing depth, etc., before sailing, is persuasive as showing that he signed the bill of lading with reference to the condition which he must have known he would encounter upon crossing the bar at the mouth of the Cape Fear river. Whether the charterer had any such knowledge does not appear. While the cross-examination of Mr. Schnitzler weakened somewhat the extent and thoroughness of his knowledge of the German law, it failed to discredit him in respect to the decisions cited by him. How far both English and German decisions are affected by local customs and conditions does not appear. That there is a marked variance between them is manifest. The conclusion reached by the commissioner, in which I concur, excludes the claim made by libelant for expense of lightening and towing from Southport to Wilmington. There is no evidence tending to show that, after reaching Wilmington, the depth of water was insufficient to enable the ship to reach Smallbone's wharf. It would seem that her movement from Southport to the wharf was continuous. Ordinarily, she would, upon reaching some convenient point in the river at Wilmington, have anchored and notified the consignee awaiting their destination of the wharf to which she should go to discharge her cargo. In the peculiar condition brought about by the course pursued by the captain upon the assumption that she had completed her voyage when at Southport, this ordinary and usual course was not pursued. There is no evidence as to the depth of the water at Wilmington, nor at the Smallbone's wharf. There is no evidence that, either by custom or law, any harbor limits have been fixed within which a ship may claim to have reached the end of a voyage to Wilmington and at which she is entitled to anchor, and demand that a wharf be designated by the consignee to which she shall go for

the purpose of discharging her cargo. The only finding by the commissioner is that it was necessary that she should have the assistance of the tug to bring her up the river from Southport to Wilmington. For that service the claimant is not liable. There is evidence, by claimant's own witness, that it was necessary that she should have such assistance to proceed from Wilmington—that is, the city limits—to Almont and Navassa. Edgar Williams, a witness for claimant, speaking of large ships, as the Manchester Miller, says:

"They can't get along without one. The river is so narrow that it is necessary to have a tug boat to pull them around the bend and enter them in the drawbridge."

Capt. Robertson says that, after "lightening sufficiently to go that draft" (20 feet, 6 inches), she went to the Navassa wharf. It was very awkward to get to." This is the only evidence bearing upon the conditions between the Smallbone's and the Navassa wharf. The guaranty by the consignee was that the water should be "of sufficient depth" at the wharves. There does not appear to be any evidence tending to show that the depth of the water was insufficient, but that the bend in the river, etc., created the necessity for the assistance of the tug to enable her to go to the Navassa wharf.

Upon a careful consideration of the entire record, with the aid of the well-considered report of the commissioner, I am of the opinion that the exceptions should be overruled and the report confirmed. A decree may be drawn accordingly.

UNITED STATES v. DOWDEN et al.

(Circuit Court, E. D. Oklahoma. September 25, 1911.)

No. 1,450.

1. INDIANS (§ 15*)—LANDS—RESTRICTIONS ON POWER OF ALIENATION.

The provision of the original treaty by which the tribal lands were vested in the Choctaw and Chickasaw Nations, making such lands inalienable without the consent of the United States, did not follow them after their allotment in severalty under the agreement approved July 1, 1902 (Act July 1, 1902, c. 1362, 32 Stat. 641), but whatever restrictions exist upon the power of the allottees to alienate must be found in such agreement or in subsequent legislation.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 37–44; Dec. Dig. § 15.*]

2. INDIANS (§ 15*)—LANDS—RESTRICTIONS ON ALIENATION—ALLOTMENTS TO DECEASED MEMBER OF TRIBE.

The restrictions imposed on the alienation of lands by Choctaw and Chickasaw allottees by the agreement of July 1, 1902 (Act July 1, 1902, c. 1362, 32 Stat. 642) §§ 15 and 16, which restrict the right to incumber, and provide that lands allotted to members of the tribes, other than homesteads, shall be alienable after issuance of patent one-fourth in acreage in one year, one-fourth in three years and the remainder in five years, apply to lands allotted in the name of a deceased member under section 22, title to which vests in his heirs, and an attempted conveyance by such heirs before the expiration of the time so fixed is void.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 37–44; Dec. Dig. § 15.*]

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

3. INDIANS (§ 15*)—LANDS—RESTRICTIONS ON ALIENATION BY ALLOTTEES.
A citizen of the Choctaw or Chickasaw Nation by intermarriage, not an Indian, who was entitled to an allotment of land and received a certificate of allotment from the commission in due form, which under section 23 of the supplemental agreement ratified July 1, 1902 (Act July 1, 1902, c. 1362, 32 Stat. 644), is made conclusive evidence of the right to such allotment, took an equitable estate which was alienable at once and entitled the grantee to the issuance of a patent; all restrictions upon alienation by such class of allottees having been removed by Act April 21, 1904, c. 1402, 33 Stat. 189.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 37–44; Dec. Dig. § 15.*]

4. INDIANS (§ 13*)—LANDS—SURRENDER OF ALLOTMENT.
An Indian allottee, who has received a certificate of allotment and has made no valid conveyance of the land, may, before issuance of patent, by agreement with the officers of the Interior Department, surrender such certificate and receive a new allotment, and on cancellation of the certificate the lands covered again become unallotted lands of the tribe.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. § 13.*]

5. INDIANS (§ 27*)—LANDS—SUIT BY UNITED STATES TO CANCEL CONVEYANCES.
Where the Interior Department under the provisions of law has made a reservation of tribal Indian lands for a town site, and there are outstanding invalid conveyances which cloud the title of purchasers of lots, the United States may maintain a suit in equity for the cancellation of such instruments.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 19, 20; Dec. Dig. § 27.*]

6. COURTS (§ 508*)—LANDS—SUIT BY UNITED STATES TO CANCEL CONVEYANCES —INJUNCTION.
A federal court *held* to have authority, in a suit by the United States to cancel conveyances of Indian lands, to grant a temporary injunction restraining defendants, during the pendency of the suit, from suing out or enforcing any execution or process based upon judgments rendered by other courts establishing the validity of such conveyances, to which judgments the United States was not a party.

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

In Equity. Suit by the United States against E. Dowden and others. On demurrer to bill and motion for temporary injunction. Demurrer overruled, and motion for injunction sustained in part

William J. Gregg, U. S. Atty.
Bond & Melton, for defendants.

CAMPBELL, District Judge. The present consideration of this case is on demurrer to the bill and application for temporary injunction. The defendants having in the meantime filed their demurrer to the bill, the demurrer and application for temporary injunction were by agreement of counsel heard together.

It appears from the bill that the land in controversy in this case was originally a part of the lands of the Choctaw and Chickasaw Tribes of Indians, located in what was formerly the Chickasaw Nation, Ind. T., now Grady county, Okl. On July 22, 1903, a certificate of allotment, covering a portion of this land, was issued by the Commission to the Five Civilized Tribes, in the name of Aaron Col-

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

bert, then deceased, who prior to his death was a duly enrolled citizen of the Chickasaw Nation, of three-quarter Indian blood. This allotment was selected by his administrator. On January 3, 1905, a certificate of allotment to the remainder of the land in controversy was issued by the Commission to the Five Civilized Tribes to Carrie L. McClure, an intermarried Choctaw citizen, duly enrolled. It further appears that on or about May 27, 1905, the Secretary of the Interior, acting through the Commission to the Five Civilized Tribes, reserved the lands in controversy for town-site purposes, as the town of Tuttle, in the Chickasaw Nation, Ind. T., now Grady county, Okl., and directed that the allotment certificates theretofore issued covering this land, as above referred to, be returned to the Commissioner for cancellation, and upon order of the Commission to the heirs of the said Aaron Colbert and to the said Carrie L. McClure, the respective certificates of allotment were returned to the Commission and stamped canceled, and said allottees selected and were allotted other lands in lieu thereof. The return of these certificates of allotment was subsequent to May 27, 1905, the date when the order reserving the land for town-site purposes was issued. Thereafter the land in controversy was surveyed and platted and the lots scheduled and sold to various purchasers, pursuant to the town-site provisions of the various acts of Congress relating to the Choctaw and Chickasaw Nations. It appears from the bill that a portion of the purchasers of said lots have paid the government in full therefor, and have received patents for the same, and that others have made all but the final payments upon said lots, and are ready to make said final payment but for the claims and allegations in regard to said land urged and instituted by the defendant Dowden.

It appears from the bill that subsequent to the issuance of the allotment certificate in the name of the said Aaron Colbert, deceased, and on the 11th day of September, 1903, Alexander Colbert and Martha Colbert, the father and mother of Aaron Colbert, deceased, executed to the defendant Dowden, in consideration of the sum of $1,500, a warranty deed purporting to convey to the said Dowden the lands theretofore allotted in the name of the said Aaron Colbert. On January 9, 1904, one Billy Colbert, purporting to be the paternal grandfather of the said Aaron Colbert, deceased, for a consideration of $1 and "the further consideration of the love and affection which I have for my son Alexander Colbert," executed what purported to be a general warranty deed to the defendant Dowden, covering said Aaron Colbert allotment. On the ——— day of January, 1904, Ellis Colbert, Washington Colbert, and John Colbert, in consideration of the sum of $1, executed what purports to be a quitclaim deed to the defendant Dowden, purporting to convey to him their interest in the Aaron Colbert allotment. On January 3, 1905, the same date upon which she received her certificate of allotment, Carrie L. McClure executed to the defendant Dowden and one E. H. Perry a warranty deed purporting to convey to them the lands comprising her allotment, as set forth in said allotment certificate. Under the foregoing deeds, the defendant Dowden claims title to the lands in controversy.

The bill charges that heretofore on a date not specifically given

the defendant Dowden filed in the Supreme Court of the District of Columbia a proceeding or petition for a writ of mandamus against the Secretary of the Interior to compel him to issue and deliver to the said Aaron Colbert and Carrie L. McClure patent deeds of conveyance to all of the land embraced in the town site of Tuttle and covered by the allotment certificates above referred to, which suit the complainant alleges is still pending undetermined in said court.

It is further charged that on the 7th day of June, 1907, the defendant Dowden instituted a suit in the United States Court for the Southern District of the Indian Territory, at Chickasha against each of the several persons who have purchased lots from the complainant through the Chickasaw Town-Site Commission in the town of Tuttle, about 125 persons in number, which cause before trial, and owing to the intervention of statehood, was passed to the district court of the Fifteenth judicial district of the state of Oklahoma, sitting in Grady county, and that upon the 8th day of April, 1908, a judgment was entered in said cause against each of the defendants therein named, who were and are purchasers of lots in the town site of Tuttle, in which judgment the defendant Dowden was decreed to be the owner in fee of the lands in controversy; that the schedule, appraisement, and sale of lots by the town-site commissioners and appraisers to the defendants was without authority; that such schedules, appraisements, and sales, so far as the same involved the lands belonging to the defendant Dowden, were without authority of law and void; and that the patents executed and delivered to the defendants in that suit, purporting to convey certain lots in the town of Tuttle, were issued without authority of law, and were void, and cast a cloud upon plaintiff's title and were therefore by the court canceled, set aside, and held for naught, and removed as a cloud upon the title of the said Dowden in and to said land.

It is further charged in the bill that on the 19th day of July, 1910, the defendant Dowden filed in the district court of Grady county, Okl., his petition against a large number of the purchasers of lots from the complainant through the Chickasaw Town-Site Commission, in the said town of Tuttle, seeking an adjudication of the title to said lots to be in the defendant Dowden, and for possession of the same, which action is now pending undetermined in said court.

It is further charged that the defendant Dowden has caused to be placed of record the deeds above referred to. It is charged in the complaint that the said deeds were executed at a time when the parties grantor therein had no right, title, estate, or interest in the land sought to be conveyed, and are each illegal, and should be adjudicated by the court to be wholly void, inoperative, and of no force and effect as instruments of conveyance against the Choctaw and Chickasaw Nations and the complainant. And it is further charged that each of said deeds was executed at a time when, under the law then in force governing the alienation and transfer of title to lands in the Choctaw and Chickasaw Nations, the grantors in said deeds could not have legally made such conveyances. It is further charged that in none of the proceedings heretofore instituted and

prosecuted by the defendant Dowden, in any of the courts above mentioned, has the complainant, the United States, or the Choctaw and Chickasaw Nations, been made a party to such proceedings, nor has any judgment or decree been entered against either of them in said proceedings; and that the judgment and proceedings had in the state courts were and are illegal, and should be adjudicated by the court to be wholly void as against the complainant and the Choctaw and Chickasaw Nations, for the reason that said courts had no jurisdiction over complainant or the Choctaw or Chickasaw Nations, and over the subject-matter of said suits, neither the complainant nor the Choctaw or Chickasaw Nations having consented to be sued in any of said courts; and that said judgments and decrees of said courts are and should be adjudged and decreed by the court to be void and of no effect as against the several defendants therein named, for the reason that said defendants cannot defend against said action, they having no title to the lands therein described which could be set up or interposed as a defense in said suits.

It is further charged that the purported deeds to the said Dowden above referred to and the several judgments obtained by him in the Oklahoma state courts and the proceedings instituted and now maintained by him in the Oklahoma state courts and the District of Columbia, each and all cast clouds upon the title to the land contained within the town site of Tuttle, and greatly hinder, delay, embarrass, and prevent the complainant from proceeding to collect from the parties to whom said lands were scheduled and sold the remaining unpaid balance of the purchase price of said lands, and hinder, delay, and prevent the complainant from executing and delivering to the purchasers deeds of conveyance of the title of said lots, and the placing of such purchasers in unrestricted peaceful and quiet possession of the same, and that the conduct and action of the said defendants in taking the deeds heretofore mentioned and recording the same, and in instituting, prosecuting, and maintaining the several suits above referred to, is all for the purpose of hindering, delaying, interfering with, and defeating the complainant in the discharge of its duty toward the Choctaw and Chickasaw Nations or Tribes of Indians, as required by law, and does hinder, delay, and prevent the complainant from the due execution, fulfillment, carrying out, and completion of the policy of the United States as declared by its acts of Congress and the final disposition, sale, and disposal of town lots in the Choctaw and Chickasaw Nations; and that said acts of the defendants hinder and delay and prevent the complainant from collecting the final payments due it from the purchasers of said town lots and from finally executing and delivering, to the persons lawfully entitled thereto, deeds conveying perfect title to the said lots, all to the great and irreparable injury and damage of the complainant, and in violation of its rights to so execute and carry into effect the laws of the United States, in accordance with their true meaning, and to their full effect, and finally to close up the town-site business in the Choctaw and Chickasaw Nations.

Pending this suit the complainant prays a temporary injunction against the defendants, restraining them from further proceeding to

prosecute the several actions above referred to, pending in the several courts of the state of Oklahoma and the district of Columbia, and enjoining them from taking any further steps or doing any further thing in connection with the prosecution of any of said proceedings in any of said courts, or procuring the issuance of any execution or process from said courts upon any judgments rendered in said causes; that upon final decree, the title to the land in controversy, except such as is already covered by patent to lot purchasers, be decreed to be in the Choctaw and Chickasaw Nations and the complainant, to be dealt with and disposed of in the manner provided by law for the sale and disposition of town sites in said nations; that the several deeds and instruments of conveyance to the defendant Dowden, above referred to, be decreed to be void and of no force and effect, and be canceled; that all judgments and decrees by any of the courts above referred to, so far as they attempt to vest, deliver, or decree any right, title, or interest in any of the lands in controversy in the defendant Dowden, be decreed void and canceled and annulled; and that upon final hearing the defendants be perpetually enjoined from setting up or asserting any right, title, or interest to the land in controversy as against the complainant herein, or the Choctaw or Chickasaw Nations, or any purchasers of said lots, and from taking any steps or doing any acts or performing anything looking toward the assertion or establishment of any right, title, estate, or interest in any of said land in and by virtue of any of the deeds, judgments, or decrees above referred to or that may be the result of actions now pending undetermined.

By their demurrer the defendants urged that it appears from the bill that the complainant is not entitled to the relief prayed; that this court has no jurisdiction to enjoin the prosecution of a suit in a state court of which the state court has acquired prior jurisdiction and where the state court has already rendered a decree therein; that the plaintiff is without capacity to maintain the action.

It appears from the bill that the respective allotments involved had been selected and certificates of allotment issued to the allotees prior to the execution of the purported conveyances on the part of the heirs in the case of the Colbert allotment and by Carrie L. McClure, the allottee, as to her allotment. Had these heirs and Carrie L. McClure an alienable interest in these lands at the time these deeds were executed, and, if so, did that interest pass to the defendant Dowden by the deeds relied upon? The provisions under which the lands in controversy were allotted are contained in the Choctaw and Chickasaw agreement approved July 1, 1902 (Act July 1, 1902, c. 1362, 32 Stat. 641); the principal sections relating thereto being as follows:

"Sec. 11. There shall be allotted to each member of the Choctaw and Chickasaw Tribes as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allotable land of the Choctaw and Chickasaw Nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allotable land of the Choctaw and Chickasaw Nations. * * *

"Sec. 12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

"Sec. 13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.

"Sec. 14. When allotments as herein provided have been made to all citizens and freedmen, the residue of lands not herein reserved or otherwise disposed of, if any there be, shall be sold at public auction under rules and regulations and on terms to be prescribed by the Secretary of the Interior, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribes.

"Sec. 15. Lands allotted to members and freedmen shall not be affected or incumbered by any deed, debt, or obligation of any character contracted prior to the time at which said lands may be alienated under this act, nor shall said lands be sold except as herein provided.

"Sec. 16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: Provided, that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value."

"Sec. 22. If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: Provided, that the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted.

"Sec. 23. Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

"Sec. 24. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of land."

Pursuant to the foregoing provisions of law, the selection was made for Aaron Colbert, deceased, and certificate of allotment issued in his name, as provided by section 22. By section 23 this allotment certificate was conclusive evidence of the right of the heirs to the land therein described.

[1] Of course, as to whether the interest in the land conveyed by the allotment certificate was alienable depends upon whether these heirs as to this land came within some of the provisions of law imposing restrictions upon alienation. Under the treaty and grant by

which these tribal lands were originally vested in the Choctaw and Chickasaw Nations, the tribes could not alienate them without the consent of the United States, and it is contended by counsel for complainant that these restrictions upon alienation followed the land into the hands of the individual allottees, and that even if it does not appear as to any particular land that Congress in providing for the allotment to the individual members of the tribes imposed restrictions upon its alienation, still it cannot be alienated by such allottee without the consent of the United States, unless such right of alienation affirmatively appears in the acts of Congress. To this I cannot agree. The Commission to the Five Civilized Tribes was created and empowered to negotiate an extinguishment of the tribal title to these lands and an allotment thereof to the members of the tribes in severalty. Wallace v. Adams, 204 U. S. 415, 27 Sup. Ct. 363, 51 L. Ed. 547. The restrictions upon the alienation which attached to the tribal title must be held to have ceased with the extinguishment of that title. Doe v. Wilson, 23 How. 457, 16 L. Ed. 584.

[2] The first act relating to the allotment of the lands of the Choctaws and Chickasaws is that commonly known as the "Atoka Agreement," incorporated in the Act of June 28, 1898, c. 517, 30 Stat. 495. There is no provision in that agreement such as appears in the Act of 1902, supra, providing for allotments in the name of deceased members of the tribe, who, if living, would be entitled to allotments, and for the vesting of such lands in the heirs. The Atoka agreement contemplated only those living at the time allotment should be made. But when the supplemental agreement of 1902, supra, was made, it covered not only the allotments to the living members provided for in sections 11 and 12, but also realizing that in the nature of things some of those entitled to an allotment would die before allotment could be made, provided by section 22 that in such case the heirs of such deceased member, according to the Arkansas law then in force in the Indian Territory, should take the title to such allotment as the deceased would have been entitled to if living, rather than that it should inure to the benefit of all the members of the tribe. By section 12 each member is required to designate a homestead out of his allotment, equal in value to 160 acres of average allottable land, which shall be inalienable during his life, not exceeding 21 years from date of certificate. In my opinion, this homestead provision cannot have any application to an allotment made in the name of the deceased allottee, because the language used confines it to living allottees and the reason for such provision can only exist in the case of a living allottee. By section 15, we see that lands allotted to members shall not be affected or incumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under the act. Nor shall said lands—that is, lands allotted to members and freedmen—be sold except as provided in the act. Then by section 16 it is provided that "all lands allotted to members of said tribes, "except homesteads, shall be alienable after issuance of patent, one-fourth in acreage in one year, one-fourth in three years, and the balance in five years, in each case from date of patent, with the further provision that such land—that is, lands allotted to members—

shall not be alienated by the allottee, or his heirs, at any time before the expiration of the Choctaw and Chickasaw tribal government, for less than its appraised value. It is clear, that, had Aaron Colbert been living when the certificate of allotment was issued to him, these restrictions of one, three, and five years would have attached to his land, other than the homestead, and had he died before the expiration of such restriction period, his heirs would have taken the land subject to such restrictions. Goodrum v. Buffalo, 162 Fed. 817, 89 C. C. A. 525. The act provides that, notwithstanding his death prior to selection of allotment, the land shall be allotted in his name and shall "descend" to his heirs under the Arkansas law. In Shulthis v. MacDougal, 170 Fed. 529, 95 C. C. A. 615, the Circuit Court of Appeals, in construing a similar provision of the Creek law, say:

"The word 'descend' is, of course, inapplicable to the actual contingency provided for by the statute, because that contingency contemplates the death of the child before he had actually become seised of any interest in the land. The word 'descend' is a word of art, and indicates the transference of property by inheritance. If any significance is to be given to it as used in this section, it must be held that the intent of the parties to the agreement was that the land should pass to the same persons and in the same proportion that it would have passed if the child had died seised of it. Any other construction simply obliterates this word, and makes the land pass to the parties who are heirs directly by allotment from the tribe. The statute itself not only declares that it shall descend, but also declares that it shall be allotted and distributed to the heirs. It is manifest, therefore, that both ideas were in the minds of the parties to the agreement. * * * It was never the intent, however, either of the tribe or of the federal government, to grant, to parties having a kinsman who had died before the actual making of the allotment, additional lands as a bounty. These kinsmen got all their right to additional lands under or through the enrolled member who had died. Whether the ancestor was actually seised of the property or not in his lifetime was immaterial. It was the intent of the statute that the property should pass by the same right and in the same manner that it would have passed if the person enrolled had survived to receive his allotment. The tribe was not bestowing such land as a bounty, but was simply providing for the right of inheritance."

Notwithstanding the death of a duly enrolled member before selection of his allotment, it was provided that the allotment should be made in his name and should "descend" to his heirs. As held in the Shulthis Case, supra, the scheme of the statute clearly indicates that the land was to be regarded the same as if it had been inherited, and that it should be treated the same as if Aaron Colbert had survived to receive his allotment. In section 11, the first section of that portion of the act relating to allotment of lands, it is provided that there shall be allotted to each member of the tribes land equal in value to 320 acres of average allottable lands, and to each freedman 40 acres. The term "member" is defined in section 3 of the act as a member or citizen of the tribe other than a freedman. By section 30 of the act, it was provided that the members or citizens to whom allotment should be made should be determined by the final rolls of citizenship therein and elsewhere provided for. That the allotment of lands to members provided for in section 11 contemplated allotments to both living and dead members, in fact all members appearing upon such final rolls, is indicated by the provision in section 22 that, in the case of deceased members, allotments shall be made in their names, notwith-

standing they are dead. As said in Shulthis v. MacDougal, supra, in relation to similar provisions in the Creek agreement, it was not the intention to grant, to parties having a kinsman who had died before the actual making of the allotment, additional lands as a bounty. They got all their right to additional land under and through the enrolled member who had died. Whether the ancestor was actually seised of the property or not in his lifetime, it was the intent of the statute that the property should pass by the same right and in the same manner that it would have passed if the person enrolled had survived to receive his allotment. It was simply providing for the right of inheritance, in cases where but for such provision the right would not have existed, because of the death of the ancestor in whom the right of allotment existed, before the title passed to him; the mere right to the allotment not being inheritable. Hayes v. Barringer, 168 Fed. 221, 93 C. C. A. 507. These allotments made in the name of dead allottees are therefore subject to the restriction provisions contained in sections 15 and 16. It follows that if the restrictions attaching to allotments made direct to living members follow the lands into the hands of the heirs of such allottees in case of their death before the term of the restriction expires, which they undoubtedly do (Goodrum v. Buffalo, supra), the same is true of lands coming to heirs by virtue of allotments made in the name of deceased allottees as provided in section 22. The land was subject to the one, three, and five year restrictions in the hands of his heirs, at the time of their attempted conveyance of the same, and such deeds are void.

I have carefully read and considered the very exhaustive and learned opinion of the state Supreme Court in Hancock v. Mutual Trust Company, 24 Okl. 391, 103 Pac. 566, wherein a conclusion contrary to that arrived at by me is announced, and I have not reached my conclusions here expressed without the most careful research and thought which I have been able to give the matter. But for the reasons above stated, and especially in view of the holding in the Shulthis Case, supra, I am forced to the conclusion that the restrictions provided in sections 15 and 16 attach to lands allotted under the provisions of section 22.

[3] Now taking the case of the Carrie L. McClure deed. It is conceded she is not of Indian blood. It is not contended that she is a minor. The land involved was not her homestead allotment. It is conceded that she was entitled to an allotment as an intermarried citizen. She had selected her allotment and received her certificate therefor. By the Act of April 21, 1904, c. 1402, 33 Stat. 189, all the restrictions upon the alienation of lands, other than homesteads, of the class of adult allottees to which she belonged, had been removed. If by the selection of her allotment and the issuance of allotment certificate therefor she acquired such title or interest in the land as might be subject to alienation, then the deed which she executed to defendant Dowden and his cograntee was sufficient to and did convey her interest in the land to them. She had done everything required of her to entitle her to the patent for the land. It does not clearly appear whether the allotment certificate, which was dated January 3, 1905, was issued immediately upon her selection of the allotment, or whether the nine months provided for contest had expired; but, in any event,

the statute makes the certificate of allotment conclusive evidence of the right of the allottee to the land described therein, and by it allottee is vested with the equitable title to the land. It does not appear from the bill that if the contest period had not expired any contest was ever filed, or that any reason existed why Carrie L. McClure was not entitled, in due time, to receive patent to her allotment. Wallace v. Adams, supra; Ballinger v. Frost, 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464. Her deed to Dowden and his cograntee therefore conveyed to them her equitable interest in the land, and no reason appears from the bill why they were not entitled to have patent issue to her in due time, conveying the legal title.

[4] If the conclusion here reached that defendant Dowden took no title by his deeds from the heirs of Aaron Colbert, deceased, is correct, then he can hardly be heard to complain because, as he contends, after issuance of the initial allotment certificate, the Secretary was without authority to request the return of such certificate for cancellation, and, upon compliance therewith, direct that another and different allotment be made in lieu of the original. Had rights of third parties intervened, this might not have been done; but where it is solely a matter between the allottee and the government, I am of opinion that, before patent issues, the allottee may by agreement with the officers of the Interior Department, having in charge the matter of allotment, voluntarily surrender his allotment certificate already issued, and take another allotment, and that upon such exchange and cancellation of the former certificate the lands it covers again become unallotted lands of the tribe.

[5] If this be true, then assuming the averments of the bill to be true, so far as the lands originally allotted to the Colbert heirs are concerned, the Secretary of the Interior had authority, upon the recommendation of the Commission to the Five Civilized Tribes, to set aside and reserve from allotment such lands at the station of Tuttle. Act of May 31, 1900, c. 598, 31 Stat. 221; Act of July 1, 1902, c. 1362, 32 Stat. 641. If in the exercise of that authority, outstanding invalid instruments relating to the lands interfere with the work of the government in the disposition of such town site, by clouding the title, the United States may maintain a suit to cancel such instruments. United States v. Rea-Read Mill & Elevator Co. (C. C.) 171 Fed. 501.

For the foregoing reasons, I find that as to the lands originally allotted in the name of Aaron Colbert, deceased, the demurrer is not well taken, and, as it is general in its nature, it should therefore be overruled.

[6] As to the prayer for temporary injunction restraining the defendants from further proceeding in the state and other courts, and from suing out or procuring the issuance of executions or process from such courts upon judgments rendered or to be rendered, without reviewing here the many authorities cited by counsel on both sides, I am of opinion that this court may properly enjoin the defendants during the pendency of this action from suing out or enforcing any execution or other process based upon judgments rendered or to be rendered in such other courts, which if enforced would dispossess persons now in possession of any town lots in said town of Tuttle, origi-

nally a part of the land initially allotted to Aaron Colbert, deceased, and for which lots the final patents have not yet been issued as provided by law; and to this extent such temporary injunction may issue, but is denied in all other respects.

LANGDON v. PENNSYLVANIA R. CO.

(District Court, E. D. Pennsylvania. January 3, 1912.)

Nos. 280, 282, 450, 510, 514, 518, 526.

1. COURTS (§ 289*)—ACTIONS BY SHIPPER—JURISDICTION OF COURT—INTERSTATE COMMERCE ACT.

The matters which the Interstate Commerce Commission is given exclusive primary jurisdiction to hear and determine by 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. 590 (U. S. Comp. St. Supp. 1909, p. 1158), are those relating (1) to rates or charges claimed to be unjust or unreasonable, and (2) to regulations or practices of the carrier affecting such rates claimed to be unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of the act, and are limited to general rates, regulations, and practices applicable to all shippers alike, and which the commission in the exercise of its administrative powers may correct by a general order, as well as award compensation in damages to the complainant. Such section as amended does not deprive a Circuit Court of jurisdiction of an action by a shipper under section 9 of the original act (Act Feb. 4, 1887, c. 104, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159]) to recover damages because of secret advantages given a favored competitor by a carrier in violation of its published rates.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830; Dec. Dig. § 289.*

Jurisdiction of federal courts of suits under interstate commerce act, see note to Bailey v. Mosher, 11 C. C. A. 318.]

2. CARRIERS (§ 32*)—INTERSTATE COMMERCE ACT—UNLAWFUL DISCRIMINATIONS.

Where a railroad company engaged in the interstate carriage of coal from the mines in its schedule of rates filed and published has grouped all points within a given territory together as a single initial point of shipment from which it makes the same rates, whether such points are on its own or connecting lines, the service rendered to all shippers from any of such points in the contemporaneous transportation of coal to the same terminal point, or to points within the same terminal group, is under substantially similar circumstances and conditions within the meaning of Interstate Commerce Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3155), and a discrimination in favor of any such shipper over others is unlawful under said section.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83–85; Dec. Dig. § 32.*]

3. ABATEMENT AND REVIVAL (§ 52*)—CAUSES OF ACTION WHICH SURVIVE PENNSYLVANIA STATUTES—ACTION FOR VIOLATION OF INTERSTATE COMMERCE ACT.

An action under Interstate Commerce Act Feb. 4, 1887, c. 104, § 9, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), against an interstate carrier to recover damages for a violation of the act, is not one strictly for the recovery of a penalty, and under Act Pa. Feb. 24, 1834 (P. L. 78) § 28, which provides that executors or administrators shall have power to commence and prosecute all personal actions which the decedent whom they represent might have commenced and prosecuted except actions for

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

slander, for libels, and for wrongs done to the person, such an action against a carrier which has abated by the death of the plaintiff may be revived in the name of his executors.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 248–254; Dec. Dig. § 52.*]

4. CARRIERS (§ 32*)—INTERSTATE COMMERCE ACT—ACTION FOR DISCRIMINATION —DEFENSES.

The provision of 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. 590 (U. S. Comp. St. Supp. 1909, p. 1158), that, if the owner of property transported shall render services connected with the transportation or furnish any instrumentality used therein, a just and reasonable allowance may be made therefor, and giving the Interstate Commerce Commission power to determine and fix such allowance, applies only to allowances provided for by the schedules published by the carrier and applicable to all shippers similarly circumstanced, and such provision is not available as a defense to a carrier when sued for discrimination by making a secret allowance to a favored shipper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83–85; Dec. Dig. § 32.*

What constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations, see note to Gamble-Robinson Co. v. Chicago & N. W. Ry. Co., 94 C. C. A. 230.]

At Law. Consolidated actions by John Langdon, by the Huntingdon Coal Company, by the Mt. Equity Coal Company, by Eichelberger & Co., by Warren H. and Chester D. Reed, by J. Herbert Sweet and William E. Shannon, as executors of the estate of William H. Sweet, deceased, and by the Carbon Coal & Coke Company against the Pennsylvania Railroad Company. On motions for judgments non obstante veredicto and for a new trial. Motions overruled.

See, also, 186 Fed. 237.

Harry Cessna, Graham & Gilfillan, and J. W. M. Newlin, for plaintiffs.

John Hampton Barnes, for defendant.

HOLLAND, District Judge. It appearing from the record that 11 cases which had been instituted in the Circuit Court against the Pennsylvania Railroad Company were of like nature, an order of consolidation was made August 16, 1909, and thereafter the causes thus consolidated were submitted to the jury, and in the seven above named a verdict was rendered in favor of the respective plaintiffs. In the first six cases the defendant moved for judgment non obstante veredicto, and filed no motions for a new trial. In the case of the Carbon Coal & Coke Company the defendant made a motion for judgment non obstante veredicto, and for a new trial. In the first five cases the reasons assigned for the motions are the refusal of the defendant's first point that the court has no jurisdiction, and the refusal of the defendant's second point. Under all the evidence the verdict of the jury should be for the defendant. In the case of the executors of Sweet an additional reason is assigned, viz., that there can be no recovery in an action by the executors substituted as plaintiffs. In the Carbon Coal & Coke Company Case the same reasons as in the

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

first five cases are assigned upon the motion for judgment, and upon the motion for a new trial numerous reasons are assigned to the alleged errors in the charge of the court to the refusal of defendant's points, and because the damages are excessive.

The question of jurisdiction arises in all the cases, and a motion was made by the defendant during the trial to dismiss them all upon that ground, which motion was dismissed temporarily in an opinion reported in 186 Fed. 237, wherein the court then said:

"The court declines now to pass upon the question of jurisdiction, and reserves the determination thereof until after the trial of the cases upon the merits."

The cases having been tried and a verdict rendered for the plaintiffs, the question of jurisdiction must now be determined, and, as the court refused binding instructions in favor of the defendant in all the cases, under the Pennsylvania practice act of April 22, 1905 (P. L. 286), the defendant may move for judgment non obstante veredicto for any reason justified by the record.

On the question of jurisdiction, it is the contention of the defendant that under section 15 of the interstate commerce act, as amended by the act of June 29, 1906, the commission has exclusive primary jurisdiction to pass upon the grievances complained of by the plaintiffs, and that, until they have submitted the question to this tribunal, they are not authorized under section 9 of the same act to institute suits for damages in the Circuit Courts of the United States. The plaintiffs did not submit their grievances to the Interstate Commerce Commission, but instituted suit in the Circuit Court under section 9 for damages which they respectively claim to have suffered by reason of the acts of the defendant prohibited under sections 2 and 3.

The Pennsylvania Railroad is a common carrier engaged in interstate commerce. The plaintiffs are coal miners in the Clearfield region of Pennsylvania, and during the time of the alleged grievances were shipping coal over the Pennsylvania Railroad and its connecting lines from the Clearfield region to South Amboy on the New York Harbor, where the coal was lightered to New York, and there sold or transhipped, and they were also shipping over the defendant's line and connecting lines to points in the New England states. The defendant company had filed schedules of joint rates showing the charges for the transportation of coal from the Clearfield region to South Amboy and Harsimus Pier on the New York Harbor. These shipments will hereinafter be referred to as "New York Harbor shipments." The defendant company also filed schedules of joint tariff rates for the shipment of coal from the Clearfield region to numerous points of destination in the New England states. These will hereinafter be referred to as "all-line shipments." The injury which the plaintiffs claim they suffered results from the alleged discriminatory practice in favor of certain favored shippers in the shipment of coal from the Clearfield region to these various points of destination.

As to the "New York Harbor shipments," it appeared from the evidence that more than six years before these suits were instituted all the shippers of coal from the central part of Pennsylvania to New

York Harbor for sale to steamboat traffic and transhipment were required to use South Amboy as the point of destination. This point is about 20 miles south of the center of the harbor at New York, and the shippers of coal were required to lighter their coal from this point to the city. Some years ago it appeared that the Pennsylvania Railroad built a pier at Harsimus Cove, right in the center of the harbor, and 20 miles nearer the market than South Amboy. This pier was then leased, on a short term, to Berwind White Coal Company, which paid the cost of its erection at that time, and has had the exclusive use of this pier since its construction. Thereafter the plaintiffs were compelled in the shipment of their coal to New York Harbor to use South Amboy, and lighter it to the city for sale or transhipment, and the Berwind White Coal Company during all of this time has had the exclusive use of Harsimus Pier in the shipment of its coal from the Clearfield region to New York Harbor. The evidence showed that the Berwind White Coal Company received a certain allowance for taking the cars from the Pennsylvania siding into the pier, and unloading them, and returning the cars to the same point. This allowance amounted at times to from 7 to 15 cents per ton. It was also shown that the Berwind White Coal Company in selling their coal to transatlantic steamships could load directly from the pier, and the cost of lighterage across the harbor for transhipment was about 1 to 1½ cents a ton. The plaintiffs, who were excluded from Harsimus Pier and shipped to South Amboy, were compelled to lighter their coal by water a distance of 20 miles for sale or transhipment. There was evidence to show that the additional cost to the plaintiffs in shipping through South Amboy was as much as 18 cents a ton in excess of what it cost Berwind White Coal Company to ship through the Harsimus Pier, and, in addition, the latter company was paid 7 to 15 cents per ton for unloading cars, and had the advantage of location. At the trial the measure of damages claimed by the plaintiffs for shipments to New York Harbor through South Amboy was the amount they alleged they were required to pay in excess of what it cost Berwind White Coal Company, the favorite competitor, to reach the same point with its coal, taking into consideration the allowance to the latter.

And as to the "all-line shipments," it is claimed by the plaintiffs they were injured, in that the defendant company paid the Altoona Coal Company and the Glen White Company certain allowances for carrying the coal shipped by each over a small lateral railway which each of these companies owned at the initial point in the Clearfield region; that is to say, the Altoona Coal Company was the owner of a short lateral railway, about six miles in length, branching off at Kittanning, and leading through a mountain pass to the mines. This company received an allowance varying from 10 to 13 cents per ton on the coal they delivered to the defendant's main line at Kittanning over their lateral railway. The Glen White Company was the owner of a short lateral railway, two miles long, branching off at the same point. This company received from the defendant an allowance varying from 10 to 13 cents a ton for delivering its coal to the main line of the defendant company at Kittanning. There were two other coal

mining companies in the Clearfield region, to wit, the Mitchell Coal Company and the Pittsburgh, Johnstown, Ebensburg & Eastern Company, with a lateral road 30 miles long, neither of which companies received any allowance for transporting coal over their lateral road, and the jury was informed that the measure of the plaintiffs' damages for "all-line shipments" was the excess on payments the plaintiffs made for the transporting of their property as compared with what the Glen White and Altoona Companies were required to pay, taking into consideration the allowance made of from 10 to 13 cents to these companies. Evidence was offered to show these were secret allowances, and that the plaintiffs had no intimation of the payments being made.

[1] The contention of the defendant is that, notwithstanding the finding of the jury, these allowances made to the favorite shippers and the exclusive use of Harsimus Pier to the Berwind White Company are practices under section 15 of the commerce act, as amended by the act of 1906, which must primarily be investigated by the commission. Under this section, the commission has primary jurisdiction (1) where it is alleged that the rates or charges are unjust or unreasonable; (2) where it is alleged that any regulations or practices affecting such rates are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial; (3) where it is claimed that any regulations or practices affecting rates are otherwise in violation of any provisions of the act. Under this section the commission is required to investigate (1) rates or charges; (2) regulations or practices, for the purpose of ascertaining how these existing rates or charges, regulations, or practices affect shippers when the matter is brought to its attention, as provided by section 13 of the act.

It is very evident from the language of this section that it was the intention of Congress that the commission should have exclusive primary jurisdiction to investigate regulations and practices of railroads which are known to be applicable to all shippers alike, such as rates and charges, which are required to be formulated into schedules and posted for the use of the general public, and all regulations and practices pertaining to the management of a railroad which are promulgated by the management as general orders and well-known regulations, such as the distribution of cars, time of detention, allowance for demurrage, icing of refrigerator cars, and all other matters of regulation and practice which can be said to be of a general character. And there is very good reason for requiring shippers who claim to be injured by these general regulations applicable to all to proceed before the commission. This tribunal has administrative powers and is authorized to pass upon the fairness of the regulation, and the question as to whether or not the regulation or practice works injuriously to some of the shippers and therein found to be discriminatory. It can, by general order, in accordance with the provisions of section 15, direct a modification of the regulation or practice by the railroad, and thereafter the entire shipping public to be affected by such regulation and practice will have equal and similar treatment.

The courts hold that it would be impossible for juries in the vari-

ous circuit courts of the country to work out any uniformity in a practice complained of if shippers be permitted to institute suits for alleged injuries resulting from general regulations and practices of railroads in the United States courts, and in order that the plain intention of Congress, as now appears in section 15, may be fully carried into effect, it is necessary to hold that section 9 is impliedly repealed, to the extent only, however, of preventing individuals from instituting actions in court to recover for alleged discriminatory practices resulting from rates and charges, regulations, or grievances which are of a general character, and the repeal is distinctly stated to extend no further, and the independent right of an individual originally to maintain an action in court to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can consistently, with the context of the act, be redressed by the courts without previous action by the commission. There will no doubt cases arise where it will be difficult to determine the tribunal in which the suit should be primarily instituted, but there should be no difficulty about arriving at the conclusion, in the cases at bar, that the proper tribunal or primary jurisdiction is the Circuit Court, because there was no scheduled rate or charge affecting rates alleged to be discriminatory and injurious, but the complaint of the plaintiffs is against a violation of the published schedules and rates.

It is alleged that the defendant company secretly, in violation of its published rate to New York and New England points, made certain allowances to its competitors, and in the "New York Harbor shipments" that one favored shipper was selected and a pier built for it 20 miles nearer the market, to which point it was permitted to ship its coal, and, at the same time, received an allowance of from 7 to 15 cents for an alleged service of unloading coal, whereas plaintiffs were compelled to go to South Amboy, 20 miles further south. It is very plain that these cases present a state of facts upon which alleged discriminations are based which are in no sense general regulations and practices in the conduct of a railroad, but they are in violation of the requirements of the whole spirit of the interstate commerce act in their manifest tendency to result in favoritism to some shippers to the detriment of others, and it is clear that it was this class of cases which it was intended by the Supreme Court should be instituted in the United States courts as the tribunals of primary jurisdiction for the redress of these wrongs, when it stated in Texas, etc., Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, that section 9 of the act must be confined to the redress of such wrongs as can consistently, with the context of the act, be redressed by the courts without previous action by the commission.

There are three cases cited bearing upon the question. The first in point of time and the one of greatest importance is the Abilene Case, supra. In this case it was stated that section 9 of the interstate commerce act must suffer necessarily a partial implied repeal in order to preserve the integrity of the interstate commerce act; that is to say, where complaint is made against a schedule as filed with the Interstate

Commerce Commission on the ground that the rates were unreasonable or unjustly discriminatory as between localities, such action must go to the Interstate Commerce Commission first for correction. This conclusion was based upon the principle that, when the schedule was filed, it must stand until attacked, and you must have some place where you can begin with a standard schedule of rates, and, as these schedules are on file with the commission, the proper procedure is to go before the commission to correct them, on the theory that the whole schedule made up of various rates is so interdependent and interlocked that it would create the greatest confusion to allow juries in different sections of the country to be dealing with the same questions and possibly result in various and different decisions. But the court, in that case, was careful to state that the shippers' right to go into the Circuit Court was left undisturbed where it could be accomplished in general harmony with the interstate commerce act; but that the facts exhibited in the Abilene Oil Case (where the published schedule itself was to be corrected) were such that the conditions could not be corrected in harmony with the act, and it was necessary to impliedly repeal section 9 to the extent indicated in order to preserve the act. But we find nothing in that case which would prevent a shipper from going into the Circuit Court upon the facts in the cases at bar where his action is to compel the railroad to stick to the rates that it published, and thereby preserve the uniformity and equality of the rates that itself had published and filed, and, instead of tending to destroy the interstate commerce act, it would have the opposite tendency, to wit, compelling the railroads to strictly adhere to the published schedule of rates, and to treat their shippers along their road equally on all matters of rates and facilities.

The Baltimore & Ohio Railroad Company v. Pitcairn Coal Company, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292, was a case which dealt with the rule of distribution of coal cars as made by the railroad. It was a general rule of the company applying to all shippers of coal, and the same reasons which impelled the court in the Abilene Oil Case to maintain the uniformity of the rule as to rates influenced the court in the Pitcairn Case in its conclusion that the tribunal of primary jurisdiction for the consideration of questions of that kind is the Interstate Commerce Commission. It is true that there were in the Pitcairn Case a number of arbitrary practices grafted on the general rule of distribution of cars, and the commission, upon taking jurisdiction of the case because of its general application to all shippers, of course, could pass upon and adjust the arbitrary practices in connection with the general rule of distribution of cars.

Morrisdale Coal Company v. Pennsylvania Railroad Co., 183 Fed. 929, 106 C. C. A. 269, was a case decided by the Circuit Court of Appeals of this circuit. In this case the company had formulated and issued a general regulation for the information of the shippers of coal, informing them of the method it had adopted for the distribution of its cars to the shippers for the shipment of their coal. It applied to everybody. The company had set out in its notice just what it would do in regard to the distribution of cars, and to this extent this rule

was analogous to the rule or regulation of rates published in their schedules and filed with the commission, and not at all similar to the secret departure from the rules of published rates in favor of two or three individuals, as it is claimed was the fact in these cases.

The complainants, both in the Pitcairn Case and the Morrisdale Case, were informed by the general regulations of the company what they could expect in the matter of distribution of cars, and they participated in these rules and regulations as to the distribution, but contended that the method of distribution worked an injustice to the respective claimants. The courts in both cases held that the tribunal of exclusive primary jurisdiction was the Interstate Commerce Commission in order that a uniformity of practice in regard to the distribution could be maintained, but the same reasons do not apply where there has been a secret allowance made to one or two shippers in a district, or where one particular shipper is picked out and given a special privilege, such as the exclusive use of Harsimus Pier.

The matter of a secret allowance to one or two favorite shippers is a violation of the public rates and schedules, and there is no reason why an injured shipper should apply to the Interstate Commerce Commission to pass upon the matter. It was not a general order applying to all shippers alike. Of course, it is conceivable that there might be a general regulation of a railroad company as to allowance for lateral railroads in proportion to their length, their cost of construction, or upon any other just and equitable basis, but in this case it was an arbitrary allowance of from 10 to 13 cents to one owner of a lateral road of 2 miles, and the same amount to the owner of another lateral road of 6 miles, and in the same territory there were other companies with lateral roads who received nothing, one with a trackage of about 30 miles, to which company an allowance had been refused.

From the facts as established in these cases, we conclude that the Circuit Court has primary jurisdiction of the subject-matter, and that they are clearly such wrongs as can consistently, with the context of the act, be redressed in courts without a previous action of the commission.

[2] It is contended, however, that, even if the court has jurisdiction of the cases, binding instructions should have been given to the jury to find a verdict for the defendant in all the cases. The principal ground for this, as stated by the defendant, is that all the shipments made by the plaintiffs in all the cases originated on the Huntingdon & Broad Top Railroad, an independent connecting line with the Pennsylvania Railroad, and all the shipments of the alleged competitors in whose favor the alleged allowances were made, were from the Clearfield region and were transported entirely over the line of the Pennsylvania Railroad, and hence the services rendered were not like services under substantially similar circumstances and conditions. It is true that all the shipments of the plaintiffs originated on the Huntingdon & Broad Top Railroad, an independent connecting line with the Pennsylvania Railroad at Huntingdon, Pa. The mines of the plaintiffs were located about 30 miles south of the Pennsylvania line on this independent railroad, and their coal was transported by it to Huntingdon,

where the shipments were taken up by the Pennsylvania railroad and carried to their destination.

The Pennsylvania Railroad, the defendant in this case, had filed a schedule of joint tariffs for the shipment of coal from Central Pennsylvania, and had included the Huntingdon & Broad Top Railroad in grouping the territory for shipments of coal, and the schedules show that the mines of the plaintiffs on the Huntingdon & Broad Top Railroad are scheduled as initial points with the alleged favorite shippers' mines, and both the plaintiffs' mines and the favorite shippers' mines are in the Clearfield zone. The tariff sheets filed in evidence show the same charges from these points to similar destinations, and the initial points are all placed together in the tariff as one initial point covering the Clearfield region. The defendant company made the rates, filed the schedule which placed the alleged favorite shipper and the plaintiffs in the same zone as an initial point, made the contract of carriage, and the plaintiffs paid the rates to the defendant company. The plaintiffs had nothing to do with the Huntingdon & Broad Top Railroad so far as the contract of carriage or the payment of the freight rate was concerned. The fact that the defendant company grouped this territory as initial points and scheduled these shippers together as such in their joint tariffs was submitted to the jury with the other evidence upon the question of whether or not this was a service in transportation under substantially similar circumstances and conditions, and the verdict establishes that the jury found in the affirmative, and it is quite evident that the conclusion reached by the jury would be justified by this evidence alone.

As to the destination points on the "all-line shipments," the same facts appeared in the joint tariff filed by the defendant company. It had made certain groups of territory and had bracketed the towns together in their schedule of rates, showing that they regarded them as similar destination points.

As to "New York Harbor," the evidence was to the effect that the whole harbor was the destination point for the supply of steamboats and for transhipment beyond. The finding of the jury establishes that this defendant received a greater compensation from the plaintiffs than it did from the alleged favorite shippers for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. As the verdict was based on ample evidence to justify it, the court is not warranted in entering judgment for the defendant.

[3] The reasons assigned for refusing to enter judgment in favor of the defendant notwithstanding the verdict in the Carbon Coal & Coke Company apply to the other six cases, but there is still one reason assigned for judgment non obstante veredicto in the Sweet Case, to wit: "There can be no recovery in the action by the executors substituted as plaintiffs." The record shows that the plaintiff, William H. Sweet, died since the action was begun, and that the fact of his death has been noted on the record, and the executors substituted as plaintiffs. It is contended by the defendant that this action being in the nature of a penalty, although not treble damages, is not assignable, and therefore does not pass to the executors.

Section 28 of the Pennsylvania act of February 24, 1834 (P. L. 78), provides:

"That executors or administrators shall have power to commence and prosecute all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander, for libels, and for wrongs done to the person."

In Penrod v. Morrison, 2 Pen. & W. (Pa.) 126, it was decided that an action on the case for conspiracy to defraud a creditor survives to the personal representatives of the plaintiff.

The contention of the defendant that suit for damages for discrimination cannot be assigned is undoubtedly supported by the case of Sensenig v. Pennsylvania Railroad Co., 229 Pa. 168, 78 Atl. 91, but the same court has held, in effect, that there is no necessary connection between what can be assigned and what survives. McCafferty v. Railroad Co., 193 Pa. 339, 44 Atl. 435, 74 Am. St. Rep. 690.

The Supreme Court of the United States has said that statutes giving a private action against a wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. Huntingdon v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. The right sought to be enforced by Sweet's executors may be in the nature of a penalty, but it is not strictly a penalty. Huntingdon v. Attrill, supra; Brady v. Daly, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109; City of Atlanta v. Chattanooga F. & P. et al., 127 Fed. 23, 61 C. C. A. 387, 64 L. R. A. 721. As the federal courts hold the liability under the act is not strictly a penalty, it is a cause of action which survives, and the executors are authorized to prosecute the action. Judgment in favor of the defendant, for this reason, in the Sweet Case, is refused.

[4] There are a number of reasons for a new trial in the Carbon Coal & Coke Company, but we do not think it necessary to consider any of them, excepting the nineteenth, which is an assignment of error to a portion of the charge of the court, as follows:

"There is a provision of this act, gentlemen of the jury—paragraph 3 of section 15 of the act of 1906—which says: 'If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance thereof shall be no more than is just and reasonable, and the commission may, after hearing on a complaint determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered, or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided in this section.' You will see that there is a provision that if the owner of property renders any services, either directly or indirectly, there may be a compensation for it, and that the commission shall upon complaint and hearing pass upon the reasonableness of it, but that is to be construed in connection with the other sections of the act, and that is that the defendant carrier is required to publish its rates and charges, and it can put upon its schedule a rate or a charge for the payment of services by any of its shippers along its line, and pay to that shipper legally, after it has put upon its schedule for any service it has done. That was enacted in 1906, and since 1906 all carriers in their schedules have had a right to give reasonable compensation for any services which a shipper renders in the transportation of its property. Then, if there is any complaint by other shippers upon the

amount which the carrier has scheduled and is paying to the shipper for such services, the act says that the commission shall adjust it and shall say what is a reasonable charge, and thereafter by an order the carrier shall be required to make only such charge. The section has no application to a situation of this kind."

We are still of the opinion that the section is not applicable to the facts in this case. The defendant made a secret allowance which was not known to the plaintiffs, and, when discovered and suit instituted to recover the damages resulting therefrom, the defendant set up that it was for services, with the exception of the Berwind White Company payments, for which they gave no reason. This section must be considered in connection with the other provisions of the act, and not in such a way as to enable railroad companies to give rebates, and subsequently claim they are for services rendered, however secret and unreasonable the allowances or rebates may appear.

It is plain that the services rendered by an owner referred to in section 15 are services which it has scheduled in its tariff rates and published in accordance with section 6 of the interstate commerce act and applicable to all shippers similarly circumstanced, and, when so published, if a shipper objects to the payment of the amount set forth in the published tariff, he will be required to establish its injurious and discriminatory effect upon him by applying to the commission to have it corrected. It does not follow that the amount so scheduled would be regarded as a lawful and reasonable payment. The commission might regard it as excessive, but shippers who did not receive it or who did not receive as fair treatment as others would have notice of its existence, and could defend against any discriminatory effect in its payment. But, where there is no publication made of the allowance, the section does not apply. It is not contended that the placing of such an allowance on the published tariffs would determine the legality or illegality of the payment. It would simply determine the tribunal to which an injured party would be compelled to apply to redress his wrongs, to wit, to the Interstate Commerce Commission; but where, as in this case, there was a secret allowance to some shippers not mentioned or published in the schedule, there would be no notice to other shippers. They could not know what allowances were being made, and there would be no regulation or practice to correct, so far as the general rules of the company or the published rates informed the shipper. The view of the defendant as to this paragraph of section 15 would enable the railroad company to rebate and discriminate in this way to an extent limited only by its ability to avoid discovery.

All the reasons for a new trial are overruled, and a new trial refused.

JOHNSON v. CADILLAC MOTOR CAR CO.

(Circuit Court, N. D. New York. March 11, 1912.)

1. NEGLIGENCE (§ 27*)—DANGEROUS INSTRUMENTALITIES—DEFECTIVE CONSTRUCTION—MANUFACTURER'S LIABILITY.

To manufacture an automobile or to purchase and assemble into a car from different makers the parts of an automobile and put the same on the market for sale by dealers to third persons for use, any essential part of which is known to be so defective, or in the exercise of ordinary care, ought to be known to be so defective as to make the car dangerous to those using it for the purpose for which it was designed and intended by the maker, is a wrongful act, rendering the manufacturer or assembler liable in damages to a third person who purchases it from a dealer in ignorance of such defect and is injured while properly using it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 25; Dec. Dig. § 27.*

Liabilities of manufacturer and vendors of injurious substances or defective machinery and appliances for injuries to persons other than immediate vendees, see note to Standard Oil Co. v. Murray, 57 C. C. A. 5.]

2. NEGLIGENCE (§ 27*)—DANGEROUS INSTRUMENTALITIES—MANUFACTURER'S LIABILITY.

To render a manufacturer liable to a purchaser of the instrumentality for injuries caused by defect therein, which was known, or could have been known by the exercise of reasonable care by the manufacturer before the instrument was placed on the market for sale, it is not necessary that such instrument or machine properly constructed should have been one of an inherently dangerous nature.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 25; Dec. Dig. § 27.*]

3. NEGLIGENCE (§ 27*)—DANGEROUS INSTRUMENTALITIES—AUTOMOBILES—MANUFACTURER'S LIABILITY—INSPECTION.

Plaintiff purchased an automobile, assembled by defendant from parts purchased from other reputable manufacturers, and was injured while using the same by the breaking of a wheel, due to the rotten character of one or more of the spokes therein. The wheels when delivered were covered with a priming coat of paint, so that the nature of the wood could not then be determined without scraping off the paint or drilling into the spokes. There was no proof that such test had ever been made in the wheel or automobile trade, and the jury found that, if made, it would have been the exercise of extraordinary, as distinguished from ordinary, care; that defendant did not know of the defect and could not have discovered the same in the exercise of ordinary care; but also found that defendant did not use due and proper care in purchasing its wheels and finishing and putting the same in its automobiles, and in giving them the tests required. *Held*, that defendant was not required, in the exercise of ordinary care, to scrape the paint off the spokes in order to test the character of the wood, and that the findings were therefore insufficient to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 25; Dec. Dig. § 27.*]

At Law. Action by E. Wells Johnson against the Cadillac Motor Car Company. Judgment for plaintiff. On defendant's motion to set aside the verdict, directed by the court on special findings of the jury, on the ground that, based on the findings, the verdict was contrary thereto and unsupported thereby, and if the findings in favor of

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

plaintiff would support such verdict, such findings, or the vital one, were contrary to and unsupported by the evidence. Motion granted.

Henry V. Borst, for plaintiff.

Hun & Parker, M. D. Reilly, and William Van Dyke, for defendant.

RAY, District Judge. The plaintiff is a liveryman and purchased an automobile for use in his livery and running about the country of a firm dealing therein, which firm obtained same from the defendant company for sale in the market for use by the purchaser. The defendant company is a manufacturer of automobiles, but not of all the parts thereof, and makes and sells same to others for use or for resale and use by the purchaser. The defendant does not actually make its own wheels used in making its automobiles, but purchases them of a reputable concern engaged in making and selling wheels for automobiles. When shipped and when received by the defendant company they are covered with a coat of paint known as the priming coat. This priming coat is put on to protect the wheels from moisture, and not for concealment of defects or improper material. Not long after purchasing this machine, and while using it in a proper manner on an ordinary good country road and running at ordinary speed, one of the front wheels collapsed by reason of one or more defective spokes therein and used in the original construction thereof, and the car overturned, pinning the plaintiff thereunder, and he received serious and permanent injuries.

The evidence was sufficient to sustain the following:

(1) The automobile broke down solely by reason of these defective or dead wood spokes in the wheel while running at ordinary speed for an automobile and on the highway of suitable construction and character for such use.

(2) By reason of the presence of this (or these if more than one) defective, or dead wood spoke in the wheel the automobile in the hands of the owner and user and when properly used and run at ordinary speed for an automobile, was liable to break down, overturn, and seriously injure, if not kill, the persons riding therein. In short, this automobile, in fact, was a machine or instrumentality imminently dangerous to human life when under ordinary circumstances and conditions put to the use for which intended by the defendant company.

(3) This condition of this wheel, and consequently of this automobile, was the result of the negligence of the maker of the wheel, the Schwarz Company, which made and sold the wheel to the defendant company. The automobile was a heavy machine and made to carry from 4 to 6 persons or even more, and as the front wheels are turned to the right or to the left as the case may be in directing the course of the machine, the wheels are subjected to great sidewise or lateral pressure, and hence the well-known necessity for strong and sound spokes in the wheels. If the wheels are not of this character, and this fact is known, or in the exercise of ordinary care ought to be known, to the maker and seller, he properly may be said to have known the dangerous character of the machine itself.

(4) The defendant company had no actual knowledge of the de-

fective spoke or spokes in this wheel, and was not shown to have had actual knowledge that the Schwarz Company used defective spokes or wood in making its wheels; but there was evidence tending to show that the defendant company might have ascertained this fact by the exercise of extraordinary care and inspection of wood used in the construction of wheels at the Schwarz factory.

(5) The evidence tended to show that the defendant company on receiving its wheels from the Schwarz Company used all known and ordinary tests for ascertaining and determining their sufficiency and strength and tested the machines thoroughly after construction and before putting them on the market for the purpose of discovering defects or weakness, if any.

(6) There was evidence pro and con that the defendant company might have discovered the character of the wood in the spokes of this wheel (or others) by scraping off the priming coat of paint referred to. The defects might have been discovered by taking the wheels to pieces or by sawing into or boring into the spokes; but, as this would have been tantamount to the destruction of the wheel, the jury was instructed that the defendant company was not obligated to make such tests.

(7) The jury was told that, while the defendant company had the right to rely on the good reputation and character of the Schwarz Company as a maker of wheels and on the high character and reputation of the Schwarz wheels, still its duty did not end there, and that it was bound to use all known and ordinary tests for determining the character and strength of the wheels.

The jury found: (1) That the car was being carefully and properly driven by the plaintiff; (2) that the breaking down of the wheel was caused solely by the dead and dozy and consequently weak condition of the wood in the spokes of the wheel; (3) that such wood was not put in the wheel with the knowledge or consent of the defendant company; (4 and 5) that the defendant company did not know the Schwarz Company used such wood in the construction of its wheels generally, or in the construction of those it sold to it (the defendant). The jury also found (6) that the defendant company did not know of the weakness or defect in this wheel, and that such defects could not have been discovered in the exercise of ordinary care by any proved and known test or method of inspection, and that the defendant company did not willfully omit or neglect to exercise ordinary care in inspecting or testing the wheel in question after it came from the Schwarz Company by omitting to use ordinary and usual or known methods of inspecting or testing same. The jury expressly found that the defendant company did not "put the car in question on the market with knowledge that the wheel in question was in a weak or defective condition by reason of unsuitable, weak, or dozy wood in the spokes." To the following questions submitted to the jury it answered, "No," viz.:

"Did the Cadillac Company use or exercise due and proper care, that is, ordinary care, in purchasing its wheels of the Schwartz Company and finishing and putting same on its automobiles and giving them the test it did and then putting them (the automobiles) on the market?"

Under the evidence in the case and the charge of the court, and in view of the other findings, the jury must have found that the defendant company was negligent in failing to ascertain the fact that the Schwarz Company did sometimes use defective spokes by omitting, either (1) to make proper inquiries and examination at the Schwarz factory in Philadelphia, or (2) to scrape off the priming coat before finishing the wheels and putting them on an automobile.

There was uncontradicted evidence that the defendant company did send a man to the plant of the Schwarz Company. There was no evidence he failed to make proper inquiry and examination, or that he discovered any defect in the wheels, wood used, or in methods employed. His report was favorable to the Schwarz wheel.

Assuming that there was negligence—legal negligence—in not scraping off the priming coat of paint from these wheels, and that such scraping would have disclosed the bad wood, will it (such finding) support this verdict under the decisions and the complaint?

First, the jury expressly found there was no negligence in omitting to use any "ordinary and usual" or known method of testing or inspecting; and, second, it expressly found that the defective condition could not have been discovered "in the exercise of ordinary care by any proved and known test or method of inspection." It follows that the jury found that scraping off the paint from a primed wheel was not a known test or method of inspection and was an extraordinary and unknown method of inspection or testing in the trade. As stated, the jury expressly found the defendant company had no actual knowledge of the defective condition, and hence the question resolves itself into this: Can the defendant company be held liable because it failed to use an "unproved" or an "unknown test or method of inspection" which if used would have disclosed the defective condition?

[1] To manufacture an automobile or to purchase and assemble into a car from different makers the parts of a car or automobile and put same on the market for sale by dealers to third persons for use, any essential part of which is known to be defective or in the exercise of ordinary care ought to be known to be defective and so defective as to make the car dangerous to those using it for the purpose for which designed and intended by the maker, is a wrongful act, and the person or corporation so manufacturing or assembling the car or automobile and placing it on the market is liable in damages to the third person who purchases it from the dealer in ignorance of such defect and is injured while properly using same. The common sense of this proposition is evident, and the legal liability in such cases has been declared in numerous decisions. While there is no contractual relation between the maker and such third person, the law imposes a duty and attaches the legal liability. If the complaint charges such an act; it charges an illegal or wrongful act, and it neither adds to nor detracts from the sufficiency of the complaint to clothe the language used in describing it with superfluous phrases or adjectives. The ferocity of the language adds nothing and detracts nothing, provided the wrongful act be actually alleged. So if the ferocious aspects of the case alleged are not proved, the case is made out if the proof sustains the proposition that defendant made and put on the market for

sale to users a machine or instrument which, because of negligent construction or defective material used in the construction thereof, was in fact and to its knowledge dangerous to the life or limb of the user when put to the use for which intended and sold.

[2] It is, of course, true that such defect must have been unknown to the purchaser and user injured, the proximate cause of the injury, and that the injury must have been sustained by reason of such defect. To create liability in such a case, it is not necessary that the instrument or machine should have been one of an inherently dangerous nature. If perfectly safe to users as ordinarily made and used, still, if so defectively constructed by reason of poor workmanship or the use of poor material that it was dangerous to the life or limb of the user when he put it to the uses for which intended by the maker, the maker is liable, for he knew, or in the exercise of ordinary care ought to have known, of the defects. A gun is not an article inherently dangerous to human life. If let alone it is perfectly harmless and can do no injury to any one. It is only when used that it becomes a dangerous instrumentality. It is intended to be loaded with powder and ball or some other explosive material and used either for the destruction of life or in some innocent amusement. The manufacturer of guns knows this, and should he make and put upon the market for sale to others for use by them a gun with a barrel made of ordinary tin metal or lead so colored as not to be distinguished from gun metal, he would be liable to a third person who should purchase such gun and in using same be seriously injured. The gun so made would not be inherently dangerous to human life if hung upon the wall and unused, but it would be inherently and imminently dangerous to human life the moment it was put to use for the purposes intended by the maker thereof and the purchaser thereof. The liability in such cases is not confined to the negligent construction and putting upon the market of articles of an inherently dangerous nature, but extends to and includes all articles intended for use by others which are so defectively constructed that by reason of such defective construction they are articles of an inherently dangerous nature when put to the use for which intended. Gunpowder, dynamite, preparations of arsenic, and other poisons, and many other things, are articles of an inherently dangerous nature whether put to the use for which intended or not. A steam engine without water and fire is no more dangerous than an ordinary wagon, but it becomes an article of an inherently dangerous nature the moment water and fire are placed therein and steam is generated. An automobile is not an article or a machine of an inherently dangerous nature. Alone and of itself it will not move, explode, or do injury to any one. Put gasoline in the tank and set it in motion upon the highway, and it becomes at once an article of an inherently dangerous nature if defectively constructed. Such defect may reside in the steering apparatus, so that the driver is powerless to control it, or, as in this case, in the defective spokes of the wheel which made it liable to break down, overturn, and destroy the lives of those using it the moment it was put to the use for which intended. Injury to the user of an automobile from the breaking of a wheel is incident to its use, but not necessarily incident to its use if properly constructed of

suitable material. Injury to the user of an automobile and to all riding therein naturally follows from a defective construction thereof, although such injury does not always follow its use.

[3] The jury in this case in effect found that the automobile manufactured by the defendant company and purchased by the plaintiff from a dealer was inherently dangerous to human life when, and only when, put to the use for which intended either by the maker and seller or the plaintiff, the purchaser. The jury by its findings also expressly negatived knowledge of the defective construction or defective material used in the construction of the car by the defendant company. The jury found that the defendant company did not know that the Schwarz Wheel Company used weak, dead, or dozy wood in the construction of its wheel generally, or those sold and delivered to the Cadillac Company. The jury also found that there was no failure to discover the defect in this wheel by failure to employ any proved and known test or method of inspection; that is, the jury found that the defective condition of the wheel could not have been discovered in the exercise of ordinary care by any proved and known test or method of inspection, and that the defendant company did not willfully omit or neglect to exercise ordinary care in inspecting or testing the wheel after it came to the defendant company by omitting to use ordinary and usual or known methods of inspecting or testing the same. The jury also found that the defendant company did not put the car or automobile on the market with knowledge that the wheel in question was in a weak or defective condition by reason of unsuitable, weak, or dozy wood in the spokes.

As before stated, the jury found, or must have found to support its tenth finding, that the Cadillac Company might have known of the defective spokes by resorting to the unknown and unproved test of scraping the priming coat of paint therefrom. This, of course, would have involved the scraping of the paint, more or less of it, from every spoke of each and every wheel purchased by the defendant company from the Schwarz Company. The question is: Can knowledge of the defective conditions be attributed or charged to the defendant company by reason of its failure to employ this unproved and unknown test? It may be argued that this test is so simple that it would have necessarily occurred to any one manufacturing or assembling automobiles to make it. But the jury has found in effect that such a test would have been unusual and an unproved and an unknown test in the business. The defendant may properly be charged with knowledge of those facts which it ought to have known in the exercise of due care and diligence.

In Statler v. Ray Mfg. Co., 195 N. Y. 478, 481, 88 N. E. 1063, 1064, the Court of Appeals, per Hiscock, J., said:

"We think further that there was evidence which permitted a jury to say that the defendant, knowing the uses for which the urn was intended when it marketed the same, was guilty, and of course chargeable with knowledge of defective and unsafe construction."

This is equivalent to a declaration that a corporation is necessarily chargeable with legal knowledge of defective and unsafe construction

resulting from negligence on its part. That is, if the manufacturer is negligent, it must know that it is negligent; and, if it is guilty of defective or unsafe construction, it must have knowledge thereof. In the case at bar it is contended that the defendant company might have known, and therefore in the legal sense did know, that the wheel in question contained defective spokes. To charge the defendant company with actual knowledge, it must appear that it did something affirmatively which it had no right to do, or neglected to do something which it ought to have done. The defendant company was guilty of no affirmative act amounting to negligence. Did it fail to do anything which amounted to negligence in the legal sense? As twice stated, its only failure was to resort to the unknown, unproved, and untried expedient of scraping the paint from the spokes of the wheels after being delivered by the Schwarz Wheel Company to the defendant company.

The court told the jury, and there was no exception to the charge:

"If this defendant company purchased from a manufacturer of recognized standing and reputation these wheels, then this defendant company was justified in assuming that in the manufacture proper care was taken and that proper tests were made of the different parts, and that proper material was used in the manufacture of those wheels, and that, as delivered to it, the defendant company, here by the Schwarz Manufacturing Company, they were in a fair and a reasonably safe condition for use. That would be the law, that is, the law of this case, unless it had actual knowledge to the contrary.

"But, of course, that did not end the duty of the defendant company, the fact that it had the right to assume that the wheels were in a fair and a reasonably safe condition for use. Now, it had a further duty. It was the duty of the defendant company to subject the wheel, the wheels, to ordinary tests for determining their strength and efficiency, the ordinary test, and that test includes examination, ordinary test and examination to determine the efficiency and strength of those wheels. Now, were there any ordinary tests? Is there any proof here of ordinary tests? If so, what? It is for you to say, and if any are established, did the defendant use them? * * * I say to you that defendant was under no obligation to cut into and bore into or to take to pieces those wheels, but they were under obligation to apply such well-known common sense tests, established tests, as were known to the trade or dictated by plain common sense; that was their obligation, and that was the full extent, full measure, of their obligation in that regard.

"So now, gentlemen, you are to say, it is for you to say, under all the evidence in this case, has the plaintiff proved to your satisfaction by a fair preponderance of the evidence, if you come to the question and are satisfied and believe and find that the wheel went to pieces, broke down because of defective wood, improper wood in the front wheel, if you come to that and find that, then can you say, under your oaths, on the evidence in this case, that this defendant company, through its managers, those who were running the business, were willfully and knowingly negligent in failing to apply proper tests and examinations of those wheels after they came to them to determine their strength. * * *

"Now, you have heard the evidence on both sides, what defendant did do and what it didn't do so far as it didn't do what plaintiff claims defendant should have done, and it is for you to say, gentlemen, on your oaths, on the evidence in this case, did defendant willfully neglect to do what it ought to have done; that is, to apply tests and examinations which experience and knowledge in the automobile trade taught it ought to apply, to determine the character of the wood in those wheels, and therefore the strength of them and the efficiency of them for the purpose for which intended?"

As already stated, the plaintiff gave evidence tending to show that the dozy and dead wood might have been discovered by scraping the

paint from the wheel. The defendant gave strong evidence to the contrary. The defendant company did not claim that it made this test. There was no evidence that such a test is used or ever was used in the trade. It would be a most extraordinary test to make. It would require the scraping of the paint from thousands of wheels annually and from tens of thousands of spokes. Can this verdict be sustained, in view of the charge and of the tenth finding, which, with the answer of the jury thereto, reads as follows:

"Did the Cadillac Company use or exercise due and proper care, that is, ordinary care, in purchasing its wheels of the Schwarz Company and finishing and putting same on its automobiles and giving them the test it did and then putting them on the market? Answer: No."

Some of the broken spokes of the wheel in question or parts of them were produced in court and put in evidence. These were shown to a representative of the Schwarz Wheel Company, and he admitted that one of the spokes was not suitable for the wheel of an automobile if all the spokes in the wheel were of that character. He contended, however, that one spoke of that character in each wheel would not weaken it. He also testified that spokes of that character of wood sometimes went into the wheels, or, at least, his evidence was such that the jury would have been justified in finding that occasionally spokes of that character went into the wheels manufactured and sent out by the Schwarz Company. The jury was therefore justified in finding that the wheel in question contained at least one and perhaps more of what we may call dead wood spokes, that is, weak, insufficient spokes, and that it went to pieces because of such defective spokes, and that the defendant company might have discovered the defects in this wheel, that is, the defective spokes, by scraping off the paint, or priming coat, thereon. We are returned to the inquiry: Was the defendant company chargeable with negligence in that it did not apply this test? Was the jury justified in saying that it was such a commonplace, well-known test that it would have occurred to any person in the wheel business to make it? There was no proof in the case that this test ever had been made in the wheel trade or in the automobile trade.

It can be contended that the defendant company should have sent or provided a man at the Schwarz Company's plant to inspect the wheels before the priming coat was applied and the wheels shipped. This could have been done, but it would have been an extraordinary precaution.

In Richmond & Danville R. v. Elliott, 149 U. S. 266, 271, 272, 13 Sup. Ct. 837, 840 (37 L. Ed. 728), the court said:

"With regard to the defect in the iron casting, which seems to have been revealed by the explosion, it may be said that it is not necessarily the duty of a purchaser of machinery, whether simple or complicated, to tear it to pieces to see if there be not some latent defect. If he purchases from a manufacturer of recognized standing, he is justified in assuming that in the manufacture proper care was taken, and that proper tests were made of the different parts of the machinery, and that as delivered to him it is in a fair and reasonable condition for use. We do not mean to say that it is never the duty of a purchaser to make tests or examinations of his own, or that he can always and wholly rely upon the assumption that the manufacturer has fully and suffi-

ciently tested. It may be, and doubtless often is, his duty when placing the machine in actual use to subject it to ordinary tests for determining its strength and efficiency. Applying these rules, if the railroad company, after purchasing this engine, made such reasonable examination as was possible without tearing the machinery to pieces, and subjected it fully to all the ordinary tests which are applied for determining the efficiency and strength of completed engines, and such examination and tests had disclosed no defect, it cannot, in an action by one who is a stranger to the company, be adjudged guilty of negligence because there was a latent defect, one which subsequently caused the destruction of the engine and injury to such party."

In Westinghouse E. & Mfg. Co. v. Heimlich, 127 Fed. 92, 62 C. C. A. 92, the court, per Lurton, C. J., held:

"Where defendant purchased a derrick chain from reputable chainmakers, who represented that it was of the highest quality of iron, handmade and tested, and it appeared that the chain was externally sound, and had been subjected to a careful visual inspection from time to time, during its three months' use, without disclosing any defects, before it broke because of crystallization of the iron, causing the death of plaintiff's intestate, defendant was not guilty of negligence in failing to test the chain by subjecting it to a strain for the purpose of discovering latent defects therein."

See, also, the cases cited by Lurton, C. J., in his opinion in the case cited.

There was no evidence that the assembled automobile was not subjected to proper and suitable tests as to strength and efficiency after being assembled and painted and before being put on the market, and the defendant gave evidence which was not contradicted that such tests were made. On the evidence and special findings of the jury, in view of the decisions of the courts, I am of the opinion the verdict cannot be sustained, and that it should be set aside and a new trial ordered.

CLARK v. CHICAGO, R. I. & P. RY. CO. et al.

(District Court, W. D. Missouri, W. D. March 9, 1912.)

No. 3,779.

1. REMOVAL OF CAUSES (§ 36*)—PARTIES—FRAUDULENT JOINDER.

Fraud, if it exists, in joining a resident with a nonresident defendant to prevent a removal of the cause to a federal court, and is appropriately developed, justifies the court in disregarding a joinder otherwise fair on its face, and in taking jurisdiction of the case transferred to it for diversity of citizenship, notwithstanding such joinder.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

2. REMOVAL OF CAUSES (§ 86*)—PARTIES—FRAUDULENT JOINDER.

Mere allegation of fraud in the joinder of a resident with a nonresident defendant without facts other than such as disclose an intention to defeat federal jurisdiction is insufficient to establish a fraudulent joinder, but facts must be shown, indicating that plaintiff, not only joined the resident defendant for the purpose of preventing a removal, but also knew, or had sufficient reason in law to know, at the time of such joinder that he had no cause of action against such defendant as a matter of law.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166–179; Dec. Dig. § 86.*]

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

3. REMOVAL OF CAUSES (§ 107*)—PARTIES—FRAUDULENT JOINDER—DETERMINATION.

Where it is alleged that a resident was fraudulently joined as a party to prevent removal of the cause to the federal court, such court on a proper petition for removal may examine the merits of the case sufficiently to determine whether the allegations of the complaint, by reason of which a nonresident defendant may be sued in a state court, have been fraudulently and fictitiously made for the purpose of preventing a removal, but it is not necessary that plaintiff should make it appear that his action will ultimately succeed as against the resident defendant, it being sufficient that there is reasonable ground from the existing state of law and facts to believe that the cause of action has merit, and has been stated in good faith.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 220, 225–234; Dec. Dig. § 107.*]

4. REMOVAL OF CAUSES (§ 107*)—PARTIES—FRAUDULENT JOINDER—TRIAL.

Where fraud in joining a resident defendant to defeat a removal of the cause to the federal courts does not otherwise appear, and cannot otherwise be inferred, the inquiry into the matter of fraudulent joinder may not go to the extent of a trial of the whole case on the merits.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 220, 225–234; Dec. Dig. § 107.*]

5. REMOVAL OF CAUSES (§ 107*)—PARTIES—FRAUDULENT JOINDER—BURDEN OF PROOF.

Where a removal petition alleges a fraudulent joinder of a resident with a nonresident defendant, the burden of proof is on the removing defendant to establish the fact.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 220, 225–234; Dec. Dig. § 107.*]

6. REMOVAL OF CAUSES (§ 107*)—PARTIES—FRAUDULENT JOINDER—MASTER AND SUPERINTENDING SERVANT.

Plaintiff, an employe in a railroad roundhouse, was injured while assisting another workman in raising one of defendant's engines by means of a jack. He joined defendant railroad company, a nonresident, and its foreman in the roundhouse, a resident, as defendants, charging that the jack was defective, and that the foreman who had charge of and had superintendence over plaintiff and his fellow servants negligently required plaintiff and the person whom he was assisting to use the jack, when, he knew, or by the exercise of ordinary care might have known, its defective condition, and that it would be likely to cause injury. On plea to the jurisdiction it was contended that the roundhouse foreman directed the use of the jack with knowledge that it was unsafe. *Held*, that it does not sufficiently appear that the foreman's act was mere nonfeasance, for which the railroad company alone would be liable, and that the facts do not necessarily indicate, as a matter of law, that the foreman was not also liable, and, consequently, that his joinder was fraudulent.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 220, 225–234; Dec. Dig. § 107.*

Fraudulent joinder of parties to prevent removal, see note to Offner v. Chicago & E. R. Co., 78 C. C. A. 362.]

7. REMOVAL OF CAUSES (§ 107*)—PARTIES—JOINDER—NONRESIDENT DEFENDANTS.

On a petition for the removal of a cause, alleging fraud in the joinder of a resident with a nonresident defendant, it is not the rule in this circuit that all doubts should be resolved in favor of the jurisdiction of the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 220, 225–234; Dec. Dig. § 107.*]

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

At Law. Action by William A. Clark against the Chicago, Rock Island & Pacific Railway Company and another. On plea to the jurisdiction. Sustained.

Horace Kimbrell and Martin J. O'Donnell, for plaintiff.
M. A. Low and Sebree, Conrad & Wendorff, for defendants.

VAN VALKENBURGH, District Judge. The defendant railroad removed the cause to this court on the ground of diversity of citizenship, asserting that the defendant Murphy is neither a proper nor necessary party to the proceeding, but, on the contrary, that he was fraudulently joined with the defendant company to prevent removal to this court. In the petition for removal the defendant railroad company sets up the facts upon which this charge of fraudulent joinder is based, and alleges that the facts stated were well known to the plaintiff, and that plaintiff well knew, and must have known, that no cause of action existed against the defendant Murphy. Plaintiff has filed a plea to the jurisdiction of this court, in which he denies the allegations of fraud in the petition for removal and the facts upon which the same are based, and asserts that said allegations are merely conclusions of the pleader, and are insufficient to support the introduction of any testimony in support of the charge of fraud. At the hearing, upon the plea to the jurisdiction, the defendant railroad introduced the defendant Murphy and the plaintiff, and examined them with reference to the facts bearing upon the question of good faith of the plaintiff in making the joinder complained of.

Some confusion seems to exist in the minds of counsel as to what facts and circumstances will justify a federal court in reaching the conclusion that a fraud has been perpetrated or sought to be perpetrated to defeat its jurisdiction, and what may be the scope of its inquiry for the purpose of determining such facts and circumstances. This confusion arises, no doubt, from observations, made by the courts in the decided cases, called forth by the special facts of the case then under consideration.

[1] There can be no doubt that fraud, if it exists, and is appropriately developed, justifies the court in disregarding a joinder otherwise fair upon its face, and that it is the duty of the court to guard against such frauds and evasions. As was said in Shaffer v. Union Brick Co. (C. C.) 128 Fed. 97:

"It is manifestly both unsafe and unsound to allow the ultimate determination of the right of removal from the state to the federal courts to rest upon the ingenuity of counsel drafting the pleadings; for, as said by Mr. Justice Miller in Board of County Com'rs v. Kansas Pac. Ry. Co., 4 Dill. 277 [Fed. Cas. No. 502]: 'It would be a very dangerous doctrine—one utterly destructive of the right which a man has to go into the federal courts on account of his citizenship—if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause join persons who have not the requisite citizenship, and thereby destroy the rights of parties in federal courts. We must, therefore, be astute not to permit devices to become successful which are used for the very purpose of destroying that right."

It may not be unprofitable to advert briefly to the attitude of the Supreme Court upon this question in order that a consistent and stable rule may be laid down for guidance in such cases. It will be

sufficient to begin with the case of Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121, where the railroad company sought to remove the case in which it was joined with its engineer and fireman as codefendants, and in which it was alleged that the "negligence was the joint negligence of all the defendants," on the ground that its codefendants were "neither necessary nor proper parties defendant to this cause, and that they were made parties defendant to this cause for the sole and single purpose to prevent a removal by petitioner of this cause to the Circuit Court of the United States for the District of Kentucky, and thereby unlawfully to deprive your petitioner of the right conferred upon it by the Constitution and laws of the United States." The state court overruled the petition for removal. The case was tried in the state court, resulting in a judgment for plaintiff, which was affirmed by the Court of Appeals of Kentucky. In considering the question whether the removal should have been granted by the court below, that court said:

"As, therefore, the appellant Chesapeake & Ohio Railroad Company neither sufficiently alleged nor attempted to prove that the defendants were wrongfully joined as such, the lower court properly refused to make the transfer."

Upon writ of error to the Supreme Court of the United States, respecting this same question, Mr. Chief Justice Fuller said:

"If the liability of defendants, as set forth in that pleading, was joint, and the cause of action entire, then the controversy was not separable as matter of law, and plaintiff's purpose in joining Chalkey and Sidles was immaterial. The petition for removal did not charge fraud in that regard or set up any facts and circumstances indicative thereof, and plaintiff's motive in the performance of a lawful act was not open to inquiry."

In Alabama Great Southern Railway Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147, the railroad company was in like manner joined with its engineer and conductor. The case was removed upon the sole ground that a separable controversy existed between the petitioner and the plaintiff as to whom diversity of citizenship existed. The case reached the Supreme Court upon questions certified by the Circuit Court of Appeals for the Sixth Circuit. In sustaining the state jurisdiction, that court, through Mr. Justice Day, said:

"It is equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court. * * * In other words, the right to remove depended upon the case made in the complaint against both defendants jointly, and that right, in the absence of a showing of fraudulent joinder, did not arise from the failure of the complainant to establish a joint cause of action. * * * It is to be remembered that we are not now dealing with joinders, which are shown by the petition for removal, or otherwise, to be attempts to sue in the state courts with a view to defeat federal jurisdiction. In such cases entirely different questions arise, and the federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the federal courts of the protection of their rights in those tribunals. * * * The test of such controversy, as this court has frequently said, is the cause of action stated in

the complaint. That is joint in character, and there is no attack upon the good faith of the action. In such case we hold that no separable controversy is presented within the meaning of the act of Congress."

In Illinois Central Railroad Co. v. Sheegog, 215 U. S. 308–316, 30 Sup. Ct. 101, 102 (54 L. Ed. 208), the court said:

"Of course, if it appears that the joinder was fraudulent as alleged, it will not be allowed to prevent the removal. Wecker v. National Enameling & Stamping Co., 204 U. S. 176 [27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757]. And, further, there is no doubt that the allegations of fact, so far as material, in a petition to remove, if controverted, must be tried in the court of the United States, and therefore must be taken to be true when they fail to be considered in the state courts. Crehore v. Ohio & Mississippi Ry. Co., 131 U. S. 240–244 [9 Sup. Ct. 692, 33 L. Ed. 144]; Chesapeake & Ohio Ry. Co. v. McCabe, 213 U. S. 207 [29 Sup. Ct. 430, 53 L. Ed. 765]. On the other hand, the mere epithet 'fraudulent' in a petition does not end the matter. In the case of a tort which gives rise to a joint and several liability the plaintiff has an absolute right to elect and to sue the tort-feasors jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that its only purpose was to prevent removal, would be bad on its face."

[2] This statement from the opinion of Mr. Justice Holmes is frequently urged by counsel as authority for the claim that a mere allegation of fraud without facts other than such as disclose an intention to defeat the federal jurisdiction is insufficient, that there must be present facts which justify a deduction of fraud in its broader legal acceptance; such, perhaps, as would involve moral turpitude apart from the mere effort to defeat the removal act. It must be noted, however, that this case cites with approval the decision in Alabama Great Southern Railway v. Thompson, supra, which has already been considered, and the later case of Wecker v. National Enameling & Stamping Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757. In the latter case the plaintiff had joined a draftsman in the office of the chief engineer, and in his petition alleged it to be his belief that this draftsman was responsible for the defects in structure of the apparatus causing the injury to such an extent as to render him liable to the plaintiff therefor. At the hearing, upon conflicting evidence, it appeared that there was no reasonable ground for the assumption of such liability on the part of the draftsman, nor for joining him as a party defendant, except for the purpose of defeating, and thereby committing a fraud upon the jurisdiction of the national court. No other fraud was charged or shown. Upon the affidavits filed the court reached the conclusion that, considered with the complaint, they showed conclusively an attempt to defeat the jurisdiction of the federal court by wrongfully joining this individual defendant. Mr. Justice Day said:

"In view of this testimony and the apparent want of basis for the allegations of the petition as to Wettengel's relations to the plaintiff, and the uncontradicted evidence as to his real connection with the company, we think the court was right in reaching the conclusion that he was joined for the purpose of defeating the right of the corporation to remove the case to the federal court. It is objected that there was no proof that Wecker knew of Wettengel's true relation to the defendant, and consequently he could not be guilty of fraud in joining him, but, even in cases where the direct issue of

fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within his reach. * * * While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the federal courts should not sanction devices intended to prevent a removal to a federal court where one has that right, and should be equally vigilant to protect the right to proceed in the federal court as to permit the state courts, in proper cases, to retain their own jurisdiction."

That such is the proper construction to be placed upon the opinion in the Sheegog Case is further made apparent by the language of the court in Southern Ry. Co. v. Miller, 217 U. S. 209–215, 30 Sup. Ct. 450, 451 (54 L. Ed. 732):

"The petition for removal contained no charge that the attempt to join the defendants was for the purpose of fraudulently avoiding the jurisdiction of the United States court, or with a view to defeat a removal thereto. The case here presented is one in which the record discloses there was an attempt to join, in good faith, the railway company and the individual defendants as for a joint liability in tort."

And in Chicago, Burlington & Quincy Ry. Co. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521, Mr. Justice Harlan said:

"A defendant cannot say that an action shall be several if the plaintiff has a right, and so declares, to make it joint; and to make it joint is not fraudulent if the right to do so exists, even if plaintiff does so to prevent removal."

The inference clearly is that if the plaintiff does so to prevent removal when the right does not so exist, and the plaintiff knows it or should know it, the conclusion would be otherwise.

In Jacobson v. Chicago, R. I. & Pac. Ry. Co. (C. C.) 176 Fed. 1004, Judge Willard states the practical rule as follows:

"If the plaintiff stated in his complaint that it was joint, the case could not be removed to the federal court, although he was wrong in his view of the law. The question whether he was right or wrong was one which he was entitled to have tried in the state court. There was one condition, however, imposed upon him, and that was that he should act in good faith. It is probably true that in these cases the employés are always joined for the purpose of keeping the actions out of the federal courts. That, however, is not conclusive upon the question of good faith. Illinois Central Railroad Company v. Sheegog, 215 U. S. 308 [30 Sup. Ct. 101, 54 L. Ed. 208]. If such employés are not fraudulently joined, the case cannot be remanded. In view of the conflict in the authorities, it cannot be said that a plaintiff who claims that the liability of the master and the servant is joint does not present such a claim in good faith. The question of fraud cannot arise upon such a claim only. That question would arise where the defendant denies the truth of the facts stated in the complaint, and so conclusively establishes by the evidence that the relation of master and servant did not exist, or that the claim of the plaintiff was for other reasons false in fact, that the court is forced to the conclusion that the complaint against the employés could not have been presented in good faith."

It must be conceded that a fraudulent joinder made to defeat the federal jurisdiction will not, if established, be permitted to accomplish its purpose; and the court, upon sufficient application, will look behind mere ingenuity of pleading, to the extent even of scrutinizing the facts alleged upon which the propriety of the joinder is asserted.

[3] In such cases the true rule is that the federal court upon a

proper petition for removal may examine into the merits sufficiently to determine whether the allegations by reason of which a resident defendant may be joined in a state court are fraudulently and fictitiously made for the purpose of preventing removal. More than that, it is its duty to make such examination. It is undoubtedly true that the mere fact that the joinder was made for the obvious or admitted purpose of defeating the jurisdiction of the national courts will not suffice to confer jurisdiction upon them, provided a cause of action exists against the resident defendant joined. Good faith must attend the joinder. It will not be exacted that the action must ultimately succeed, but there must be reasonable ground from the existing state of laws and facts to believe that the cause of action has merit; and it must be stated in good faith. The fraud here under consideration is simply a purpose to deny to the nonresident defendant the right of having his case tried in the jurisdiction to which he would otherwise be entitled by the unwarranted joinder as a codefendant of one against whom the plaintiff knows, or has sufficient reason in law to know, he has no legal ground for suit. This may appear upon the face of the pleading, or it may be skillfully concealed by allegations that are untrue and unjustified. The duty of this court is the same in either case, except that the latter involves inquiry into the facts stated, while the former does not. It is well settled that when it is disclosed, either upon the face of the complaint or in a showing by affidavit, or by oral testimony taken upon plea, that the plaintiff has no cause of action against the employé who is made defendant, the cause is removable by the other defendant if the proper diversity of citizenship exists between that defendant and the plaintiff. Marach v. Columbia Box Co. (C. C.) 179 Fed. 412; Lockard v. St. Louis & San Francisco R. R. Co. (C. C.) 167 Fed. 675; Chicago, Rock Island & Pac. Ry. Co. v. Stepp (C. C.) 151 Fed. 908; Floyt v. Shenango Furnace Co. (C. C.) 186 Fed. 539.

My attention has been called to the case of Enos v. Kentucky Distilleries & Warehouse Co. (C. C. A., Sixth Circuit) 189 Fed. 342. A careful consideration of that case convinces that it is not an authority against the position here taken. Among other things Judge Knappen, speaking for that court, says:

"But the rule which permits a removal to the federal court in case of the fraudulent joinder of defendants whose presence destroys diversity of citizenship cannot be carried to the extent of permitting such fraudulent joinder to be inferred from the fact only that no cause of action is found to exist against any defendant, resident or nonresident, or of permitting removal in a case where the negligence of the corporate defendant can be made out only by proof of negligence of the servant alleged to be fraudulently joined, but against whom a cause of action is stated."

[4] This means, and must mean, to give effect to the decisions of the Supreme Court of the United States upon this subject, as well as to the uniform holdings in federal jurisdictions, that where fraud does not otherwise appear and cannot otherwise be inferred the inquiry into the matter of fraudulent joinder should not go to the extent of a trial of the whole case upon the merits. That case arose in Kentucky, and by statute of that state a servant whose negligent acts cause lia-

bility of the corporation may as matter of right be joined as defendant with the corporation; and this is equally true there whether his act is one of omission which charges his master alone under the doctrine of respondeat superior, or whether it is an act of positive misfeasance. This is made further apparent by a careful analysis of the decisions of the Supreme Court in Illinois Central R. R. Co. v. Sheegog, 215 U. S. 308–315, 30 Sup. Ct. 101, 54 L. Ed. 208, and Chicago, B. & Q. R. R. Co. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521, which are cited and quoted as authority in the Enos Case. Those cases were decided, and must have been decided, as shown by the language of the opinions and by the facts involved, upon the theory that a cause of action was stated against the resident defendants, as was also expressly held in the Enos Case, and that to hold that the joinder of such resident defendants was fraudulent, without more, would be to hold that the entire case was fraudulent, and would, in fact, amount to an indirect method of trying the case against the nonresident defendant upon plea to the jurisdiction. And so the Supreme Court in the Sheegog Case said:

"It seems to us that to allow that to be done in such a petition as is before us would be going too far in an effort to counteract evasions of federal jurisdictions."

But in all these cases the doctrine laid down by the Supreme Court in the case of Wecker v. Enameling & Stamping Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757, is expressly adhered to. And if, in the examination in this court, therein authorized and approved, it appears either that no case at all is stated against the resident defendant, or if apparently stated, that fraud has been employed in presenting the facts for the purpose of defeating the federal jurisdiction, then it is the duty of this court so to declare, even though the possible effect might be ultimately to defeat the entire cause of action. Upon no other basis can effect be given to the conceded power of the courts to protect themselves against frauds upon their jurisdiction. Otherwise, nonresident defendants would be at the mercy of the ingenious, but disingenuous, pleader.

[5] In the case at bar the petition for removal sufficiently alleges a fraudulent joinder for the purpose of defeating the jurisdiction of this court and the facts upon which its contention is based. Plaintiff puts these allegations in issue by his plea to the jurisdiction, and the burden of proof is upon the removing defendant to establish the fact of fraudulent joinder. Enos v. Kentucky Distilleries & Warehouse Co. (C. C. A.) 189 Fed. 342–345; Hunter v. Illinois Central R. R. Co., 188 Fed. 645, 110 C. C. A. 459.

[6] The defendant railroad company assumed this burden, and placed upon the stand the foreman, Murphy, and the plaintiff. The petition stated that the defendant Murphy was at all the times mentioned in the employ of the defendant railway company as foreman in its roundhouse having charge of and superintendence over plaintiff and his fellow servants at work in said roundhouse, and that on the night in question the said foreman, within the proper scope of his employment, ordered the plaintiff to assist another workman in raising one of

defendant's engines by means of a jack, that the jack slipped, and the lever thereof jerked upwards, and caused the injury complained of. The negligence of the railroad company and foreman was charged as follows:

"That said injury was occasioned by the fault and negligence of defendants in that they furnished plaintiff with said jack which was not in a reasonably safe condition for use by plaintiff, but was in a defective and dangerous condition, in that it was worn and rusty, so that the dogs thereof would not catch and did not catch at the time of said injury, and that said defendants assigned plaintiff to work at the place at which he sustained injury when they knew, or by the exercise of ordinary care could have known, that said jack was defective and unsafe as aforesaid, and that said defendants were also guilty of negligence, in that the place in which plaintiff was assigned to work by said foreman was a place which was perilous and dangerous by reason of the aforesaid unsafe condition of said jack, and that said defendants could, by the exercise of ordinary care, after said foreman saw that plaintiff was in said perilous and dangerous position, have prevented injury to him by ordering said work to cease and by exercising ordinary care in the use of the means at their command to prevent said jack from slipping and injuring plaintiff as aforesaid."

At the hearing Murphy testified: That he was the night foreman at the roundhouse in question. That it became necessary to put a truck spring under an engine, and he ordered an employé named Martin to do this, and told him to get the plaintiff to assist him. That this had to be done by means of jacks. He had no knowledge of any defects in these jacks, and had no duty to repair them. If any were out of order within his knowledge, his custom was to report that fact to the day foreman. He did not pick out the tools on this occasion, nor did he have any direct supervision over the work of putting in the spring other than to know in a general way that the work was being done. That he did, however, issue the order that Martin and the plaintiff should make this repair. The plaintiff states that the foreman, Murphy, told him to assist Martin in this work. That Martin and he proceeded to the house where the jacks were kept, and found most of them in use; the only ones remaining being, perhaps, six or more lying in what the plaintiff describes as a "bad order pile." Plaintiff then testified as follows:

"A. This man Martin, the truck man, and he said that he would see Murphy, and he walked over and talked to Murphy, the roundhouse foreman, and he came back and said we would have to use those jacks because 'we will have to have that engine to-night.' That was No. 3's engine. Q. Was that in your presence, did you hear that conversation? A. I didn't exactly hear the words, but Martin came back and said Murphy said we would have to use them. * * *

"Q. Where was Murphy at the time that you and Martin got the jack, and moved it over to the engine? A. I don't know just exactly where he was at that time; but the time we were talking about the jacks he was right close there.

"Q. You didn't hear what he said, but Martin told you what he said? A. I didn't hear exactly what they said.

"Q. Martin came back and told you what he said? A. Yes, sir."

He further said that the jacks appeared smooth and worn, and that they used three men instead of two, as was customary, thinking it might be safer.

Upon these allegations of the petition and this evidence, it is claimed by the defendant railroad that the negligence of Murphy, if it was negligence, consisted of nonfeasance and not of misfeasance, for which he was responsible, if at all, to the master alone; that the duty of furnishing a safe place to work and safe appliances with which to work was that of the master; that Murphy had no knowledge of any defect in the appliances, if they were defective, and took no part in the performance of this work other than to issue an order, in his capacity of foreman, that the work be done.

The plaintiff states his conception of the law in the following language:

"Where a servant omits to do that which he should have done his master alone is liable, but, when the servant negligently does what should have been done, both are liable. That is to say, if a servant altogether omits to perform a duty owing to his master, then for failure to perform same the servant is guilty of nonfeasance merely, but if a servant once enters on the performance of a duty to his master, and is negligent in the performance, then he is guilty of misfeasance."

He contends that Murphy, as a vice principal, ordered the plaintiff to work with an unsafe tool with knowledge that it was unsafe, and that this was an act of misfeasance, for which he is personally liable to plaintiff. The rule in this state undoubtedly is that a foreman is not liable in damages for personal injuries sustained by a servant of the master in consequence of the foreman's nonfeasance or mere neglect of duty. This is stated to be well settled in Jewell v. Bolt & Nut Co., 231 Mo. 176–206, 132 S. W. 703, 140 Am. St. Rep. 515; McGinnis v. Chicago, R. I. & P. R. R. Co., 200 Mo. 347, 98 S. W. 590, 9 L. R. A. (N. S.) 880, 118 Am. St. Rep. 661, 9 Ann. Cas. 656; Harriman et al. v. Stowe, 57 Mo. 93. And this is undoubtedly the general rule prevailing in this jurisdiction. Floyt v. Shenango Furnace Co. (C. C.) 186 Fed. 539. Perhaps the rule is best stated by Mr. Mechem in his Law of Agency, paragraphs 569 to 572:

"At common law, an agent is personally responsible to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done; the agent in the latter case being liable to his principal only. For nonfeasance, or mere neglect in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other. * * * Misfeasance may involve, also, to some extent the idea of not doing, as where the agent while engaged in the performance of his undertaking does not do something which it was his duty to do under the circumstances, does not take that precaution, does not exercise that care, which a due regard for the rights of others requires."

Where the servant acts as the master's representative, he is not responsible for injuries to his fellow servant resulting from his negligence, unless those injuries are either directly or in effect positive physical wrongs, for which he would be legally liable were he acting without, instead of with, orders. Steinhauser v. Spraul, 127 Mo. 541–560, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441. The difficulty arises in the application of the law to the facts in each special case. Here the petition alleges that the foreman knew or could have known by the exercise of ordinary care that the jack was defective and un-

safe. Furthermore, there is an indication in the testimony that the matter was reported to Murphy, and that he insisted that these jacks must be used because they had to have that engine that night. In Missouri it has been held that orders from a superior servant to an inferior may be equivalent in force, effect, and resultant injury to a physical act. Steinhauser v. Spraul, supra; Jewell v. Bolt & Nut Co., supra; Mellor v. Merchants' Mfg. Co., 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792; Bell v. Josselyn, 3 Gray (Mass.) 309, 63 Am. Dec. 741.

[7] Plaintiff urges that all doubts must be resolved in favor of the jurisdiction of the state court. While this doctrine has been not infrequently announced (Vanderbilt v. Kerr [C. C.] 188 Fed. 537), nevertheless it is not the rule in this jurisdiction (Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 C. C. A. 288). However, the question here is not what the decisions of this court might be as to liability disclosed by the facts in a trial of this case upon the merits, but whether the defendant has so conclusively established by the evidence that the claim of the plaintiff is so false, in fact, that the court is forced to the conclusion that the complaint against the employé could not have been presented in good faith. Jacobson v. Chicago, R. I. & P. Ry. Co. (C. C.) 176 Fed. 1004. The point to be determined is whether the plaintiff has acted in good faith in asserting that Murphy should legally respond in damages. If he has, then no fraud has been committed, no matter what the ultimate outcome may be. In view of the decisions of the Supreme Court of this state, as well as of the state of the law in other jurisdictions, as disclosed by the decisions of courts of last resort, I do not feel that I am justified in concluding that the plaintiff may not have asserted his claim against the foreman Murphy in good faith, even though he may have had it in mind thereby to prevent the removal of the case to this court.

If this be true, he was strictly within his legal rights, and the motion to remand must be sustained. It is so ordered.

THE GOLDEN ROD et al.

(District Court, E. D. New York. January 31, 1912.)

1. COLLISION (§ 95*)—TOWS MEETING—DISOBEDIENCE OF RULE BY TUG.

When Transfer No. 20 with a car float on either side was passing up through Hell Gate against an ebb tide, she met the tug Golden Rod, with two barges in tow on a line; the entire tow being 335 feet in length. It was in the daytime, and the vessels saw each other and exchanged signals for passing port to port when some 3,000 feet apart. The Golden Rod was outside of another tow which she was overtaking, but, instead of falling back on entering the narrow channel as required by pilot rule 7, she kept on, and attempted to cross the bow of the other tug before meeting the Transfer, with the result that her tow was swung over by the action of the tide, and came into collision with the Transfer's port car float. The collision occurred on the Long Island side of the channel. *Held*, that the Golden Rod was in fault for not obeying the rule, and that the Transfer was not in fault, having stopped as soon as it became

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

certain that the Golden Rod would not drop back, to afford her all the opportunity possible to get her tow ahead of the other before they met.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*

Collision with or between towing vessels and vessels in tow. See note to The John Englis, 100 C. C. A. 581.]

2. COLLISION (§ 1*)—RIGHT TO RELY ON OBEDIENCE TO RULES BY OTHER VESSELS.

In a situation of danger, an approaching vessel has the right to expect that other vessels will move according to the rules governing them in their relative positions, and that a vessel bound to comply with any rule will not create a new situation, in which the proximate danger guarded against by the rule may be avoided, but in which a greater danger will be created by conditions which respect for the rule would prevent.

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

In Admiralty. Suit for collision by the C. F. Harms Company, as owner of the barge Crow, against the steam tugs Golden Rod and Transfer No. 20. Decree for libelant against the Golden Rod alone.

Herbert Green, for libelant.

Alexander & Ash (Peter Alexander, of counsel), for the Golden Rod.

Charles M. Sheafe, Jr. (James T. Kilbreth, of counsel), for Transfer No. 20.

CHATFIELD, District Judge. [1] The libelant is the owner of a barge which, without fault on its part, was injured while in tow of the tug Golden Rod by collision with a float, then being towed on the port side of the tug Transfer No. 20, in Hell Gate, upon the 15th day of January, 1911. There being no fault on the part of the barge, and the Golden Rod and Transfer having both been brought in, the case develops into charges of fault by the Golden Rod against the Transfer, and counter charges by the Transfer against the Golden Rod.

A difficult question of fact arises. The tide was running ebb, at a rate of not less than four miles an hour. The accident occurred in the daytime, and in clear weather, although the sky was overcast. All of the vessels saw each other, no mistake of signals occurred, no failure to give warning by any lookout or delay in observation on the part of the boats occurred, and but two questions of fact are presented for decision. The first is the place of collision, which includes the relative positions of the boats; and, second, the movements of the boats and their exact positions from the time signals were exchanged.

Transfer No. 20 is one of the powerful tugs frequently passing up and down through Hell Gate, in the service of the New Haven Railroad. Her captain had many years of service in New York waters, and particularly upon the very trip which he was making on this day. There is no dispute that the Transfer was proceeding up the river at a fair speed around Hallett's Point, and, as she made the turn in front of what is known as Pot Cove, she observed two tows coming down toward the Gate. Both tows at the same time observed her, and the testimony of all the witnesses is to the effect that, when

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

more than 3,000 feet apart, the pilots or masters of the three boats could clearly observe everything that was going on. The Transfer had a large car float upon each side; these floats being 327 feet in length and about 40 feet in width. Each float was loaded with freight cars, and, as they straightened out after making the turn referred to, they followed what is apparently for some distance a straight course, against a true ebb tide, running parallel to the Long Island shore. The captain, lookout, deck hand, and engineer of the Transfer fix their position within 50 feet of the shore, but the captain of the Golden Rod has drawn upon the chart his idea of the course of the Transfer, at a distance of about 200 feet from the shore; and the captain of the Transfer himself has made a diagram (Exhibit A), in which he locates the Transfer's tow some 200 or more feet off shore. The width of the Transfer and its floats at the stern was more than 110 feet, as the tug was about 30 feet beam, while at the bow the floats were drawn together somewhat. The captain of the Transfer testifies that after having blown one whistle, which was answered by the tow nearest midstream, he saw that there would not be room for his boats to pass if this tow to which the signal was given came on past the other, and that he relied upon her falling back before coming to the narrow portion of the channel. Instead of so doing, she continued her course until a point was reached opposite Negro Point Bluff on Ward's Island, where the captain of this tow put his helm to port, and attempted to work to starboard around the bow of the tow in shore. It was then too late for the Transfer to fall back without going ashore herself. By this time both of the tows and the Transfer with its floats were subjected to the effect of the cross-tide setting from Negro Point Bluff toward the Long Island shore. The Transfer was holding her way against this tide, but, as the tow of the Golden Rod turned to starboard, the set of the tide, before the tow could be drawn out of the way, swung the rear barge (which was being towed stern first) at a point not less than three nor more than 15 feet from the starboard forward corner, against the port forward corner of the float upon the port side of the Transfer.

This tow of the Golden Rod (which is a boat 30 feet wide by 62 feet long) consisted of a barge, the Sarah, upon a hawser 75 feet long, and a barge, the Crow, which suffered the damage by collision. The Crow was close up to the Sarah, and was herself 30 feet wide and 95 feet long. The Sarah was about the same width and about 90 feet in length. Thus the entire length of this tow was approximately 325 feet. If proceeding in a straight line, its width would be no more than 30 feet, but, according to all the testimony, the tug was holding over to starboard, so as to counteract the effect of the ebb tide, and the barges were towed to port a distance estimated by the captain of the Golden Rod at 25 feet, and by the captain of the Crow at 50 feet. This tow of the Golden Rod had come around Lawrence Point between the Middle Ground and the Sunken Meadows, and then followed a steady course until she had passed Negro Point Bluff. She was making about six knots an hour, and her captain estimates the tide at five knots, giving a combined speed of eleven knots over the ground. The other tow which affected the situation consisted of two

boats in charge of the tug O'Brien Brothers, which came down the Sound over the Middle Ground ahead of the Golden Rod, and on a course which brought them, as testified to by the captain of the O'Brien Brothers and the captain of the Golden Rod, about 100 or 150 feet off Negro Point Bluff, and there immediately inside of the Golden Rod and her tow. The O'Brien Brothers' speed was about one knot less than that of the Golden Rod. Apparently at Sunken Meadows the Golden Rod crossed the wake of the O'Brien Brothers, which then slowed up to allow the Golden Rod to go by. The Golden Rod began to overhaul the O'Brien Brothers' tow, opposite Little Hell Gate, or the upper end of Ward's Island. A one-whistle signal was exchanged between the Transfer and the Golden Rod, which was bound from its position to answer the signal and to protect the O'Brien Brothers' tow, when the tows were off the upper end of Ward's Island, and when it is admitted by all the witnesses the Golden Rod had commenced to lap or pass the O'Brien Brothers' tow. From this point the two boats running with the tide traveled before the collision about half a mile, while the Transfer, running against the tide, traveled to the place indicated by her captain as the point of collision, some 2,000 feet.

The captain of the Transfer has put in evidence a diagram made by him in connection with his report immediately after the collision, in which he locates his float close to the Long Island shore, and the tow of the O'Brien Brothers and the tow of the Golden Rod as at all times to port of midchannel, indicating by this diagram that both the O'Brien Brothers' tow and the Golden Rod's tow had been carried over bodily—that is, shifted to port by the set of the tide—to such a degree that both boats were occupying a part of the river where they had no business to navigate. The captain of the O'Brien Brothers was called as a witness, and he corroborates the captain of the Golden Rod in fixing the position of both tows prior to the collision, as just off the Ward's Island shore, but he corroborates the captain of the Transfer in fixing its position as just off from the Long Island shore, and suddenly transfers the Golden Rod and the O'Brien Brothers to a point some 200 feet further to port, or substantially into the position located by the captain of the Transfer as the place of collision. The captain of the O'Brien Brothers, the captain of the Transfer, and to some extent the captain of the Golden Rod, all agree that the tow of the Golden Rod had not completely cleared or passed the tug O'Brien Brothers. The captain of the Transfer, corroborated to some extent by the captain of the O'Brien Brothers, places the Golden Rod barely ahead of the O'Brien Brothers' tug, but with the tows still alongside of each other. The captain of the barge which was struck did not see the O'Brien Brothers' tug at any time. Other witnesses upon the Golden Rod locate the O'Brien Brothers as almost directly astern, but this would put the O'Brien Brothers hundreds of feet from her actual position, as the Golden Rod was at this time working to starboard according to all the testimony. If this had been the position of the boats, the O'Brien Brothers would have gotten in trouble also.

It is some 3,000 feet from Little Hell Gate to the point of collision. While passing they were moving at a rate of 1,100 and 1,000 feet per minute, respectively. Hence they covered the distance in

less than three minutes, and the Golden Rod would have gained 300 feet. Her tow was 335 feet long, and the O'Brien Brothers' tow was about the same length. It is evident that a gain of 670 feet at least ws necessary to let the Golden Rod get into a course ahead of the O'Brien Brothers. These figures exactly corroborate the witnesses, who place the Golden Rod as just passing the O'Brien Brothers' tug.

The captain of the Golden Rod charges the captain of the Transfer with a rank sheer to port, and a forward movement of some 200 or 300 feet under the effect of this sheer, explaining that it occurred because of the Transfer's reaching the point where the tide set over to the Long Island shore. The captain of the Transfer charges the captain of the Golden Rod with a swing to starboard, in an attempt to pull around ahead of the O'Brien Brothers' tow and out of the way of the Transfer. This maneuver was not of itself negligent or blamable at the time, for, if it had not occurred, the captain of the Transfer says that the Golden Rod's tow would probably have gone into the car float's broadside. This broadside collision might have been less injurious than what occurred, but the execution of such a maneuver just at the time of the collision could not be held negligent.

The Transfer has not alleged fault against the O'Brien Brothers, because the whistle signal was properly given to the Golden Rod, and she accepted responsibility for the situation, and never by alarm or otherwise attempted to do more than rely upon her own efforts. If the O'Brien Brothers was in the position located by the captain of the Transfer, she would still be substantially in the middle of the channel, and would have interfered only with the Golden Rod's movements. If she occupied the position located by her captain and that of the captain of the Golden Rod, the O'Brien Brothers had nothing at all to do with the difficulties of the colliding boats.

The Transfer has alleged fault against the Golden Rod for not obeying rule 7, requiring an overtaking tow coming down through Hell Gate at ebb tide to fall back and let a tow ahead of her and to starboard pass through the Gate first. This rule was in effect when the collision occurred, but has since been changed. It was plainly a rule to provide protection for the overtaken vessel. At the same time it established a binding rule upon the overtaking vessel, so as to insure safety by observing single file and actually falling back if the boats be so located as to reach the narrow passage side by side. An evasion of the rule, if collision results with a vessel coming in the opposite direction, cannot be excused by suggesting that an approaching vessel would understand that the overtaking tow was not intending to obey the rule, but was putting the approaching vessel into danger because this could be done without risk to the tow which was being overtaken, and for whose benefit the rule was primarily intended.

[2] In a situation of danger, an approaching vessel has the right to expect that other vessels will move according to the rules governing them in their relative positions, and to expect that a vessel bound to comply with any rule will not create a new situation, in which the proximate danger guarded against by the rule may be avoided, but in which a greater danger will be created by conditions which respect for the rule would prevent.

When the one-whistle signal was given, the Golden Rod and her tow were going faster than the tide, and could easily have held back of the tow of the O'Brien Brothers, as they had the whole width of the river on the side toward which they would drift with the tide. An attempt to pass the O'Brien Brothers would have been allowable only if the O'Brien Brothers accepted a signal or direction to so yield her rights and give the Golden Rod room as to allow the Golden Rod to obtain the lead before the approaching vessel was reached. If the O'Brien Brothers was unable because of the tide, or unwilling to take any other course or speed than that which she did take and which she had a right to take, then the captain of the Golden Rod must be held to have known the danger which was likely to result, for he was familiar with these waters and familiar with the rule in question, and he cannot excuse his presence either alongside or substantially past the O'Brien Brothers' tow, unless the court find as a fact that both tows were over to the starboard side of the channel, and that the Transfer deliberately crossed the river to such an extent as to bring the boats into collision, under a miscalculation of the space which the Golden Rod's tow would occupy as it swung with the tide. If the Golden Rod were over toward the Long Island side of the channel, such miscalculation may have entered into the situation. But, if we put the Golden Rod where her captain says she was, then the Transfer must have crossed the river to port for several hundred feet, in order to be where a miscalculation could have caused the accident.

The court is satisfied that no such movement on the part of the Transfer has been proven. Plenty of water and a clear river was in front of the Transfer to the east. The testimony of witnesses for the Transfer is persuasive that, before the collision, she stopped her engines and waited, her captain testifying that in his opinion there was not room for the vessels to pass at the point in the channel where they were going to meet, and that he therefore stopped his engines and substantially stood still; the way of the Transfer being merely sufficient to overcome the effect of the tide. Under these circumstances, even if the O'Brien Brothers had forced the Golden Rod to a position where she could not avoid the Transfer, it must be held that the responsibility for getting in that position was with the Golden Rod; that an observance of rule 7 would have protected the O'Brien Brothers so far as the Golden Rod was concerned, but would also have kept the Golden Rod in a position where a reliance by the O'Brien Brothers upon her rights would not have given rise to the danger of collision between the barge and the Transfer. The collision according to the testimony must have occurred more to the port side of the channel and nearer the Long Island shore than the captain of the Golden Rod locates it.

The only remaining question to consider is the responsibility of the Transfer in proceeding up the river and into the narrowest part of the channel after she had given a one-whistle signal to an approaching tow, which she saw at the time of the signal was to port of another tow, which it was then passing. The fact that the Golden Rod was given the signal and answered the signal, and that the Transfer saw no reason to signal the O'Brien Brothers, is positive proof that the

Golden Rod was then passing the O'Brien Brothers, and was not in a position where she was expected to come down inshore of the O'Brien Brothers.

The captain of the Transfer testifies that he expected the Golden Rod's tow to drop back, and that, when he did stop his engines, he did so because he saw that she had not dropped back. Before this, he proceeded against the tide some 2,000 feet, and ultimately stopped at a point where he could not back and could not do anything to avoid being struck as the Golden Rod attempted to pull out of the way. Inasmuch as both the O'Brien Brothers and the Golden Rod were affected by the same ebb tide, it would appear that the Golden Rod could have dropped back at any time before the boats actually rounded Negro Point Bluff, and it is apparent that the Transfer by that time had reached a position from which she could not do more than she did do to avoid collision. If the O'Brien Brothers by slowing up had waived rule 7 and let the Golden Rod start to go through ahead, then the Transfer should not be blamed if the O'Brien Brothers kept too close to the Golden Rod until it was too late for the Transfer to tell which of the others would yield. Even a mistake in estimating the swing of the rear scow in the Golden Rod's tow, and a failure on the part of the Transfer to stop quick enough to avoid being carried to a point where the extreme corner of her nearest float failed to clear by from 3 to 15 feet, would not seem to be such negligence on the part of the captain of the Transfer as to justify holding her responsible for a part of the damages of the collision, in the face of the apparently plain fault on the part of the Golden Rod. Perhaps a little more caution on the part of the captain of the Transfer and greater readiness to anticipate that the Golden Rod was not intending to respect rule 7, but was negligently disregarding that rule upon the theory that the O'Brien Brothers would either give way, or that the Golden Rod could pass so quickly as to make observance of the rule unnecessary, would have allowed him to avoid the collision. But this cannot be considered negligence on his part, nor should he be thereby made responsible for an accident of which the proximate cause was plainly the miscalculation on the part of the Golden Rod, or utter disregard by her of the rights of the other parties.

The cases in which damages have been divided because one of the vessels has been approaching a situation recognized as dangerous and has failed to observe ordinary precautions, but has insisted upon the right of way or has relied on compliance with the rules by other vessels after they have passed the point where compliance could be observed, such as Duluth Steamship Co. v. Pittsburg Steamship Co., 180 Fed. 656, 103 C. C. A. 622, U. S. v. Erie R. Co., 172 Fed. 50, 96 C. C. A. 538, and The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126, cannot apply in this case. To hold the Transfer at fault for proceeding a few feet too far toward the east before she stopped her engines and waited seems to be impossible. The necessity for careful estimate on the part of the Golden Rod before attempting to pass the O'Brien Brothers, or on the part of both the Golden Rod and the O'Brien Brothers, if the latter tug was slowing up and the Golden Rod was endeavoring to go ahead, makes it necessary to hold (even

if the Transfer could see that rule 7 had been disregarded and that the Golden Rod was seeking to take the lead) that the Transfer should not be punished for not being able to estimate better than the Golden Rod what the Golden Rod was capable of accomplishing in the dangerous situation which she chose for herself, or for not being able to tell what the O'Brien Brothers would do.

It must be remembered that the O'Brien Brothers could always have given way, and, if the Transfer could be blamed, after the O'Brien Brothers had waived the requirements of rule 7, the O'Brien Brothers could be held in fault as well, and the court would have to try the issue between her and the Transfer.

The libelant may have a decree against the Golden Rod for his damages and costs, and the libel against the Transfer must be dismissed.

INTERNATIONAL TRANSIT CO. v. CITY OF SAULT STE. MARIE et al.

(District Court, W. D. Michigan, N. D. March 14, 1912.)

1. LICENSES (§ 6*)—REGULATION—AUTHORITY OF CITIES—INTERNATIONAL NAVIGATION.

A city, by virtue of its charter powers derived from the state, has no right to exact a license fee from a citizen of a foreign country for the privilege of operating ferryboats, situs of which is in such foreign country, engaged in the ferriage of passengers and property from a private wharf across an international boundary river to a landing on the opposite shore.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 5, 6; Dec. Dig. § 6.*

Ferries as carriers, see note to Wade v. Lutcher & Moore Cypress Lumber Co., 20 C. C. A. 536.]

2. TREATIES (§ 8*)—INTERNATIONAL NAVIGATION—REGULATION—FEES.

Under the treaty between the United States and Great Britain, Jan. 11, 1909, 36 Stat. 2449, art. 1, relating to the boundary waters between the United States and Canada, and providing that the navigation of navigable boundary waters shall be free and open for the purpose of commerce to the inhabitants and to the ships of both countries, equally, subject to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation, and applying equally without discrimination to the inhabitants, ships, vessels, and boats of both countries, the city of Sault Ste. Marie had no power to prescribe and fix rates of fare to be charged by the Canadian owner and operator of ferryboats across St. Mary's river between Ontario and Michigan as a municipal regulation.

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

In Equity. Suit by the International Transit Company against the City of Sault Ste. Marie and others. Decree for complainant.

The complainant is a corporation organized under the laws of the province of Ontario, Dominion of Canada, and licensed by the Dominion government to operate a ferry called "Kings Ferry" across St. Mary's river between Sault Ste. Marie, Ontario, and Sault Ste. Marie, Mich. St. Mary's river is navigable for large boats and vessels and is a part of the boundary waters between the United States and Canada. Complainant owns and operates two steam vessels of Canadian register in its business of ferrying passengers and property across St. Mary's river between the two cities. It owns and uses a pri-

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

vate wharf in the city of Sault Ste. Marie, Ontario, and leases and uses a private wharf or dock in the city of Sault Ste. Marie, Mich., and does not make use of any dock, wharf, or property of any kind belonging to the city. It maintains and has an office and warehouse upon the leased dock where all fares and tolls are paid and received; none being paid or collected upon the boats. Complainant's license from the Dominion government specifies the seasons during which the ferry shall be operated, the frequency of service to be given, and the hours at which boats shall be run, fixes a schedule of rates to be charged for the several classes of transportation, passengers, vehicles, and freight, prohibits the taking or receiving of any other or larger fares or tolls than those so imposed, and declares that by any failure to comply with its terms the right to operate the ferry shall be forfeited.

The defendant city of Sault Ste. Marie is a municipal corporation organized under the laws of the state of Michigan, and, by its charter granted by the state Legislature, has the right, power, and authority "to establish or authorize, license and regulate, ferries to and from the city or any place therein, or from one part of the city to another, and to regulate and prescribe, from time to time, the charges and prices for the transportation of persons and property thereon."

Section 191 of the legislative act constituting the city charter also provides as follows: "The council may regulate and license ferries from the city or any place or landing therein to the opposite shore, or from one part of the city to another, and may require the payment of such reasonable sum for such license as the council shall deem proper; and may impose such reasonable terms and restrictions in relation to the keeping and management of such ferries, and the time, manner and rates of carriage and transportation of persons and property as may be proper; and provide for the revocation of any such license, and for the punishment, by proper fines and penalties, of the violation of any ordinance prohibiting unlicensed ferries and regulating those established and licensed."

Pursuant to the authority thus conferred, the council of the defendant city has adopted an ordinance entitled "An ordinance to license and regulate ferries." Sections 1, 2, and 3 of such ordinance are as follows:

"Section 1. No person, persons, or company shall operate a ferryboat, or engage in the business of carrying or transporting persons or property thereon from the city of Sault Ste. Marie, Michigan, and across the St. Mary's river to the opposite shore, without first obtaining a license therefor from the mayor and by otherwise complying with the provisions of this ordinance.

"Sec. 2. The mayor of said city is hereby empowered and authorized to issue and grant a license, as herein provided, to any person, persons, or company to keep, maintain and operate a ferry or ferries, for the carrying and transporting of persons and property from the city of Sault Ste. Marie, Michigan, across the St. Mary's river to the opposite shore, on his, or their paying into the city treasury the sum of fifty ($50) dollars annually for each boat so engaged in the carrying and transportation of persons and property, and for each launch, sailboat or rowboat used and operated as a ferry from said city to the opposite shore, the sum of five ($5) dollars annually.

"Sec. 3. Before any license shall be issued or granted by the mayor as provided in section two (2) of this ordinance, the person, persons or company desiring the same, shall make application therefor to the mayor in writing, which application shall state the name or names of the boat or boats to be operated as a ferry or ferries, the place or places for receiving and landing persons and property by said ferry or ferries within said city, and which application shall also be signed by the person or persons desiring the license; and when said application is made by a company or corporation, said application shall be signed by the duly authorized officers of such company or corporation. Said application shall also contain a true and correct schedule of the rates of ferriage of persons and property proposed to be charged by the applicant within the territory prescribed by section two (2) of this ordinance. And no license shall be issued or granted hereunder unless the application therefor shall conform to the provisions of this ordinance. And any licensee, to whom a license shall have been issued under this ordinance, who shall fail or refuse to conduct his or their business of ferrying under said license in

accordance with the terms, provisions and conditions contained in the application therefor, or contrary to the provisions of this ordinance, shall be deemed to have forfeited his or their rights to operate said ferry or ferries, and shall subject the offender to the same penalties herein provided for operating a ferry or ferries contrary to this ordinance without a license therefor."

Other sections of the ordinance specify, as minutely as the Canadian license, the season, frequency, and hours of service and rates to be charged for the several classes of transportation. In all these particulars the rules specified by the ordinance are different from those prescribed by the Canadian license. The ordinance also provides that, for failure to comply with any of its terms, the right to operate the ferry shall be forfeited and the company and its employés shall be subject to criminal prosecution.

Article 1 of the treaty between the United States and Great Britain of Jan. 11, 1909, 36 Stat. 2449, relating to boundary waters between the United States and Canada, contains this provision: "The high contracting parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries."

The defendants seek to enforce the ordinance above mentioned by prosecution of the complainant's employés for failure to comply with it and complainant brings this suit to restrain such enforcement.

Boynton, McMillan, Bodman & Turner, of Detroit, Mich., for complainant.

F. T. McDonald (John W. Shine, of counsel), of Sault Ste. Marie, Mich., for defendants.

SESSIONS, District Judge (after stating the facts as above). Complainant contends that, in operating its ferry and ferryboats, it is engaged in foreign commerce, and that the enforcement of the city ordinance in question is a violation of the commerce clause of the Constitution of the United States, which places the regulation of interstate and foreign commerce within the exclusive jurisdiction and control of Congress, and is also a violation of the above-quoted article of the treaty between the United States and Great Britain. On the other hand, the defendants contend that the right to license and regulate ferries, even though they are operated upon and across boundary waters between states or between the United States and a foreign country, is one of the many powers reserved to the states and not delegated to Congress, and therefore that the enforcement of this ordinance is a lawful exercise of such power and is not an encroachment upon the constitutional powers of Congress, nor a violation of rights secured by treaty, even though foreign commerce may thereby be incidentally affected.

In support of their respective contentions, counsel upon both sides rely upon decisions of the Supreme Court of the United States. Counsel for complainant insist that the later decisions of that court, particularly in the cases of Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158, and Covington Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962, have set-

tled the present issues in its favor, while counsel for defendants are equally insistent that the later decisions have in no wise modified or overruled the earlier ones (Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23; Fanning v. Gregoire, 16 How. 524, 14 L. Ed. 1043; Conway v. Taylor, 1 Black, 603, 17 L. Ed. 191, and Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 2 Sup. Ct. 257, 27 L. Ed. 419), by which they claim the questions here involved have been foreclosed in accordance with their contentions.

The difficult and delicate problem thus presented is precisely stated but not solved in St. Clair County v. Interstate Transfer Company, 192 U. S. 454–465, 24 Sup. Ct. 300, 303 (48 L. Ed. 518), where the court, after reviewing the cases above mentioned, says:

"The position of the parties as to the cases which we have reviewed is this: The county (city) insists that the statement in Gibbons v. Ogden that the establishment of ferries was within the reserved powers of the states, and the rulings in Fanning v. Gregoire, Conway v. Taylor, and Wiggins Ferry Co. v. East St. Louis, affirmatively settle that a state may establish ferries over a navigable river, the boundary between two states, and license the same, and that doing so is not only not repugnant to the commerce clause of the Constitution of the United States, but is in consonance therewith, since the power as to ferries was reserved to the states and not delegated to the national government. The Gloucester Ferry Case, it is said, rested upon the nature of the particular tax imposed by the state of Pennsylvania, and that the case may hence not be considered as overruling the previous cases, not only because it did not expressly refer to them, but also because some expressions found in the opinion which we have cited are construed as substantially affirming the right of the state to regulate and license a ferry like the one here in question. On the other hand, the corporation urges that the rulings in Fanning v. Gregoire and Conway v. Taylor proceeded upon a misconception and partial view of the language of Chief Justice Marshall in Gibbons v. Ogden. That language, it is insisted, when the sentences are considered which immediately precede the passage quoted in Fanning v. Gregoire and Conway v. Taylor, clearly demonstrates that the Chief Justice was referring to the power of the states to license and control ferries on streams of a local character, and this, it is said, is demonstrated by the statement on the subject in the Gloucester Ferry Case. The case of Wiggins Ferry Co. v. East St. Louis, it is argued, proceeded, not upon the right of the state over the ferry, but upon its power to tax property whose situs was within its jurisdiction, and this was the view adopted by the court below. The Gloucester Ferry Case, it is urged, did not proceed upon the nature of the tax, but upon the want of power in the state of Pennsylvania to exert its control over a ferry crossing a river which was a boundary between two states, so as in effect to burden the carrying on of interstate commerce. And that case, it is further insisted, therefore qualifies, if it does not specifically overrule, the earlier cases."

The rulings in Gloucester Ferry Co. v. Pennsylvania and Covington Bridge Co. v. Kentucky, when applied to the conceded facts of the present case, settle beyond controversy that the complainant is engaged exclusively in foreign commerce, and that its ferryboats, wharfs, docks, offices, and warehouses are all instruments of foreign commerce. But defendants insist that the power to regulate ferries, even though they are engaged in and are instruments of interstate or foreign commerce, is vested and rests in the state and its municipal corporations, and that such power to regulate includes the right to license and to require the payment of a license fee and also the right to prescribe rates and tolls for the transportation thereon of persons and

property. Section 1 of the city ordinance under consideration provides that:

"No person, persons, or company shall operate a ferryboat, or engage in the business of carrying or transporting persons or property thereon" from the Michigan city across the river to the Canadian shore "without first obtaining a license therefor from the mayor and by otherwise complying with the provisions of this ordinance."

Section 2 empowers and authorizes the mayor of the city to issue and grant a license "as herein provided" upon the payment of the prescribed annual license fee. Section 3 provides that:

"Before any license shall be issued or granted by the mayor as provided in section 2 of this ordinance, the person, persons or company desiring the same, shall make application therefor to the mayor in writing * * * signed by the person or persons desiring the license. * * * Said application shall also contain a true and correct schedule of the rates of ferriage of persons and property proposed to be charged by the applicant. * * * And no license shall be issued, or granted hereunder unless the application therefor shall conform with the provisions of this ordinance."

Section 6 prescribes in detail the tolls and fares to be charged for the ferriage of persons and property. It thus appears that the payment of a license fee and an agreement to comply with the terms of the ordinance as to tolls and fares are both conditions precedent to the obtaining of a license and to the right to engage in a business which is foreign or international commerce. It necessarily follows that unless the state, through its municipal agency, has the right both to exact a license fee for the privilege of engaging in international commerce and to prescribe the rates to be charged therein, this ordinance cannot be sustained. Two questions are thus presented:

First. Has a state municipality the right and power to license a ferry operated by a foreign corporation upon and across navigable international boundary waters?

Second. As a municipal regulation, can the state municipality prescribe and fix the rates of fare to be charged by the owner for the transportation of persons and property upon such ferry?

[1] The first question has not been definitely answered in the adjudicated cases in the federal courts. The doctrine that the power to license ferries and to impose a license fee upon ferry keepers engaged in interstate commerce is a police power which can be exercised by the state and its municipal corporations "undoubtedly finds support in the opinions announced in Fanning v. Gregoire and Conway v. Taylor." In Wiggins Ferry Co. v. East St. Louis, the court expressly declared that a state has the power "to impose a license fee either directly or through one of its municipal corporations upon the keepers of ferries living in the state for boats owned by them and used in ferrying passengers and goods from a landing in the state across a navigable river to a landing in another state." The following excerpts from the opinion in that case clearly and concisely state the rule there laid down and also its limitations:

"The levying of a tax upon vessels or other water craft or the exaction of a license fee by the state within which the property subject to the exaction has its situs is not a regulation of commerce within the meaning of the Constitution of the United States. * * * The exaction of a license fee is

an ordinary exercise of the police power by municipal corporations. When, therefore, a state expressly grants to an incorporated city, as in this case, the power 'to license, tax, and regulate ferries,' the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different states, and the act by which this exaction is authorized will not be held to be a regulation of commerce."

The basic principle underlying this decision of the Supreme Court seems to be that a municipality has the power to tax property located within its limits or to exact a license fee from the owners thereof living within its limits for the privilege of using and employing such property in a quasi public service, and that the exercise of such power, when applied to persons engaged in and to instruments employed in interstate commerce, is not an invasion of the exclusive power of Congress to regulate commerce conferred upon it by the Constitution. Thus construed and limited, the Wiggins Ferry Case falls far short of sustaining defendants' contention that the city of Sault Ste. Marie, by virtue of its charter powers derived from the state, has the right to exact a license fee from a citizen of a foreign country for the privilege of operating ferryboats, whose situs is in such foreign country, in the ferriage of passengers and property from a private wharf in the defendant city across an international boundary river to a landing upon the opposite shore. By inference at least, the right to exact such license fee is negatived in the following cases, where the Wiggins Ferry Case is cited and construed: Moran v. New Orleans, 112 U. S. 69–74, 5 Sup. Ct. 38, 28 L. Ed. 653; Pickard v. Pullman Southern Car Co., 117 U. S. 34–50, 6 Sup. Ct. 635, 29 L. Ed. 785; Pullman's Car Co. v. Pennsylvania, 141 U. S. 18–23, 11 Sup. Ct. 876, 35 L. Ed. 613.

[2] The second question must be answered in the negative upon the authority of Covington Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962, in which it was held that the state of Kentucky had no power to fix or regulate tolls upon a bridge over a navigable stream between the states of Ohio and Kentucky. The positive language of the Supreme Court in that case, when applied to the facts in the present case, settles beyond controversy that the city of Sault Ste. Marie has no power to fix rates and charges for the transportation of persons and property upon an international ferry:

"If, as was intimated in that case (Gloucester Ferry Company v. Pennsylvania), interstate commerce means simply commerce between the states, it must apply to all commerce which crosses the state line, regardless of the distance from which it comes or to which it is bound, before or after crossing such state line; in other words, if it be commerce to send goods from Cincinnati, in Ohio, to Lexington, in Kentucky, it is equally such to send goods or to travel in person from Cincinnati to Covington. And while the reasons which influenced this court to hold, in the Wabash Case [118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244], that Illinois could not fix rates between Peoria and New York, may not impress the mind so strongly when applied to fixing the rates of toll upon a bridge or ferry, the principle is identically the same, and, at least in the absence of mutual or reciprocal legislation between the two states, it is impossible for either to fix a tariff of charges.

"With reference to the second question, an attempt is made to distinguish a bridge from a ferryboat, and to argue that while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture

makes no difference in the application of the rule. * * * While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river.

"In Conway v. Taylor's Executors, 1 Black, 603 [17 L. Ed. 191], a ferry franchise on the Ohio was held to be grantable under the laws of Kentucky to a citizen of that state who was a riparian owner on the Kentucky side. It was said not to be necessary to the validity of the grant that the grantee should have the right of landing on the other side or beyond the jurisdiction of the state. The opinion, however, did not pass upon the question of the right of one state to regulate the charge for ferriage, nor does it follow that because a state may authorize a ferry or bridge from its own territory to that of another state, it may regulate the charges upon such bridge or ferry. A state may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it would hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such foreign ports would not be a regulation of commerce and beyond the constitutional power of the state. * * *

"We do hold, however, that the statute of the commonwealth of Kentucky in question in this case is an attempted regulation of commerce which it is not within the power of the state to make. As was said by Mr. Justice Miller in the Wabash Case: 'It is impossible to see any distinction in its effects upon commerce of either class between a statute which regulates the charges for transportation and a statute which levies a tax for the benefit of the state upon the same transportation.'"

It is undoubtedly true that the courts of several of the states, in deliverances both before and since the decision above quoted, have held that the states possess the rights and powers claimed for them by the defendants in the case at bar. It is also true that this doctrine finds slight support in certain dicta contained in some of the earlier opinions of the Supreme Court when read and considered apart from their context and when separated from the facts to which they relate. Further comment upon these decisions of the state court and these expressions of the federal court is made unnecessary, if not improper, by the following pertinent statement in the opinion in the Covington Bridge Case:

"It is true the states have assumed the right in a number of instances, since the adoption of the Constitution, to fix the rates or tolls upon interstate ferries and bridges, and perhaps in some instances have been recognized as having the authority to do so by the courts of the several states. But we are not aware of any case in this court where such right has been recognized."

Neither the state of Michigan nor its municipal corporation, the city of Sault Ste. Marie, has any power or authority to negotiate or treat with the Dominion of Canada with relation to the regulation of commerce between the two countries or the instruments of such commerce. As was said in the case of Bowman v. Chicago & Northwestern Ry. Co., 125 U. S. 465–482, 8 Sup. Ct. 689, 697 (31 L. Ed. 700):

"Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation. The organization of our state and federal system of government is such that the people of the several states can have no relations with foreign powers in respect to commerce or any other subject, except through the government of the United States and its laws and treaties. Henderson v. Mayor of New York, 92 U. S. 259, 273 [23 L. Ed. 543]."

And again, in Crutcher v. Kentucky, 141 U. S. 47–57–58, 11 Sup. Ct. 851, 854 (35 L. Ed. 649):

"It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a state Legislature could prohibit a foreign corporation—an English or a French transportation company, for example—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation. Inman Steamship Co. v. Tinker, 94 U. S. 238 [24 L. Ed. 118]. The prerogative, the responsibility, and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce, belong to the government of the United States, and not to the government of the several states; and confidence in that regard may be reposed in the national Legislature without any anxiety or apprehension arising from the fact that the subject-matter is not within the province or jurisdiction of the state Legislatures."

In this particular instance the regulating acts of the local and subordinate municipalities of the two nations, whether authorized or unauthorized on the part of either, are conflicting and not mutual and reciprocal. The national governments have acted directly and, in the exercise of their treaty-making power, have ordained that the navigation of the waters of St. Mary's river "from main shore to main shore" shall forever continue free and open for the purpose of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject only to such local laws and regulations as are not inconsistent with such privilege of free navigation. In these respects the present case differs from those cases involving the regulation of bridges or ferries used in interstate commerce, and the intimation contained in the opinons in some of the cases that states by mutual or reciprocal legislation may possibly regulate and fix rates and tolls upon an interstate bridge or ferry has no application and need not be considered or discussed.

Complainant is entitled to the injunction prayed for in its bill of complaint, and a decree will be made accordingly. Complainant will recover its costs to be taxed against the defendant city of Sault Ste. Marie.

CONWAY et al. v. CITY OF NEW YORK et al.

(District Court, E. D. New York. February 1, 1912.)

1. SALVAGE (§ 31*)—AMOUNT OF COMPENSATION—SAVING SCOW FROM FIRE.

An award of $150 as salvage made to the owners, master, and crew of a tug for services rendered in putting out a fire in a load of rubbish on board a scow, the service requiring about an hour, and not having been attended by any particular danger to the tug or crew.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 75–77; Dec. Dig. § 31.*

Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

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

2. SALVAGE (§ 50*)—SUIT TO RECOVER—LIABILITY AS BETWEEN RESPONDENTS. Libelants brought suit in admiralty against the city of New York to recover for salvage services rendered to a scow owned by the city. Respondent appeared, and set up as a defense that the scow was at the time under hire to an improvement company which had contracted to return it in good condition, and the service, if any, was rendered to such company. Before the issuance of citation against the company, it was adjudged bankrupt, and appeared by its trustee. *Held*, on a finding that the company was ultimately liable, that inasmuch as the city had not brought it in before bankruptcy so as to enable libelants to require security, and it appearing that the city had security under its contract of hiring, libelant was entitled to a decree against both respondents.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 130–132; Dec. Dig. § 50.*]

In Admiralty. Suit by William J. Conway and Charles A. Fox, as owners of the tug Charles A. Fox, against the City of New York and the Water Front Improvement Company, brought in by respondent city. Decree for libelants against both respondents.

Foley, Martin & Nelson (Mr. Martin, of counsel), for libelants.

Archibald Watson, Corp. Counsel (Mr. Nicholson, of counsel), for City of New York.

William C. Foster, for trustee of Water Front Improvement Co.

CHATFIELD, District Judge (orally). I will reserve the question as to the liability of either the city or the Water Front Improvement Company; it being apparent that as it stands there is no security in the possession of the court.

[1] As to the question of salvage—that is, the mere amount—there are several things to be taken into consideration. There was no damage done to the boat in the putting out of the fire, which was in the load of ashes and rubbish. Aid had to be timely, and the advantage of calling on anybody for assistance was to prevent damage rather than to stop the damage that had already been caused. The danger was not great, taking into account the draught of the boat, the locality and the exact circumstances of the fire, but the rendering of the services was as efficient as could have been, even had the services been dangerous. When a tug undertakes such work, it takes the chance of the value of its services as well as of the danger, and in this instance the value of the service (inasmuch as the dredge was some distance away and the fireboat would have gotten there before the fire would seem to have spread to any great extent) as well as the danger of the situation proved to be less than they anticipated. According to the testimony, there was considerable blaze, and the position of the boats and the fact that access to the scows could only be had over a temporary plank seem to justify the action of the Italians in calling for help, and what they wanted was the help of a stream of water, so that the act of the tug was a salvage act. At the same time the services were not much more than pumping services. The time occupied in the entire transaction seems to have been less than an hour. The time that the fireboat had to use, whether she was aground or was simply getting to the scene of

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

the fire, not being great in point of time, still justifies the rendering of services by a tugboat on the spot.

As to the claims, I think that the $50 claim filed at first was evidently one for services, and was not based upon the idea of salvage. The second claim for the master and sailors would seem to have been made in full contemplation of the idea that they were entitled to compensation for what they did. The fact that the men on board of the tug did not participate in it, that the estimate of it was solely by the owner, limits him, but not the men on the tug.

I think that for such services an award of $66.67 to the owner of the tugboat and of $83.33 to the men is right. The idea of estoppel applies to the master of the tug, but under the circumstances, there being no knowledge of the claim brought home to the men, I think they are entitled to an award for what they did, and that the master's share should be cut down as I have suggested.

I will take under consideration the question of liability as against the city and the Water Front Improvement Company and the imposition of costs.

After consideration the court renders the fourth written opinion:

[2] The libel herein was filed for services performed in saving from fire a scow at Riker's Island, New York City, upon June 15, 1910, at about half past 7 in the evening. The circumstances of the transactions and the value or award have been disposed of above.

It appears that a fire occurred in a load of ashes and rubbish upon the scow. The workmen in charge called to a tug passing up the Sound. This tug put in by a short channel, and put out the fire before the fireboat could arrive. One witness testified that the fireboat had to go around by a longer channel, and seemed to be aground in the mud for a time.

As to the fixing of liability, many complications arise. The libelant is entitled to recover the allowance of $150 primarily from the owner of the barge, namely, the city of New York. Inasmuch as this barge was in use in the public service, and as the city of New York is a corporation capable of being sued, an action in rem would not lie, but under the rules of admiralty the present suit was brought in personam and no security was required.

The answer of the city was not filed until the 23d of February, 1911, and therein the city not only raises an issue upon the merits of the alleged cause of action, but also pleads in bar that a contract existed between the city of New York and the Water Front Improvement Company, by which the city of New York furnished the scow in question, with others, to the company for certain work, at the rate of $6 per day. The contractor agreed at his own cost and expense to keep the scows in good condition and repair, and to return them in good condition and repair to the city at the end of the service. Hence the city alleges that the salvage service, if rendered, was rendered to the Water Front Improvement Company, and not to the city.

A petition was filed by the city upon the same day, based upon the terms of this contract, in which citation against the Water Front Improvement Company was asked, that they might be brought in to answer the libel, and that the Water Front Improvement Company should

be condemned to pay the costs and damages of the action if any were awarded. No citation was issued thereon, nor appearance in the suit filed, but a voluntary notice of appearance by the Water Front Improvement Company in the action, praying that "right and justice in the premises should be decreed," was served upon the city of New York on the 8th day of March, 1911. Within a short time thereafter the Water Front Improvement Company was adjudicated a bankrupt, and its property is now in the hands of the trustee in bankruptcy. On November 25, 1911, the trustee in bankruptcy appeared in the action and filed an answer on behalf of himself as trustee, denying the right of the libelant to recover an award for salvage, and answering the libel upon the merits. Upon the same day the said trustee in bankruptcy interposed an answer on his own behalf to the petition filed by the city of New York, setting up as a defense to said petition an allegation that any salvage service was rendered for the benefit of the city of New York, and not for the Water Front Improvement Company. Inasmuch as the city of New York neither obtained the issuance of a citation, nor did the Water Front Improvement Company formally appear on the record prior to the bankruptcy, no occasion arose and no opportunity was afforded for the libelant to consent to the substitution of the Water Front Improvement Company as party respondent in the place of the city of New York, nor to obtain any security from the Water Front Improvement Company in the place of the res, which ordinarily would be the subject of the action.

The city of New York has now introduced in evidence the contract with the Water Front Improvement Company referred to in the answer and petition, and it would appear that any loss of services of the boat, because of the repairs to the boat itself, which were prevented by the action of the libelant at the time of this fire, would fall upon the Water Front Improvement Company under its contract. The rendering of salvage services was in a sense like the collection of insurance, if insurance had been taken out by the Water Front Improvement Company and a loss had been paid. If the boat was turned back to the city of New York in as good condition as it was turned over to the contractor, so that no claim arose under the contract, it would seem that whatever benefit was rendered by salvage was rendered to the Water Front Improvement Company, rather than to the city of New York. But this question is complicated by the possibility of damage to other property of the city and to other boats in the neighborhood, for which again a claim might have been made against the Water Front Improvement Company, and hence from the prevention of which they received benefit.

The city of New York by bringing in the Water Front Improvement Company would have made it possible for the libelant to elect to transfer his claim to the Water Front Improvement Company, relieve the city, and to seek security for his actions, which he was entitled to do in admiralty if the proceeding be in rem, but which he could not do against the city. The advantages which the libelant might have had under this situation were lost through the failure of the city of New York to compel the Water Front Improvement Company to act until the case actually was called for trial, and it now appears that the in-

tervention of bankruptcy has rendered this an unliquidated claim. Present liquidation by the decree of this court would only entitle the libelant to a dividend against the bankruptcy estate. Even if the award be made against the city, it, in turn, would have in bankruptcy merely a claim upon which it would obtain the same dividend as the claim of the libelant. But on the trial the libelant has allowed the trustee in bankruptcy finally to join in the action and to litigate the salvage claim upon the merits, and has thus apparently waived any rights which he might have had against the city for laches on its part.

Hence it is impossible to determine in this suit the rights of the three parties as they might be determined if bankruptcy had not intervened. Salvage services, however, are a claim against the property saved and the owner thereof, primarily, even if payment of this obligation can be transferred to another party when brought in as the real party in interest. This nevertheless is subject to the allowance of a claim against the original party and the substitution in the decree of the parties against whom the award shall run. In the present case the city of New York did not settle the claim when originally made because of the contract with the Water Front Improvement Company. The city of New York must by law have obtained security for itself against all loss occasioned by or representing a portion of the subject-matter of the contract entered into. This bond is available to the city, and rights under it would seem to be superior to the claim of the trustee in bankruptcy, and the salvage award, if allowed against the city, can be recovered by the city in full.

For these reasons, it would seem inequitable to allow the city to be relieved of its liability for these salvage services and to direct the libelant to pursue the Water Front Improvement Company by any process of subrogation to the city's rights. As between the city of New York and the Water Front Improvement Company, inasmuch as both the city and the Water Front Improvement Company have submitted themselves to the jurisdiction of this court to determine the obligation of the company under its contract, it must be held that the city of New York is entitled to claim under the contract set forth this salvage award as damages for the breach of contract to return the boats in as good condition as when delivered; it being evident that the salvage claim attaches to the boat, even though an action in rem be not allowed.

The execution herein should issue upon the award of salvage against the property of the Water Front Improvement Company which the city of New York has as security for the performance of the contract in question, but the libelant may have a decree for the salvage services jointly against the city of New York and the property of the Water Front Improvement Company as it existed prior to the filing of the petition in bankruptcy.

RICH et al. v. TEASLEY et al.

(Circuit Court, N. D. Georgia. March 7, 1912.)

JOINT ADVENTURES (§ 1*)—FIDUCIARY RELATIONS—VENDOR AND PURCHASER.
By accepting complainants' offer to buy mining property on which defendant had an option and to pay him 20 per cent. of any profits arising from a resale or operation of the property, defendant became bound to disclose to them the fact that the option price was actually $7,000, and not $18,000, as written in the option agreement.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 1; Dec. Dig. § 1.*]

In Equity. Bill by William Rich and others against William A. Teasley and others. Decree for complainants.

King & Spalding, for complainants.

Dorsey, Brewster, Howell & Heyman and George F. Gober, of Atlanta, Ga., for defendants.

NEWMAN, District Judge. In the spring of 1900, James R. Brown, W. A. Teasley, and William M. Davidson were the owners of a piece of property known as "Canton copper mine," in Cherokee county, Ga. It appears at one time work was done on the property mining ore, but at the period in question it was not being mined. John G. Westerman was a dealer in mining lands. Westerman appears to have been something of an expert in this line. He obtained from Brown, Teasley, and Davidson an option for 90 days on the property in question, authorizing and allowing him to purchase the same for the price of $7,000. When the option was reduced to writing, it showed $18,000 as the option price, although it is agreed by all parties Westerman was to pay Brown, Teasley, and Davidson only the sum of $7,000. The option was dated April 25, 1900, and was for 90 days.

It appears that Westerman, desiring to sell, wrote to certain parties in Nashville, Tenn., about his control of this property, and his desire to sell it. William Rich, one of the complainants here, was a resident of Nashville, and in some way heard of Westerman and of his having control or the right to sell this property. William Rich had a brother-in-law in Atlanta, Ga., Aaron Haas, and it seems Rich wrote Haas to make inquiries about the property. Haas wrote to Westerman, and there were some telegraphic communications which resulted in Haas agreeing to go up to Canton, meet Westerman, and look over the property on a certain day in July, 1900. Haas was prevented from going however, and in a few days William Rich and his brother Herman Rich of Birmingham, Ala., appeared in Canton, met Westerman, and went out to look over the property. On their return to Canton from the country, some negotiations occurred between the two Rich brothers and Westerman. Westerman first asked $30,000 for the property, which the Riches thought too much. The negotiations resulted finally in the Rich brothers expressing a willingness to pay $18,000 for the property, and to give Westerman, in addition, 20 per cent. of any amount of profit they might make from the sale of the property, or

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

20 per cent. of the profits they might make by operating or carrying on the mine. An appointment was made for Westerman to come to Atlanta the second day after the Riches visited Canton. Westerman did come, and there was a meeting of Westerman on the one hand, and Haas and the two Rich brothers on the other hand in Haas' office. At that time Westerman produced the option from Teasley, Brown, and Davidson to himself, which was as follows:

"State of Georgia, Cherokee County: Know all men by these presents that we have agreed at the expiration of ninety days from this date to make an escrow deed to lots of land Nos. 127, 128, 161, and 162, in the 14th district, 2d section, of said county. This property known as the Canton copper mine. Said lots containing six hundred and forty acres more or less, upon the following conditions, $2,500.00 to be paid to us at the expiration of the said ninety days, $1,500.00 on the expiration of twelve months from this date, and $8,000.00 at the expiration of eighteen months from this date, said deed to be deposited at the Canton Bank in said county, and to be made to the owner of this property, or to whom he may direct, said deed to be delivered to the purchaser upon the payment of the sums of money made therein and at the times specified. This paper is given to John G. Westerman who has contracted to pay the sums of money herein mentioned. April 25, 1900.

"Signed, W. A. Teasley for Himself, and J. R. Brown and W. M. Davidson by W. A. Teasley."

After considerable discussion, the result was shown by papers executed by the parties respectively as follows: Certain letters and telegrams from Aaron Haas to Westerman, the paper signed by Haas and William and Herman Rich dated July 7, 1900, with an addition signed by Westerman, as follows:

"Mr. J. G. Westerman, Canton, Ga.

"Referring to the offer we made to you under this date for the Canton copper mine, we agree to give you twenty per cent. of all profits arising from or accruing to the same. These profits are to be yours, whether they result from a sale of the property, or through its operation by us or a corporation owned by us. It is clearly understood that you are to receive nothing from the sale or the operation of the property before the cost of the land and the expense of operating the mine have been first taken out of the proceeds resulting from such sale or operation. It is also fully understood and agreed that you are to be at no expense, and are to assume no liability on account of this property or through its operation.

"[Signed] Aaron Haas. William Rich. H. Rich.

"I agree to the within proposition.

"[Signed] J. G. Westerman."

A paper signed by J. G. Westerman dated July 7, 1900, is as follows:

"Whereas, Aaron Haas, William and Herman Rich have made an offer for the purchase of lots 127, 128, 161 and 162, known as the Canton copper mine, in Cherokee county, and whereas I hold an option on said property; in consideration of the twenty per cent. interest which I am to get in said property when purchased, I hereby agree that I will not sell this property to any other purchaser without the written consent of either one of the foregoing named parties. In the event of a sale being made by me with such consent, I am to receive twenty per cent. of the profit arising from such sale.

"[Signed] J. G. Westerman."

A document addressed to J. G. Westerman and dated July 7, 1900, signed by Aaron Haas and associates, submitting a proposition for

the purchase of copper mine property, with indorsement of an acceptance of same on the back, is as follows:

"Mr. J. G. Westerman, Canton, Georgia.

"We will contract for lots 127, 128, 161, and 162 known as the Canton copper mine in Cherokee county, Georgia, upon the following conditions: As soon as we have examined and approved titles, we will pay $2,500.00 in cash. After which we are to have the privilege of opening and working the mine in such a manner as we find necessary and expedient. All minerals found and taken out by us are to be our property. We are to have permission to use all timber necessary for mining purposes. We are to pay all cost and expenses of opening and operating said mine. At the end of twelve months from the time the first payment is made, we are to pay $7,500.00 more, or surrender the property back to the owners.

"At the time this payment is made, we are to execute our note in the sum of eight thousand dollars, payable twelve months from that date. Prior to the cash payment of $2,500.00 a deed in escrow is to be executed and deposited in the Bank of Canton, to be delivered to us or to our assigns, when we have fully performed our contract as herein recited. It is also fully understood and agreed that we may at any time pay the deferred payment amounting to $15,500.00 and when so paid, the deed must and shall be delivered to us or to our assigns.

"As soon as this offer is accepted we will cause an examination of titles, and will pay the $2,500.00 as soon as our attorney approves the same. The examination of title to be completed within thirty days from the date of the acceptance of this offer.

"[Signed] Aaron Haas, for Himself and Associates."

Indorsement on back, dated July 9, 1900:

"Canton, Georgia. We, J. G. Brown and W. A. Teasley of the county of Cherokee and said state, and W. M. Davidson of the city of Savannah, the owners of the Canton copper mine in said county of Cherokee, consisting of lots of land Nos. 127, 128, 161 and 162, in the 14th district, 2d section, do accept this proposition of Aaron Haas and his associates, which is set out in the writing on the foregoing pages. We agree to do and perform all that is required of us on the conditions therein specified being performed by the said Haas and his associates.

"[Signed] W. A. Teasley, for Himself and Brown and Davidson."

Certain correspondence between Aaron Haas and Westerman before the final contract was signed by Teasley, Brown, and Davidson is in the record, but is not very material. There was a power of attorney given by the Rich brothers to Aaron Haas appointing him to act for them, dated July 24, 1900. Shortly after the last of the foregoing papers was executed and the $2,500 had been paid by Aaron Haas, representing the Rich brothers, to Teasley in Canton, Ga., the deed was deposited in escrow in the Lowry National Bank as stipulated, and the matter for the time being was closed. Westerman was employed by the Riches to proceed with the work of opening and operating the copper mines, and early in 1901 he was joined there by Herman Rich. It seems a few months after the trade was closed Herman Rich discovered that Westerman was only to pay Brown, Teasley, and Davidson $7,000 for the mining property. This discovery he communicated to his brother, William Rich, and after this they conferred with counsel, the result being that the bill commencing the litigation in this case was filed.

There was an acknowledgment of tender from Herman Rich to Brown, Teasley, and Davidson, and of demand for deed dated June 11, 1901, as follows:

"I hereby acknowledge that Herman Rich has this day tendered to me and W. A. Teasley the sum of fifty-eight hundred dollars with interest thereon from the 24th of July, 1900, and has demanded a deed for lots of land Nos. 161, 162, 127, and 128 in the 14th district and second section, which he claims to be the balance due for the purchase of said land by himself and William Rich under a contract made on said 24th of July, 1900, with the said Teasley for himself and as agent for W. M. Davidson, and myself, and I have declined to accept it on the ground that he did not tender as much as their written contract shows to be due.

"This 11th June, 1901. [Signed] James R. Brown.
"W. A. Teasley.
"W. M. Davidson,
"By W. A. Teasley, Attorney in Fact."

The bill goes upon the theory that Westerman was a representative of the Riches, and was to purchase the property for them from Brown, Teasley, and Davidson, and that he misrepresented the amount which he was to pay, stating it to be $18,000, when, in fact, it was $7,000. The prayers of the bill are that Westerman be decreed to have been the agent of complainants and to occupy a fiduciary relation toward them, and that complainants be entitled to the benefit of all profits or commissions of every character which the said Westerman may have obtained in the purchase of said property. Second. That complainants be entitled to pay to the owners of the property only such price as Westerman had agreed with them that they should receive, and that all surplus over and above said sum be decreed not to be due by complainants and that the purchase price named should be credited therewith. Third. That the exact sum to be received by Teasley, Brown, and Davidson as the price of the property be ascertained, as well as the exact sum which has been heretofore received by them on account of said price and that it be decreed that upon payment by complainants to Teasley, Brown, and Davidson of the balance of said price not heretofore paid to and received by them, the deed now deposited with the Lowry National Bank be delivered to complainants, and that complainants be entitled to have vested in them all the right, title, and interest of the said Teasley, Brown, and Davidson in and to the premises described in said deed, and that they thereupon be decreed to hold said property subject only to such rights and interests as may be decreed to be due to and enjoyed by the said Westerman under and by virtue of the agreements between complainants and Westerman, if any he now have. Fourth. That it be decreed that Westerman has undertaken to secure for himself an illegal profit in said transaction, to wit, the difference between said sum of $18,000 and the price to be actually received by the said Teasley, Brown, and Davidson, and that by reason of the same it be decreed that Westerman is not entitled to any interest whatever in the property. Fifth. That Teasley, Brown, and Davidson be restrained and enjoined pending this suit from undertaking to sell or dispose of the premises in question, and that the Lowry National Bank be enjoined and re-

strained from delivering to them or any one, the deed to the premises deposited with it in escrow.

The real question in the case for determination is whether the complainants are entitled to have the property conveyed to them upon the payment of $7,000; that is to say, that they should have the deed now in escrow in the Lowry National Bank delivered to them upon the payment of said sum.

It is urged for complainants in the first place that there was an actual misrepresentation by Westerman as to the amount he was to pay for the property. Both the Riches and Haas testify most positively that Westerman stated in reply to inquiries by the Riches that the amount he was paying Brown, Teasley, and Davidson was the amount named in the option, $18,000. Westerman denies this. It seems that this is an inquiry which it is entirely probable that the Riches would have made; that is, a careful inquiry to ascertain if Westerman was paying the full amount named in the option which he had from Brown, Teasley, and Davidson. But, in the view I have taken of this case, it is unnecessary to decide whether actual inquiry was made by the Riches of Westerman as to whether he was really paying $18,000, and whether he stated, as they claim positively, that he was, because I think the case is controlled upon a different ground.

It is conceded by all the parties, including Westerman, that he did not disclose to them the fact that the amount named in the option was not the true amount he was to pay for the property, but that the amount he was to pay was very much less. He rests his case on the fact that he was dealing with Haas and the Riches at arms length, and was selling the property at the best price he could get, and was, consequently, under no obligation to disclose to them what he was to pay for the property. Westerman and his counsel treat it as a sale of the property by Westerman to the Riches, and not as a purchase by him of the property for the Riches from Brown, Teasley, and Davidson. If the relation of seller and buyer really existed and went on all the time until the conclusion of the contract, there might be room at least for the contention that Westerman was under no duty to disclose the amount he was paying for the property. But the controlling fact in the case to my mind is that Westerman accepted the offer of the Riches to pay $18,000, and to give Westerman 20 per cent. of the profits derived from the sale of the property or from its operation. His relation thereby to the Riches in the transaction became such that it was his duty then at least to disclose to them the true amount to be paid by him for the property. Westerman's interest and his relation to the matter at once became such when this agreement was made that it was his duty to act towards the Riches just as the members of a firm are required to act toward each other, or as an agent toward his principal. He could not participate with them in the profits of the property and act in bad faith toward them as to what he was paying.

Section 4623 of the Code of Georgia 1910 is as follows:

"Misrepresentation of a material fact, made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitutes legal fraud."

Section 4627, Id., is in this language:

"Any relations shall be deemed confidential, arising from nature or created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another; or where, from similar relation of mutual confidence, the law requires the utmost good faith; such as partners, principal and agent," etc.

It seems to me perfectly clear that the moment that Westerman agreed with the Riches to receive 20 per cent. of the profits to be derived from the sale or operation of the property that such relationship arose between him and the Riches that before the payment of the cash part of the purchase price and the execution of the notes it was his duty to have disclosed to the Riches the actual amount that he was to pay for the property, otherwise the contract for the $18,000 would not be enforcible on Westerman's part.

Brown, Teasley, and Davidson are making no effort to enforce the contract for this amount, nor do they claim any interest in anything over $7,000, and this amount has been paid them by money deposited in the registry of the court. It appears that Westerman, being in need of money, was allowed by Brown, Teasley, and Davidson to have $1,300 of the $2,500 in cash paid on July 24, 1900. Since this litigation commenced $7,500 has been deposited in the registry of the court by the Riches. Of this, Brown, Teasley, and Davidson were first paid $4,500 by consent, and subsequently the $1,300 which they had allowed Westerman out of the first $2,500, so that they are now paid in full, and are nominal parties to the suit. Complainants are entitled to a decree in accordance with what has been stated. Counsel will be heard as to whether Westerman is entitled to a conditional decree for 20 per cent. out of any profits realized from the sale or operation of the property.

Application is made by the defendant for leave to file a cross-bill asking for money judgment against the Riches for the amount unpaid, and for an additional decree for the 20 per cent. under the terms of the contract Westerman was to receive from the profits derived from the property. It is objected that it comes too late, and ought not to be now allowed. In order to put the record in shape, so that, if the defendant has rights and the court here should be in error, the same may be properly corrected, I shall allow the filing of the cross-bill.

UNITED STATES v. HIGGINS et al.

(District Court, W. D. Kentucky. March 15, 1912.)

POST OFFICE (§ 33*)—"NONMAILABLE MATTER"—NEWSPAPER WITHOUT WRAPPER.

A newspaper without a wrapper, the address being written on the paper itself, though containing scurrilous and defamatory matter, marked with blue pencil and so folded as to expose the same to view, is not "nonmailable matter," within Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1909, p. 1454]) § 212, which provides that all matter otherwise mailable, on the "envelope or outside cover or wrap-

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

per" of which language of a libelous or scurrilous character may be written, is nonmailable, and which prohibits the sending thereof through the mails.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 53; Dec. Dig. § 33.*

Nonmailable matter, see notes to Timmons v. United States, 30 C. C. A. 79; McCarthy v. United States, 110 C. C. A. 548.]

Criminal prosecution by the United States against William M. Higgins and J. J. Barry. Motion for a directed verdict for defendants granted.

George Du Relle, U. S. Dist. Atty.
W. M. Smith, for defendants.

EVANS, District Judge. The testimony having all been heard, the defendants have moved the court to charge the jury to return a verdict of not guilty. The question thus raised is interesting and important, and, as we shall see, has two sides to it. The indictment charges that the defendants—

"unlawfully did knowingly deposit and cause to be deposited in the post office of the United States at Louisville, Kentucky, for mailing and delivery, a certain copy of a newspaper publication then and there entitled 'Kentucky Irish-American,' bearing the date of Saturday, April 15, 1911, which said newspaper was then and there matter mailable by law otherwise than as hereinafter charged, upon the outside cover of which said newspaper was then and there printed and apparent language of a scurrilous and defamatory character, and calculated by its terms and manner of display and obviously intended to reflect injuriously upon the character and conduct of one D. E. O'Sullivan, which said copy of said newspaper was then and there addressed to Walter E. Huffaker, Paul Jones Building, and said language on the outside cover of said newspaper was then and there in part of the tenor following, to wit:

"'SHAME

"'Will Come upon the Irish-Americans if They Back O'Sullivan's Opinion.

"'Wanton Attack upon Useful Citizens Made by Former Editor. Master of Blackguardism Dares to Assail Men of Better Reputation.

"'Story of Base Ingratitude.

"'Daniel E. O'Sullivan, the erstwhile editor of the Critic and of the later O'Sullivan's Opinion, went out of his way last week to attack the Whalens. It was not a physical attack. It was one of those long-distance ambush affairs, via the columns of a newspaper. Mr. O'Sullivan is noted for dipping his pen into vitriol when he writes and he has been writing for more than twenty years. He has some gifts. He has mentality. He has read some books. He has circulated in society in Louisville and elsewhere in the state and country. He came of honest parents. They gave Daniel every possible educational advantage. Yet he has been tried and found wanting in every stage of his life. He has no sense of gratitude. The ingrate is worse than the man who kills in the heat of passion.

"'Just as charity is the greatest of all virtues, so is ingratitude the worst of vices. Give a dog a bone and he will be your friend. Not so with Dan.'"

The charge thus made is based upon section 212 of the Criminal Code of the United States (35 Stat. 1129), which is in this language:

"All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which, any delineations,

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

epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, may be written or printed or otherwise impressed or apparent, are hereby declared nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster General shall prescribe. Whoever shall knowingly deposit or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, or shall knowingly take the same or cause the same to be taken from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

The matter was, upon its face, undoubtedly scurrilous and defamatory. The uncontradicted testimony leaves no room for dispute, first, that it was calculated by its manner and style of display, and indeed was obviously intended to reflect injuriously upon the character and conduct of O'Sullivan; second, that it was printed with large headlines on the first or front page of the newspaper publication entitled "Kentucky Irish-American"; third, that on each side at the top of the headlines cross-marks in blue pencil were placed; fourth, that copies of the newspaper were, perhaps inevitably, so folded as to bring the matter set forth in the indictment to the outside; fifth, that on the margin of the newspaper itself, as thus folded, and on that part of each copy of it which contained the matter referred to, the respective names and addresses were written of the persons to whom copies of the paper were to be sent; sixth, that in this shape and without any envelope, wrapper, or other separate covering of any sort the newspapers were sent in bulk to the post office in this city, and were there by the defendants caused to be deposited in the post office for mailing and delivery to the several persons to whom they were respectively addressed; and, eighth, that in the form indicated and with the matter referred to so marked and placed in plain view on the outside of the newspaper, the papers were handled by the employés of the post office, and in that condition were by them delivered to the various persons to whom copies were respectively addressed.

Under this state of fact the only question to be determined is, Was the newspaper so folded and with the objectionable matter so marked and exposed "nonmailable matter" within the statutory provision we have copied? The solution of the question depends upon the proper interpretation of those words of the section which read, "matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which" the objectionable matter may be found. May the newspaper itself be properly regarded as the "envelope, outside cover or wrapper," within the meaning of those words of the statute? In this case the testimony is uncontradicted that neither an "envelope" nor a "wrapper" was used. Could the newspaper itself, which was otherwise mailable, be its own "outside cover" within the meaning of the statute which uses that phrase in close collocation with the words "envelope" and "wrapper," both of which can only refer to separate coverings for the matter mailed? Neither the attorneys nor the court

have been able to find more than two cases in which the question has been adjudicated. Both are directly in point. One of them was United States v. Gee (D. C.) 45 Fed. 194, in which Judge Severens, then a District Judge, held:

"That this section of the statute applies only to matter exhibited upon an inclosing wrapper or cover, and not to matter which is contained in the body of the thing mailed; that, the statute being one constituting a criminal offense, it cannot be extended by construction to cases where there is no wrapper or cover at all, even though such cases may be within the reason and policy of the enactment."

The other case was United States v. Burnell (D. C.) 75 Fed. 824, in which Judge Woolson, in an opinion of some elaboration, held directly to the contrary, and distinctly expressed his dissent from the conclusion reached by Judge Severens in the Gee Case. After discussing the meaning of the word "cover," Judge Woolson said:

"Congress has enacted this statute. It in no wise affords a person assailed through a paper or pamphlet redress for injuries or damages thereby suffered. The determination of such questions is properly left with the state or other courts, under other and different proceedings. But at the date of the enactment of the present statute there existed an evil against which this statute was expressly aimed. The mails of the country were used for the carriage of scurrilous and defamatory, etc., matter, which was so mailed as to be exposed to the eyes of the employés in the Post Office Department. This was the mischief to remedy which Congress legislated. It has not declared that such matter shall not be carried in the mails. Whether such a widespread or flagrant abuse of the mails may be at any time occasioned by mailing of such publications, and when, as that the mails shall be entirely closed to them, is for Congress to determine. As this statute now stands, defendant is not liable thereunder, except when, by his method of sending his paper through the mails, he shall so expose the objectionable matter on the 'envelope, outside cover or wrapper.' The abuse of the mails which brought this statute into existence is clearly apparent. The mischief sought thereby to be remedied exists in the Interstate Tracer in evidence, as mailed by defendant."

It may be that the object Congress had in view was, at least in part, what Judge Woolson imputes to it. At the same time it may be that Congress had other objects in view at that time, and certainly it may have had other objects in view when, long afterwards, it enacted section 212. But, however this may be, the meaning of the language of the statute we have quoted is the thing to be ascertained, and the ambiguousness of the words used makes a resort to interpretation inevitable. It will be seen that when Judge Severens was endeavoring to ascertain the meaning and intention of the statute (the one he was construing, so far as the question before us is concerned, being similar to section 212) he thought the intention of Congress would be clear if the word "inclosing" were supplied, thus showing the meaning of the language to be the same as it would have been had Congress said "envelope, outside *inclosing* cover or wrapper," etc.

When Judge Woolson in the Burnell Case had before him the same statute, he seems to have concluded (though he does not in terms say so) that the best way to get at the intention of Congress and to meet the evils it had in view was practically to eliminate the word "cover," and thus in effect have the clause read on the "envelope, outside, or

wrapper," of the matter mailed. Whether the theoretic insertion of one word or the theoretic elimination of another, for the purpose of aiding construction, would better disclose the real meaning of the statute may, and indeed does, admit of doubt, when we compare the views of the two judges referred to, one of whom was later a distinguished Circuit Judge for many years. While not myself coming to a definite or final conclusion upon the question, in view of the association of the words "envelope, outside cover or wrapper," I have greatly inclined, upon consideration of the maxim ejusdem generis, to agree with Judge Severens. Should we not hold that Congress was dealing exclusively with the outside thing which contained the matter to be mailed, whether that containing thing was called an "envelope," a "wrapper," or an "outside cover"? Coupling, as the statute does, the word "cover" with the word "outside," and collocating both with the words "envelope" and "wrapper" (the meaning and use of which are well known), seems to be very suggestive, if not persuasive, that Judge Severens was right. Was not Congress dealing with the subject of placing the objectionable matter on any sort of separate covering for the thing sent, rather than the exposure of the objectionable words otherwise? Judge Severens took the first view indicated by this question. Judge Woolson took the other.

Although the conflict of judicial opinion manifested in the Gee and Burnell Cases had arisen long before the enactment of the Criminal Code, Congress left the provision as it is found in section 212. In this situation I have turned for guidance to the rule announced by the Supreme Court in United States v. Brewer, 139 U. S. page 288, 11 Sup. Ct. 541, 35 L. Ed. 190, where it was said:

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. United States v. Sharp, Pet. C. C. 118 [Fed. Cas. No. 16,264]. Before a man can be punished, his case must be plainly and unmistakably within the statute."

The rule thus expressed should, we think, be our guide in such cases. See Prettyman v. United States, 180 Fed. 34, 103 C. C. A. 384, and United States v. McClarty (D. C.) 191 Fed. 518, 522.

For the reason thus indicated, and because the case does not plainly and unmistakably come within section 212, supra, I shall sustain the motion of the defendants, and direct the jury to find the defendants not guilty.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(District Court, S. D. New York. January 29, 1912.)

1. STREET RAILROADS (§ 49*)—LEASES—CONSTRUCTION—LIABILITY OF SUBLESSEE FOR TAXES.

A sublease of a street railroad, held by the lessor under a lease from the owner for a term which does not expire until after that of the sublease, cannot be construed as an assignment of the original lease so as to bind the sublessee by a covenant therein for the payment of taxes on the franchise of the owner; nor does a covenant by the sublessee to

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

pay the taxes on the demised property and extensions and additions thereto cover such franchise taxes.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

2. STREET RAILROADS (§ 49*)—LEASE—COVENANT BY LESSEE TO PAY TAXES.

Under a covenant in a lease of street railroad property binding the lessee to pay franchise taxes assessed against the lessor, but permitting it to contest their validity in the courts, the estate of the lessee in insolvency is liable to the lessor for the amount of such taxes which became due and payable under the law prior to the appointment of receiver but had not been paid, although they were then in litigation and their validity had not been determined.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

3. CORPORATIONS (§ 180*)—DEBTS DUE CORPORATION—POWER OF STOCKHOLDER TO RELEASE.

A stockholder of a corporation, although the owner of a large majority of the stock, cannot waive or release a claim existing in favor of the corporation where it has creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 665–673; Dec. Dig. § 180.*]

In Equity. Suit by the Pennsylvania Steel Company and another against the New York City Railway Company and the Metropolitan Street Railway Company, and three other cases. On exceptions to report of Special Master in the matter of the claim of Central Crosstown Railroad Company. Exceptions overruled, and report confirmed.

The following is the opinion of William L. Turner, Special Master:

Those claims were filed in pursuance of orders permitting such filing against the estates both of the Metropolitan and City Companies nunc pro tunc under the orders made in the beginning of the receiverships of the two companies, directing the filing with me of claims against those companies, meaning claims existing against each company as and of the date that receivers of each were appointed, which was September 24, 1907, for the City Company, and October 1, 1907, for the Metropolitan Company. These latter orders do not authorize the adjustment of controversies suggested either by agreements made with the receivers, or by their acts during the receiverships in the management of the property in their custody, but only of those claims which existed at the dates of their appointment. As the claims here urged for the rents, interest, and speculative damages for breach of covenants in the leases executed by the respective companies as lessees were not in existence on said dates, but have accrued since, they are not, I think, provable under said orders for reasons more fully stated in memoranda accompanying the reports on the claims of the Hemphill Committee and the National Conduit and Metropolitan Express Companies lately presented to the court for disposition.

The claims against the estate of Metropolitan Company for the allowance of payments of franchise taxes accruing on and prior to October 1, 1907, assumed by the covenant in the Central Crosstown lease to it, which are, I think, covered by the reservation in the correspondence which subsequently passed between the claimant and the receivers, stand upon a different basis. The obligation of the Metropolitan Company to make the payments arose under that lease and was in existence at the time receivers of its property were appointed, and, while by its covenant the lessee was not as between itself and its lessor required to pay a tax as long as it should in good faith contest its legality and validity unless the payment were necessary to protect the demised property from forfeiture, the obligation had nevertheless accrued at that time and was then debitum in presenti, solvendum in futuro, notwithstanding that the lessee was then in good faith litigating the assess-

ments on which they were based. Nor do I think the facts that the Metropolitan Securities Company owns 5,028 out of 6,000 shares of the stock of the Crosstown Company, and that the former company has agreed with the Interborough Company not to participate directly or indirectly in any moneys in the possession of the Metropolitan receivers, prevent the Crosstown Company from asserting its claim to the allowance of all these taxes. It was not a party to this agreement, has its own creditors whose rights in any event could not be affected by agreements between others to which they had not assented, and is not bound by acts or agreements of its stockholders with third parties. As finally adjusted against both the Crosstown and the Christopher & Tenth Street Companies, the franchise tax with interest to October 1, 1907, should be allowed for the years 1904, 1905, and 1906 as payable against the Metropolitan estate; the year 1907 not being allowed, as under the charter the payment accrued on October 7, 1907, after the date of the appointment of its receivers.

Against the estate of the City Company I do not think the claim for franchise taxes provable, as it was clearly not an assignee of the lease from the Crosstown Company to the Metropolitan and liable as such, and as the language of its covenants either of assumption or of payment of taxes in the Metropolitan lease to it does not in terms broad enough for that purpose include such payments. The covenant of assumption in paragraph 3 of the City lease is of payment of charges arising under leases or contracts to which the lessor is a party (i. e., in February, 1902), and the Metropolitan was not then a party to the Crosstown lease, for it had not then been entered into. So, too, the covenant for the payment of taxes contained in paragraph 2 cannot be invoked because it refers to taxes imposed only on the property thereby demised and extensions and additions thereto, and not to railroad franchises then in existence and subsequently leased. The words "extensions" and "additions," as used in the statutes and contracts relating to railway lines and franchises, have a more or less definitely fixed meaning, which is hardly broad enough to govern an acquisition by lease of existing systems of railway.

Counsel for receivers may submit a proposed report in accordance herewith on or before June 23, 1911, and the claimant will file with me, within three days after service upon it of a copy of my proposed draft report, its objections thereto and proposed amendments thereof.

This cause comes here upon exceptions to reports of the special master, filed July 5, 1911, disallowing certain claims against the estate of the Metropolitan Street Railway Company and the estate of the New York City Railway Company. The exceptions to both reports were argued together. The reports were accompanied with an opinion of the special master to which reference should be made. The cause has been argued upon the exceptions by

Richard Reid Rogers and J. Tufton Mason, for Crosstown Co.

Arthur H. Masten, William M. Chadbourne, and Ellis W. Leavenworth, for Metropolitan receivers.

Matthew C. Fleming, for City receiver.

LACOMBE, Circuit Judge. The first proposition contended for, viz., that the Crosstown Company is entitled to prove a claim against the Metropolitan Company for damages resulting from a breach of the lease occurring six months after the appointment of receivers, has been already disposed of in decisions touching other claims. Claim of Met. Ex. Co. (C. C.) 188 Fed. 339; Claim of Nat. Conduit Co. (C. C.) 188 Fed. 343; Claim of Second Ave. Bondholders (C. C.) 189 Fed. 661. It is conceded on the brief that if these decisions stand

the present claim cannot be distinguished from them. The special master's disposition of it is therefore sustained; it will come up for review with the other appeals already pending.

[1] So far as concerns the City Company, it seems entirely clear that it is not an assignee of the lease from Crosstown to Metropolitan, but only a sublessee. The lease from Metropolitan to City was by its terms limited to expire about two years before the expiration of the lease from Crosstown to Metropolitan. How assignment can be worked out in the face of that incontrovertible fact it is difficult to understand. I concur with the special master in his construction of the covenants of assumption in the City Company's lease.

[2, 3] The Metropolitan receivers except to so much of the report as sustains the claim against the estate of that road for special franchise taxes of the years 1904, 1905, and 1906. The special master's reasoning and conclusions on this branch of the case are concurred in.

The exceptions are overruled, and report confirmed.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al. (four cases).

In re NEW YORK RYS. CO.

(District Court, S. D. New York. February 3, 1912.)

STREET RAILROADS (§ 54*)—SALE UNDER FORECLOSURE—LIABILITY FOR TORT CLAIMS AGAINST RECEIVERS.

An application by the purchaser of street railroad property at foreclosure sale for an order requiring the receivers to set aside a sum from the cash fund in their hands arising from their operation of the property to be applied in payment of tort claims against them growing out of negligence in such operation denied in view of the provisions of the decree under which the sale was made.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 133; Dec. Dig. § 54.*]

In Equity. Suit by the Pennsylvania Steel Company and another against the New York City Railway Company and the Metropolitan Street Railway Company and three other suits. In the matter of application of the New York Railways Company for an order on Receivers of the Metropolitan Company. Motion denied.

See, also, 177 Fed. 925, 101 C. C. A. 205.

This is an application by the New York Railways Company, the new company to which the purchasing committee has turned over the property sold under foreclosure of the two mortgages of the Metropolitan Street Railway Company. Petitioner asks that receivers of the last-named company set aside from the cash funds in their hands a sum equal to $500,000, which may be immediately available for settling and discharging tort claims and suits against the receivers concerning their operation of said company. Such operation ceased on December 31, 1911.

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

Richard Reid Rogers, for petitioner.
Arthur H. Masten, for Metropolitan Receivers.
Matthew C. Fleming, for N. Y. City Ry. Co. Receivers.
George N. Hamlin, for Contract Creditors Committee.
Benjamin S. Catchings, for Tort Creditors Committee.
Brainard Tolles, for First Mortgage Bondholders.

LACOMBE, Circuit Judge. The petition avers that receivers have from time to time during their receivership segregated and set aside the sum of $1,382,653.58 especially to meet their tort claims. The fact is that no such sum has been actually set aside. The amount is a mere bookkeeping entry of what it has been estimated such claims will ultimately aggregate. The receivers, however, had in their possession on December 31st, when they turned over the railway property, about $1,800,000 proceeds remaining from their operation of the same. The obligations incurred by receivers for damages and personal injuries inflicted on other persons as a consequence of their operation of the road are undoubtedly an operating expense, and there is a strong equity in petitioner's request that such damages be paid by them if possible out of the money earned by them from such operation. But a serious objection to making the order asked for is found in the language of the decree in foreclosure under which this property was sold to petitioner's assignor. That decree provided as a condition of sale that the purchaser should pay at least $10,000,000 in cash for the property covered by the first mortgage and $2,000,000 in cash for property covered only by the second mortgage—a total cash bid of $12,000,000. It provided as a further condition of sale that:

> The "purchaser shall, as a part of the consideration for such sale *and in addition to the price bid, * * * assume liability for all claims in tort,* whether in suit or presented or not, arising during the period of operation of said railway system by receivers appointed by this court, *which shall not have been paid* and discharged *by said receivers at the time of the sale.*"

The petitioner contends that, because it is equitable that receivers should discharge their own liabilities out of their own receipts, if the receipts are sufficient, this clause must be construed merely as a guaranty that the purchaser will assume and pay them, should it eventually be found that receivers are unable to do so. Other parties contend that the language of the decree expresses no such idea, merely of further assurance, and that such decree means precisely what it says, viz., that touching all tort claims which receivers had not discharged at the time of the sale the purchaser assumed the burden of paying them as a part of the consideration which he agreed to pay in addition to the $12,000,000. In other words, if it should eventually turn out that the total claims of this sort aggregate $1,300,000, the purchaser is to pay at least $13,300,000 for the property—$12,000,000 in cash and the balance from time to time in the future as the same comes due and is liquidated.

Of course, it was within the power of the court to fix such conditions of sale as it thought best, and there is nothing inexplicable or surprising in requiring the purchaser to pay these particular obliga-

tions incurred during the operation of the road under direction of the court. It is manifest that they cannot be liquidated for years to come, certainly not for more than three years (the period fixed in the statute of limitations). It may have seemed to the court an unwise thing to continue the receivers in office for some indefinite period without any opportunity to pass their accounts and obtain their discharge, when as to all their other transactions and obligations their accounting might be closed within a year.

Moreover, it must be borne in mind that this decree has been approved by the Circuit Court of Appeals; and approved by that court after its attention was called to this very provision. In the brief filed by the Guaranty Trust Company on that appeal, at page 122 et seq., it was contended that the decree was erroneous because it undertook to charge the proceeds of sale of the mortgaged property with the payment of the liabilities incurred by torts or negligence in the operation of the railways by receivers. Such liabilities it was argued should be paid out of the assets of the receivership in which they were incurred. Nevertheless the Court of Appeals rewrote several of the clauses of the decree incorporating in what it thus rewrote the very language now under consideration. 177 Fed. 925, 101 C. C. A. 205. Under these circumstances a lower court acting under a mandate should be extremely cautious not to give instructions which may seem to be not entirely consistent with the text of the mandate.

Counsel for the trustee under the first mortgage has asked that the question raised as to what construction should be given to the language above quoted be not decided at this stage of the proceedings. He represents, of course, nonassenting as well as assenting bondholders. Concededly the interest of nonassenting bondholders will be pecuniarily affected by a construction which holds that the amount of the bid is less by more than $1,000,000 than the language of the decree seems to indicate that it should be. Counsel suggests that probably in the course of time all nonassenting will become assenting bondholders, and therefore will be no longer interested in having the bid so construed.

It may be well, therefore, to look into some other matters which have been presented, and which suggest practical difficulties in the way of granting the relief asked for. The total amount of the particular fund out of which it is asked that receivers pay these claims is about $1,800,000. There are, however, other claims which have been filed against receivers, because of their actions as such receivers, and which certainly are as much "operating expenses" as are the damages resulting from negligence in such operation. The receiver of the New York City Railroad Company claims that cash and property which belonged to his company was taken possession of and used up by the Metropolitan receivers. This claim aggregates $1,500,000 or more. Two companies, the Second Avenue Railroad and the Central Park Northern & Eastern Railroad have claims for use and occupation of their property by receivers and for personal property of their own which it is alleged receivers converted without right and used in operation of system. These aggregate several hundred thousand dollars. A similar claim of the Third Avenue Railroad has been adjusted

at $200,000, which sum will shortly be paid from the surplus in the receivers' hands. If all these be liquidated at anything near the amount claimed, and are grouped as they should be with the tort claims as "operating expenses" of receivers and payment be undertaken out of the apparent surplus as it stood on December 31, 1911, it is manifest that the fund would be inadequate to pay them all in full. At what amounts these other claims will finally be liquidated, no one can tell until the Court of Appeals shall pass upon the contentions raised in the several proceedings.

It is suggested that there are funds coming from other sources from the $12,000,000 cash bid, possibly from claims made on behalf of the Metropolitan against cash now in the hands of the New York receiver, which eventually will prove sufficient to pay all obligations of every sort. But that condition would not eliminate the question which we find at the threshold of the present application, viz.:

"What did the Court of Appeals mean by its direction that the purchaser at foreclosure sale should assume liability for all claims in tort as *a part of the consideration in addition to the price bid*?"

Some time that question will have to be decided. The sooner it can be presented to the Court of Appeals upon review of a decision of it by this court, the sooner it will be definitely settled. Nevertheless, in view of the suggestion on behalf of the trustee for bondholders, I shall not now pass upon it, unless at the settlement of the order there may be evidenced some general consensus of opinion that such decision be made.

Upon the whole situation as it is now presented, I conclude that receivers should not be now instructed to pay these tort claims, as they are liquidated, out of the cash surplus remaining in their hands on December 31, 1911.

THE JAMES A. WALSH.

THE WALTER B. POLLOCK.

(District Court, S. D. New York. January 10, 1912.)

1. COLLISION (§ 95*)—STEAM VESSELS CROSSING—NEGLIGENT NAVIGATION.
   A steam lighter, crossing East river from Brooklyn in the daytime, *held* solely in fault for a collision with a barge in tow alongside a tug, also crossing, but on a different and crossing course, which made her the privileged vessel.
   [Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*
   Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

2. COLLISION (§ 6*)—STEAM VESSELS CROSSING—RIVER AND HARBOR RULES.
   A pilot rule providing that, whenever danger signals are given, both vessels shall be stopped and backed. is invalid, as in violation of articles 19 and 21 of the inland navigation rules of June 7, 1897 (30 Stat. 101, c. 4 [U. S. Comp. St. 1901, p. 2883]), which require the privileged of two crossing steam vessels to keep her course and speed, and should not be followed, unless under special circumstances.
   [Ed. Note.—For other cases, see Collision, Dec. Dig. § 6.*]

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

In Admiralty. Suit for collision by Nathaniel S. Knapp, owner of the canal boat Knapp, against the steam lighter James A. Walsh and the tug Walter B. Pollock. Decree for libelant against the Knapp alone.

On August 13, 1909, the tug Walter B. Pollock, with libelant's canal boat Knapp in tow alongside, on the port side, left Pier 16, Brooklyn, bound for Pier 5, East River, New York City. About the same time the steam lighter James A. Walsh left Pier 22, Brooklyn, further down the river, bound for the Maine Steamship Company's pier, No. 20, East River, New York. The two vessels came in collision about the middle of the river, the Walsh striking the port side of libelant's boat.

Robinson, Biddle & Benedict, for libelant.
Armstrong & Brown, for lighter Walsh.
Foley & Martin, for tug Pollock.

HOLT, District Judge (orally). [1] So far as the liability of the Walsh is concerned, this, in my opinion, is a clear case. The story given by her captain, as I understand him, seems to me almost incredible. He says that when he backed out from Pier 22 he saw the Pollock headed down the Brooklyn shore. Then he came on, and did not see her again until she loomed up right in front of him and he ran into her. The evidence is clear that the Pollock, with the barge in tow, backed out from Pier 16 in clear daylight, and the captain must have seen that she was backing and turning, and that there was only one moment in her turning when she was headed down the Brooklyn shore. If he had been paying attention, he would have seen that the Pollock kept coming around until she got on her course coming across the river to New York. He also says he gave the Pollock a two-whistle signal. Why did he do that, if, as he says, he first saw the Pollock going down the Brooklyn shore, and the next time he saw her she loomed up before him?

The fact is, when the two tugs got on their courses they were on crossing courses, and the Walsh was the burdened vessel, and bound to keep out of the way of the Pollock. If she did not see the Pollock until she ran into the barge, she was not keeping proper lookout. If the mast had anything to do with preventing the man at the wheel from seeing the Pollock, he should have had another man on lookout. But I think the mast would not prevent him from seeing the Pollock, if he was attending to his business. This is a case where the burdened vessel was bound to leave the road clear for the privileged vessel and keep out of the way. After the collision the Walsh went off and did not stand by, although asked to do so. In every point of view, it seems to me the Walsh is in fault.

[2] So far as the Pollock is concerned, the ground upon which I am asked to hold her in fault is that, after having given danger signals, she did not back. The pilot rule says:

"Whenever the danger signal is given, the engines of both steamers should be stopped and backed until the headway of the steamers has been fully checked."

But the statute does not say so. The statute (article 19, Inland Navigation Rules) says:

"When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other. Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed."

That is the general rule. But there is this prudential rule:

"In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

The only circumstances under the statute which justify a violation of the rule that the privileged vessel shall keep her course and speed are when there are special circumstances which render departure from the rule necessary in order to avoid immediate danger. The pilot commissioners, in making this rule, probably had in view the case of two vessels meeting on crossing courses at an angle greater than a right angle. In that situation, if both back, they naturally get away from each other. But if they are on crossing courses, at an angle less than a right angle, by backing they may get into greater danger. I think this rule is invalid, and one which sometimes, if acted on, violates the statute.

Here we have a collision taking place in which the burdened vessel strikes the barge near her stern. Suppose, when the Pollock gave her danger signals, she had backed, she would have come into a position of greater danger, in my opinion. Therefore I do not think this rule has any application here. I think the pilot did just what he should have done. The special circumstances were not such as to justify anything different. I do not think the Pollock is guilty of fault in this case. Probably the captain has been in error in some of his evidence, and I think his report is probably correct. I think he gave one whistle, held his course, and that the other vessel, like many of the vessels around the harbor, wanted to go ahead, and make the privileged vessel yield her rights, and he jammed ahead, and ran into the other vessel.

I think the Walsh is wholly in fault, and I direct a judgment to that effect.

In re MICHAELS.

(District Court, E. D. New York. March 5, 1912.)

BANKRUPTCY (§ 241*)—ADMINISTRATION OF ESTATE—FALSE TESTIMONY—CONTEMPT.

Evidence in a bankruptcy proceeding examined, and *held*, that a witness was guilty of contempt for giving false testimony on an issue as to whether a sale of a stock of goods was collusive.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 398, 402–404, 408, 409; Dec. Dig. § 241.*]

In the matter of Burt H. Michaels, bankrupt. On motion to punish Israel Diness for contempt, he is cited before the court for punishment.

Lesser Bros., for trustee.
Meyer Greenberg, for bankrupt.

CHATFIELD, District Judge. The testimony shows that one William Hermann, a notary public, and one Israel Diness, a speculator in merchandise, were called as witnesses in an attempt to show that a sale to one Rothman of the stock of goods in the hands of the bankrupt, a few days before the filing of the petition, was collusive, and that both Diness and Hermann were parties, or acted with knowledge of the collusion, in helping to carry out the sale by the bankrupt, which was presumptively fraudulent, and which by the testimony appears to have actually occurred in such a way as to strengthen this presumption of fraud. The purchaser at this sale has not been and cannot be located. The notary public, Hermann, and Mr. Diness showed apparent unwillingness to recall events, while professing a desire to assist the creditors, although Diness testified freely to the effect that he knew nothing wrong or questionable in the transaction, and also protested with much volubility that he had no knowledge of the goods, after his own bid was refused, as he was promised a small amount by the intending purchaser to keep him from further bidding. Under these circumstances a long examination was had, and the referee has reported, in a certificate which shows fully his lack of belief in the protests of the witnesses Diness and Hermann, that their behavior and refusal to answer differently than they did answer was contemptuous, within the provisions of the bankruptcy act, and recommends such action as to the court seems just and necessary.

There is no evidence showing that either the witness Hermann or the witness Diness has any property of the bankrupt in his possession, and no application to compel them to turn over property has been made. Upon the return of an order to show cause why they should not be punished for contempt, the matter was referred to the United States attorney for prosecution, if perjury had been actually committed, as was implied by the petition on which the order to show cause was based. The United States attorney has reported that no ground for such an indictment exists, and in fact it appears that the statute of

limitations had run before the matter was brought to the attention of the court upon the certificate of the referee.

The motion to punish the witness Diness for the contempt set forth in the referee's certificate has now been brought on again before the court, and during adjournment the court has directed that the witness Hermann be brought before the court at the same time, as his testimony seems to contradict that of Diness, and one or the other of these men has avoided telling what they both seem to know about the matter. But the witness Hermann has not been served, and is said to have filed the jurisdiction for this or some other reason, his whereabouts being unknown even to his son-in-law, an attorney. It is apparent that neither Hermann nor Diness really attempted to make a statement of the transaction which would assist the creditors. On the contrary, their testimony shows that they were doing what they could to profess ignorance or to avoid giving information as to matters which any person of ordinary intelligence must have known about.

The court has expressed willingness to consider an application to compel Diness to produce the property of the bankrupt estate, if the creditors consider that there is any of it in his possession or control. The court has endeavored to have him prosecuted for perjury, if any definite false statements can be shown, and, now that the statute of limitations has expired, the court is ready to punish Diness for the contempt shown in his apparent disregard for the court's jurisdiction and authority in endeavoring to locate the property of the bankrupt. But in the absence of Hermann, and in the face of his flight, it must be held that Diness, who has shown some attempted effort to locate Hermann, and who has at all times appeared in court ready to repeat his former statements of the transaction, cannot be punished for perjury, for secreting property, and for disregard of his oath, as he would be punished on a criminal trial; nor can he now be made to suffer alone (because of his contempt for the court's authority) for the entire futility of the proceedings before the referee, and the escape of all others who were implicated.

An examination of the report of the case of In re Friedman, 161 Fed. 260, 88 C. C. A. 306, shows that William Hermann, a notary public, was one of the witnesses who testified as to his share in the transactions resulting in an order to various parties to turn over the proceeds of the sale of an entire stock, under circumstances very similar to those in the present case. The attorney for the creditors in the present instance, which had to do with a stock of shoes, was the attorney for the creditors in the Friedman Case, which also had to do with the sale of a stock of shoes; and while the court feels that the attorneys have placed too much reliance (through previous experience with perhaps the same individuals in similar cases) upon the testimony, as showing its own falsity, nevertheless the record shows that the witness Diness clearly justified the finding of the referee that his conduct was contemptuous, in that he avoided telling the whole truth, that he professed ignorance as to matters as to which he must have had knowledge, and that he showed disregard for and brought disrespect

upon the court proceedings by not playing the part of an honest man and a truthful witness. It is apparent that his readiness to testify to his own innocence, and his willingness to explain his participation in events of which he did not remember evident facts, was because of a disregard for his oath and for the authority of the court, and that disregard should not be allowed to stand without punishment, even though that punishment cannot go to the extent of being used to take the place either of a trial for perjury, before a jury, or a proceeding to compel discovery of the bankrupt's estate and restitution thereof.

The witness Diness may be cited before the court for punishment, and the matter will be held open as to Hermann, so long as he continues a fugitive.

BORDEN'S CONDENSED MILK CO. v. BORDEN ICE CREAM CO. et al.

(District Court, N. D. Illinois, E. D. March 12, 1912.)

No. 30,496.

TRADE-MARKS AND TRADE-NAMES (§ 95*)—UNFAIR COMPETITION.

Borden's Condensed Milk Company, as a well-known manufacturer of various milk products, is entitled to a temporary injunction against use of the name of Borden in the manufacture and sale of ice cream and like products, unless purchasers are advised in some unmistakable way that the product is not that company's.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

In Equity. Bill by Borden's Condensed Milk Company against the Borden Ice Cream Company and others. On motion for a preliminary injunction. Motion granted.

Pringle & Fearing, for complainant.

George W. Brown and Wharton Plummer, for defendants.

KOHLSAAT, Circuit Judge. This cause is now before the court upon motion for a preliminary injunction. The amended bill represents that complainant and its predecessors have been engaged in the milk business in all its phases since the year 1864, having its main office and 11 other offices in Chicago; that it manufactures and sells 17 different milk products under the name Borden, besides 14 products under other fancy names; that it has registered trade-marks used on more of said brands; that the name Borden was taken from the name of Gail Borden, the founder; that it has made great expenditures of money in and about building up its said business, and that the name Borden has become a trade-name of great value in the milk business and its products; that it handles cream, butter, condensed milk, evaporated milk, malted milk, caramels, milk chocolate, buttermilk, casein, and condensed coffee, and sells the same throughout the state of Illi-

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

nois, much of it to confectioners to be used in making ice cream, and that it has spent large sums in placing said confection product in the market, so that the name Borden, used in connection with milk or cream foods, such as ice cream, would, in the public mind identify such article with that of orator; that under its charter orator has the right to deal in the manufacture and sale of all forms of milk products and all articles incident thereto. The bill further represents that the defendants, Borden, Brown, and Stanley, applied for a license to incorporate on May 25, 1911, under the name "Borden Ice Cream Company," with full notice of complainant's rights in the premises, and were requested by complainant to drop the name Borden; that objection was also made to the Secretary of State; that, notwithstanding, defendant corporation was granted a charter on August 16, 1911, for the purpose of manufacturing and selling ice cream, ices, and similar articles.

The bill further states, on information and belief, that Charles F. Borden was given one share of stock in said corporation, having a face value of $100, being 1/50 of the amount at which said corporation was stocked, in consideration for this consent to the use of his name in connection with said corporate name; that, therefore, he had never been engaged in the milk business, or any phase thereof, and that the adoption of said name was solely for the purpose of fraudulently appropriating the reputation of complainant's product; and that defendant Lawler subscribed for 47/50 of said stock, and is believed to be the real owner of said corporation. The bill further sets out that complainant has the right to engage in the manufacture and sale of ice cream and similar articles, and is about to do so, and to use the name Borden in connection therewith; that said articles of manufacture are closely allied to its present manufacture, and that the principal ingredients thereof are identical with its products; that defendant corporation intends to advertise its wares as the Borden product throughout complainant's territory aforesaid, in order to deceive and defraud the public into the belief that said wares are complainant's product, whereby the reputation of complainant's products will be greatly injured, and its business injured; that confusion will inevitably arise, and that customers of complainant will be unable to know that defendant's product is not that of complainant; and that each of said defendants is conspiring with the others to do said illegal acts for their several benefit, to the detriment and injury of orator.

The answer denies all the allegations of fraud, claiming that it has the right to use the name Borden Ice Cream Company, admits that Borden has only one share, and states that said Borden subscribed for said share in good faith, and is now the vice president of the company. It denies that said share was given Borden without other consideration than the use of his name, but admits that he had never before been engaged in the ice cream or kindred business. The answer further states that Harry Lawler, one of the defendants, is the principal owner of the stock of said corporation, having subscribed to 47/50 thereof, and that he is also the principal stockholder of the W. H. Collins Ice

Cream Company, claiming $40,000 fully paid stock thereof, doing business in Chicago and Cook county, and is, besides, a wholesale and retail dealer in ice in said county.

The answer denies all charges of conspiracy, all claims of intent on defendant's part to appropriate complainant's reputation or good will, and denies that complainant's business will be injured by the use of same name. It further denies that complainant has a property right in the name Borden, in connection with the milk business, any more than defendant Borden has.

From the pleadings and the affidavits filed herein, the court finds that complainant has, through great expense and business sagacity, built up a very large trade in milk and milk products in Chicago and the state of Illinois under the name Borden; that by its charter it is permitted to manufacture ice cream and kindred articles, and is about to do so; that in the milk and kindred trades the name Borden has become inseparably associated with complainant, and that the public so associates it; that defendant is just starting in the ice cream and other business; that the defendants, and each of them, entered into a scheme to appropriate the good will and secure the benefits of the trade-name of complainant, and in pursuance of such scheme secured the connivance of defendant Borden, and now seek to justify their act by the fact that he owns a nominal interest in the corporation. The purpose is naked.

Complainants, upon the record shown, have a valuable property interest in the name Borden in connection with the manufacture and sale of ice cream, and the consummation of defendants' scheme would necessarily result in serious injury to complainant's business and in fraud upon the public.

It is therefore ordered that the preliminary injunction be granted, restraining defendants from the use of the name Borden in the manufacture and sale of ice cream and like articles, without plainly advising purchasers in some unmistakable manner that the product is not that of complainants, until the further order of the court.

DES MOINES WATER CO. v. CITY OF DES MOINES et al.

(District Court, S. D. Iowa, C. D. March 22, 1912.)

No. 134—M.

1. COURTS (§ 508*)—FEDERAL COURTS—CONSTRUCTION OF STATE STATUTES.
A federal District Court will not temporarily enjoin proceedings under an appointment by the state Supreme Court of appraisers in proceedings by a city to condemn a waterworks plant, on the ground that an act authorizing the appointment is unconstitutional, where the state Supreme Court has not passed upon the validity of the act, except by acting under it, where there is a conflict in authority on the question involved, and the state Supreme Court could find ground sustaining the act.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418–1430; Dec. Dig. § 508;* Injunction, Cent. Dig. § 72.
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.]

2. INJUNCTION (§ 135*)—TEMPORARY WRIT—JUDICIAL DISCRETION.
Application for a temporary injunction is addressed to the court's legal discretion.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 304; Dec. Dig. § 135.*]

In Equity. Bill by the Des Moines Water Company against the City of Des Moines and others. Temporary injunction denied.

N. T. Guernsey, for complainant.

Robert O. Brennan and H. W. Byers, for defendants.

Before WALTER I. SMITH, Circuit Judge, and WILLIAM H. MUNGER and SMITH McPHERSON, District Judges.

PER CURIAM. The complainant is a corporation of the state of Maine and the owner of the Des Moines city waterworks. The individual defendants are citizens and residents of the city of Des Moines, Iowa, and the defendant city is a municipal corporation, being a city of the first class under the laws of the state of Iowa. The city instituted proceedings under chapter 45 of the Acts of the Thirty-Third General Assembly of Iowa, as amended by chapter 35 of the Acts of the Thirty-Fourth General Assembly of that state, with the view of acquiring the complainant's plant by condemnation proceedings. The statutes in question provide for the appointment by the state Supreme Court of three district judges to act as appraisers. The Supreme Court made the order designating the judges, and the complainant filed an application and bond for removal to the federal court, both in the Supreme Court and in the court of condemnation.

The complainant brings this action, alleging in substance that the Supreme Court of Iowa is a court of appellate jurisdiction only, and that the provision authorizing it to designate three district judges to act is unconstitutional, and further alleging that plaintiff's franchise has not expired, and that the case has been heretofore removed to this

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

court. The case is thus dual in character—original, in so far as it seeks to enjoin the further proceedings under said appointment by the Supreme Court on the ground that the action of said Supreme Court is unconstitutional, and in so far as it is claimed the franchise is not terminated; auxiliary, in so far as it tends to sustain the petitions and bonds heretofore filed for removal to this court.

[1] It is, of course, with reference to the first that this court, three of us sitting, is primarily charged. The Supreme Court of Iowa has never passed upon the constitutionality of the statute authorizing the appointment of three district judges by the Supreme Court, except as it acted under the statute shortly after its enactment, by the appointment of three judges to act in the condemnation of the Council Bluffs waterworks, and has recently acted in the Des Moines waterworks matter. In passing upon the constitutional question it must be borne in mind that it was said in Pelton v. National Bank, 101 U. S. 143, 25 L. Ed. 901:

"It has long been recognized in this court that the highest court of the state is the one to which such a question properly belongs; and though the courts of the United States, when exercising a concurrent jurisdiction, must decide it for themselves, if it has not previously been considered by the state court, it would be indelicate to make such a decision in advance of the state courts, unless the case imperatively demanded it."

[2] It must be borne in mind that this is an application for a temporary writ, which is always submitted to the legal discretion of the court. And the court, upon investigation, finds that there is a great conflict of authority on the interpretation of the constitutional provision here relied upon and similar constitutional provisions of other states. See State v. Neble, 82 Neb. 267, 117 N. W. 723, 19 L. R. A. (N. S.) 578, and the cases therein cited, including the case of State v. Barker, 116 Iowa, 96, 89 N. W. 204, 57 L. R. A. 244, 93 Am. St. Rep. 222. Under these circumstances, it being possible that, even before this case would be reached for final trial in this court, the Supreme Court of Iowa would have passed upon it, we do not feel justified in awarding a temporary injunction upon the ground that the act is in conflict with the state Constitution. Whether the action of the Iowa Supreme Court, heretofore taken in ex parte proceedings in appointing the commissioners in the Council Bluffs and Des Moines cases, constitutes an interpretation of this constitutional provision, we do not determine. See Cross v. Allen, 141 U. S. 528, 12 Sup. Ct. 67, 35 L. Ed. 843.

It should be kept in mind that section 4 of article 5 of the Iowa Constitution provides that the Supreme Court of the state shall have appellate jurisdiction only, both in actions in chancery and in actions at law. But that section of the Constitution concludes by reciting that the Supreme Court of the state shall "exercise a supervisory control over all inferior judicial tribunals of the state." The statute in question substantially provides that three district judges shall sit as a board of inquest in such cases. And the Supreme Court of the state has nothing whatever to do with the matter, except to designate what

three judges out of the very large number in the state shall act. It is manifest that the Supreme Court might well hold that for it to designate which three of the very large number of district judges should act on the particular board of inquest would be exercising a supervisory control over all inferior tribunals.

For the reasons indicated, we are all of the opinion that the injunction, so far as it seeks to enjoin the action of the city because of a supposed lack of authority upon the part of the Iowa Supreme Court to designate the three district judges, should be denied. The questions as to whether the franchise of the waterworks company has expired, and whether the case has been properly removed to this court heretofore, or not, would more properly come before the presiding judge, sitting alone, than before us. But Judge McPHERSON holds that a case has not been made for the granting of an injunction. See Kaw Valley Drainage District v. Metropolitan Water Co., 186 Fed. 315, 108 C. C. A. 393.

It is ordered that the application for a temporary injunction be denied, and the restraining order heretofore issued be vacated.

THE AURORA.

THE CITY OF BERLIN.

(District Court, W. D. Wisconsin. March 2, 1912.)

1. MARITIME LIENS (§ 26*)—NATURE OF LIEN—PROOF TO ESTABLISH.

A maritime lien is a privileged one, secret in character and overriding all other liens and transfers, and in the nature of things is stricti juris, and must be affirmatively shown to exist.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 39; Dec. Dig. § 26.*]

2. MARITIME LIENS (§ 29*)—SUBJECT-MATTER—SERVICES RENDERED ON REQUEST OF TOWING COMPANY.

A libelant held not entitled to a maritime lien on a barge for services rendered to her, while stranded, by tugs and lighters which libelant sent to her assistance at the request of the manager of a towing company, which had contracted with the owner of the barge to furnish all tugs and wrecking service required by his vessels during the season; it appearing that libelant did not even know by whom the barge was owned when the services were rendered, but in fact performed such services for the towing company.

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

In Admiralty. Suit by the Barnett & Record Company against the barge Aurora; Henry Wineman, Jr., owner. Decree for respondent.

Spencer & Marshall, for libelant.

Holding, Masten, Duncan & Leckie, for The Aurora and claimant.

SANBORN, District Judge. Final hearing on libel in rem against the barge Aurora for quantum meruit for the services of two tugs

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

and two lighters rendering service to the barge June 29, 1910, while stranded near Split Rock, in the vicinity of Two Harbors, on the north shore of Lake Superior. The barge was in tow of the steamer City of Berlin, carrying coal, and during a thick fog both vessels went ashore. The circumstances under which the services of the boats were rendered were as follows:

The owner, Mr. Henry Wineman, Jr., a resident of Detroit, Mich., shortly before the accident in question, entered into a contract with the Great Lakes Towing Company, which provided that the company should furnish all the tugs and wrecking service required by the boats under Wineman's management during the season of 1910 at certain discounts from the regular rates made by the towing company, and subject to the following condition:

"In case, however, at any time, for any reason, we are unable to have tugs on hand to serve your boats, you are at liberty to engage any other tugs to serve for that time, but without right to charge us any difference in price."

Soon after the accident the mate went to Two Harbors and called up Mr. Wineman in Detroit, who told him to communicate with Mr. Tomlinson, the vessel agent at Duluth. They then informed Tomlinson of the situation, and he in turn called up Capt. Vroman, manager of the towing company, whose duty it was under the contract with Wineman to render any wrecking service necessary, if the company had on hand the tugs. Capt. Vroman had no lighters, but sent a tug and a pump. The next day Tomlinson again called up Capt. Vroman and asked for a lighter and a boiler. Being required by the contract to furnish tugs, lighters, and wrecking outfit, and having no lighter or boiler on hand, Capt. Vroman communicated with libelant, through its manager, Mr. John E. Meyer, and asked him to send tugs and scows to assist the steamer and barge, and to instruct their captains to look to the masters of those boats for further instructions, whereupon the tug Meyer and scow or lighter Ajax were dispatched to the scene by libelant. After some four days work they were sent back to Superior. About the same time Tomlinson requested more assistance of Capt. Vroman, who procured libelant to send another tug and barge. For the services of these vessels the libelant claims a maritime lien, and libeled the barge accordingly.

[1] The important question is whether libelant's claim is properly one against the vessel, or only against the towing company. Was the contract between libelant and towing company made on the credit of the vessel, or in reliance only on Capt. Vroman, and as an accommodation to him? A maritime lien is a privileged one, secret in character, overriding all other liens or transfers, possibly operating to the prejudice of creditors or purchasers without notice. In the nature of things it is stricti juris, and must be shown to exist. Vandewater v. Yankee Blade, 19 How. 82, 15 L. Ed. 554; Seaman, J., in The Westover (D. C.) 76 Fed. 383. Libelant performed valuable services, and should be paid for them; but by whom? Should the vessel pay, or Capt. Vroman's company?

[2] Mr. Meyer, manager of libelant, was questioned as to whom the credit was to be extended; but he does not give a direct answer. He says he rendered the bills to Capt. Vroman, in the name of the barge Aurora and owners, and, not knowing whom to send them to, therefore sent them to him. He did not even know the name of the owner of the barge, nor that Tomlinson was his agent.

"Q. To whom did you look for your pay? A. To the barge Aurora and owners."

In January, 1911, Meyers wrote to Wineman, confirming the testimony referred to as to his talks with Capt. Vroman, and stating that it was impossible for him to say whether the equipment was ordered through the captain of the barge or Tomlinson, but that he understood from his captains that they worked under the directions of the masters of the City of Berlin and Aurora.

The owner of the barge knew nothing of the hiring of libelant until after the services were performed. Had the contract been made between his agent, Tomlinson, and libelant, a maritime lien might be presumed; the owner being a nonresident of the state where the contract was made. There was no apparent necessity to trust the vessel, and the testimony tends to show that this was not done, or even thought of. The contract was undoubtedly maritime in its nature, having reference to services performed for a stranded vessel on navigable waters. This, however, is quite a different thing from the creation of a maritime lien.

Counsel for libelant refer to Pacific Mail S. S. Co. v. Commercial Co., 173 Fed. 28, 97 C. C. A. 346, Wilmington Transp. Co. v. The Old Kensington (D. C.) 39 Fed. 496, Pacific Mail S. S. Co. v. Sugar Co., 181 Fed. 927, 104 C. C. A. 365, and several other cases. In all of these, except the last, the contract was made with the master, from which the maritime lien was presumed. In the last case cited the suit was in personam.

If there were any lawful or proper way to reach the merits of the case by amendment, that should be allowed; but the difficulty is that the owner is not in court, and cannot be bound by any amendment. He ought to pay for whatever benefit he received from the services rendered, but is entitled to his day in court on that question, which cannot possibly be given him in this case.

It is not an agreeable duty to be obliged to dismiss on a technical ground like this; but I am convinced that the maritime law gives no lien, and that the libel must therefore be dismissed.

In re HIRSHOWITZ.

(District Court, M. D. Pennsylvania. March 27, 1912.)

No. 1,543.

BANKRUPTCY (§ 408*)—DISCHARGE IN BANKRUPTCY—MISCONDUCT OF BANKRUPT.

A bankrupt, who within a few months of his adjudication in bankruptcy, and while insolvent, purchased on credit merchandise consisting of personal ornaments and gave them to his wife, without any intention to pay for them, and who did not include in his schedules considerable valuable property, with intent to hinder his creditors, and who within a month or two prior to the adjudication established branch stores to which he moved large quantities of merchandise, and who instructed his agents to sell the same at any price, even below cost, if necessary, and who never kept any account of such merchandise or the proceeds thereof, except slips indicating the amount of sales and the goods sold, and who destroyed such slips before the adjudication, disposed of property with intent to defraud his creditors and destroyed records of his financial condition in violation of the statute, and he was not entitled to his discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732–736, 759, 762, 763; Dec. Dig. § 408.*]

In the matter of the bankruptcy of Louis Hirshowitz, bankrupt. Heard on exceptions to the report of the master recommending the discharge of the bankrupt. Sustained, and discharge denied.

David Rosenthal, for bankrupt.
Wm. N. Reynolds, for exceptions.

WITMER, District Judge. Every bankrupt coming into court, invoking its aid for relief from his obligations, must come with clean hands and show that his conduct has been that of an honest, upright man, and that he is entitled to the advantages which the act confers.

The bankrupt should do all within his power to aid and assist the court in determining the matters and facts surrounding his business so as to facilitate the administration of his estate for the benefit of his creditors. He should not willfully do anything tending to delay, hinder, or obstruct such in any manner whatsoever.

Although the learned master recommended the discharge of Louis Hirshowitz, the bankrupt, we cannot, after a careful examination of all the evidence, agree with his conclusions, and therefore decline to adopt his recommendation. The bankrupt, who is here seeking a discharge, was a most reluctant witness; his attempts at evasion amounted to almost obstinacy; his contradictions and inconsistencies were many and flagrant; in truth, his entire testimony seems to be tainted with insincerity.

There can be no doubt, however, that, at the time of filing his schedules, he had in his dwelling some goods and merchandise which he did not include in his schedules. He contends that these articles of merchandise were not secreted or withheld for the purpose of hindering, delaying, or defrauding his creditors, that he had purchased them and presented them as a gift to his wife in good faith, and it

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

is argued that he had a legal right to do this. By this process of reasoning, the bankrupt would have been permitted to give away to members of his family all his property without committing a technical violation of the statute, because he alleges there was no malus animus. Most of the goods was purchased within two months prior to his adjudication, at a time when he was hopelessly insolvent, the merchandise so presented was not paid for, and there evidently was never an intention on the part of the bankrupt to pay, and while his creditors were eagerly awaiting the compensation justly due them, the bankrupt presented the unpaid property to members of his family. I am unable to conclude, from these circumstances, reluctantly admitted by the bankrupt himself when he was confronted with the facts, that the goods were not disposed of or secreted for the purpose of hindering, delaying, or defrauding his creditors.

It is not necessary to resort to deduction, as has been urged, to conclude that the "bankrupt concealed, removed, or destroyed property to the value of upwards of $17,000," because there is that which is certain. The bankrupt did not include in his schedules considerable valuable property consisting of cut glass, a lamp, opera glasses, punch bowl, gas dome, chafing dish, and numerous other articles, with the undoubted intent to hinder, delay, and defraud his creditors, and although these items do not approach the sum charged, it matters little whether the amount be large or small, it is, nevertheless, an offense against the statute. But it may be fairly deduced, in the light of all the evidence, that not all the property concealed has been discovered. The bankrupt only made such admissions as he was compelled to do, after he was detected. He made no confession, and in view of the fact that the concealment was made in secret, it is exceedingly improbable that all the secreted merchandise was discovered.

Within a month or two prior to the adjudication, he established at least two branch stores or stations in neighboring towns, where he moved large quantities of goods and merchandise, and instructed his agents to sell the same at any price, even below cost, if necessary. He never kept any account of this merchandise or the proceeds thereof. That he might be able to check the sales, so he alleges, his agents were required to return to him slips indicating the amount of the sales and the goods sold. These slips, although they practically contained a correct record of the goods and the amount of sales, were destroyed by the bankrupt before his adjudication, so that the only available account of these transactions were thus wholly extirpated, and the bankrupt is unable to account for the proceeds received from these sales as well as for the proceeds of the store. Even if these slips were destroyed with an honesty of purpose, the bankrupt could not have selected a more opportune moment for self-preservation, nor a more unfortunate moment for the interest of his creditors, because they were deprived of the last vestige of written evidence that might lead to the recovery of assets that rightfully belonged to them. It even precluded a proper examination of the bankrupt. It is conceded that the bankrupt is a good business man, and to within a short period prior to the filing of the petition was successful, yet he kept no books

that would tend to explain the disposition of merchandise aggregating many thousands of dollars, which he disposed of in some manner, within the last two or three months prior to his adjudication. The greater portion of this merchandise was purchased on credit within four or five months immediately preceding his adjudication and not paid for, and the bankrupt could not have been ignorant of the fact that he was hopelessly insolvent at the time he made these purchases. I cannot determine that the slips were destroyed without any ulterior or improper motive.

The bankrupt, having destroyed or concealed records from which his financial condition might be ascertained, with intent to conceal such condition, and having, subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, or concealed, or permitted to be removed, destroyed, or concealed, some of his property with intent to hinder, delay, or defraud his creditors, is not entitled to his discharge.

In re WILSON.

(District Court, M. D. Pennsylvania. April 1, 1912.)

No. 1,695.

1. BANKRUPTCY (§ 351*)—CLAIMS—PARTNERSHIP—DISSOLUTION AGREEMENT—ORAL PROVISIONS.

Where, as a part of an agreement for the dissolution of a partnership, it was stipulated that the continuing partner should furnish the outgoing partner with a release from liability from certain creditors of the firm, and that certain book accounts should be collected and the proceeds used to pay the other creditors, but the agreement as to the appropriation of such accounts was not contained in the dissolution agreement, and the accounts were not so applied, the outgoing partner was not entitled to compel such application as against the creditors of the firm in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 563, 564; Dec. Dig. § 351.*]

2. BANKRUPTCY (§ 318*)—DISSOLUTION AGREEMENT—PARTNERSHIP ASSETS—APPLICATION.

Where an oral agreement between partners incident to dissolution provided that firm accounts should be collected and the proceeds applied to pay the indebtedness of the firm, but there was no appropriation of the same pro tanto by transferring them, or otherwise, in such a manner as to take them out of the hands of the parties, or authorizing the holder to pay the amount directly to the creditor, without further intervention or concern on the part of the partnership, the provision of the contract was executory only, and unenforceable as against creditors in bankruptcy proceedings against the continuing partner.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. § 318.*]

In the matter of Harry B. Wilson, bankrupt. On certificate for review of a referee's order disallowing a claim for preference. Affirmed.

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

W. H. Sponsler, for the petition.
Walter Rice, Charles H. Smiley, and James M. Barnett, opposed.

WITMER, District Judge. The petitioner, Thomas H. Milligan, protests against making a part of the general fund for distribution the amount ($422.49) collected of the book accounts of Thomas H. Milligan & Co. by the bankrupt's trustee, and asks that the same be turned over to John Lucas & Co. and the Keystone Farm Machinery Company in liquidation of their accounts against the said company, to which it is claimed the same was dedicated and pledged under the terms of the dissolution of the partnership company of which the bankrupt and the said Thomas H. Milligan were partners.

It appears that the partners, trading as Thomas H. Milligan & Co., having been engaged in the general hardware business, on August 2, 1909, by mutual consent and agreement in writing dissolved the partnership, transferring the business, stock in trade, all bills and accounts receivable, and the assets of the partnership, in general, to the partner H. B. Wilson, the bankrupt; the latter, as part consideration for such transfer, agreeing to secure for the other partner releases from certain debts due and owing by the partnership, and to pay and extinguish all remaining debts of the said firm existing on the 25th day of February, 1909, or since.

The petitioner, however, does not rest his contention upon the written agreement. He insists that some time prior to its date, and since February 25, 1909, it was orally agreed between the partners that Wilson should furnish Milligan a release from certain creditors, discharging him (Milligan) from all liability as a partner, and as to other creditors the same were to be paid by the collection of the book accounts due the said partnership from divers persons and companies, and that by the terms of this verbal arrangement or agreement the said accounts were set aside for that purpose and so dedicated.

It will be noted that the promise of Wilson to furnish releases and discharges of Milligan from certain of their creditors was made a part of the written dissolution agreement. Accounting, therefore, for the failure to incorporate the later portion of this alleged oral agreement, referring to the setting aside and dedication of the book accounts to the liquidation of certain accounts owing by the partnership, including those represented by the petitioner, it is said that:

"At the date and immediately prior to the agreement in writing, Wilson informed Milligan, through his attorney, that he had collected of the book account assets so dedicated, and had paid off the accounts due from the partnership, which the petitioner supposed liquidated and extinguished all debts of the firm, except those from which releases were to be obtained, and, depending on this statement, the firm was dissolved under a written agreement of the 2d day of August, 1909."

Allowing the petitioner all that he claims, it appears clearly established that by the terms and provisions of the later agreement in writing all of the book accounts receivable were transferred to the bankrupt including those since collected by the trustee, and reserving none. This conclusion is furthermore strengthened by the presumption that

the entire understanding and agreement between the parties at the date of the instrument merged in the writing representing their mutual covenants regarding the subject-matter.

[1] That the provision concerning the alleged oral agreement failed from being incorporated in the writing through the deception or misrepresentation of Wilson, one of the parties, and thus permitting the oral agreement to remain in force would not avail the petitioner if established. If the controversy were one between the parties to the agreement, and not between them and their creditors, it might be different. After entering into a solemn writing, publishing the terms of the dissolution, and the continuing partner falls into bankruptcy, it does not come with favor, on contest with their creditors, for the other partner, having taken a cash consideration, to say that he was deceived into the writing, and, for the purpose of saving himself from its consequences, attempt to establish a verbal collateral agreement by its very nature shunned by the law. If Milligan was deceived by Wilson, what can be said for their creditors? The loss, if any, by reason of the transaction, should not be visited upon the stranger. "Equity does not favor secret agreements, at the expense of those who neither know nor have opportunity of knowing of their existence." Com. v. Brenneman, 1 Rawle (Pa.) 311.

[2] However, the oral agreement, if favored, and considered as established, could only be regarded in character as an executory contract, and not as an actual transfer or assignment of specific accounts, or the proceeds thereof, there having been no appropriation of the same pro tanto, by transferring them or otherwise, in such manner as to take them out of the hands of the parties, and authorizing the holder to pay the amount directly to the creditor, without further intervention or concern to the debtor. Trist v. Child, 21 Wall. 441, 22 L. Ed. 623; Christmas v. Russell, 14 Wall. 69, 20 L. Ed. 762. If this had been accomplished—that is, a complete assignment or transfer of specific accounts effected—it is not unfair to presume that these accounts would not again have found a place, or been considered, as an item in the writing that was finally entered into between the parties.

There are other reasons supporting the conclusion reached, to which I will not allude. The findings, conclusion, and order of the learned referee are affirmed.

UNITED STATES v. KOMIE.

(District Court, N. D. Illinois, E. D. March 12, 1912.)

No. 4,894.

CRIMINAL LAW (§ 200*)—ISSUANCE OF MONEY ORDERS—DIFFERENT OFFENSES—FORMER CONVICTION.

Pen. Code (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1909, p. 1453]) § 210, provides that whoever, being a postmaster or other person employed in any branch of the postal service, shall issue a money order without having received the money therefor, shall be fined, etc.; and section 218 declares that whoever, with intent to defraud, shall issue any money order without having previously received or paid the full amount of money therefor, etc., shall be convicted. Accused was indicted for issuing three of seven money orders at the same time, in two counts, one under each section, after which he was allowed to withdraw a plea of not guilty, and all the counts were nolled except one, charging the issuance of three of the orders under section 210, on which he was convicted and fined. He was thereafter indicted for issuing the other four, to which he pleaded former conviction. *Held*, that the issuing of a money order in violation of section 210 was not the same offense as the issuing of the orders in violation of section 218; and hence the plea was not good as to the counts charging an offense under the latter section.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 347, 386–409; Dec. Dig. § 200.*]

Emanuel Komie was indicted for putting out certain postal money orders without having received the money therefor, and he pleaded autrefois convict, to which the government demurred. Demurrer sustained.

James H. Wilkerson, U. S. Dist. Atty.
Seymour N. Cohen, for defendant.

SANBORN, District Judge. Demurrer to plea in bar to an indictment filed February 9, 1912, charging the issuance of four postal money orders by defendant as postal clerk without having received the money therefor. It appears from the plea that defendant issued seven money orders at the same time to the same person. He was indicted November 23, 1911, for issuing three of the seven. To the second indictment for issuing the other four, he pleads autrefois convict. The putting out of each order is made the subject of two counts, one under section 210, and the other under section 218, of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1129, 1131 [U. S. Comp. St. Supp. 1909, pp. 1453, 1457]). The question is whether it is the act of issuing an order or orders which is denounced, or the putting out of each order. The statutes in question read as follows:

"Sec. 210. Whoever, being a postmaster or other person employed in any branch of the postal service, shall issue a money order without having received the money therefor, shall be fined not more than five hundred dollars."

"Sec. 218. Whoever, with intent to defraud * * * shall issue any money order or postal note without having previously received or paid the full amount of money therefor, with the purpose," etc.

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

The act of 1883 (Act March 3, 1883, c. 123, 22 Stat. 527, 5 Fed. Stat. Ann. 943 [U. S. Comp. St. 1901, p. 2743]) limits the amount of each order to $100.

Examination of the plea of former conviction, and of the first indictment of 1911 (a copy being attached to the plea), shows that defendant was indicted under sections 210 and 218 for issuing three of the seven money orders. His first plea was not guilty. Afterwards he was allowed to withdraw the plea, and, upon a nolle being entered on all counts except the first, he pleaded guilty to that count, and was sentenced to pay a fine of one cent and costs, which he thereupon satisfied by full payment, and was discharged accordingly. It thus appears that defendant was sentenced and punished only under section 210, and not under section 218, and that different proof is required to sustain a conviction under the two sections referred to.

The question, then, is whether the conviction for issuing one order, charged as a violation of section 210, and not also of section 218, bars a prosecution for issuing four other orders under both sections. The proper rule to be applied, I think, is that where an offense is in violation of two or more statutes, and different proof is required to convict under one, different elements or grounds being involved in each, a conviction or acquittal under one statute is not a bar to a prosecution under the other. Carter v. McClaughry, 183 U. S. 365, 389, 22 Sup. Ct. 181, 46 L. Ed. 236; U. S. v. Harmison, 26 Fed. Cas. No. 15,308; 3 Sawy. 556; Morey v. Commonwealth, 108 Mass. 433; Burton v. U. S., 202 U. S. 344, 381, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; Gavieres v. U. S., 220 U. S. 338, 343, 31 Sup. Ct. 421, 55 L. Ed. 489.

Defendant, having pleaded guilty to the offense of issuing a single money order under section 210, cannot be put on trial again under that section for issuing the six other orders, because they were issued at the same time, to the same person, and by a single act. But he may be prosecuted for issuing the same orders, or any one or more of them, as an offense against a different statute covering different elements and requiring additional proof. It follows that the plea of former conviction should be sustained as to the first four counts, since they show an offense against section 210 alone. As to the other four counts, charging violations of section 218, the plea should be overruled.

The demurrer to the plea is overruled in respect to the first four counts, and sustained as to the last four.

It appears from the plea that the four orders covered by the last indictment were made payable to the Interstate Audit Company, and the three covered by the first were made payable to G. H. Somers. The plea, however, states that all the orders were issued and delivered to the same person, at the same time and place, payment therefor made at the same time and place, and that the offenses charged in both indictments are identical in all respects.

BLODGETT & ORSWELL CO. v. GEORGE S. LINGS & CO.

(District Court, D. Rhode Island. March 13, 1912.)

No. 2,935.

JUDGMENT (§ 622*)—RES JUDICATA—QUESTIONS CONCLUDED.

A judgment for a seller for the contract price, rendered after a trial on the merits involving the defense that the sale was by sample and that the goods delivered were not in accordance with the sample, bars a subsequent action by the buyer for damages based on the same claim, though at the former trial he dismissed his affirmative claim for damages based on the same matter.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1136; Dec. Dig. § 622.*

Conclusiveness of judgment as dependent on theory of action or recovery, see note to Millie Iron Mining Co. v. McKinney, 96 C. C. A. 163.]

At Law. Action by the Blodgett & Orswell Company against George S. Lings & Co. Judgment for defendant.

Edward W. Blodgett, for plaintiff.

John I. Devlin (George W. Bristol, of counsel), for defendant.

BROWN, District Judge. This is an action on the case, originally brought in the state court, but removed to the Circuit Court.

The declaration alleges that the defendants, copartners as George S. Lings & Co., agreed to supply yarn for the manufacture of spool cotton, said yarn to be of same quality as sample skeins, and alleges the failure of the defendants to deliver yarn in accordance with the agreement, and the delivery of other yarn of inferior quality, which could not be used by the plaintiff; that it notified defendants that the yarn did not compare as to quality with sample skeins, and refused to accept the same. It alleges damages arising from its inability to supply its customers with thread in consequence of the failure of defendants to fulfill its contract, etc.

The defendants plead in bar the judgment obtained against the present plaintiff by the defendants, which they contend is a full determination between the parties of the matters set forth in the plaintiff's declaration.

In the former action the present defendants brought suit for the contract price. The defendant filed a general denial, and also set up certain matters both as a distinct defense and by way of counterclaim; that the yarn was to be used by the defendant in its special manufacture, and to be of a quality equal to samples; that the yarn was not equal to samples, and was so full of imperfections that it could not be used by the defendant.

The third to the eighth paragraphs of the defendant's answer are in substance like the declaration in the present case. Upon the face of the answer, however, this matter was set up both as a defense to the plaintiff's alleged cause of action and by way of counterclaim thereto.

The defense was that the sale was by sample, and that the yarn delivered was not in accordance with the samples, and was unfit for use for the purpose intended.

The plaintiff denied that the sale was by sample, and further contended that, even though there was a sale by sample, there was a good delivery in accordance with the sample.

Upon the issues submitted to the jury they may have found either that the sale was not by sample or that it was by sample, and whichever they may have found the verdict is conclusive evidence that they found that delivery was in accordance with the agreement.

The plaintiff contends that in the former case the counterclaim, practically a copy of the declaration filed in this case, was dismissed by consent, and also claims that the trial of the question of damages was waived as an issue in the New York case.

The error of the present plaintiff is in the failure to recognize the fact that its answer stood as a matter of defense, and that, this defense being disposed of, the basis of a counterclaim for damages was removed and finally disposed of by the judgment.

The record clearly discloses that the defendant did rely upon the defense of sale by sample and quality and the lack of conformity, and that the goods were ordered for a specific purpose. Though the defendant's affirmative claim for damages was withdrawn or dismissed, the substantial issue of whether the goods were delivered in accordance with the contract was not dismissed or withdrawn. Upon the record as it stands the third to the eighth paragraphs of the answer were not stricken out as matters of defense.

The following portion of the record clearly shows that the matters set forth as the basis of a counterclaim were relied upon as matters of defense, and that only the affirmative claim for damages to the defendant was withdrawn.

"The Court: You intend to offer no proof on the counterclaim for damages?
"Mr. McKee: Simply rely on the defense, sale by sample and quality.
"The Court: And the lack of conformity?
"Mr. McKee: Lack of conformity, goods ordered for a specific purpose. That will be simply resting upon the matters of defense, and not the affirmative counterclaim.
"Mr. Bristol: May I renew my motion at this time to dismiss the counterclaim?
"The Court: Have you any objection?
"Mr. McKee: No objections, as we don't intend to rely upon it as a counterclaim.
"The Court: The counterclaim is dismissed by consent."

The defendant's plea is sustained. Judgment may be entered for the defendant.

LINCOLN v. ROBINSON et al.

(District Court, D. Maine. March 16, 1912.)

No. 117, Law.

REMOVAL OF CAUSES (§ 102*)—AMOUNT IN CONTROVERSY—SUIT REMOVED PRIOR TO JANUARY 1, 1912—REMAND.

Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091) § 24 gives the District Court jurisdiction of suits where the matter in controversy exceeds $3,000; and section 28 gives it the same jurisdiction of suits by removal. Section 37 provides that if, in any suit pending in the District Court, removed from a state court, it shall appear to the satisfaction of the court, at any time after removal, that such suit does not involve a controversy properly within its jurisdiction, it shall remand the same. Section 290 provides that suits pending in the Circuit Courts at the time the Code takes effect shall thereupon be proceeded with in the District Courts in the same manner as if originally begun there. *Held*, that a suit properly removed to the Circuit Court before the Code took effect should not be remanded, on motion made in the District Court after it took effect, because it involved less than $3,000, in view of section 299, which provides that the Code shall not affect any act done, or any right accrued or accruing, or any suit or proceeding pending, at the time it takes effect.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218–220, 223, 224; Dec. Dig. § 102.*]

At Law. Action by Abbie M. Lincoln against Frank P. Robinson and others. On motion to remand to state court. Motion denied.

Arthur S. Littlefield, for plaintiff.

Frank H. Haskell, for defendants.

HALE, District Judge. This cause comes before the court on plaintiff's motion to remand the case to the Supreme Judicial Court of Maine, County of Lincoln, from whence it was removed to the United States Circuit Court shortly before the April term, 1911, and was pending in the Circuit Court when that court was abolished. By virtue of the Judicial Code, approved March 3, 1911, the action has come to this court. The amount claimed is $2,376.12. The motion sets out that this court now has no jurisdiction of the action, for the reason that by section 24 of the Judicial Code it is provided that the District Court has jurisdiction of suits where the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000; that by the twenty-eighth section of the Judiciary Act it is provided that this court has jurisdiction of suits by removal from state courts in the same cases where this court would have original jurisdiction; that by section 37 it is provided that if in any suit pending in this court, removed from a state court, it shall appear to the satisfaction of this court, at any time after said suit has been removed hereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, this court shall remand such suit to the court from which it was removed. The plaintiff says

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

that this suit does not involve a dispute which is now within the jurisdiction of this court, and that hence it should be remanded to the state court.

It appears, then, that the Circuit Court had full jurisdiction of the cause at the time of its removal from the state court to the Circuit Court. It is true that section 37 provides that in case a suit is removed from the state court to the District Court of the United States, and it shall appear to the satisfaction of the District Court after such removal that the suit does not really involve a dispute properly within the jurisdiction of the District Court, then the District Court shall proceed no further. It is true that this action does not present a claim exceeding $3,000 in amount. We find, too, that by section 290 suits pending in the Circuit Court on the date of the taking effect of the Judicial Code shall "thereupon, and thereafter, be proceeded with, and be disposed of, in the District Courts in the same manner, and with the same effect, as if originally begun therein."

When we first look at these two sections, and when we consider that a motion directed to the jurisdiction must be considered at the very time when the case is presented to the court for hearing, there appears to be some force in the contention of the learned counsel for the plaintiff that under the Judicial Code the District Court has no jurisdiction, inasmuch as the claim involves less than $3,000. But upon examination of section 299 we find that this section contains the substantial provision that the repeal of existing laws, or the amendments thereof, embraced in the Judicial Code, shall not affect any act done, or any right accrued or accruing, or any suit or proceeding pending, at the time of the taking effect of the act. Bearing in mind this provision, I cannot think that Congress intended to deprive the District Court of jurisdiction in a case where the Circuit Court had jurisdiction. If Congress had intended such result, I think it would have expressed its intention in clear, unmistakable language.

After a careful examination of the case, I conclude that the District Court has jurisdiction. The motion to remand is denied.

SAMSON CORDAGE WORKS v. PURITAN CORDAGE MILLS.

(District Court, W. D. Kentucky. March 23, 1912.)

1. TRADE-MARKS AND TRADE-NAMES (§ 17*)—MARKS SUBJECTS OF OWNERSHIP —USE OF COLORED MATERIALS IN MANUFACTURE.

The use of a colored strand in the fabrication of cordage, the other strands being of another and uniform color, so as to make spots on the finished cord or rope where such strand comes to the surface, cannot be made the subject of a valid trade-mark; the use of any colored strands being something which is open to the public generally, and which cannot be exclusively appropriated by any one.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 20; Dec. Dig. § 17.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 17*)—MARKS SUBJECT OF OWNERSHIP.

An arbitrary mark not naturally part of a fabric in any wise impressed upon it may be a trade-mark if so intended and used, but a spot made on or color imparted to a fabric as the inevitable or natural result of the use of the material of which the fabric is made cannot be the basis of a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 20; Dec. Dig. § 17.*]

In Equity. Suit by the Samson Cordage Works against the Puritan Cordage Mills. On final hearing. Decree for defendant.

Coale & Hays and McDermott & Ray, for complainant.

Helm & Helm, for defendant.

EVANS, District Judge. This case is now before us for final determination. The record is precisely the same as it was when, on the 11th day of November last, we disposed of a motion for a temporary injunction. In an opinion then delivered (193 Fed. 274) we quite briefly expressed our views upon the essential question upon which the case must turn. We need not repeat much of what was then said.

[1] This is not a suit for unfair competition in trade to which much of the argument of complainant's counsel might be more applicable, but is one based upon the alleged infringement of a trade-mark. The right to relief, therefore, depends upon the existence of a valid trade-mark. As previously indicated, we think none exists.

In manufacturing cordage the complainant combines as many threads or strands as may be desired. One of these is of a color different from all the others which are of a uniform color. The process of fabrication by twisting and intertwining these strands into cord, and the regular appearance of spots on its surface as the result of the process was described in the former opinion. It will suffice now to say that in this way striking and probably decorative spots are made to appear on the surface of the cord—a red spot, if a red strand is used, and so on through the list of colors. The complainant insists that it may in this way appropriate all the colors for trade-mark purposes. As has been done time out of mind in making

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

cordage by others, one thread of a different color from the others is used by the complainant. In the process of fabrication the colored thread, as the strands are twisted, makes spots of its own color on the surface of the cord. All this is part of the cord itself and cannot be regarded as a "mark," arbitrary in character, within the meaning of trade-mark law. It is an inherent and necessary result of the fabrication of a rope out of strands of different colors, and hence cannot be a trade-mark. Many cloth fabrics have more or less distinctively colored figures woven into them. These are not regarded as trade-marks but as decorative devices open to all and free from monopoly.

[2] The line may be a narrow one, but we take it the distinction is this: When an arbitrary mark, not naturally part of the fabric, is in any wise impressed upon it, it may be a trade-mark, if so intended and used, but no spot made on or color imparted to a fabric as the inevitable or natural result of using the material of which the fabric is made can be the basis of a trade-mark, for the reason that the making of the spots thereon or the impartation of the color thereto by the use of appropriate raw material is open to the public generally, and may not be exclusively appropriated by anybody. Any other doctrine would be intolerable.

The complainant seeks support in the fact that it uses the trade-mark on sash cord, but we think such a limitation, if insisted upon, is immaterial. It may be, too, that, if a trade-mark is not applicable to the genus, it cannot be so as to any species of cordage. However, it is not necessary to rule upon this proposition.

It may be that the defendant has closely and intentionally imitated complainant's fabric, but, however that might affect a suit of different character, it cannot aid in assuring complainant's claim to a valid trade-mark.

It results that the bill of complainant must be dismissed, with costs.

FRENCH v. BUSCH.

(District Court, E. D. New York. March 4, 1912.)

PLEADING (§ 218*)—DEFENSES—DEMURRER—REARGUMENT.

Where, in a receiver's suit against stockholders of an insolvent corporation to enforce a stock subscription liability, a demurrer has been overruled to defendant's answer, and it appears that defendant is entitled to an allowance of a set-off of some sort, in case the facts pleaded are proved, a reargument of the demurrer will not be granted more than six months after the decision thereof, based on a single ground that the demurrer to the set-off pleaded could not, as a matter of technical pleading, have been assumed to admit more than the specific facts of the counterclaim itself.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 549-566; Dec. Dig. § 218.*]

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

Action by Thomas E. French, as receiver of the Agnew Company, against Clarence M. Busch. On application for reargument on a demurrer. Overruled.

See, also, 189 Fed. 480.

Burlingham, Montgomery & Beecher (Herman S. Hertwig and Morton L. Fearey, of counsel), for plaintiff.

W. Russell Osborn, for defendant.

CHATFIELD, District Judge. Application has been made for reargument, some six months after decision upon a demurrer. In making the application, the grounds of the reargument have been stated. The court sees no reason for granting the reargument, nor for changing its decision, if reargument be had.

The complainant has called attention to the case of Babbitt v. Read (C. C.) 173 Fed. 712, in which the court states that a set-off arising from a debt of the bankrupt is not available against a trustee, suing stockholders for funds to distribute in bankruptcy; and it is suggested that this case was not used upon the preceding argument. It is unnecessary to go into the many questions arising from this proposition. The record shows plainly that upon the whole situation, as admitted by the demurrer, a set-off of the sort in question should be allowed in this case; and, it being apparent that the facts which might be produced upon the trial would present the actual situation shown by the admissions of the demurrer, it does not seem that after this long lapse of time a reargument should be had, based upon the single point that the demurrer to the set-off or counterclaim should not, as a matter of technical pleading, have been assumed to admit more than the specific facts of the counterclaim itself. As a matter of fact, it may well be doubted whether, even if nothing but the allegations of the complaint, the counterclaim, and the demurrer thereto be taken, a situation is not presented upon which the demurrer should be overruled.

Motion for reargument, therefore, will be denied.

SHIPMAN v. WILLARD.

(District Court, D. Rhode Island. March 19, 1912.)

No. 2,871.

JUDGMENT (§ 927*)—ACTION ON—NUL TIEL RECORD.

In an action of debt on a judgment, a plea of nul tiel record must be sustained, where plaintiff merely shows proceedings in another state, of which defendant is a nonresident, for the ascertainment of stockholders' liability.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1757; Dec. Dig. § 927.*]

Action by Leonard H. Shipman, receiver, against Ella Willard. Judgment for defendant.

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

Gardiner, Pirce & Thornley, for plaintiff.
William P. Sheffield, for defendant.

BROWN, District Judge. This is an action at law described in the writ, dated July 10, 1908, as "an action of debt on judgment." Jury trial was waived.

The declaration alleges that in a certain suit in Ohio—

"judgment was obtained by the said Leonard H. Shipman, receiver, against the defendant, by reason of her liability as a stockholder in F. Gray Company, under section 3, art. 13, of the Constitution of the state of Ohio, 1851, and under section 3258 of the Revised Statutes of the state of Ohio."

To this declaration the defendant files several pleas, the first of which is a plea: "Nul tiel record."

The plaintiff at the hearing put in evidence the record of certain proceedings in the case of Sharon National Bank v. American Straw Board Company, had in the court of common pleas for Miami county, state of Ohio. This record sets forth protracted proceedings for the ascertainment of stockholders' liability, but it does not justify the allegations of the declaration. Furthermore, the proceedings under the Ohio statutes wherein an assessment was made upon stockholders did not result in a personal judgment against the defendant, a nonresident, even if they did result in fixing the amount of the obligation of shareholders under the Ohio laws. Bernheimer v. Converse, 206 U. S. 516, 532, 27 Sup. Ct. 755, 51 L. Ed. 1163; Hale v. Allinson, 188 U. S. 56, 81, 21 Sup. Ct. 946, 45 L. Ed. 1031; Irvine v. Bankard (C. C.) 181 Fed. 206, 209.

The form of the action is of special importance, because of the various questions raised as to which of several statutes of limitations is applicable. The plaintiff's contention that the 20-year statute of limitations is applicable, and that the defendant is now precluded by the Ohio record from raising certain questions as to the statute of limitations of Ohio, makes it impossible to regard the contention that this is an action on a judgment as a mere formal matter.

I am of the opinion that the plea of nul tiel record must be sustained. Whether an amendment of the form of action should be allowed at this stage of the case cannot now be determined. The plaintiff, however, may within 20 days file a motion for leave to amend; otherwise, judgment will be entered for the defendant.

MAAS v. LONSTORF.

LONSTORF v. MAAS et al.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1912.)

Nos. 2,132, 2,133.

1. JOINT ADVENTURES (§ 4*)—EXPLORATION CONTRACT—CONSTRUCTION.

Where defendant M., in order to obtain complainant's assistance in certain mining explorations, obtained complainant's consent to pay one-half of the exploration expenses, in consideration of which M. agreed that, in case he secured options on lands in the vicinity of the premises described, complainant should have one-third interest therein, such contract included options for purchase as well as options for lease, so that M. was not entitled to procure purchase options for purchase in his own name and for his sole benefit.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. §§ 3–6; Dec. Dig. § 4.*]

2. JOINT ADVENTURES (§ 4*)—RIGHTS OF TRUSTEE—INDIVIDUAL INTEREST.

Where defendant induced his aunt to furnish one-half the expense required to explore certain mining property with the understanding that she should have one-third interest in any options he should secure on the land, defendant owed her a fiduciary relation, and was estopped to claim that by merging lease options into purchase options on mining property he obtained and held the purchase options for his own benefit without any duty to account.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. §§ 3–6; Dec. Dig. § 4.*]

3. RELEASE (§ 17*)—TRUSTEE—SETTLEMENT—CONCLUSIVENESS—FRAUD.

Under the rule that the duty of a trustee to exercise the utmost good faith extends to the matter of obtaining a release from the beneficiary, where defendant M. obtained a release from his aunt, with whom he stood in a fiduciary relation, of all her interest in certain mining options in consideration of certain notes, she was not, under the circumstances of the case, concluded by the release from thereafter maintaining a suit for an accounting of her interest in the property.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 32; Dec. Dig. § 17.*]

4. JOINT ADVENTURES (§ 4*)—RIGHTS OF PARTIES.

Where defendant M., while purchasing options on mining property for one-third of which he was bound to account to complainant, purchased outright an undivided interest in a particular tract with his own funds in order to use the same as a lever to obtain a lease option on the entire tract, and complainant in her bill for an accounting did not claim any interest in such property on the theory that there had been an actual purchase thereof by defendant, but alleged that defendant had acquired an option which he had transferred to the iron company with the other options in which she was interested, and as a part of the same transaction complainant, under the circumstances of the case, had no interest in the purchase of the option on the particular tract and could not compel an accounting with reference thereto.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. §§ 3–6; Dec. Dig. § 4.*]

5. JOINT ADVENTURES (§ 4*)—MINING OPTIONS—SALE—ACCOUNTING—ROYALTIES.

Complainant was entitled to one-third of certain mining options obtained by defendant and leased by him to an iron company. Defendant between the date of the execution of the lease and January 20, 1910, had

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

received in royalties $53,111, but of this $35,407.40 was received as royalties under the original terms of the lease; the remaining $17,703.70 being received under a supplemental agreement as to an increase in the royalties in consideration of defendant's transfer of one-half of his separate undivided interest in certain other property in which complainant was not interested and of his "good will." *Held*, that complainant was not entitled to share in any part of the royalties so received except the $35,407.40.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. §§ 3–6; Dec. Dig. § 4.*]

6. JOINT ADVENTURES (§ 4*)—TRUSTEE—EXPENSES.

Complainant contracted to pay half the expenses of certain mining explorations in consideration of one-third of any options that might be obtained by defendant. Defendant employed his brother as an expert and confidential driller and agreed to pay him $80 a month in cash and one-fourth of his own profits in the venture, and thereafter defendant paid his brother $24,583 as his fourth of the profits. *Held*, that the settlement was beneficial to complainant and that she was properly charged in an accounting with her share of the reasonable value of the brother's services.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. §§ 3–6; Dec. Dig. § 4.*]

7. JOINT ADVENTURES (§ 4*)—TRUSTEE—ACCOUNTING—CLAIM FOR SERVICES.

In a suit for an accounting of complainant's interest in certain mining options, defendant was not entitled to an allowance for services rendered after the making of a lease under the options to an iron company, where no claim for such services was pleaded or included in the order of reference to the master, and where he claimed no credit therefor in a list filed by him before the special master intended to show the extent of his claim.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. §§ 3–6; Dec. Dig. § 4.*]

Appeals from the Circuit Court of the United States for the Western District of Michigan.

Bill by Margaretha Lonstorf against George J. Maas and another. From a decree in favor of complainant for less than the relief demanded, both Margaretha Lonstorf and George J. Maas appeal. Affirmed.

See, also, 166 Fed. 41, 91 C. C. A. 627.

In No. 2,132:

A. C. Dustin and Young & Bell, for appellant.

D. H. Ball and A. B. Eldredge, for appellee.

In No. 2,133:

D. H. Ball and A. B. Eldredge, for appellant.

A. C. Dustin (Hoyt, Dustin, Kelley, McKeehan & Andrews and Young & Bell, of counsel), for appellees.

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

PER CURIAM. This bill was filed for the purpose of compelling Maas, one of the defendants below, to convey to Mrs. Lonstorf, the complainant below, an undivided interest in certain mineral properties alleged to have been acquired by him as the proceeds of explorations

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

for iron ore conducted for the joint benefit, and to account for her proportion of the rents and royalties received therefrom. The Circuit Court, after a hearing upon the pleadings and proof, entered a decree requiring Maas to convey to her a one-sixth interest in the properties therein described and referring the cause to a special master for an accounting. An appeal by Maas from this decree was dismissed by this court on the ground that it was not a final decree, and the cause remanded for further proceedings. Maas v. Lonstorf, 166 Fed. 41, 91 C. C. A. 627. Thereafter the cause was heard on exceptions to the special master's report, and a final decree was entered describing the lands and mineral interests in which Maas was directed to convey a one-sixth interest to Mrs. Lonstorf, subject to a mineral lease made by Maas to his codefendant, the Cleveland-Cliffs Iron Company, together with an interest in a certain Race Course property not set forth in the interlocutory decree; adjudging that there was a balance due to Mrs. Lonstorf from Maas of $12,099.94; and decreeing that the Cleveland-Cliffs Company attorn to Mrs. Lonstorf as the owner of an undivided one-sixth interest in the lands covered by its lease and pay her one-third of all royalties accrued thereunder since January 20, 1910. From this final decree both Mrs. Lonstorf and Maas have appealed to this court; the Cleveland-Cliffs Company not appealing.

The main facts are these: Mrs. Lonstorf is a resident of Milwaukee, Wis. The defendant Maas is her nephew; his mother, Mrs. Maas, being her sister. Maas and his mother reside at Negaunee, Mich. In 1898 Mrs. Lonstorf and Mrs. Maas were each the owners of an undivided one-third interest in a valuable iron ore mine at Negaunee, known as the Negaunee mine, which was leased to a mining company under a lease which would expire in 1903. The defendant Maas being familiar with the ore formation and somewhat experienced in exploring for mineral properties, and believing that the drift in the Negaunee mine pointed to the northwestward, secured, at some expense in time and money, options for mining leases on two farms, known as the Corbit and Martel tracts, lying northwestwardly from the Negaunee mine, and the promise of a similar option on another tract. Subsequently, after a preliminary correspondence between Maas and George J. Lonstorf, the complainant's son, who acted as her agent in the matters involved in this suit, Mrs. Lonstorf and Maas on November 25, 1898, entered into a written contract which is the foundation of this suit. By the terms of this contract Maas assigned and transferred to Mrs. Lonstorf a one-third interest in the options for lease on the Corbit and Martel tracts, and in the leases of said premises, if taken, and agreed to give the benefit of his skilled labor and knowledge and the use of his drilling outfit in the exploration of said lands; Mrs. Lonstorf agreeing on her part to pay one-half of the actual expenses of exploring for iron ore on said premises. This contract contained the following clause, concerning which this controversy chiefly relates, namely:

"Said first party (Maas) further agrees in case he secures options on lands in vicinity of the above-described premises that said second party (Mrs. Lonstorf) shall have a one-third (⅓) interest therein."

Maas also made a similar oral agreement with his mother; but she is not a party to this suit, and her rights are not involved herein.

Under this contract Mrs. Lonstorf from time to time furnished moneys to Maas, as required, for her part of the expenses of the exploration. He proceeded diligently in the work, and placed at first a test hole on the line between the Martel and Corbit tracts, and, later, test holes on other lands more to the southwestward, as the tests indicated that the ore extended in a more westwardly direction from the Negaunee mine than at first supposed. In the light of these developments he took from time to time options for lease on various other tracts in the vicinity, and from time to time renewed various of the options. In March, 1900, he bought outright for $300 an undivided mineral interest in a tract known as the Race Course property. In October, 1900, however, instead of thereafter extending all the options for lease or endeavoring to obtain options for lease on other tracts which the explorations indicated to be desirable, he commenced to take options for the purchase of various tracts or mineral rights. In some instances these purchase options were taken at the expiration of the lease options on the same tracts, and in others, before such expiration; in some, at the same time with the renewal of lease options on the same tracts, and in others, on tracts on which he had not obtained lease options. On November 1, 1900, after taking some of these purchase options, he wrote Lonstorf, without mentioning that any purchase options had been taken, stating that he had decided to sell the exploration and asking authority to sell their lease options or the leases which they might take by virtue thereof, for not less than $300,000, to be equally divided between Mrs. Lonstorf, Mrs. Maas and himself; to which Lonstorf gave his mother's consent. Maas thereafter continued the taking of purchase options instead of lease options, including an option for the purchase of a part of the original Corbit tract, with an extension of the lease option on the entire tract, and an option for the purchase of a part of the original Martel tract, on which the lease option had expired.

In December, 1900, Maas visited Mrs. Lonstorf at her home in Milwaukee, and had various conversations with her, her son George, and another son. He had with him a map showing the various tracts on which he held options for lease and for purchase. Maas states that he pointed out to them the different properties on which he held these options and told her that he had increased the territory by getting a great many options for purchase, but that she and his mother "would share alike in the benefits of the lease from all these properties"; that if he sold he would add the properties he had for purchase to the other, and extend the scope of the lease they were interested in under the contract and treat it as if the lease covered all the properties; to which he states she made no reply and seemed to be satisfied. The weight of the evidence, however, as was found by the learned trial judge, is that Maas not merely pointed out the various tracts on which he held options for purchase and lease, but that he stated that while he could not continue to get lease options he would hold those which he had as a lever to force purchase options, and that

he referred to all the options for purchase and lease as "their" property, and stated that Mrs. Lonstorf was interested in all this property.

On January 14, 1901, Maas held purchase options on 11 tracts and mineral interests in the vicinity of the Negaunee mine, including portions of the Corbit and Martel tracts and other tracts on which he had previously held lease options, and two tracts, known as the Barabe and Stewart tracts, on which he also held lease options. He also held lease options on two so-called Cemetery tracts, on which he had no purchase options. Under his several purchase options the amount to be paid the various vendors in order to acquire the 11 properties aggregated about $290,000.

On this date, Maas, by written contract with the Cleveland-Cliffs Company, granted it an option, "not divisible," of purchasing and acquiring from him, within five months thereafter, an undivided half interest in the 11 options for purchase, with a mining lease from him on the other half interest in these properties, at a specified tonnage royalty and minimum annual royalty which were to be doubled after 2,000,000 tons had been mined. The consideration to be paid by the company, if it elected to purchase, was to be $600,000, plus such sum, not exceeding $10,000, as Maas might be required to pay for certain option extensions. Of this, $300,000, or so much thereof as necessary, was to be used in paying the original vendors the prices fixed under the eleven purchase options; the remainder to be paid to Maas in cash or in notes secured by mortgage. The deeds to the 11 properties were then to be taken in the name of Maas and the company jointly, an undivided half interest in each, and Maas was to lease his half interest therein to the company. This contract further provided that if the company should elect to purchase, Maas should, without further consideration, also assign and transfer to it his lease options on the two Cemetery tracts and release all claim thereto. Under this contract, however, Maas did not agree to sell the company any interest in the lease options on the Barabe and Stewart tracts, the purchase options on these tracts being alone mentioned; and these two lease options were subsequently allowed to expire.

It also appears that in the preliminary negotiations Maas stated to the officers of the company that he had options for lease for the benefit of his mother, his aunt, and himself, on certain of the properties on which he proposed to sell the options for purchase, and intended to give them the benefit of a similar lease on all the properties, and that he wanted to apply $300,000 of the purchase price to pay for such lease, or to get the land rid of these leases, as he expressed it; but the company declined to agree to his suggestion that the contract should separate the consideration and specifically appropriate $300,000 to the purchase of the lease. There is furthermore evidence that a mining lease on the Martel, Corbit, Stewart, and Barabe tracts alone would not have been worth more than $150,000.

Within a short time the company elected to purchase under its option from Maas. Out of $300,000 of the purchase price which it paid in money, $294,331.53 was used in paying the vendors under the 11 purchase options, and the balance, $5,568.47, paid to Maas, to-

gether with $11,429.01 to reimburse him for additional payments made to secure title. For the remainder of the purchase price, $300,000, the company executed its notes. The several vendors delivered to Maas and the company, jointly, deeds to the 11 properties covered by the purchase options; and Maas delivered to the company a lease upon the undivided one-half interest thus acquired by him in these properties. As a supplemental transaction Maas also conveyed to the company a one-half undivided interest in his mineral interest in the Race Course property, and in consideration of this transfer and of his "good will," the company, in effect, agreed that pending the mining of 2,000,000 tons under its lease from Maas, both the tonnage royalty and the minimum royalty should be increased one-half; that is, should be at the rate of three-quarters of the royalties to be ultimately paid under the lease. It does not appear, however, that the company ever required Maas to assign to it the lease options on the Cemetery tracts; and apparently they were allowed to lapse.

The final result was that, as the outcome of these negotiations and through the sale of the 11 purchase options acquired primarily in consequence of the explorations undertaken for the joint benefit of Mrs. Lonstorf and Mrs. Maas and himself, Maas obtained an undivided half interest in these mineral properties, subject to the lease to the company, in addition to receiving a cash payment of several thousand dollars and the notes of the company for $300,000; and he also retained one-half of the mineral interest which he had acquired in the Race Course property.

After the company had elected to purchase, Maas notified Mrs. Lonstorf, through her son George, that he had induced the company to close with him, and that she would receive $100,000 in notes; and he subsequently sent her $100,000 of the notes which he had received, for which she executed to him a receipt reciting that this was "in payment" of her one-third interest in the "so-called Maas exploration" acquired by their agreement of November 25, 1898.

Subsequently, in October, 1903, Mrs. Lonstorf filed the present bill, which was framed upon the theory that the purchase options which Maas had sold the company were part of the exploration venture contemplated by their contract; that under this contract she was entitled to an undivided one-third interest in all the proceeds of the joint exploration, less one-half of the expenses; and that Maas had paid her one-third of only a portion of the proceeds, namely one-third of the notes, and had retained the remainder of the proceeds, namely, a one-half interest in the mineral properties which he had reserved under his dealings with the company, in which she was likewise entitled to an undivided one-third interest, subject to the lease to the company, as well as in the mineral interest which he had retained in the Race Course property. Maas, upon the other hand, in his answer, insisted that the joint exploration entered into under the contract was limited to lease options; that under the contract Mrs. Lonstorf had no interest in the purchase options which he had taken for himself independently of the contract; that though not legally bound thereto, in pursuance of verbal assurances to Mrs. Lonstorf that he would pro-

tect her in the one-third leasehold interest upon any lands in which he might acquire purchase options, he had in his sale to the company fixed upon the sum of $300,000 as the full value of such lease, and had treated the property as if it were incumbered with such a lease in favor of himself, his mother, and Mrs. Lonstorf, and had paid her one-third of the full value received therefor, namely, the $100,000 of notes, which she had accepted with full knowledge of the transaction; and he specifically relied upon the receipt above mentioned as a full settlement of all claims and demands on her part.

After careful consideration of the questions involved under these appeals, we have reached the following conclusions:

[1] 1. Without reciting the evidence, consisting mainly of correspondence, which is fully set forth in a careful and well-reasoned opinion of the trial judge upon the interlocutory hearing, we entirely concur in his conclusion, as did the judge who heard the cause upon final hearing, that the contract of November 25, 1898, was entered into not merely for the purpose of proving the ore deposits in the Negaunee mine and thus obtaining an extension of the existing lease on favorable terms, but also for the purpose of ascertaining valuable ore formations in the vicinity and acquiring control thereof by options for lease or purchase, to be held for the joint benefit of the contracting parties; that the provision of the contract that Mrs. Lonstorf should have a one-third interest "in options on lands" which Maas might acquire in the vicinity includes, by its terms, options for purchase as well as options for lease—in fact describing them the more aptly—and is not limited by the context to options for lease; and that the contract was furthermore, so construed by the parties themselves. And we are of opinion that upon the taking by Maas of the purchase options on ore properties in the vicinity, involving practically no greater expenditure than the taking of lease options, Mrs. Lonstorf became, under the contract, both by its express terms and as construed by the parties, the equitable owner of a one-third undivided interest therein, entitled to receive one-third of all the proceeds thereof upon paying one-half of the expenses incident thereto; and that her claim was not discharged by the transfer of one-third of the purchase-money notes merely, but that she was also entitled, in equity, to a one-third interest in the mineral properties which he also received as part of the proceeds of this joint venture, subject to the lease executed by him to the company, and to be substituted with him as a joint lessor in said lease to the extent of a one-third undivided interest.

[2] We furthermore concur in the opinion of the learned trial judge that even if under the contract Mrs. Lonstorf had been interested only in lease options, the relation of Maas to her, whether it be one of partnership, joint venture, or agency, forbade him to so act that his personal interest would be hostile to her, and that the course taken by him in merging lease options into purchase options which he claimed for his own benefit, and seeking to determine what part of the profits belonged to the joint enterprise and what part to himself, is one forbidden by his fiduciary relation and which equity will not tolerate. The greater weight of the evidence shows, in our opinion, that he al-

lowed lease options to expire, failed to obtain other lease options, and acquired purchase options in lieu thereof, in consequence of the information which he obtained through the joint exploration and largely by the use of the lease options, admittedly held on the joint account, as a leverage by which he sought to obtain purchase options for his own benefit. Clearly such course of dealing renders him liable to Mrs. Lonstorf, as a trustee, to the extent of one-third of the entire proceeds realized by him. It is well settled that an agent or other person sustaining a fiduciary relation to another cannot deal on his own account with the subject-matter of that relationship, or acquire an interest therein adverse to the one whom he represents, or make use of the knowledge which he acquires in the course of such agency or fiduciary relationship for his own benefit and to the injury of the trust; and that upon so dealing, he will be held, in equity, as a trustee of the person represented and compelled to transfer to him the property and benefits which he has thus obtained. Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Dennis v. McCagg, 32 Ill. 429; Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541; Vattelle v. Tedens, 122 Ill. 607, 14 N. E. 52, 3 Am. St. Rep. 502; Fricker v. Improvement Co., 124 Ga. 165, 52 S. E. 65; Forlaw v. Naval Stores Co., 124 Ga. 261, 52 S. E. 898. And see Warren v. Burt (8th Circ.) 58 Fed. 101, 7 C. C. A. 105; McKinley v. Williams (8th Circ.) 74 Fed. 94, 20 C. C. A. 312; Ludington v. Patton, 111 Wis. 208, 229, 86 N. W. 571; Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252; and Goodhue Warehouse Co. v. Davis, 81 Minn. 210, 83 N. W. 531. In Kimberly v. Arms, supra, in which it was held that where two persons had entered into a partnership for the purchase and sale of minerals and mining lands, one of the partners who had acquired for his own benefit and at his own expense certain shares of stock in a mining company, was accountable in equity to his partner for a one-half interest in the stock so purchased, the court said (page 528 of 129 U. S., page 361 of 9 Sup. Ct. [32 L. Ed. 764]):

"Neither by open fraud nor concealed deception, nor by any contrivance masking his actual relations to the firm, can a member of it, or an agent of it, be permitted to hold to his own use acquisitions made in disregard of those relations, either as partner or agent."

The position taken by Maas that since the entire consideration received from the Cleveland-Cliffs Company was paid for the purchase options of which he claimed to be the sole owner, he was under no legal obligation to account to Mrs. Lonstorf for any portion of the proceeds whatever, but that in consequence of a previous oral assurance that he would treat the entire property as if it were incumbered with an option for lease in favor of his aunt, his mother, and himself jointly, he apportioned $300,000 of the amount received for his purchase options to such imaginary lease, and fully discharged Mrs. Lonstorf's claim by giving her one-third thereof, clearly shows, we think, the fallacy of his contention that upon undertaking joint explorations of this character for the benefit of himself and them, contemplating on his theory, the acquisition of lease options merely, he could so deal with the result of these explorations and the information which he

received as to gradually substitute for the valuable lease options, in which they were jointly interested with him, purchase options of which he was the sole owner, and leave them in a position where they had no legal right whatever in the proceeds and must remain content with such portion only of the profit of the joint exploration as he might deem proper to concede to them as a matter of grace. Furthermore, while he may have had in mind the idea of setting apart $300,000 of the proceeds as representing the value of such imaginary lease on the property, no such lease in fact existed or was transferred to the company, and no such apportionment of the purchase price was or could have been made between him and the company. And even if the company could be considered as having paid him $300,000 for his lease upon a half interest in these properties, this obviously could not be treated as the equivalent of the imaginary lease of which he states he agreed to give Mrs. Lonstorf and his mother the benefit, since this was a lease upon half of the property merely, and obviously not the equivalent of a lease upon all the property.

[3] 2. Upon the question whether Mrs. Lonstorf is prevented from asserting her rights to a full one-third in the proceeds of this venture by the receipt which she executed to Maas on receiving one-third of the notes, we have had greater doubt. The main facts are these: On November 1, 1900, he wrote Mrs. Lonstorf's son that he had made up his mind to sell the exploration and was going to demand $600,000, but would not sell for less than $300,000, and requesting authority from Mrs. Lonstorf to sell their options for lease or the leases which they might take by virtue thereof for not less than $300,000; which authority was given. On December 15, 1900, he wrote that he had been negotiating with different parties and had come down to $400,000; and on January 9, 1901, that the Cleveland-Cliffs Company "will have to pay us by June 1st, if they take property $300,000." On January 17, 1901, he wrote that he had given the Cleveland-Cliffs Company an option, and inclosed the proof of an article which was to appear the next day in the Iron Herald, which stated that Maas, having some months before secured "options upon the mineral right of land" owned by the various designated persons whom he then held the options for purchase, and on the Cemetery tracts, had given an option to the Cleveland-Cliffs Company, and that it was understood that the money to be paid the several fee owners under the Maas options approximated $250,000, to which must be added the amount of his expenses and any profit he might make; but which contained nothing to suggest that under the option to the company Maas was to reserve any interest in the fee of the lands. On March 5, 1901, he wrote Lonstorf that the company had closed with him, and that Mrs. Lonstorf would receive $100,000 in notes secured by mortgage, and requesting that he send on the contract of November 25, 1898. Two days later, Lonstorf, on a visit to Negaunee, accidentally saw an article in the Marquette Mining Journal which recited the fact that it appeared from a lease from Maas to the Cleveland-Cliffs Company, which had been filed, that Maas had retained a half interest in the lands he had purchased from the other owners, and that the company had bought a half interest in the properties, with this lease from Maas.

After reading this article, Lonstorf had a conversation with Maas on the subject while riding on the train from Negaunee to Marquette. They agree that in this conversation Lonstorf asked Maas if the statement in the Mining Journal that he had received a half interest in the fee of the property sold the company was true, and that Maas said it was. Lonstorf testifies that he then said he thought they ought to have an interest in the fee, which Maas denied; and that this was the only talk. Maas testifies that Lonstorf said he understood Maas should not have any more interest than Mrs. Lonstorf, and did not think it was right, to which he replied that the purchase options were his own private property to do with what he wanted to; that he saw fit in making the deal to extend the scope of the lease so that they could get the benefit of these purchase options, and they got a greater price than they ever would have gotten if he had not gotten purchase options, and he thought he had treated his aunt and mother very fair; to which Lonstorf answered that he did not think it was gentlemanly at all, and he replied that he did not want to have any more words about it. It does not appear that in this conversation Lonstorf either asked Maas to see the contract with the company or inquired as to any particulars of the sale. That evening Lonstorf returned to Negaunee and saw Mrs. Maas, and told her that his mother was entitled to a third of what was received, and he would send his mother up to Mrs. Maas and let them settle. On learning of this interview, Maas, on March 13, 1901, wrote Lonstorf a letter in which he said:

"I want to say right here that under no circumstances will I allow my mother to worry herself or discuss my business with your mother or with any one else. Neither will I discuss my business nor will I quarrel with your mother or with you or anybody else over this matter of my fee. What I have to say will be written in this letter and that will end it from my part. I sold the fee and lease separately and sold the lease for the sum stated in the option from your mother to sell. The fee I acquired for my own benefit, paid all the expenses and lawyer fees in doing so myself, and never expected anybody to question my right in doing so. Every offer I made to sell the property was fee and lease separated and the first price of lease was $600,000.00. I came down to $300,000.00. * * * I thought I was doing a generous act in extending the scope of the lease, and getting the property in shape to handle. That I kept my private dealings to myself is my own affair. I wish to state again I will not allow my mother to discuss this affair with your mother, neither will I discuss it any more and what I have written must suffice."

In reply Lonstorf, on March 15, 1901, wrote Maas that "my mother will not bother you or your mother regarding the matter you refer to," requesting him to send him the mortgage and an assignment of a one-third interest therein, so he might have his attorneys look over them, and stating that when the notes arrived he would go to Negaunee to settle up with Maas, "or if you can get $100,000 cash the same will be acceptable." After writing this letter, Lonstorf appears to have made no effort to ascertain the precise facts, and a few weeks later, on receiving from Maas the $100,000 in notes, Mrs. Lonstorf, upon the advice and with the consent of her son, executed and sent him a receipt therefor, containing the clause:

"In payment of my one-third interest in the so-called Maas explorations, which was acquired by certain agreement dated November 25, 1898, copy of which is hereto attached."

It also appears that at and previously to this time Maas was, and had been, actively engaged in endeavoring to secure an advantageous renewal of the lease on the Negaunee mine in which Mrs. Lonstorf and Mrs. Maas each owned a one-third interest, and had been corresponding with her son in regard thereto, and we think it fairly inferable that the principal motive which induced Mrs. Lonstorf to then accept the notes and sign this receipt, without further information than she then possessed, was the desire to preserve friendly relations with Maas in order that nothing might occur to lessen the chance of an advantageous renewal of the Negaunee lease.

We are of the opinion, in the first place, that the statement, in Maas' letter of March 13th, that he "sold the fee and lease separately and sold the lease" for $300,000, was not intended by him or understood by Lonstorf as meaning that he had actually sold any fee or any lease, but that the meaning which Maas intended, and which Lonstorf understood, was that he had sold separately the purchase options and lease options, and had sold the lease options with an extension of their scope, for the sum of $300,000. This is clearly shown by the pleadings, since in the bill Mrs. Lonstorf alleges that Maas reported to her "that he had sold the options for lease for the sum of $300,000," and Maas, in his answer, specifically admits that in connection with the balance of the transaction "he informed complainant that he had sold the options for lease for the sum of $300,000." Giving, then, the statement in Maas' letter this construction, it is evident that it misrepresented the actual facts of the transaction. In fact, Maas had not sold the purchase options and lease options separately; nor had he sold any lease options for $300,000, or any other sum. In fact, he had sold the purchase options alone, for a little more than $300,000, plus a half interest in the fee of the properties, and had merely set apart in his own mind $300,000 of the proceeds as representing the value of an imaginary lease on the properties the joint benefit of himself, his mother, and Mrs. Lonstorf, as above recited. This letter, therefore, contained a misstatement as to the material facts. In addition to this, the previous correspondence does not show any full and fair disclosure of the facts of the transaction, and, on the contrary, indicates a studious withholding of such information. We find no satisfactory evidence that Maas had previously informed Mrs. Lonstorf or her son, either by correspondence or on the train or elsewhere, that he had allowed the greater portion of the lease options to expire and had obtained therefor purchase options of which he claimed to be the sole owner, or had explained, fully and fairly, that he had in fact sold the company purchase options only, and that the $100,000 of notes had been merely allotted by him to Mrs. Lonstorf as her part of the supposed consideration for an imaginary lease on the properties.

It is clear, however, that the duty of a trustee or person occupying a fiduciary relationship to exercise the utmost good faith in all dealings with his cestui que trust or beneficiary extends to the matter of obtaining a release from such beneficiary; that it is his duty in making settlement to put the beneficiary in possession of a full and fair state-

ment of the affairs of the trust, uberrima fides on his part being required; and that a release obtained from the beneficiary through concealment or misrepresentation of essential or material facts is of no effect. Booth v. Bradford, 114 Iowa, 562, 87 N. W. 685; Jones v. Lloyd, 117 Ill. 597, 607, 7 N. E. 119; In re Hodges' Estate, 63 Vt. 661, 666, 22 Atl. 725; North Nebraska Fair Ass'n v. Box, 57 Neb. 302, 77 N. W. 770; Snailham v. Isherwood, 151 Mass. 317, 320, 23 N. E. 1135; Diller v. Brubaker, 52 Pa. 498, 91 Am. Dec. 177; Stewart's Estate, 140 Pa. 124, 21 Atl. 311; Alexander v. Solomon (Tex.) 15 S. W. 906; 2 Perry on Trusts (2d Ed.) § 923, p. 560; Hill on Trustees (Am. Ed.) 581. And see Field v. Banking Co., 77 Miss. 180, 26 South. 365, and Ludington v. Patton, 111 Wis. 208, 239, 86 N. W. 571. In Perry on Trusts, supra, it is said:

"A release by the cestui que trust will not be binding, unless the parties are made fully acquainted with their own rights, and the nature and full extent of the liabilities of the trustee. Any concealment, misrepresentation, or other fraudulent conduct will vitiate such a release. There should, therefore, be a full statement and detailed explanation of the accounts, * * * especially if there is anything in the nature of a breach of trust. Even if the accounts are clearly stated, the release will be set aside, if there is any misapprehension as to the basis upon which they are made up."

We do not think the general rule deducible from the foregoing authorities is in conflict with either Perkins v. Fourniquet, 14 How. 313, 327, 14 L. Ed. 435, in which it was held that there was no proof that the release in question was obtained by any fraud or circumvention, or Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678, which involved merely the general rule as to the proof required to rescind a contract of purchase on the ground of fraudulent representation by the seller. And we find no well-considered case in which it is held that a beneficiary is bound by a release executed to a trustee under circumstances analogous to those appearing in the present record.

On the whole, therefore, we conclude that although Mrs. Lonstorf's conduct in executing the receipt, after the partial information which she had received, without further inquiry into the facts, was such that, if she had been dealing at arm's length with Maas, she might well be barred from repudiating the settlement made, yet in view of the fiduciary relationship between Maas and herself in the joint venture, added to the closeness of the kinship between them, the receipt given by her, based upon misleading statements and at least a partial suppression of the material facts, is not now binding upon her. Nor do we think that this conclusion is affected by the fact that the principal motive leading Mrs. Lonstorf to execute this receipt appears to have been her desire not to then break off her friendly relationship with Maas on account of the expectation of valuable services from him in connection with the renewal of the lease of the Negaunee mine; or that the fact that she delayed bringing her suit until after the negotiations for the renewal of this lease had been concluded at an increased royalty and for a large cash bonus, of which she received $500,000, either constitutes such laches as to now bar her claim against Maas, or creates, in the absence of any changed status on his part, any estoppel which

now prevents her from repudiating the settlement in question. We, accordingly, entirely concur in the conclusion reached by the trial judge that Mrs. Lonstorf is not now barred from recovering a full one-third of the proceeds of the joint exploration, upon paying one-half of the expenses thereof, in accordance with the terms of the original contract.

[4] 3. The court below was, however, in our opinion, in error in requiring Maas, in the final decree, to convey to Mrs. Lonstorf an undivided one-sixth in the mineral interest—apparently an undivided $1/24$—acquired by him in the Race Course property. The contract of November 25, 1898, refers only to "options on lands," and does not, we think, by its terms include the purchase of lands, requiring manifestly a much greater outlay of money than the acquisition of options merely, and involving a permanent investment in land as contrasted with a speculative venture requiring merely the outlay of sufficient funds to acquire options. Furthermore, Maas bought this interest with his own money. And on the same day he wrote Mrs. Lonstorf's son advising him that he had bought this interest, but not stating the amount paid or requesting her to contribute to the payment. In this letter he said: "I own to-night at least $1/24$. I bought it for a lever." And while thus referring to his purchase as a lever, we are of opinion that the entire tenor of this letter was that he regarded it as his own purchase and did not expect Mrs. Lonstorf to contribute to the purchase or share therein. She herself evidently so regarded it, and neither made any inquiry as to the price paid by him or offered to contribute thereto. In addition to this, both of Mrs. Lonstorf's sons specifically state that at the subsequent Milwaukee interview Maas told them that their mother was interested in all the lands inclosed within the heavy lines on the map, which he then showed them, except the Race Course property, which was one of the properties shown on the map within these lines. Maas further states, in substance, that when he pointed out to them on the map the properties on which he had options for purchase and options for lease, he spoke of the Race Course in which he had an interest in the fee, as they knew, but said that he had not succeeded in getting an option for lease and hoped, with his interest as a lever, that he would get it in the end. It does not appear that either Mrs. Lonstorf or her sons made any objection whatever to the specific statement by Maas that she was not interested in the Race Course property, or that she then claimed any interest in this property, or offered then or at any subsequent time to contribute to its purchase. We think that the undisputed evidence as to what occurred at the Milwaukee interview shows conclusively that all parties then understood that the interest which Maas had bought outright in the Race Course property belonged to him individually, but that if, by the use of his interest as a lever, he should succeed in getting an option for lease on the entire property, she would be interested in the lease option thus acquired. That Maas treated this interest as entirely separate from the joint exploration is further indicated by the fact that he did not provide for a transfer of this interest under the original option to the Cleveland-Cliffs Company, but retained it as his own property, and

subsequently transferred a half interest therein to the company as an entirely separate matter and for a distinct and separate consideration. Furthermore, Mrs. Lonstorf in her bill did not claim an interest in this property on the theory that there had been an actual purchase by Maas, but, on the contrary, alleged that he had acquired an option for its purchase which he had transferred to the company with the other options for purchase and as part of the same transacation.

We therefore must conclude that, both under the plain terms of the contract and as it was construed by the parties themselves, the interest in the Race Course property was not purchased by Maas on the joint account, but, as Mrs. Lonstorf then and afterward understood, was acquired and retained by him as his sole and individual property, without objection on her part; and that, under the doctrine of Twin-Lick Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328, having for so long a time, with full knowledge, acquiesced in this independent purchase on his own account, she cannot now, after it has resulted profitably, through the increased royalty realized by him from the assignment of a one-half interest therein to the Cleveland-Cliffs Company, be permitted in equity to claim an interest in the purchase.

[5] 4. We are of opinion that the court below was likewise in error in holding that Maas was chargeable on the accounting with one-third of all the royalties which he had received from the Cleveland-Cliffs Company between the date of the execution of the lease and January 20, 1910, amounting to $53,111; that is, with $17,703.70, and interest. Only $35,407.40 of this amount was received by him as royalties under the original terms of the lease executed as part of the sale to the company of the purchase options in which Mrs. Lonstorf was interested; the remaining $17,703.70 being received under the supplemental agreement as to an increase in the royalties in consideration of his transfer of one-half of his separate undivided interest in the Race Course property and of his "good will." As the consideration for this supplemental agreement was furnished solely by Maas, by a transfer of his own individual property, we are constrained to hold that Mrs. Lonstorf is not entitled to share in the increased royalties received thereunder, and that Maas is properly chargeable with only one-third of the royalties which he received under the original terms of the lease as part of the proceeds of the transfer of the purchase options in which Mrs. Lonstorf was interested with him.

In the defendant's assignment of error the royalty received by Maas under the supplemental agreement is, by an obvious clerical error, stated as one-fourth of the total amount, namely, $13,277.75. We think, however, that under rule 11 of this court (150 Fed. xxvii) we may take notice of the full extent of the error in this matter, although not properly assigned; and hence conclude that the decree in reference to this item should be corrected so as to charge Maas on this account with only one-third of $35,407.40, that is, with $11,802.15, and interest.

[6] 5. It further appears that during the progress of the exploration Maas employed his brother, William J. Maas, as an expert and confidential driller, and agreed to pay him $80 per month in cash and one-fourth of his own profits in the venture. The $80 per month was

charged to the joint account and acquiesced in by Mrs. Lonstorf. Later Maas paid his brother the sum of $24,583 as one-fourth of his profits. The learned trial judge was of opinion that while the services which his brother rendered were largely, if not entirely, those which it was his own duty to perform under the original contract, yet, as Mrs. Lonstorf had acquiesced in this employment, she should be charged, as part of the joint expenses, with one-half of the amount paid his brother, the extent of the reasonable value of the services rendered, such reasonable value being fixed by the court, under all the evidence, at $4,510.00, of which one-half was charged to Mrs. Lonstorf. Both appellants have assigned error; Mrs. Lonstorf insisting that she should not be charged with anything on this account, and Maas, that she should be charged with one-half of the entire $24,583. After careful consideration of the evidence, we are of opinion that the court below reached the substantial equities of the situation in accordance with the spirit of the contract and in view of the undoubted benefit accruing to Mrs. Lonstorf by reason of the rendition of these services, and find no error in its decree in this behalf.

6. In the reference under the accounting Maas also claimed a credit of $25,000 for services rendered by him subsequent to the execution of the lease to the Cleveland-Cliffs Company, stating in his evidence that he claimed this as compensation for services he subsequently rendered in clearing up titles in certain lawsuits and aiding the company in the development of the leased property. His testimony is, however, very vague as to the services rendered. The court below was of opinion that while the amount claimed by Maas was wholly unjustified by any services he could specify in this immediate matter, nevertheless, as the proof showed that during the two years after the execution of the lease, while Mrs. Lonstorf was apparently resting content with her division of the profits, he has assisted in negotiating a renewal of the lease of the Negaunee mine, from which she received a bonus of $500,000 and an increased royalty, and as the whole record, in the opinion of the court below, put this matter fairly though not directly, in issue, Maas should be allowed for his services in these two closely related matters, namely, the Negaunee lease and his own lease, the sum of $25,000, of which one-third, or $8,333, was charged to Mrs. Lonstorf. Both appellants have assigned error; Mrs. Lonstorf insisting that she should not be charged with anything on this account, and Maas, that she should be charged the full sum of $25,000 for his services in perfecting title and enhancing the value of his lease, in addition to the full value of his services to her in negotiating the renewal lease of the Negaunee mine.

After careful consideration we are constrained to hold that Mrs. Lonstorf is not properly chargeable in any sum whatever on account of either of these matters. In so far as his services in connection with his own lease are concerned, the evidence, is not merely so indefinite as to form no satisfactory basis upon which any allowance could be made, but it may well be doubted whether, by analogy to the rule laid down by this court in Ruggles v. Buckley, 175 Fed. 57, 99 C. C. A. 73, 27 L. R. A. (N. S.) 541, 20 Ann. Cas. 1057, compensation could be in

any event allowed him for services rendered after the execution of the lease, in the absence of a special agreement with Mrs. Lonstorf, especially since he was assuming to own the entire lease in derogation of Mrs. Lonstorf's rights.

[7] But aside from these matters, we are clearly of the opinion that the allowances claimed by him are entirely foreign to the pleadings. No claim for services in reference to either of these leases was set up in his answer or put in issue in any way under the pleadings, or included in the order of reference to the master. Nor was his claim for services in reference to the Negaunee lease even included in the items for which he claimed credit in the list filed by him before the special master; the testimony in reference to his services in this matter being apparently introduced, not as a matter of accounting in this case, but solely in support of his theory as to Mrs. Lonstorf's motive in executing the receipt for the $100,000 of notes and delaying the filing of her bill. Mrs. Lonstorf was clearly not required under any issue made in the case to introduce any proof before the master on the accounting in reference to his services in either of these matters; and under the limited scope of the reference to the master she properly did not attempt so to do. And while it would appear that Maas' services in connection with the renewal of the Negaunee lease were very beneficial to her, although the extent to which he was acting in the matter as the representative of his mother and for her benefit instead of for Mrs. Lonstorf is not shown, and that in a proper case, upon issue properly joined, he might well be entitled to recover just compensation from her for such services, we are constrained to conclude that, under this bill and the issues made thereunder, so much of the decree below as charged Mrs. Lonstorf in any sum for his services in reference either to his own lease or the renewal of the Negaunee lease, was coram non judice, and cannot, for this reason, be sustained.

7. Without setting forth in detail the various assignments of error of the parties, the determination of which is sufficiently indicated by the conclusions hereinabove stated, it is sufficient to say that, upon the whole case, we are of the opinion that the final decree below is erroneous in the following respects: (1) In so far as it directed Maas to convey to Mrs. Lonstorf an interest in the Race Course property; (2) in so far as it adjudged Maas to be chargeable to Mrs. Lonstorf on account of royalties received by him in excess of $11,802.15, and interest thereon; and (3) in so far as it charged Mrs. Lonstorf on the accounting with the sum of $8,333, or any sum whatever, for services rendered by Maas in connection with his own lease or the Negaunee lease. In other respects we are of opinion that the decree below is correct and should be affirmed.

The decree below will, accordingly, be reversed to the extent hereinabove indicated, but otherwise in all things affirmed, and the cause will be remanded to the court below for further proceedings not inconsistent with this opinion. Each of the appellants will pay one-half of the costs of these appeals.

EMPIRE STATE SURETY CO. v. CARROLL COUNTY et al.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1912.)

Nos. 3,357–3,364.

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY (§ 20*)—CREATION OF RELEASE—WRITTEN INSTRUMENT—CONDITIONAL DELIVERY.

Where the principal named in a bond would be liable in the absence of the bond for the acts or omissions which constitute the breach in suit, the failure of the principal to execute the bond does not relieve the surety, who has executed it and caused or permitted it to be delivered to the obligee, from the liability for the breach.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 39–42; Dec. Dig. § 20.*]

2. COUNTIES (§ 96*)—OFFICERS—LIABILITIES ON BONDS.

The term of the bond of an officer to a county fixed by statute and clearly expressed in the bond may not be shortened or changed by the fact that the county supervisors had called for or prescribed a bond with a shorter term before the bond in suit was made and accepted.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 137–139; Dec. Dig. § 96.*]

3. OFFICERS (§ 127*)—LIABILITIES ON BONDS.

Sureties on an official bond liable by its terms concurrently with sureties on other bonds of the same officer, who permit their bond to stand unquestioned for more than two years after it was made and until the officer has defaulted, present no equity as against the sureties on concurrent bonds, for its reformation so as to relieve them from their share of the liability and cast it upon the sureties on the other bond, by proof that they failed to read their bond, but all parties to it stated previous to its execution and understood that it was to be so limited in its terms as to exclude the liability in controversy.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 223; Dec. Dig. § 127.*]

4. TRUSTS (§ 353*)—FOLLOWING TRUST FUNDS—PREFERENCES.

A cestui que trust who is the equitable owner of his fund for one sound reason is as much entitled to it as another who is the equitable owner of of his fund for many sound reasons, and the latter is entitled to no preference over the former in payment out of a common fund in which the trustee has commingled them.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 526; Dec. Dig. § 353.*]

5. TRUSTS (§ 358*)—FOLLOWING TRUST FUNDS—PREFERENCES.

It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only, and only to the extent that the trust property or its proceeds went into it.

It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and value thereof which came to the hands of the receiver.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 523, 553; Dec. Dig. § 358.*]

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

6. TRUSTS (§ 358*)—FOLLOWING TRUST FUNDS—PREFERENCES.
Proof that a trustee mingled trust funds with his own and made payments out of the common fund is a sufficient identification of the remainder, not exceeding the smallest amount the fund contained subsequent to the commingling, coming to the hands of the receiver as trust property, because the legal presumption is that he regarded the law and neither paid out nor invested in other security or property the trust fund, but kept it sacred.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 523, 553; Dec. Dig. § 358.*

Following trust property converted by trustee as dependent on its identification, see note to In re T. A. McIntyre & Co., 108 C. C. A. 545.]

7. TRUSTS (§ 372*)—FOLLOWING TRUST FUNDS—PREFERENCES.
For the same reason the legal presumption is that promissory notes, bonds, and other property coming to the hands of the receiver were not produced by the use of and are not trust property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 600–603; Dec. Dig. § 372.*]

8. TRUSTS (§ 353*)—FOLLOWING TRUST FUNDS—PREFERENCES.
Where a trustee has mingled in a common fund the moneys of many cestuis que trustent and then made payments out of it, the legal presumption is that the moneys were paid out in the order in which they were paid in, and the cestuis que trustent are equitably entitled to any allowable preferences in the inverse order of the times of their respective payments into the fund.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 526; Dec. Dig. § 353.*]

9. BANKS AND BANKING (§ 80*)—INSOLVENCY—CLAIMS AGAINST INSOLVENT BANK—PREFERENCES.
Checks of third parties on a bank with which they are deposited which are paid by crediting the bank and charging the drawers on its books, do not increase the cash in the bank and present no basis for a preferential payment to the depositor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 184–196; Dec. Dig. § 80.*]

10. BANKS AND BANKING (§ 80*)—INSOLVENCY—CLAIMS AGAINST INSOLVENT BANK—PREFERENCES.
The deposit of checks of third parties, which are credited to the depositor and used by the bank to pay its debts, bring no money into its cash and lay no foundation for a preferential payment to the depositor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 184–196; Dec. Dig. § 80.*]

11. BANKS AND BANKING (§ 80*)—INSOLVENCY—CLAIMS AGAINST INSOLVENT BANK—PREFERENCES.
Checks of third parties deposited with a bank credited to the depositor and collected through a clearing house do not warrant a preferential payment, in the absence of proof of the actual balance of cash which the bank received through the clearing house, for they may have been, and presumptively were, used in whole or in part to discharge debts of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 184–196; Dec. Dig. § 80.*

Right to proceeds of collection in insolvency of collecting bank, see note to Western German Bank v. Norvell, 69 C. C. A. 333.]

12. RECEIVERS (§ 152*)—CLAIMS AGAINST ESTATE—PREFERENCES.
A claim of a cestui que trust to a preference in payment out of the assets of an insolvent estate will not be allowed over the objection of

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

the receiver, where the claims of the majority of the creditors in amount and in value which the receiver represents are equal to it in law and in equity, although such creditors are content to share ratably with all the creditors and make no claims for preferences.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 272–275, 278; Dec. Dig. § 152.*]

13. BANKS AND BANKING (§ 287*)—NATIONAL BANKS—RECEIVERS—POWERS.

It is beyond the power of a receiver of a national bank, who is a party to a decree allowing a preferred claim in a suit between a creditor of the insolvent who is entitled to appeal from the decree and the receiver and the successful claimant, to deprive the creditor of his right to appeal from the decree and this court of its jurisdiction to review it, by compromising it with the successful claimant without the consent of the aggrieved creditor and without any order of the court. Barber Asphalt Paving Co. v. Morris, 132 Fed. 945, 953, 66 C. C. A. 55, 63, 67 L. R. A. 761.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1089–1127; Dec. Dig. § 287.*]

Hook, Circuit Judge, dissenting in part.

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

Suits in equity by the Chicago & Northwestern Railway Company against the First National Bank of Carroll, Iowa, and another, and by the Empire State Surety Company and another against Carroll County and others, consolidated. From the decrees, certain parties appeal. Reversed and remanded, with instructions.

These are appeals from decrees of the Circuit Court which adjudged the claims of the Chicago & Northwestern Railway Company, of Carroll County, Iowa, of George L. McAllister, its treasurer, and of the sureties on his bonds against each other, and for preferences in the payment of claims against the First National Bank of Iowa by the receiver of its property. The bank failed on October 17, 1908, owing the Railway Company about $2,000 and the county about $25,000. Its indebtedness to the county arose from the deposit with it between June 15, 1908, and October 18, 1908, of county funds by the county treasurer without any order or direction of the county board to make such deposits so that the county treasurer and the sureties on his bonds were liable for any loss the county might sustain by the failure of the bank to pay the debt it incurred on account of these deposits. The term of office of the county treasurer commenced on January 1, 1907, and continued two years. The county board fixed the amount of his bonds at $60,000. In January, 1907, he gave a bond for $25,000 with the Empire State Surety Company as surety and a second bond for $25,000 with the Illinois Surety Company as surety, and in April, 1907, he gave a third bond for $10,000 with John Meyers, William Arts, and Theresia McAllister as sureties. For more than four months before the bank suspended payments it had been, and its officers had known that it was, insolvent. But its credit among those who were not aware of its condition had enabled it during this time to borrow of one to pay another and to continue its business. When it finally failed on October 17, 1908, it still had on hand $5,912.05 and the Surety Companies and the Railway Company respectively claimed that this was money paid into the bank by them after the bank officers knew that it was insolvent and that it could not repay the money thus paid into the bank by them, and that this money, therefore, became a trust fund which they were entitled to have applied to the payment of their claims in preference to the payment of the claims of other creditors.

In this state of the case, the Chicago & Northwestern Railway Company, on January 18, 1909, exhibited its bill in equity in the court below against the bank and Fowler, the receiver of its property, to secure a preference over other creditors in the payment of its claim against the bank. Thereupon, in

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

April, 1909, the Empire State Surety Company and the Illinois Surety Company brought their bill in the same court against Carroll county, the First National Bank of Carroll, I. W. Fowler, the receiver of the property of this bank, George L. McAllister, the county treasurer, and John Meyers, William Arts, and Theresia McAllister, the sureties on his bond for $10,000, and prayed for an adjudication of the amount due to the county of Carroll from the bank, that the individual sureties be adjudged to be liable with the surety companies to pay their just share of the amount of the treasurer's debt to the county, and that the receiver of the bank be adjudged to pay this amount out of the proceeds of its property in preference to the payment of claims of other creditors. The Illinois Company subsequently discovered that McAllister, the principal named in the bond, never signed it, and thereupon it withdrew as complainant, became a defendant, and answered the bill of the Empire Company and denied all liability on its bond. Before the final hearing of these two suits the Railway Company was made a party in the suit of the Empire Company, all the parties to the latter suit were made parties to the suit of the Railway Company, and the two suits were by consent and by order of the court consolidated for final hearing. They were afterwards heard and decided by the Circuit Court, and decrees were rendered on the same day to the effect, among other things: (1) That the Illinois Company was liable on its bond for its just share of the debt of the treasurer to the county; (2) that the individual sureties were not liable for any part of that debt; (3) that the Chicago & Northwestern Railway Company was entitled to the payment in preference to other creditors of a balance of $1,895.80 out of the property of the bank; and (4) that the two surety companies were entitled to payment out of the property of the bank in preference to other creditors of $3,132.21. These conclusions are now assailed on every side by proper appeals in the cases in hand which demand their review by this court.

John F. Stout (Halleck F. Rose, on the brief), for Empire State Surety Co.

James C. Davis (A. A. McLaughlin, on the brief), for Chicago & N. W. Ry. Co.

Emmet Tinley (W. E. Mitchell, on the brief), for Illinois Surety Co.

George S. Wright, for appellees Meyers, McAllister, and Arts.

F. F. Oldham (W. R. Lee and E. A. Robb, on the brief), for First Nat. Bank of Carroll, Iowa, and I. W. Fowler, receiver.

E. A. Wissler (W. R. Lee and E. A. Robb, on the brief), for appellant Carroll County, Iowa.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). [1] 1. Did the failure of the principal, the county treasurer, to sign the bond of his surety, the Illinois Company, relieve that company from liability thereon? The statutes of Iowa 1897, §§ 1177, 1183, required the county treasurer to give a bond conditioned, among other things, to "promptly account for all balances of money remaining in his hands at the termination of his office" and to "promptly pay over to the officer or person entitled thereto, the moneys which may come into his hands by virtue of his office," and it is for a breach of these conditions of the bond and of these only that the Illinois Company is charged with liability in these cases. The statutes also provided that the sureties on such a bond should "be liable for all money or public property that may come into the hands of such officer at any time during his possession of the office" (section 1183); that the county treasurer should take and subscribe a prescribed oath of office on the bond,

or on a paper attached thereto (section 1181); that the penal sum for which he should give bond should be fixed by the board of supervisors of the county (section 1185); and that his bond should be approved, or disapproved, by that board within five days after its presentation for that purpose and should be indorsed, in case of approval, to that effect and filed (section 1188). In this state of the law the treasurer applied to the agent of the Illinois Company in Iowa to furnish him as his surety his official bond in the penal sum of $25,000 and the agent sent his application and a blank form of the bond to the company at its general office in Illinois. The company there filled the blanks for the names of the obligors with the name of the treasurer as principal and with its own name as surety, and the blank for the amount of the bond with $25,000, executed it, and sent it back to its agent in Iowa, who caused it to be delivered to the treasurer with a direction to him that he should execute it as principal before he delivered it. The treasurer then subscribed and executed his official oath, which was written on the bond, and without signing it as principal delivered it to the county as his official bond, and it was accepted as such and filed with the county auditor.

The Illinois Company and its officers expected and intended that the treasurer should sign the bond as principal and that it should not be delivered to the county until it was so signed by them, exacted no promise of and made no agreement with the treasurer to that effect, and they gave no notice to the county of their expectation or intention in this regard other than the notice, if any, inferable from the absence of the treasurer's signature on the bond. The county, the treasurer, and the Surety Company all believed, and the county permitted the treasurer to receive and hold its funds during the term of the bond in reliance upon its belief, that the Surety Company was legally bound thereby. There is no evidence that the Surety Company ever made any investigation to find out whether or not the treasurer had signed the bond before this litigation arose. It collected its premium in 1907 for its services as surety on this bond during that year and again in 1908 for its services as surety on this bond during the second year. No one discovered the alleged defect in the bond now asserted until many months after the defalcation of the treasurer, and, when the Illinois Company discovered it, it tendered repayment of the premiums and insisted that it never was liable upon the bond.

It was undoubtedly lawful for the county to take and for the Surety Company to give a bond made and executed by itself only, conditioned as prescribed by section 1183 of the statutes of Iowa, to indemnify the county against the defalcations of the treasurer. If the Surety Company had intentionally made and delivered, and the county had intentionally accepted and relied upon, such a bond, it is clear that the Surety Company could not have escaped liability thereon, for there is no prohibition in the statutes of such a contract, and it would have constituted a valid agreement under the common law. Nor can there be any doubt that the Surety Company would not have been bound by the bond it executed if it had distinctly notified the county so that the latter knew before it received the bond that the

Surety Company did not intend to be and declared that it would not be bound by the bond unless it was executed by the treasurer as principal before it was delivered to the county.

Now, the facts are that the Surety Company did not intend to be bound unless the treasurer signed the bond before it was delivered, and the county supposed that the Surety Company was and intended that it should be bound by the bond it had executed and had caused to be delivered to it. If the treasurer had done his duty, if he had either signed the bond as principal or had notified the county that the Surety Company did not intend to be bound by it, or that it did not intend that it should be delivered until he signed it, the alleged defect would not have existed, and this controversy would not have arisen. The real question in the case therefore is: Shall the Surety Company or the county suffer for the failure of the treasurer to discharge his duty? It is a general and salutary maxim of equity jurisprudence that, where one of two innocent parties must suffer from the fault of a third, he whose negligence or trust put it in the power of the third party to cause the loss ought to sustain it. The Surety Company executed this bond and delivered it to its associate and employer, the treasurer. It had it in its power to clearly express in writing in the bond itself that it would not be bound thereby until the treasurer signed it. It had it in its power to require the treasurer to sign it before it executed it. It had it in its power to retain the possession and thereby to prevent a delivery of the bond until the treasurer signed it. It did none of these things. It delivered the bond duly executed by itself to its employer, the treasurer, and thereby furnished him with the means of inducing the county in reliance upon it to permit him to receive its funds and cause this loss. If now the Surety Company may repudiate the acts of its employer which became effective by reason of its executed bond which it intrusted to him for a premium which he paid, the county or the sureties on concurrent bonds must lose thousands of dollars which throughout the terms of the bonds all parties in reliance upon the bond of the Illinois Company believed and intended should be saved to them by that bond. If, on the other hand, the liability of the Illinois Company upon this bond is affirmed, it will suffer no loss in these cases which it would not have sustained, and it will have the same recourse over upon the treasurer which it would have had if the treasurer had signed the bond. In other words, an affirmance of the liability of the Illinois Company places loss and liability here where the acts of the Surety Company in executing and delivering its bond to its employer induced the county to believe, and where all parties supposed during the term of the bond they were and would be, and where they all intended they should be, while a denial of that liability imposes them upon others and releases the Illinois Company whose acts induced the county to risk them. In this state of the case, the more persuasive reasons argue for the conclusion, and the maxims and principles of equity demand, that the Illinois Company shall be required to comply with the terms of its bond although the principal never signed it. This conclusion has not been reached without a consideration of the arguments: First, that this is a joint

and not a joint and several bond and that some authorities make a distinction betwen them in the consideration and decision of this question. But this distinction is immaterial where, as in these cases, the relation of principal and surety necessarily exists under the law whether the bond is signed by the principal or not. Second, that the bond, if signed by the treasurer, would have extended his liability beyond that incurred by him in the absence of his signature; but it would not have extended his liability for the breach of duty or of the bond which is the occasion of these suits, and hence that fact is immaterial in these cases, and it will be soon enough to consider its effect when the liability of some surety for matters involved in such extensions is at issue. And, third, that the facts that in the body of the bond the treasurer was named as principal and the Surety Company as surety, and that the bond was not signed by the principal when accepted by the county, constituted notice to the latter that the bond was incomplete and that the Surety Company never intended that it should be delivered or that the company should be bound by it until the treasurer signed it. But the treasurer and the Surety Company on one side were negotiating at arm's length with the county on the other side to make a contract not to provide the county with the personal liability of the treasurer for his defalcation now in issue, for it had that liability without the bond, but to furnish the county with the security of a surety that that liability of the treasurer would be discharged. It was the province and duty of the treasurer and of the Surety Company to determine what security they would offer, and that of the county to decide whether or not it would accept the security they offered. It was the duty of the Surety Company and of its employer and associate in this negotiation, the treasurer, to see that the bond they tendered was so signed and executed that it charged them with the legal liability they respectively intended to assume. The county stood in no fiduciary relation to the Surety Company, and it owed that company no duty to see that the bond was signed or executed as the latter intended. It was its right to presume and to rely on the presumption that the bond duly executed by the Surety Company and tendered to it by its employer, the treasurer, was signed and executed as the Surety Company intended it should be, notwithstanding the fact that the Surety Company had not required the treasurer to sign it before it put it in his hands. By placing it in his possession, it gave him the power to deliver it, because the duty to see that it was signed and executed as the Surety Company intended was on that company and not on the county. And now that the county has lawfully relied upon this presumption until the treasurer has defaulted and the liability of the Surety Company has accrued, that company ought to be and it is estopped in equity from denying its obligation to do what it agreed to do by the expressed terms of the bond it executed and caused to be delivered to the county.

This question is not a novel one in this court, and the court is not ignorant of the fact that there are many decisions which are more or less in conflict with the views which have been expressed. Johnson v. Kimball Township, 39 Mich. 187, 33 Am. Rep. 372; Board of

Education v. Sweeney, 1 S. D. 642, 48 N. W. 302, 36 Am. St. Rep. 767; Russell v. Annable, 109 Mass. 72, 12 Am. Rep. 665; Gay v. Murphy, 134 Mo. 98, 34 S. W. 1091, 56 Am. St. Rep. 496; Martin v. Hornsby, 55 Minn. 187, 56 N. W. 751, 43 Am. St. Rep. 487; Bjoin v. Anglim, 97 Minn. 526, 107 N. W. 558; Weir v. Mead, 101 Cal. 125, 35 Pac. 567, 40 Am. St. Rep. 46; Bean v. Parker, 17 Mass. 591; Wood v. Washburn, 2 Pick. (Mass.) 24; Goodyear Dental Vulcanite Co. v. Bacon, 151 Mass. 460, 24 N. E. 404, 8 L. R. A. 486; Wild Cat Branch v. Ball, 45 Ind. 213; Novak v. Pitlick, 120 Iowa, 286, 94 N. W. 916, 98 Am. St. Rep. 360. In deference to the exhaustive and forceful presentation of this case by counsel for the Illinois Company, these authorities have been again examined, and the reasons suggested for the conclusions reached therein have been considered; but a review of the arguments and reasons which have induced courts to reach opposite conclusions in the decision of the question here in issue has served but to strengthen our conviction that the more cogent reasons persuade, and the principles of equity demand, that we adhere to the conclusion that, where the principal named in the bond would be liable in the absence of the bond for the acts or omissions which constitute the breach of its condition in suit, the failure of the principal to sign the bond does not relieve the surety who has executed and caused, or permitted, it to be delivered to the obligee, from its liability for the breach of its condition. United States Fidelity & Guaranty Co. v. Haggart, 91 C. C. A. 289, 297, 163 Fed. 801, 809; St. Louis Brewing Ass'n v. Hayes, 38 C. C. A. 449, 97 Fed. 859; State v. Bowman, 10 Ohio, 445; City of Deering v. Moore, 86 Me. 181, 29 Atl. 988, 41 Am. St. Rep. 534; Pima County v. Snyder, 5 Ariz. 45, 44 Pac. 297; Douglas County v. Bardon, 79 Wis. 641, 48 N. W. 969; Gibbs v. Johnson, 63 Mich. 671, 30 N. W. 343; Trustees of Schools v. Scheik, 119 Ill. 579, 8 N. E. 189, 192; Woodman v. Calkins, 13 Mont. 363, 34 Pac. 187, 40 Am. St. Rep. 449; United States Fidelity & Guaranty Co. v. Union Trust & S. Co., 142 Ala. 532, 38 South. 177; Lovejoy v. Isbell, 70 Conn. 557, 40 Atl. 531; Johnson v. Johnson, 31 Ohio St. 131; San Roman v. Watson, 54 Tex. 254. There was no error in the holding of the court below that the failure of the principal to sign the bond of the Illinois Company did not relieve it from liability thereunder.

[2] 2. Were the individual sureties on the treasurer's bond for $10,000 exempt from liability for his defaults after the expiration of one year from the approval of the bond? The term of the treasurer's office was two years from January 1, 1907. The bond was dated, executed, and approved on April 2, 1907. It was in the same form as were those of the Surety Companies. It complied literally with the requirements of section 1183 of the statutes of Iowa, and it contained no limitation of liability to any particular fund or to any other time than the duration of the treasurer's office, so that on its face it clearly bound the sureties upon it to indemnify the county for any defaults of the treasurer between April 2, 1907, and January 1, 1909. The defalcations in issue occurred during the last six months of the treasurer's term, and these sureties claim exemption from liability

therefor: (1) Because the record of the board of supervisors is that on January 7, 1907, "on motion the following official bonds were approved, George L. McAllister, treasurer, $50,000," on January 8, 1907, "it was moved and seconded that the county treasurer furnish an additional bond of $10,000 for the ensuing year. Carried." On January 18, 1907, "on motion the bond of the county treasurer was fixed at $60,000 for the ensuing year," and on April 3, 1907, "the additional bond of George L. McAllister for $10,000 was read and on motion ordered approved." And (2) because the sureties produced parol evidence that before the bond was executed the supervisors called for a bond for the term of one year to cover collections for drainage matters, informed the treasurer and these sureties of this fact, and all parties so understood the purpose of the bond.

But the fact that the board fixed the amount of the bonds of the treasurer at $60,000 for the ensuing year and called for the bond for $10,000 for the ensuing year cannot be effective to limit, modify, or set aside the clear terms of the subsequent contract between the sureties and the county. That contract was not made until more than two months after these motions had been adopted by the board. It was effected by the tender of the bond and its acceptance and approval by the board of supervisors on April 2, 1907. In that contract all previous calls, demands, negotiations, and understandings of the parties were merged, and the accepted bond became incontrovertible evidence of the terms of their agreement. This bond was one of those which, together with the two bonds of the Surety Companies, made up the $60,000 fixed by the board. The statute required this bond to be conditioned that the treasurer would "account for the balances in his hands at the termination of his office." The bond was so conditioned, and the termination of the treasurer's office was more than 20 months after the bond was accepted, so that both by the terms of the statute and by the expressed terms of the bond these sureties contracted to indemnify the county for all defaults of their principal during the remainder of his term of office. A bond of an officer is for the remainder of his term, where no time is mentioned therein; much more is it so where the bond itself expressly so stipulates. County of Wapello v. Bigham, 10 Iowa, 39, 42, 74 Am. Dec. 370; South Carolina Society v. Johnson, 1 McCord (S. C.) 41, 10 Am. Dec. 644; Bigelow v. Bridge, 8 Mass. 275. The term of the bond of an officer to a county fixed by the statute and expressed in the bond may not be shortened, changed, or avoided by the fact that the county board before the bond was made or accepted called for a bond with a shorter term.

Nor was the parol evidence that, before the contract was made or delivered, the members of the board of supervisors informed the treasurer and the sureties, and all these parties understood, that the bond was demanded and made to cover collections on account of drainage matters during the ensuing year only, adequate to warrant any limitation or modification of its plain terms. In the absence of fraud or mistake, this evidence was incompetent because all the previous negotiations, statements, and promissory representations of these parties

were merged in the written contract, which is conclusive evidence of the nature and extent of their undertaking. Wilson v. New United States Cattle Ranch Co., 20 C. C. A. 244, 249, 73 Fed. 994, 999; Baxter v. Billings, 28 C. C. A. 85, 83 Fed. 790.

[3] The execution of the bond was not induced by fraud, and there is no proof of such a mistake in its draft or execution as can successfully appeal to the conscience of a chancellor. The sureties knew the form and the terms of the official bonds required by the statute, for they must have known the law. The bond they signed was such a bond. They could read. If they read it, they knew it bound them for the default of the treasurer throughout his term of office, and if they failed to read it that was their fault, and as against others who had a right to rely upon it and in reliance upon it disadvantageously changed their position these sureties are estopped from denying that they knew the terms of this bond. They made it, they caused it to be filed on the public records, and they let it stand concurrently with the bonds of these Surety Companies as an indemnity for their just share, one-sixth, of any loss the county might sustain through the default of the treasurer. Nothing but conscience, good faith, and reasonable diligence move a court of equity to grant relief to a complainant. And the case against the Surety Companies which the evidence for these individual sureties presents under their cross-bill, which was not filed until long after the defalcation of the treasurer and the expiration of his term, for a reformation of the plain terms of their bond so as to relieve them from liability for one-sixth of the treasurer's defalcation and to cast it upon the Surety Companies, is so devoid of equity and discloses such a lack of diligence in their failure to read the bond and to discover the mistake they allege when they signed it, and such a lack of diligence in their failure to investigate, discover, and bring suit to remedy it for more than two years after the bond was filed and until many months after the defalcation, that no relief ought to be or can be lawfully granted to them by a court of equity. As against the Surety Companies the individual sureties are liable under their bond for one-sixth of the loss that has been or shall be sustained by the county by reason of the defalcation of the treasurer.

3. Was the allowance to the sureties of a preferential payment of $3,132.21 just and equitable? This allowance is assailed by the receiver of the bank on the ground, among others, that none of the funds or of the proceeds of the funds of the county came to his hands, and by the Surety Companies on the ground that the court should have decreed a preferential payment to them of the entire claim of the county against the bank because its funds had been used to augment the assets of the bank which came to the hands of the receiver. In the litigation of this claim of preference the rights of the sureties are the same as those of the county, because the former must pay the deficit of the treasurer, and the terms "sureties" and the "county" will be used interchangeably in the discussion of the questions here presented.

The bank was hopelessly insolvent, and its president and cashier knew that fact and continued to receive deposits from June 11, 1908,

until October 17, 1908, inclusive, when it failed. When it closed its doors on that day, it had failed to pay out on the orders of the treasurer or to return $25,801.21 of the amounts credited by it to the county for deposits made during that time. During the same time other depositors had paid into this bank more than $800,000, and when it failed it owed to other depositors $343,277.27. Applying the settled rule that, in the absence of affirmative evidence to the contrary, where payments are made out of a common fund, the presumption is that the earliest in are the earliest out, the fact is established that all the deposits made prior to June 11, 1908, had been drawn out, and those remaining in the bank were deposits of those depositors who had been deceived and defrauded into leaving their moneys with the bank between June 11, 1908, and October 18, 1908, after the president and the cashier knew the bank was hopelessly insolvent, but still received deposits on the faith of its apparently solvent condition. The claims allowed against the bank aggregated $409,105.45, so that the record is that four-fifths of the amount owing by the bank is for deposits made by creditors while the officers of the bank knew it was insolvent. All the deposits remaining, therefore, those of the individual depositors and those of the county alike, the bank had unlawfully deceived and defrauded these depositors into making by its appearance of solvency when it knew it was insolvent, and it received and held them all in trust for their respective depositors. The deposits of the bank were also charged with a trust for the county because the bank knew that the county treasurer deposited them with it without authority and in violation of a penal prohibition of the statutes. Statutes of Iowa 1897, § 1457. But the trust with which the funds of the other depositors was charged by the fraud committed upon them by accepting their money when the bank knew it was insolvent was as sacred as that imposed upon the funds of the county by the fact that the bank knew they were deposited in violation of a penal statute, and the latter fact entitles the county to no preference over the other depositors in the payment out of the proceeds of the bank of the moneys it deposited.

[4] A cestui que trust who is the equitable owner of his fund for one sound reason is as much entitled to it as another who is the equitable owner of his fund for many sound reasons, and the latter is entitled to no preference over the former in payment out of a common fund in which the trustee has commingled them. Cherry v. Territory, 17 Okl. 213, 89 Pac. 190, 192.

[5] This is a suit in equity against the receiver of a national bank to require him to take from the ratable dividends of other creditors of the bank the requisite amount to pay the county's claim in full. The receiver must make the distribution of the property of this bank in accordance with the provisions of the national banking law. It is the dominant purpose and requirement of that law that, after provision for a redemption of its notes is made, the proceeds of an insolvent national bank shall be equally distributed among its unsecured creditors. So imperative is this provision that it repeals a former act of Congress giving a preference to the United States and annuls a statute of a state giving a preference to deposits of savings banks.

Rev. St. § 5236 (U. S. Comp. St. 1901, p. 3508); Davis v. Elmira Savings Bank, 161 U. S. 275, 285, 16 Sup. Ct. 502, 40 L. Ed. 700; National Bank v. Colby, 21 Wall. 609, 613, 614, 22 L. Ed. 687. The burden, therefore, is on the sureties to prove clearly that they are entitled on equitable principles to the preference they seek. They proved that the bank took the deposits of the county and of its other depositors in trust for them respectively. But this was not enough. They were also required to prove that these deposits or their proceeds, or a certain part of them, came to the hands of the receiver, for he is liable to cestuis que trustent to pay trust funds in full only to the extent that he receives them. How do the sureties claim to have made this proof? They argue that, as the bank received other deposits and earned profits sufficient to pay its operating expenses, the deposits of the county necessarily augmented the general assets which came to the hands of the receiver, and that this fact entitles them to have their claims paid in full out of the proceeds of the property of the bank in preference to its general creditors. The position is not without support in many remarks and in some decisions of the courts. Beard v. Independent District of Pella City, 31 C. C. A. 562, 88 Fed. 375; City of Spokane v. First National Bank of Spokane, 68 Fed. 982, 16 C. C. A. 85; Smith v. Township of Au Gres, Michigan, 150 Fed. 257, 261, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876; San Diego County v. California Nat. Bank (C. C.) 52 Fed. 59; Page County v. Rose, 130 Iowa, 296, 299, 106 N. W. 744, 5 L. R. A. (N. S.) 886, 8 Ann. Cas. 114; Lucas County v. Jamison (C. C.) 170 Fed. 338, 347; American Can Co. v. Williams, 178 Fed. 420, 423, 101 C. C. A. 634; St. Louis, etc., Ry. Co. v. Johnston, 133 U. S. 566, 576, 578, 10 Sup. Ct. 390, 33 L. Ed. 683; Richardson v. New Orleans Coffee Co., 102 Fed. 785, 788, 789, 43 C. C. A. 583; Western German Bank v. Norvell, 134 Fed. 724, 726, 69 C. C. A. 330. But the contention cannot be sustained on either reason or authority. A deliberate consideration of the questions this phase of this case presents and a re-examination of authorities have convinced that these are the rules by which claims of this nature to preferential payments out of the proceeds of the property of an insolvent must be adjudged:

(1) It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the receiver. Peters v. Bain, 133 U. S. 670, 693, 694, 10 Sup. Ct. 354, 33 L. Ed. 696; Spokane County v. First Nat. Bank, 68 Fed. 979, 982, 16 C. C. A. 81, 84; Board of Com'rs v. Patterson (C. C.) 149 Fed. 229; Frelinghuysen v. Nugent (C. C.) 36 Fed. 229, 239; Board of Com'rs v. Strawn, 157 Fed. 49, 51, 84 C. C. A. 553, 555, 15 L. R. A. (N. S.) 1100; Lowe

v. Jones, 192 Mass. 94, 101, 78 N. E. 402, 6 L. R. A. (N. S.) 487, 116 Am. St. Rep. 225, 7 Ann. Cas. 551; Cherry v. Territory, 17 Okl. 213, 89 Pac. 190; St. Louis Brewing Ass'n v. Austin, 100 Ala. 313, 13 South. 908; Little v. Chadwick, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570; Howard v. Fay, 138 Mass. 104; Attorney General v. Brigham, 142 Mass. 248, 7 N. E. 851; Erie Ry. Co. v. Dial, 140 Fed. 689, 72 C. C. A. 183; Ferchen v. Arndt, 26 Or. 121, 37 Pac. 161, 29 L. R. A. 664, 46 Am. St. Rep. 603; Blake v. State Savings Bank, 12 Wash. 619, 41 Pac. 909, 910; In re North River Bank, 60 Hun, 91, 14 N. Y. Supp. 261; Williams v. Van Norden Trust Co., 104 App. Div. 251, 257, 93 N. Y. Supp. 821; Bishop v. Mahoney, 70 Minn. 238, 73 N. W. 6; Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383; Burnham v. Barth, 89 Wis. 362, 366, 62 N. W. 96; Bradley v. Chesebrough, 111 Iowa, 126, 82 N. W. 472; Lebanon Trust & Safe Deposit Bank's Assigned Estate, 166 Pa. 622, 31 Atl. 334; Marquette Fire Com'rs v. Wilkinson, 119 Mich. 655, 670, 78 N. W. 893, 44 L. R. A. 493; Hauk v. Van Ingen, 196 Ill. 20, 39, 63 N. E. 705; Ellicott v. Kuhl, 60 N. J. Eq. 333, 46 Atl. 945; Ober v. Cochran, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118; In re Mulligan (D. C.) 116 Fed. 715, 717, 718; Holmes v. Gilman, 138 N. Y. 369, 376, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463; In re Hicks, 170 N. Y. 195, 198, 63 N. E. 276.

[6] (2) Proof that a trustee mingled trust funds with his own and made payments out of the common fund is a sufficient identification of the remainder of that fund coming to the hands of the receiver, not exceeding the smallest amount the fund contained subsequent to the commingling (Board of Com'rs v. Strawn, 157 Fed. 49, 51, 84 C. C. A. 553, 555, 15 L. R. A. [N. S.] 1100; Weiss v. Haight & Freese Co. [C. C.] 152 Fed. 479; American Can Co. v. Williams, 178 Fed. 420, 423, 101 C. C. A. 634, 637), as trust property, because the legal presumption is that he regarded the law and neither paid out nor invested in other property the trust fund, but kept it sacred (Board of Com'rs v. Patterson [C. C.] 149 Fed. 229, 232; Spokane County v. First National Bank, 68 Fed. 979, 16 C. C. A. 81).

[7] (3) For the same reason the legal presumption is that promissory notes, bonds, and other property coming to the hands of the receiver were not procured by the use of, and are not, trust property. Spokane County v. First Nat. Bank, 68 Fed. 979, 980, 16 C. C. A. 81, 82.

[8] (4) Where a trustee has mingled in a common fund the moneys of many separate cestuis que trustent and then made payments out of this common fund, the legal presumption is that the moneys were paid out in the order in which they were paid in, and the cestuis que trustent are equitably entitled to any allowable preference in the inverse order of the times of their respective payments into the fund.

The claim of the sureties for a preferential payment of the amount of the claim of the county against the bank because the county's moneys augmented the general assets that came to the hands of the receiver is forbidden by the first rule. They next claim that they are entitled to a preferential payment of about $12,000: (1) Because $4,-

455.05 was owing on notes discounted by the bank between June 11, 1908, and October 17, 1908, which came to the hands of the receiver; but the claim to such an allowance on account of these notes is forbidden by the third rule and by the fact that there is no evidence tracing any of the county's deposits or any of the proceeds of them into any of these notes. (2) Because the receiver collected $1,763.77 from credits to the First National Bank in other banks; but no preference on this account may be allowed for the same reasons. And (3) because $5,912.05 in cash came to the hands of the receiver when the bank failed. But the allowance of a preference on this account is forbidden by the fourth rule and by these facts: All the deposits of the county were made prior to October 10, 1908, except a deposit made on that day of tax receipts aggregating $1,041.22 and checks of third persons aggregating $486.11, and a deposit made on October 17, 1908, of $1,604.88 in checks. It was for these two deposits that the preference of $3,132.21 was allowed to the sureties by the court below. But this record has been searched in vain for any evidence that the checks for the $1,604.88 deposited on the last day the bank was open ever went into the hands of the receiver, and no claim is made to recover these checks. Nor can any evidence be found sufficient to show what banks these checks were drawn upon, or that any moneys derived from them ever went into the $5,912.05, or into the hands of the receiver. Proof that these checks augmented the cash that went into the hands of the receiver, or that they produced cash which he obtained, was indispensable to any preference on their account.

[9] But checks of third persons on the bank with which they are deposited which are paid by crediting the bank and charging the drawers on its books fail to increase the cash in its possession and form no basis for a preferential payment to the depositor. Beard v. Independent District of Pella City, 88 Fed. 375, 382, 31 C. C. A. 562.

[10] Moreover, the deposit of checks of third persons which are credited to the depositor and used by the bank to pay its debts bring no money into its fund of cash and form no foundation for preferential payment to the depositor. City Bank v. Blackmore, 75 Fed. 771, 773, 21 C. C. A. 514.

[11] Again, checks of third parties deposited with a bank credited to the depositor and collected through a clearing house lay no foundation for a preferential payment, in the absence of proof of the actual balance of cash the bank received on account of them, for they may have been and usually are used in whole or in part to discharge the debts of the bank. In re Seven Corners Bank, 58 Minn. 5, 59 N. W. 633; City of St. Paul v. Seymour, 71 Minn. 303, 308, 74 N. W. 136; Willoughby v. Weinberger, 15 Okl. 226, 229, 79 Pac. 777.

These checks may have been, and the probability is much greater that most of them were, used for some of these purposes than it is that cash for them was paid into the bank and remained there at the close of the day and went into the hands of the receiver. The sureties failed, therefore, to prove that any, much less how much, cash went into the $5,912.05 from the proceeds of these checks, and for that

reason alone they were not entitled to a preference on account of this deposit.

For the same reason they were entitled to no preference on account of the deposit of the checks and tax receipts on October 10, 1908. There is no evidence how much, if at all, these papers augmented the cash in the bank, much less that any cash it derived from them remained in the $5,912.05 that went into the hands of the receiver seven days later. On the other hand, it is certain that it did not, for the proof is conclusive that more than $8,000 was deposited in the bank subsequent to October 10, 1908, and more than $20,000 was drawn out. All these deposits were trust funds, and applying the rules that deposits of equal trust rank are presumed to be drawn out in the order they are paid in, and that allowable preferences in the remaining balance must be given in inverse order of their payment to the trustee, all of the deposits of the 10th of October had been drawn out long before October 17, 1908, and the $5,912.05 was the property of later depositors.

[12] It is true, as suggested by counsel, that the individual depositors who put these deposits into the bank after June 11, 1908, have not claimed preference in payment out of the proceeds of their funds. But they are represented here by the receiver, who objects on their behalf that they are cestuis que trustent equally with the county, and that, while they are content in view of the fact that four-fifths of the claims against the bank are by claimants of this class to share the proceeds of its insolvent estate equally with all claimants, they protest against the taking of a share of their dividends to pay other cestuis que trustent of only equal rank in full. These sureties are appealing for their preferences to a court of equity which may and ought to require those who seek equity to do equity. And when, as in this case, the entire record shows that the allowance of a claim for a preferential payment out of the proceeds of an insolvent estate will be inequitable and unjust to the great majority in number and in amount of the creditors of the estate whose claims are equal in law and in merit to that pressed for preference, while the denial of this preference will violate no rule of law or of equity and work no injustice, but will tend to preserve that equality which is equity, the claim presents no equity and makes no appeal to the conscience of the chancellor for its allowance, and it must be denied. Cherry v. Territory, 17 Okl. 213, 89 Pac. 190, 191. The county and the sureties are entitled to no preference in payment out of the proceeds of the property of the bank.

4. Was the Chicago & Northwestern Railway Company entitled to preference in the payment of $1,895.80 allowed to it by the decrees below? This allowance is based on the facts that the Railway Company bought of the bank four drafts on other banks which were never paid and which there was no money with the drawees to pay, while the bank was insolvent and its officers knew these facts. The Railway Company paid for these drafts as follows: On October 13, 1908, it bought a draft for $536.08 for which it paid $364.27 in cash and $171.81 in checks of third parties on other banks. On October 14, 1908, it bought a draft for $624.70 for which it paid in cash $377.76

and in checks of third parties on other local banks $112.67 and in checks of such parties on the First National Bank $134.27. On October 16, 1908, it bought a draft for $741.62 for which it paid in cash $571.68 and in checks of third parties on other local banks $170.04. On October 17, 1908, it bought a draft for $150.08 for which it paid in cash $119.52, in checks of third parties on other local banks, $8.15, and in checks of third parties on the First National Bank $22.41. The court below found that the aggregate amount of these payments in cash and in checks on other banks, which was $1,895.80, constituted a fund held in trust by the bank for the company; that this fund augmented the general assets of the estate which came to the hands of the receiver by that amount; and that the Railway Company was entitled to a preference in its payment. Conceding that the amounts paid to the bank for these drafts constituted, at the times they were respectively received, funds held by the bank in trust for the Railway Company, it was not sufficient to sustain a preference that the estate coming to the hands of the receiver was augmented thereby. It was indispensable to a preferential payment that these amounts should be traced by adequate proof into some specific fund or property which came to the receiver's possession. The only property that came to the hands of the receiver that there is any evidence tending to show that any part of the amounts paid for these drafts went into is the cash fund of $5,912.05 which was turned over to the receiver when the bank closed. On October 17, 1908, 26 parties deposited $4,319.19; on October 16, 1908, 16 parties deposited $1,169.62; and on October 15, 1908, 27 parties deposited $2,719.79—making the aggregate deposits during the three last days of the bank's operation $8,208.60. These deposits were trust funds to the same extent as the payments by the Railway Company, for they were induced by like acts of the officers in fraudulently receiving them into the bank when they knew it was insolvent. During these three days more than $20,000 was paid out by the bank. Applying the rules that, in the absence of counter proof, payments out of a common fund composed of commingled trust funds are presumed to draw them out in the order of time in which they were paid in, it is certain that none of the Railway Company's payments on the 13th and 14th of October went into the $5,912.05 left on the night of October 17, 1908, because all payments into the cash of the bank prior to the 15th had been drawn out, and the remnant was composed of the deposits and payments into the bank on the 15th, 16th, and 17th of October, and those who made these payments were entitled to preferential payment in the inverse order of the times of their making. Under the latter rule, the parties who deposited the $4,319.19, and the Railway Company which paid in the $119.52 in cash on October 17th, are entitled to $4,438.71 of this $5,912.05, and there remained $1,473.24 to be applied to the deposits and payments into the bank on October 16th. On that day there were deposited $1,169.62, and the Railway Company paid in $571.68 in cash, making in all $1,741.30. There is no evidence in what order of time the payment of the Railway Company and the deposits on that day were made; but, if the deposits were made after the payment, there

remained the difference between $1,473.24 and $1,169.62, or $303.62 of the moneys paid in by the Railway Company which must have gone into the $5,912.05 which came to the hands of the receiver. The burden was on the Railway Company to prove the order of time of the payment and the deposits and the amount of the preference to which it was entitled. It has failed to prove that it was entitled to more than $423.14, and the decrees should have adjudged a preferential payment to it of that amount and no more. In this computation and statement the checks of third parties paid into the bank by the Railway Company have been disregarded because the cash paid in on the 16th and 17th exceeds the amount allowable to the Railway Company under the law and the evidence, and it is immaterial whether the checks were paid by a discharge of debts of the bank or by an actual payment of cash into its vaults.

[13] 5. At the hearing in this court its attention was called to the fact that after the decrees in these cases had been rendered, and before the time for appeal had expired, the Railway Company and the receiver, without the consent of the Empire Company or the court, or of the other parties to the suit, agreed to compromise the claim of the Railway Company for preferential payment by allowing it a preferred claim for $1,433.23 and a general claim for $619.25. But when that agreement was made, the Empire Company, in these two suits, in one of which it was complainant and the receiver and the Railway Company were defendants, and in the other of which the Railway Company was complainant and the Surety Company and the receiver were defendants, had invoked the jurisdiction of the federal courts to determine the validity and extent of this preferential claim, and those suits were pending and were not finally determined. Within the time allowed by the act of Congress the Empire Company appealed to this court and assigned the allowance of the Railway Company's preferential claim as error in each case. The Surety Company was interested in that allowance and aggrieved thereby, for its effect was to diminish the dividend on its claim. It therefore had the right to a review of that allowance by appeal from the decrees which made it and its right of appeal was absolute, so absolute that the Circuit Court could not have deprived it of its right, much less could the receiver or any of the other parties to these suits. Simpson v. First National Bank, 129 Fed. 257, 259, 63 C. C. A. 371, 373; McCourt v. Singers-Bigger, 150 Fed. 102, 104, 105, 80 C. C. A. 56, 58, 59.

Moreover, as soon as the issue of the validity and extent of this preferred claim arose between the Empire Company on the one side and the receiver and the Railway Company on the other, the jurisdiction of this court to review the decision of that issue and finally to determine it attached. And conceding that, in the absence of a suit pending against him concerning a claim for preference, the receiver of a national bank may lawfully compromise and settle it, it is too late for him to do so, without the consent of all the interested parties to the suit or an order of the court, after the courts have acquired jurisdiction of the claim in a suit to which he is a party.

It is beyond the power of a receiver of a national bank who is a party to a decree allowing a preferred claim in a suit between a creditor of the bank, who is entitled to appeal from it, and himself and the claimant, to deprive the creditor of his right to appeal from the decree and this court of its jurisdiction to review it by compromising it with the claimant without the consent of the creditor or the order of the court. Barber Asphalt Pav. Co. v. Morris, 132 Fed. 945, 953, 66 C. C. A. 55, 63, 67 L. R. A. 761. The decrees should establish the preferred claim of the Railway Company for $423.14, its general claim for the balance of the amounts it paid for its drafts, and should require it to pay back to the receiver the amount, if any, it has received in excess of the amount to which it was entitled upon this basis.

The result is that the decrees of September 30, 1910, and the supplemental decree of November 3, 1909, must be reversed, and these cases must be remanded to the District Court, with instructions to enter decrees in accordance with the views expressed in this opinion.

Let the Empire Company recover costs from the Railway Company in No. 3,357, and let the costs in Nos. 3,358 to 3,364, inclusive, be so divided that one-eighth thereof shall be paid by the Empire Company, three-eighths thereof by the Illinois Company, one-eighth thereof by the receiver, one-eighth thereof by the Railway Company, and two-eighths thereof by the individual sureties.

HOOK, Circuit Judge. With one exception, I concur in the results reached in the foregoing opinion, though not in every respect with the reasoning. The exception is in the case of the Railway Company. When the bank failed, the Comptroller of the Currency at once took charge, appointed a receiver, and proceeded with the liquidation of its affairs. The Railway Company asserted and was decreed by the Circuit Court to have a preferential claim upon funds in the receiver's hands. The receiver did not appeal, but, acting under the direction of the Comptroller, compromised and settled the claim of the Railway Company at less than the amount of the decree. The sum agreed on was paid. The Empire Surety Company, which by the way was not a direct creditor of the bank, but simply a surety for a county treasurer who had lost public funds by unlawfully depositing them in the bank, appealed from the decree. The appeal was taken after the settlement with the Railway Company. The point of my dissent is here: The action of the Comptroller, whose authority in such cases under the statutes of the United States is well known and need not be enlarged upon, puts the right of the bank upon a ground wholly independent of the decree, and the court should not now require the repayment of the money. Any different rule would enable a single creditor, a common nonlien creditor for that matter, which at the most the Surety Company was, to thwart the power of the Comptroller and his duty speedily to administer the affairs of an insolvent national bank, by merely beginning a suit in equity and making all claimants to preferences parties defendant. Indeed, if my Brothers are right, it would seem to follow that a creditor of an insolvent national bank might commence a suit to marshal its assets and so compel the Comp-

troller to sit by and await the termination of the litigation before he could exercise his statutory powers with respect to the allowance and payment of claims. Within his power the Comptroller or his receiver is the representative of all the creditors.

UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MD., v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. March 22, 1912.)

No. 1,982.

PRINCIPAL AND SURETY (§ 100*)—BUILDING CONTRACTS—DISCHARGE OF SURETY.

The surety on a federal building contractor's bond was discharged from liability by the government taking possession of the work on the contractor's default and making a substantially different contract with a third person, though the original contract authorized the government to make changes in the work.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 162–165; Dec. Dig. § 100.*

Discharge of surety on building contract by change in obligation or duty of principal, see note to United States v. Walsh, 52 C. C. A. 427.]

Gilbert, Circuit Judge, dissenting.

Upon Writ of Error to the Circuit Court of the United States for the Southern District of California, Southern Division.

Action by the United States of America against the United States Fidelity & Guaranty Company of Baltimore, Md. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

The question in this case is whether the surety on a contractor's bond, conditioned for his performance of a contract for the erection of a stone messhall and kitchen at the Rice Station Indian School, in the then territory of Arizona, was released by occurrences happening subsequent to the entering by the contractor upon the performance of the contract.

By the contract the contractor, who was one Augustus W. Boggs, agreed to furnish all the labor and materials and to do and perform all of the work required to construct and complete the buildings mentioned in accordance with certain plans, drawings, and specifications annexed to and made a part of the contract. It was agreed that the entire work should be completed and turned over to the government on or before September 1, 1905, and that, in the event of the contractor's failure or refusal so to do, $20 a day should be deducted from the contract price for each and every day the completion and delivery of the buildings should be delayed beyond the stipulated time. The government reserved the right to at any time make "changes, alterations, or omissions from or additions to the work and materials herein provided for, the valuation of such work and materials if not agreed upon, to be determined on the basis of the contract unit of value of material and work referred to, or, in the absence of such unit of value, on prevailing market rates, which market rates, in the case of dispute, are to be determined by" the Commissioner of Indian Affairs, whose decision was made binding upon both parties. The contract further provided that no claim for damages on account of such changes or for anticipated profits should be made or allowed, and that the contractor should not be allowed any additional compensation for labor or material "unless he receives written authority from the Commissioner of Indian Affairs, and the price agreed upon before execution of the work; that no addition to or omission from the work herein specifically

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

provided for shall make void or affect the other provisions or covenants of this contract, but the difference in the cost thereby occasioned, as the case may be, shall be added to or deducted from the amount of the contract; and that in the absence of any express agreement or provision to the contrary, no addition to or omission from the work herein specifically provided for shall be construed to extend the time fixed herein for the final completion of the work."

The agreement further provided that if the contractor should fail to complete the work or any part thereof in accordance with the contract and within the stipulated time, or should fail to prosecute the work with such diligence as in the judgment of the government would insure its completion within the stipulated time, the government might withhold all payments for work in place until the final completion and acceptance of the work, and "is authorized and empowered, after eight days' notice thereof, in writing, to the party of the second part, and the said party of the second part having failed to take such action within the said eight days as will, in the judgment of the party of the first part, remedy the default for which said notice was given, to take possession of the said work in whole or in part and of all machinery and tools employed thereon and all materials belonging to the said party of the second part delivered on the site, and, at the expense of said party of the second part, to complete or have completed the said work, and to supply or have supplied the labor, materials, and tools of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second part and his sureties on the bond to be given for the faithful performance of this agreement shall be further liable for any damages incurred through such default and any and all other breaches of this contract."

The contract further provided that the government should pay the contractor, "on the presentation of proper receipts or vouchers in duplicate to the Commissioner of Indian Affairs, the sum of twelve thousand seven hundred nine no-100 ($12,709.00) dollars, in lawful money of the United States, in consideration of the herein recited covenants and agreements made by the party of the second part, as follows: Eighty (80) per centum of the value of the work executed and actually in place to the satisfaction of the party of the first part at the expiration of each thirty (30) days during the progress of the work, the amount of each payment to be computed upon the actual amount of labor and materials expended during the said period of thirty (30) days for which partial payment is to be made (the said value to be ascertained by the party of the first part); and the balance thereof will be retained until the completion of the entire work, and the approval and acceptance of the same by the party of the first part, which amount shall be forfeited by the said party of the second part in the event of the nonfulfillment of this contract; it being expressly covenanted and agreed that said forfeiture shall not relieve the party of the second part from liability to the party of the first part for any and all damages sustained by reason of any breach of this contract."

The complaint filed in the case alleged the commencement of the work contracted for and the making by the government of two payments on account, one of $4,356.24, made on the 10th of June, 1905, and the other of $3,539.16, made on the 21st of July of the same year, and that no part of those sums has been repaid, and it alleged various subsequently discovered fraudulent practices on the part of the contractor, and also various other failures on his part to comply with the provisions of the contract and various efforts by the government authorities to get the contractor to remedy such failures, defects, and defaults, without success, which neglect, failure, and refusal on his part, the complaint alleged, continued to September 1, 1905; that notwithstanding those facts Boggs continued in possession of the work until November 4, 1905, on which day the whole of it, so far as then performed, was, through his fault and negligence, destroyed by fire; that subsequently, to wit, about December 28, 1905, the government took possession of the premises and has ever since remained in possession thereof; that thereafter and pursuant to proceedings regularly had and taken by the plaintiff, acting through its Commissioner of Indian Affairs, the plaintiff entered

into a contract with one James H. Owen "for the construction of said stone mess-hall and kitchen at said Rice Station Indian School in all respects as required by said contract with the said Augustus W. Boggs as hereinabove set forth, except as to the time of the completion thereof, for the sum of sixteen thousand six hundred ($16,600.00) dollars, which said last-mentioned sum said plaintiff had been required to pay for the purpose of securing the completion of the said work agreed by said Augustus W. Boggs, under and by the terms of said contract with him hereinabove referred to, to be by him completed as aforesaid"; that after the 4th day of November, 1905, and prior to the entering into said contract with said James H. Owen, the plaintiff duly advertised for bids for the construction of the said mess-hall and kitchen "in accordance with the same terms and specifications as contained in said contract with said defendant Augustus W. Boggs"; that certain bids were received in response to that advertisement, of which bids so received the lowest was the bid of the said Owen "agreeing to construct said stone mess-hall and kitchen, in all respects as required by said contract with said defendant Augustus W. Boggs, for the said sum of sixteen thousand and six hundred ($16,600.00) dollars, which said sum was a reasonable price to be paid for and was and is the reasonable value of the said construction of said stone mess-hall and kitchen in accordance with the contract with the same James H. Owen."

The complaint further alleges that by reason of Boggs' failure and refusal to construct and complete the structures contracted for by him, the plaintiff was obliged to and did construct and equip a laundry building for use at the said Rice Station Indian School at a cost of $4,339.10, which would not have been required had the mess-hall and kitchen been constructed and completed by Boggs as called for by his contract. The prayer of the complaint was for judgment for damages alleged to have accrued to the plaintiff by Boggs' default.

Except as to its execution of the bond sued on and the jurisdictional averments, the separate answer of the surety company (plaintiff in error here) put in issue the material allegations of the complaint. The cause was tried by stipulation of the respective parties before the court without a jury.

The court found as facts, among other things, the making of the contract between the plaintiff and Boggs, and the execution by the surety company of the bond for the faithful performance by the contractor of his obligations, the entry of Boggs upon the performance of the contract on or about the 12th of April, 1905, and his subsequent failure to comply with the provisions of the contract in many particulars set out in the findings, both as respects material and workmanship; that during the progress of the work the plaintiff made to Boggs the two payments mentioned, no part of which has ever been repaid; that on the 1st day of September, 1905, Boggs had failed to complete the work in accordance with the provisions of the contract or within the time therein specified; that on the 3d day of October, 1905, Boggs caused his interest in the mess-hall and kitchen to be insured; "that on or about the 27th day of October, 1905, the plaintiff rejected the work done, materials furnished, and building thereby and thereof constructed as previously offered for acceptance by the said Augustus W. Boggs"; that on November 4, 1905, while the work, material, and structures were still in the possession of Boggs, all thereof were completely destroyed by fire; that on the 28th day of December, 1905, the plaintiff, pursuant to the terms of the contract, and because of the failure and refusal of Boggs to perform its terms and to complete and turn over the buildings as therein required, took possession of the premises and directed Boggs to leave the Indian reservation, where the buildings had been located, which he did, since which time the plaintiff has been continuously in the possession thereof; that at the time Boggs was so ordered to leave the premises he had "belonging to him and located upon said premises certain building materials, tools, and implements, of the reasonable value of $2,418.58; that all of said materials, tools, and implements, as aforesaid, were confiscated and seized by plaintiff, although the same then and there belonged to Augustus W. Boggs, as aforesaid; that no part of the said materials, tools, and implements, as aforesaid, were ever returned to the defendants herein, or either of them, nor was any part of the value

thereof ever paid to the defendants or either of them; that, on the contrary, all of said materials, tools, and implements, as aforesaid, were kept, retained, and used by the plaintiff."

The twenty-third and twenty-fourth findings of fact are as follows:

"That it is not true that said plaintiff did not comply with the terms, covenants, and agreements, in said contract specified, but it is true that plaintiff has duly and regularly performed all of the terms, conditions, and obligations of said contract on its part to be performed. It is not true that plaintiff without the knowledge or consent of said defendants, or either of them, or at all, or in violation of the terms or conditions of said bond, or at all, changed or abrogated the terms of said contract in any particular. It is not true that said plaintiff without the knowledge or consent of the defendants, or either of them, or at all, extended the time of the performance of said contract for the said Augustus W. Boggs, otherwise or at all. It is not true that the failure and delay of the said Augustus W. Boggs to complete the said mess-hall and kitchen within the period of time prescribed by said contract was by or with the consent of the said plaintiff. It is not true that the said plaintiff without the knowledge or consent of the defendants, or either of them, further violated, or violated at all, the terms or conditions of said contract either by building or causing to be built the said stone mess-hall and kitchen on or along different lines than those provided for in said contract, or that plaintiff caused said stone mess-hall and kitchen to be built or constructed in violation of or contrary to the plans, drawings and specifications made a part of said contract. It is not true that under or pursuant to the directions of plaintiff in the construction of said stone mess-hall and kitchen by said defendant Augustus W. Boggs, said work was improperly done, or that plaintiff caused the said stone mess-hall and kitchen to be constructed by said defendant Augustus W. Boggs improperly or in violation of the terms and specifications agreed upon in said contract. It is not true that through the act, or any act, of plaintiff herein, the consideration for the bond mentioned in said complaint has wholly failed, or failed at all, or that the same is null and void and without effect.

"That on or about the 8th day of December, 1906, plaintiff, acting by and through the then Commissioner of Indian Affairs, advertised for bids to be received on or before January 16, 1907, for the construction of a stone mess-hall and kitchen at said Rice Station Indian School; that certain bids were received in response to said advertisement; that of said bids so received, the lowest received was the bid of one James H. Owen, of Los Angeles, Cal.; that on the 22d day of January, 1907, in pursuance of said bid, said James H. Owen entered into a written contract with plaintiff for the construction of a stone mess-hall and kitchen for the sum of $16,600 on the site occupied by the building theretofore constructed by the said Augustus W. Boggs; that the said sum of $16,600 was paid by the plaintiff to the said James H. Owen under said contract for the construction of said building thereunder in lieu of the stone mess-hall and kitchen agreed to be built for and delivered to plaintiff by said Augustus W. Boggs under and by the terms of said contract with him, heretofore referred to, to be by him completed as aforesaid; that the said James H. Owen constructed the building aforesaid according to the contract between himself and plaintiff, and in accordance with the plans and specifications thereunto attached; that the reasonable value of the structure built by the said James H. Owen under the contract, plans and specifications between himself and plaintiff was $16,600 at the time the same was constructed; that the aforesaid contract, plans, and specifications between plaintiff and the said James H. Owen were different in many substantial respects from the contract, plans, and specifications between plaintiff and the said Augustus W. Boggs; that the building required to be erected and actually erected by the said James H. Owen under his contract, plans, and specifications was different in many substantial respects from the building required to be erected by the said Augustus W. Boggs under his contract, plans, and specifications; that $1,200 of the contract price required to be paid and actually paid to the said James H. Owen under his contract applied to work wholly outside of the work provided for in the contract between the

said Augustus W. Boggs and plaintiff; that $500 of the aforesaid contract price required to be paid and actually paid to the said James H. Owen under his contract by plaintiff was for work and materials in excess of what was embraced and included in the contract between the said Augustus W. Boggs and plaintiff; that the cost of labor and building supplies was different in 1907 from their cost in 1905; that plaintiff waited from the 28th day of December, 1905, to the 22d day of January, 1907, before entering into a new contract for the construction of said building; and that by reason of the lapse of time and the changes in prices in the meantime, a comparison between the two contracts furnishes no basis for estimating the plaintiff's damages in this case."

Judgment was thereupon entered against the defendants, but for a less amount than the plaintiff claimed to be entitled to, resulting in not only a writ of error sued out by the surety company, but a cross-writ of error sued out by the United States, both of which are now for consideration.

Gray, Barker, Bowen, Allen, Van Dyke & Jutten and William A. Bowen, for plaintiff in error.

A. I. McCormick, U. S. Atty., and G. Ray Horton, Asst. U. S. Atty.

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

ROSS, Circuit Judge (after stating the facts as above). The findings, as well as the evidence, show many failures on the part of the contractor to perform his obligations under the contract, including his refusal to remedy defects pointed out to him by representatives of the government and his failure to remedy such defects within the stipulated time after the serving upon him of the required notice, and also his failure to complete the work contracted for within the stipulated time. The taking of possession by the government of the premises, together with all materials, tools, and machinery thereon belonging to the contractor, was therefore fully authorized by the contract; but for the purpose, as is expressly declared in the contract, "at the expense of said party of the second part, to complete or have completed the said work, and to supply or have supplied the labor, materials and tools of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event," proceeds the contract, "the said party of the second part and his sureties on the bond to be given for the faithful performance of this agreement shall be further liable for any damages incurred through such default and any and all other breaches of this contract."

While the complaint alleges that the subsequent contract made by the government with Owen for the construction of the mess-hall and kitchen, which Boggs had failed to build and complete as he had agreed to do, was, except as to the time of completion thereof, based upon the same plans and specifications, and was in all respects the same as the Boggs' contract, the findings of fact made by the court below, as well as the evidence in the case, show such allegations to be far from true. The court expressly finds, what the evidence abundantly shows, that the contract between the government and Owen and the plans and specifications upon which it was based "were different in many substantial respects from the contract, plans, and specifications between plaintiff and the said Augustus W. Boggs; that

the building required to be erected and actually erected by the said James H. Owen under his contract, plans, and specifications was different in many substantial respects from the building required to be erected by the said Augustus W. Boggs under his contract, plans and specifications; that $1,200 of the contract price required to be paid and actually paid to the said James H. Owen under his contract applied to work wholly outside of the work provided for in the contract, between the said Augustus W. Boggs and plaintiff; that $500 of the aforesaid contract price required to be paid and actually paid to the said James H. Owen under his contract by plaintiff was for work and materials in excess of what was embraced and included in the contract between the said Augustus W. Boggs and plaintiff; that the cost of labor and building supplies was different in 1907 from their cost in 1905; that plaintiff waited from the 28th day of December, 1905, to the 22d day of January, 1907, before entering into a new contract for the construction of said building; and that by reason of the lapse of time and the changes in prices in the meantime, a comparison betwen the two contracts furnishes no basis for estimating the plaintiff's damages in this case."

The government, pursuant to the terms of the contract between it and Boggs, by reason of his default, took from him the possession of the premises as well as all of his materials, machinery, and tools thereon for the purpose of having, at his expense, his contract fulfilled; and for that his surety bound itself, but not for the fulfillment of any essentially different contract. It is true that by its contract with Boggs the government reserved to itself the right "to make changes, alterations or omissions from or additions to the work and materials herein provided for"; that is to say, changes in, additions to, or omissions from, the work covered by the plans and specifications of the contract. This is plainly shown by the subsequent provisions of article 3 of the Boggs' contract, in which the reservation occurs. It is, in the same clause, followed by these provisions:

"The valuation of such work and materials (that is to say, such work and materials as might be embraced by the authorized changes and alterations), if not agreed upon, to be determined on the basis of the contract unit of value of material and work referred to, or, in the absence of such unit of value, on prevailing market rates, which market rates, in the case of dispute, are to be determined by the said Commissioner of Indian Affairs, whose decision with reference thereto shall be binding upon both parties; that no claim of damages on account of such changes or for anticipated profits shall be made or allowed; that the party of the second part (Boggs) shall not be allowed any additional compensation for labor or material unless he receives written authority from the Commissioner of Indian Affairs, and the price agreed upon before execution of the work; that no addition to or omission from the work herein specifically provided for shall make void or affect the other provisions or covenants of this contract, but the difference in the cost thereby occasioned, as the case may be, shall be added to or deducted from the amount of the contract; and that in the absence of any express agreement or provision to the contrary, no addition to or omission from the work herein specifically provided for shall be construed to extend the time fixed herein for the final completion of the work."

That reservation, in our opinion, affords no ground for holding the government entitled to make a substantially different contract with a

third party at the expense of the former contractor and his surety. And such was the ruling of the Supreme Court in a similar case. In speaking of a like clause in the case of United States v. Freel, 186 U. S. 309, 311, 317, 22 Sup. Ct. 875, 878 (46 L. Ed. 1177), the court said:

"Coming, then, to the question of the effect on the responsibility of the surety of the supplemental agreement of August 17th, we agree with the Circuit Court and the Circuit Court of Appeals in holding that the alterations thereby caused were beyond the terms of the undertaking of the surety, and extinguished his liability. The seventh action had in view such changes as might be found advantageous or necessary in the plans and specifications. But the changes called for by the new agreement had no reference to the original plans and specifications, but changed the location of the dry dock, requiring the contractor to make additional excavations and connections with the water, at an increased expense, and gave an increased time of performance."

We do not understand the case just referred to (United States v. Freel) to be overruled by the very recent decision of the same court in the case of United States v. McMullen et al. (decided January 9, 1912) 222 U. S. 460, 32 Sup. Ct. 128, 56 L. Ed. ——.

In the present case not only do the findings show that the contract and the plans and specifications upon which it was based, subsequently made between the government and Owen, were different in many substantial particulars from the contract for which the plaintiff in error became surety, but that the government waited more than one year before entering into a new contract, during which time there was such a change in the cost of labor and building supplies as, according to the findings of the trial court, "the two contracts furnishes no basis for estimating the plaintiff's damages."

In the case of American Bonding Co. v. United States, 167 Fed. 910, 93 C. C. A. 310, the question here involved was carefully considered by us, and, being satisfied of the correctness of that decision, it is useless for us to pursue the subject further. Boggs' surety is not, in our opinion, liable in this action for the reason that the government did not complete Boggs' contract, as it had the right to do, but instead chose to have the structures erected in a substantially different manner, pursuant to the contract made by it with Owen.

It results that the judgment must be reversed, and the cause remanded, with directions to the court below to enter judgment for the defendant surety company on the findings.

It is so ordered.

GILBERT, Circuit Judge (dissenting). The case, as I view it, contains no question of a release of a surety resulting from a change in the contract with the assured, as in the cases of United States v. Freel, 186 U. S. 309, 22 Sup. Ct. 875, 46 L. Ed. 1177, and American Bonding Co. v. United States, 167 Fed. 910, 93 C. C. A. 310. No such issue is presented in the complaint, and no such defense is pleaded or even remotely suggested in the answer. It is a case of an action for damages for the total failure of a contractor to carry out his contract. The contract, the breach thereof, and the surety's undertaking are established by the findings of the trial court. The only question in the case

is as to the measure of the plaintiff's damages. Is the government by the terms of its contract confined to proof of damages by showing the cost of constructing a building of the same kind under a new contract, or may it recover damages irrespective of the construction or cost of a new building? It is important to observe the language of the obligation which the plaintiff in error assumed. The contract provided that on default the United States was authorized and empowered to take possession and to complete the work or have it completed, "in which event the said party of the second part and his sureties on the bond to be given for the faithful performance of this agreement shall be further liable for any damages incurred through such default and any and all other breaches of this contract." These provisions do not limit the government to merely completing the contract which was entered into with the contractor, and thereby establishing by the cost of such second contract the measure of damages for the breach of the first; but the contract authorized the government to complete the work, and the very wording of the contract is that, if the government should elect to complete the work, the surety should be liable for any damages incurred through any breach whatever of the original contract. There is nothing in the contract that deprives the government of the right to recover damages generally for a total breach thereof. The trial court was of the opinion that the new contract differed so materially as to essential features that it afforded no safe measure of damages for a breach of the first contract, but allowed damages for the breach to the extent of the payments which the government had made on that contract. In United States v. Stone Sand & Gravel Co., 177 Fed. 321, 100 C. C. A. 651, the Circuit Court of Appeals for the Fifth Circuit had under consideration the right of the government to recover against a surety for the total breach of a contract, in a case where a second contract, which varied in some particulars from the first, had been let at an increased cost. The court said:

"With reference to the new contract, no recovery is sought on it in this action. And it is not apparent to us how the so-called 'substitutions' complained of can or could affect the rights of the defendants under the original contract."

In the present case, although a building was constructed by the contractor, it was not constructed according to the contract, but was essentially different therefrom, and the work done constituted "a willful and substantial departure from said contract and said plans, drawings and specifications," and the contractor "willfully, knowingly, purposely, fraudulently, and intentionally failed, neglected, and refused to erect the structure in accordance with the plans and specifications," as found by the trial court. The government rejected the work done, the materials furnished, and the building thereby and thereof constructed, and gave the contractor formal notice to tear down the building and construct another in exact accordance with the specifications. The contractor insured his interest in the building against loss by fire, and while the building was still in his possession it was totally destroyed by fire. During the progress of the work the contractor, in accordance with the terms of his contract, was paid on account thereof

$7,895.40, which has not been repaid to the government, but against which the trial court allowed a set-off for the value of materials belonging to the contractor which the government confiscated after the destruction of the building. In American Bonding Co. v. United States, supra, the contract differed substantially from that under consideration here. It provided that upon the default of the contractor the United States should have the right to recover from him whatever sums might be expended by it "in completing the said contract in excess of the price herein stipulated to be paid." There was no other provision for the payment of damages. When the new contract was let, it so far departed from the first that it was obvious that the cost of its completion could furnish no criterion for determining what would have been the cost of "completing the said contract" first made. In the opinion it was said:

"This is not a suit to recover generally whatever damages the United States would have sustained had Axman abandoned his contract, but a suit for damages under the express stipulations of the contract which are set forth in the complaint and made the basis of the action."

In brief the decision gave effect to the rule that, if there be in the contract a provision for ascertaining the damages incurred through a violation of any of its provisions, the surety has the right to insist on its observance before being held responsible.

In George A. Fuller Co. v. Doyle (C. C.) 87 Fed. 687, in a case similar to the case at bar, the court said:

"Before plaintiff undertook the work, the contract had been broken by Doyle, and plaintiff's rights and Doyle's obligations under it had become fixed. If plaintiff made any changes in the details of the work in the progress of completing it, they were not made as a result of any agreement between it and Doyle, such as usually operates to discharge a surety, and such changes imposed no new or modified obligation upon Doyle. He had already failed to perform his contract, and abandoned the work, and plaintiff's cause of action had arisen thereupon, and, in my opinion, the surety's liability is in no manner affected by the fact that plaintiff, while it was doing the very work which Doyle had contracted to do, did, of its motion, some other things for the doing of which no claim is made against Doyle or his surety."

The plaintiff in error contends that the partial payments having been properly made during the progress of the work, the loss thereof constitutes no element of recoverable damages. The general rule is that, in an action against a builder for a breach of his contract, all damages are recoverable which are the proximate result of the breach. 6 Cyc. 113. The payments made by the government were totally lost through the default of the contractor. The action is not one to recover money negligently paid, but to recover damages for a breach of the contract. The government ought not to be and is not bound by payments made upon a fraudulent, negligent, or inefficient inspection of work during the progress thereof, when in fact the work has been fraudulently done in willful disregard of the terms of the contract. Dox v. Postmaster-General, 1 Pet. 318, 7 L. Ed. 160; Kingston v. Harding (1892) 2 Q. B. Div. 494; Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449; Barker v. Nichols, 3 Colo. App. 25, 31 Pac. 1024. It is only where the contract stipulates in express terms that

a certificate of inspection shall be conclusive evidence of compliance with the contract that it is binding, and even in such a case it is held binding only in the absence of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment. Martinsburg & Potomac R. R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255. But in this case the contract contained the express provision that partial payments should in no way be considered as an acceptance of any work or material included in the contract.

But in any view of the defenses that may be urged against recovery of damages arising out of payments of installments of the agreed compensation, they are of no avail in a case like this, where before the completion of the building according to the plans and specifications, and before its acceptance by the government, the building was destroyed. In such a case the loss is that of the contractor, and he is not only denied a recovery of compensation for the work done, but the other party to the contract may recover from him his damages, including the partial payments made as the work progressed. Tompkins v. Dudley, 25 N. Y. 272, 82 Am. Dec. 349; School Trustees of Trenton v. Bennett, 27 N. J. Law, 513, 72 Am. Dec. 373; School District No. 1 v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371; Adams v. Nichols, 19 Pick. (Mass.) 275, 31 Am. Dec. 137; Stees v. Leonard, 20 Minn. 494 (Gil. 448); 30 Am. & Eng. Encyc. of Law, 1249.

WORK MIN. & MILL. CO. v. DOCTOR JACK POT MINING CO.†

(Circuit Court of Appeals, Eighth Circuit. March 2, 1912.)

No. 3,468.

1. MINES AND MINERALS (§ 44*)—LODE MINING CLAIMS—PATENTS—CONCLUSIVENESS.

Under the Colorado statutes, which require one filing a lode mining claim to post a notice at the point of discovery and sink a shaft within 60 days after the discovery, a patent to a claim concludes, on collateral attack, an assertion that the claim was located and patented without the discovery of any vein, lode, or ledge.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 130; Dec. Dig. § 44.*

Conclusiveness of patents for mining claims, see notes to Carson City Gold & Silver Min. Co. v. North Star Mining Co., 28 C. C. A. 346; Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co., 48 C. C. A. 674.]

2. MINES AND MINERALS (§ 44*)—LODE MINING CLAIMS—PATENTS—CONCLUSIVENESS.

A federal patent to a lode mining claim is conclusive, as against collateral attack, on every question properly within the jurisdiction of the Land Department.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 130; Dec. Dig. § 44.*]

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

† Rehearing denied June 10, 1912.

8. MINES AND MINERALS (§ 40*)—FEDERAL PATENTS—DUTY OF LAND DEPARTMENT.
In issuing a federal patent to a lode mining claim, the Land Department must take notice, not only of acts of Congress, but of local laws and regulations.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 115; Dec. Dig. § 40.*]

4. MINES AND MINERALS (§ 43*)—LODE MINING CLAIMS—BOUNDARIES.
Where a lode mining claim is longer than it is wide, the end lines of the claim as fixed in the patent are prima facie at least the true end lines, as affecting extralateral rights.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 125–129; Dec. Dig. § 43.*]

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

Ejectment by the Doctor Jack Pot Mining Company against the Work Mining & Milling Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Henry C. Hall and Charles S. Thomas (Wm. H. Bryant, George L. Nye, and Wm. P. Malburn, on the brief), for plaintiff in error.

William V. Hodges (Clayton C. Dorsey, on the brief), for defendant in error.

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

RINER, District Judge. This is an action in ejectment to recover the possession of certain mining ground situated in the Cripple Creek mining district, Teller county, Colo., and for damages. The Doctor Jack Pot Mining Company was the plaintiff and the Work Mining & Milling Company was the defendant in the Circuit Court, and for convenience will be so referred to hereafter.

Three separate causes of action were stated in the complaint, based upon three different veins or ore bodies. The second cause of action was dismissed by the plaintiff at the trial, and the case proceeded to verdict and judgment upon the first and third causes of action. In its first cause of action plaintiff avers that it and its grantors at all times since the 17th of October, 1901, were the owners in fee, and that the plaintiff at the time the complaint was filed was the owner in fee and entitled to the occupation and possession of a certain lode mining claim in the Cripple Creek mining district known as the Lucky Corner lode mining claim, United States survey No. 9,209; that on the 17th of October, 1901, the United States duly issued to the grantors of the plaintiff its patent for the mining claim above referred to, who thereafter by mesne conveyances conveyed and transferred to the plaintiff the surface of the Lucky Corner lode mining claim; that the patent and conveyances above mentioned conveyed to the plaintiff the surface of the Lucky Corner lode mining claim, together with all veins, lodes, and ledges throughout their entire depths, the tops or apices of which lie inside the surface lines thereof extended downward vertically, although such veins, lodes, or ledges may so far depart from the per-

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

pendicular in their course downward as to extend outside the vertical side lines of said premises, confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said Lucky Corner lode mining claim so continued in their own direction that such planes will intersect such exterior parts of such veins, lodes, or ledges, and that the end lines are parallel.

It is further averred in the first cause of action that in mining and developing said claim the plaintiff and its grantors opened and discovered a vein, lode, or ledge, commonly called No. 1 vein, which is not the vein, lode, or ledge discovered in the discovery shaft of said claim, and which has its top or apex inside of the surface boundaries of the Lucky Corner lode mining claim, and runs in a northeasterly and southwesterly direction and crosses on its strike at its apex, the westerly side line 4–5 of said claim at a point on said side line about 260 feet N. 18° 55′ E. from the southwest corner No. 4 of said claim and the northerly end line 6–1 of said claim at a point about 80 feet N. 71° 05′ W. from the northeast corner No. 1 of the claim; that by virtue of the patent and mesne conveyances the plaintiff is the owner of so much of said vein as lies between vertical planes, one drawn downward through said end line extended in its own direction and the other parallel thereto drawn downward at the point on said westerly side line 4–5, about 260 feet north from the southeast corner No. 4 of said claim, where said vein at its apex crosses said side line, throughout the entire depth of said vein, the distance between said vertical planes being about 760 feet; that between said vertical planes so drawn said vein on its dip extends northwesterly to a great depth and beneath and beyond the westerly and northerly side lines of the claim.

It is further averred that while the plaintiff and its grantors were the owners and in possession and entitled to the possession of the said Lucky Corner lode mining claim, and the vein, lode, or ledge above described, the defendant, on or about the 1st day of November, 1901, entered upon the vein and ousted the plaintiff and its grantors therefrom, and from the possession thereof, and that it has ever since continued, and still continues, to hold possession thereof, to the damage of the plaintiff in the sum of $1,000,000. It is further averred in the complaint that the defendant had extracted ores from the vein and lode owned by the plaintiff to the amount and value of $950,000. It is also averred that the grantors of the plaintiff had duly assigned, transferred, and set over to the plaintiff all claims and demands, actions, and causes of action which its grantors had for ores and minerals extracted.

In the third cause of action the plaintiff makes the same allegations as to possession and ownership of the Lucky Corner lode mining claim and to all veins, lodes, and ledges having their tops or apices inside the surface lines of said claim extended downward vertically, as set out in the first cause of action, and then avers that it is the owner of a certain vein called the "Timber Drift vein," having its top or apex inside the surface boundaries of the plaintiff's claim throughout its entire depth where it lies between vertical planes parallel to the end

lines of the claim extended in their own direction through the points on the side lines where the apex of the Timber Drift vein crosses the side lines, that the part or segment of the vein on its dip extends northerly and westerly to a great depth between the westerly and northerly side lines of plaintiff's claim. It is then averred that the Timber Drift vein like the number one vein described in the first cause of action, is not the vein, lode, or ledge discovered in the discovery shaft of the claim. The same averments as to the possession of number one vein set out in the first cause of action are repeated in this cause of action as to the Timber Drift vein.

The defendant in its answer admits that a patent was issued to the grantors of the plaintiff for the Lucky Corner lode mining claim, as averred in the complaint, denies that the end lines are parallel, but admits the existence of the number one vein, and that a portion of its top or apex is within the patented boundaries of the Lucky Corner claim. It admits that the No. 1 vein extends upon its dip northwesterly to a great depth and beyond the westerly and northerly side lines of the Lucky Corner claim, but denies that the plaintiff is the owner of that part of the vein lying westerly and outside of or beyond the Lucky Corner claim. The same admissions and denials are made with respect to the Timber Drift vein.

It is further averred in the answer that the top or apices of the several veins, lodes, and ledges described and set forth in the complaint and all other veins, lodes, or ledges known to exist within the surface boundaries of the Lucky Corner claim intersect in their strike or longitudinal course at their top or apices the side lines of the said claim and that said side lines are not parallel to each other, and for that reason the plaintiff is not the owner of nor entitled to the possession of any part of either the No. 1 vein or Timber Drift vein found or lying beneath or within the boundary lines of the Little Clara lode mining claim owned by the defendant.

Four affirmative defenses were also set out in the answer, and numbered 4, 5, 6, and 7. A demurrer to the affirmative defenses was sustained as to the fourth and seventh, and overruled as to the fifth and sixth. In the fourth affirmative defense it is averred, in substance, that in the place designated in the patent as the discovery cut of the Lucky Corner claim there never was disclosed any crevice, vein, lode, ledge, or valuable deposit, and that no discovery of any vein, lode, or ledge was ever made within the surface boundaries of the Lucky Corner lode mining claim, prior to the entry or patent thereof, and that the plaintiff did not by virtue of its patent from the government acquire any ownership or the right to follow any vein, lode, or ledge, the top or apex whereof may thereafter have been found within the vertical boundaries of the Lucky Corner claim beyond or across vertical planes drawn downward through the surface boundaries into the premises of the defendant. In the seventh affirmative defense it is averred that long prior to the alleged discovery by the plaintiff of the existence of any of the veins, lodes, or ledges described in the complaint, or of any other vein, lode, or ledge in the Lucky Corner claim, the defendant by its lessees, beneath the vertical boundaries of the Little Clara claim

owned by the defendants, uncovered a lode or deposit of valuable gold and silver bearing ore known and called the Basalt Flat vein, being an entirely distinct and different vein from any of the veins, lodes, or ledges described in the complaint, and that by its lessees the defendant, long prior to the discovery of any of the veins in the Lucky Corner claim, extracted, mined, shipped, and sold the ore therefrom.

The court also sustained a motion of the plaintiff to strike out those portions of the answers to the first and third causes of action denying that any vein, lode, or ledge whatever was discovered in the Lucky Corner discovery works. The plaintiff filed its reply, and, the parties having stipulated that the issue of title, ownership, and right of possession of the veins and ores in controversy should alone be determined at this trial, leaving the question of damages to be determined by a future proceeding, the case proceeded to trial upon the issues not eliminated by the court in its rulings upon the demurrer and motion to strike.

Forty errors are assigned, consisting of exceptions taken to the rulings of the court upon the demurrer, the motion to strike, the admission and rejection of evidence, and to the giving and refusing to give certain instructions. We think a determination of certain legal principles applicable to the questions presented by the record will settle all the points in controversy without taking up and discussing separately each assignment of error, although they have all been carefully considered.

[1] The principal question presented by the record, and upon which the rights of the parties largely depend, is whether the defendant had the right to show as matter of defense that the Lucky Corner claim was located and patented without the discovery of any vein, lode, or ledge, it being insisted by the defendant that such was the fact, and that, therefore, the Lucky Corner claim carried with it no extralateral rights. The question first arose upon the demurrer to the fourth affirmative defense, and again upon the motion to strike out parts of the first and third defenses, the motion for judgment at the close of the plaintiff's testimony, and upon the instructions requested by the defendant and refused by the court. If the defendant had the right to go into that question in its proofs and show, if it could, that such was the fact, then the judgment in this case must be reversed. On the other hand, if the patent establishes conclusively that such a vein existed in the discovery cut of the Lucky Corner claim prior to patent, then the patent conveyed, not only such rights as attached to that vein, but to all other veins or lodes apexing within the surface boundaries thereof.

[2, 3] It must be conceded that every question which was properly within the jurisdiction of the Land Department at the time the patent issued was finally determined, and is not open to collateral attack. As to all matters within its jurisdiction the judgment of the Land Department, as has been often decided, is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. And the test of its jurisdiction is whether or not it has the power to enter upon the inquiry, and not whether its conclusions

were right or wrong. It becomes important, therefore, to notice what the miner must do, prior to its issuance, to secure a patent from the United States under the laws of the United States, the laws of the state and the regulations of the mining district wherein the mine is located. He must first make his location, which, as stated in Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735, "is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations." So that, in addition to complying with the requirements of the acts of Congress, he must, in Colorado, comply also with the laws of that state in so far as they are not in conflict with the laws of the United States. Under the statutes of Colorado, he is required, first, to place at the point of discovery on the surface a notice containing the name of the lode, the name of the locator, and the date of discovery; second, within 60 days from the discovery he must sink a discovery shaft 10 feet deep, showing a well-defined crevice, the disclosure of a lode or vein in an open cut, crosscut, or tunnel may be accepted instead of the 10-foot shaft; third, he is required to mark the surface boundaries by six posts, one at each corner and one at the center of each side, marked on the side or sides in towards the claim; fourth, within three months from the date of discovery, he must file a location certificate with the county recorder, giving a proper description of the claim, together with the name of the lode, the name of the locator, the date of location, the number of feet in length on each side of the center of the discovery shaft or cut and the general course of the lode. As there seems to be nothing in the Colorado statute in conflict with the laws of the United States, it follows that the Land Department at the time it issued the patent necessarily passed upon the question, not only as to whether there was a discovery upon the claim, but whether such discovery was in the discovery workings, as required by the laws of Colorado, because the Land Department must take notice, not only of the requirements of the acts of Congress, but the local laws and regulations of miners as well. Therefore, upon application for the patent, it became a question before the Land Department, to be determined by it, whether the applicant had complied with the requirements of both the laws of the United States and the state of Colorado. Kendall v. San Juan Mining Co., 144 U. S. 658–664, 12 Sup. Ct. 779, 36 L. Ed. 583.

The contention of plaintiff is that, after issuance of the patent, a denial of discovery prior thereto cannot impugn the validity of the patent; that the patent establishes conclusively the discovery of the apex of a vein in the discovery cut of the Lucky Corner claim prior to patent and the patent is prima facie evidence that the discovery vein does not extend transversely across the claim as patented; that by its terms the patent grants to the Lucky Corner claim the two veins in controversy and the right to follow them on their respective dips outside of the side lines of the Lucky Corner ground into the Little Clara territory for the purpose of mining the ore therein, and, furthermore, even if the general language of the denial can be construed as an affirmative allegation that the discovery vein has no dimensions

outside of the discovery cut wherein it is conclusively presumed in law to exist, and conceding that such allegation of fact be not immediately rebutted by some legal presumption, yet the allegation would not constitute a defense to the action for the reason that it would not show the lines described by the patentee as end lines were mistakenly designated; and also, if it be admitted that the discovery vein crosses neither end line nor side line, it does not necessarily follow that extralateral rights must be denied to the discovery vein, and certainly it does not follow that extralateral rights must be denied to secondary veins which, it is averred in the complaint and admitted in the answer, the veins in controversy are.

Taking into consideration the affirmative admissions and the failure to deny certain averments of the complaint, the answer, in effect, admits the patent, admits that the veins in question, or portions of them, apex in the Lucky Corner claim; admits that the end lines described in the patent are parallel, and that the end line planes, extended vertically to an intersection with the veins in controversy, embrace the ore bodies claimed by the plaintiff; admits that neither the Timber Drift vein nor the No. 1 vein is the discovery vein of the Lucky Corner claim, and then avers that the ore bodies in controversy are within the boundary lines of the Little Clara claim extended vertically downward; that the Little Clara was located prior to the Lucky Corner; that there is not and never was disclosed any vein, lode, or ledge in the discovery cut of the Lucky Corner, and that no discovery whatever was made upon the Lucky Corner claim prior to patent, and for that reason no extralateral rights attached to the two secondary veins apexing in plaintiff's ground. Whatever may have been the right of the defendant to raise the question, by protest or other appropriate proceeding, of no discovery within the patented ground prior to patent, that question was forever foreclosed when the patent issued, except by a direct proceeding to set aside the patent or to declare that the grantee therein held it in trust for some party having a better right. In Uinta Tunnel Mining & Transportation Co. v. Creede & Cripple Creek Mining & Milling Co., 119 Fed. 164, 57 C. C. A. 200, this court, speaking through Judge Sanborn, said:

"If the query were whether or not it is competent to show by proof outside the receiver's receipts or the patents that there had been no location of the patented claims or no discovery of lodes therein before they were entered for patent, there would be no doubt that a negative answer must be returned to the question, for the reason that this is an issue between the parties to a proceeding before the Land Department which that tribunal necessarily considers and decides when it permits entry of the lands, and its decisions of questions within its jurisdiction are impervious to collateral attack." King v. McAndrews, 111 Fed. 860, 50 C. C. A. 29; Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200.

Mr. Lindley in his work on Mines, § 305, states the rule thus:

"It is true that after a lode patent is issued the existence of an apex within the patented ground will be conclusively presumed."

In New Dunderberg Mining Co. v. Old, 79 Fed. 598, 25 C. C. A. 116, Judge Sanborn, delivering the opinion of the court, said:

"The patent which the department issued in 1876 was a judgment of that tribunal that no such claim did exist on May 10, 1872, and that no adverse rights would be affected by issuing it in accordance with the provisions of the act at that date. It is at the same time a judicial determination of these questions and the conveyance of the legal title to every lode or vein whose apex lay within the surface boundaries of the patented claim extended downward vertically. If this action of the Land Department resulted from fraud, mistake, or erroneous views of the law, a court of equity might set aside the patent, or declare it to be held in trust for him who had a better right. * * * Our conclusion is that a patent issued under and in accordance with the provisions of the act of May 10, 1872, * * * to a mining claim located before the passage of that act conveys the legal title to every vein or lode of mineral whose apex is within its surface lines extended downward vertically, and is not subject to collateral attack in an action at law, either on the ground that there was a claim adverse to that patent when the act of 1872 was passed or on the ground that adverse rights were affected by its issue under the provisions of that act." Mining Co. v. Campbell, 17 Colo. 272, 29 Pac. 513; Doe v. Waterloo Mining Co. (C. C.) 54 Fed. 935; Lindley on Mines, § 277.

In Davis v. Shephard, 31 Colo. 146, 72 Pac. 58, the court in the course of its opinion said:

"Before patent the question of whether the Refugee vein carried precious minerals in appreciable quantities might, in an appropriate action, have been a material question of fact, but after patent it cannot be raised collaterally. The government has granted the owner of the Refugee all veins the top or apex of which lie inside of the surface boundary of the claim extended downward vertically, and, after patent, the presumption must be that the vein or veins embraced within the claim are of the character which the law contemplates." Grand Central Mining Co. v. Mammoth Co., 29 Utah, 490, 83 Pac. 668; Carson City Gold & Silver Mining Co. v. North Star Mining Co., 83 Fed. 658, 28 C. C. A. 333.

In Talbott v. King, 6 Mont. 76, 9 Pac. 434, the Supreme Court of Montana said:

"Before a mining claim patent can be issued, it must be established in the Land Department by competent evidence that there has been a discovery within the boundaries of the claim and a notice and location according to law; that the necessary work has been done; and that all preliminary and precedent acts have been performed which authorize and justify the issuance of a patent. The issuance of the patent conclusively proves all these precedent acts and facts which the Land Department must find to exist, before the patent can rightfully issue. The act of the department, therefore, in issuing a patent, is an adjudication, and, like a judgment, is final as to all matters necessarily included in and determined by it. What, then, does a patent to a mining claim prove? First, that the lands bounded and described therein are mineral lands; second, that a discovery and location within said boundaries has been made according to law; and, third, that the necessary amount of work has been performed thereon, and that all preliminary and precedent acts necessary, in order to authorize and justify the issuance of the patent, have been performed as the law requires."

Many other authorities to the same effect might be cited—indeed, we find none holding a contrary view.

Our conclusion is that the rulings of the Circuit Court on the demurrers to the fourth and seventh affirmative defenses and the motion to strike out certain portions of the first and third defenses were right, and will have to be sustained.

It is earnestly insisted by the defendant that the conclusive presumptions of law that follow from the issuance of a patent for a

mining claim ought not to be applied in this case because there is no surface conflict between the Lucky Corner and Little Clara claims, and therefore the defendant had no chance to adverse the Lucky Corner application for patent. It might have filed a protest against the application for a patent, in which it could have set up the matters here relied upon, and, if these were found to be true, the Land Department would have declined to issue a patent, for discovery is one of the prerequisites to be established by satisfactory proof before a patent can issue. However that may be, and granting it to be true, as contended by the defendant, that because of its inability to adverse the Lucky Corner application for the reason that there is no surface conflict, it is a fault of the law, and presents a case in which the court is powerless to afford relief. As stated by Mr. Justice Brewer in Del Monte Mining Co. v. Last Chance Mining Co., 171 U. S. 66, 18 Sup. Ct. 899 (43 L. Ed. 72):

"If cases arise for which Congress has made no provision, the courts cannot supply the defect."

The patent in this case granted to the owners of the Lucky Corner claim:

"All that portion of the said Lucky Corner vein, lode or ledge and all other veins, lodes or ledges throughout their entire length the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said lot No. 9,209, extended downward vertically although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises."

The authorities are uniform that such a grant is authorized by the mining laws. Crown Point Mining Co. v. Buck, 97 Fed. 465, 38 C. C. A. 278; New Dunderberg v. Old, 79 Fed. 604, 25 C. C. A. 116; Del Monte v. Last Chance, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72. A mining right, as was said in Last Chance Mining Co. v. Bunker Hill & Sullivan Min. & C. Co., 131 Fed. 585, 66 C. C. A. 306, "is an integral one and is precisely the same as to all that belongs to its location, its surface and all veins or lodes apexing within it and all not apexing elsewhere found within the surface lines extended vertically downward, as well as the extralateral rights defined by section 2322 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1425]."

[4] The defendant insists that it does not attack the patent of the Lucky Corner claim, yet it contends, assuming the facts pleaded by it, that, as there was no discovery prior to patent, no extralateral rights were acquired thereby to any other, or secondary, veins found within the surface boundaries of the claim. To sustain this contention the court would necessarily have to find that the evidence before the Land Department showing a compliance with the requirements of the statute was false and the patent fraudulently obtained. This, as we have already seen, cannot be done, except in a direct proceeding to set aside the patent. But it is insisted by the defendant that in determining the extralateral rights and defining their boundaries we must find the true end lines of the claim, and, if there was in fact no discovery vein outside of the discovery cut, where it must be pre-

sumed to exist, then it follows that no line of the claim is intersected by the discovery vein. Therefore the end lines cannot be determined and the extralateral rights to veins or lodes found within the claim cannot be bounded. As already suggested, the fact that a discovery vein existed in the discovery cut must, for the purposes of this case, be conclusively presumed, and prima facie at least the end lines of the claim as fixed in the patent are the true end lines, and, in the absence of evidence showing that the discovery vein instead of running lengthwise of the claim in fact crosses opposite side lines of the claim, the end lines as fixed by the patent must prevail; and this for the reason that, the claim being longer than it is wide, it is entirely fair to assume that the locator will take all of the length of the vein he can. In Enterprise Mining Co. v. Rico-Aspen Mining Co., 167 U. S. 115, 17 Sup. Ct. 765 (42 L. Ed. 96), Mr. Justice Brewer, speaking for the Supreme Court, said; "The presumption, of course, would be that the vein ran lengthwise and not crosswise of the claim as located." As suggested by counsel for the plaintiff, the establishment of the end lines by the patent is part of the administrative action of the Land Department and must be taken as correct until the contrary is made to appear; and, as the defendant seeks to question the correctness of the end lines as fixed by the patent, the burden is upon it to show that the end lines therein described are not the true end lines of the claim. While it is competent to show that the discovery vein, instead of running lengthwise of the claim, runs transversely across the claim, thereby showing that the end lines have been mistakenly laid, and that the side lines described in the patent are in fact end lines and the end lines the true side lines of the claim (King v. Amy & Silversmith Mining Co., 152 U. S. 222, 14 Sup. Ct. 510, 38 L. Ed. 419), yet the burden, as the court instructed the jury, is upon the defendant to establish that fact. The end lines as fixed in the patent fix the limits beyond which the owner of a mining claim cannot go, upon either a discovery or secondary vein, and also fix the boundary lines within which extralateral rights may be exercised in following the vein upon its dip, but it does not follow that to secure extralateral rights the vein must extend from end line to end line or, for that matter, intersect either end line, if it lies lengthwise of the claim. As said in Ajax G. M. Co. v. Hilkey, 31 Colo. 131, 72 Pac. 447, 62 L. R. A. 555, 102 Am. St. Rep. 23:

"The extent of the right depends upon the length of the apex, and the extralateral rights are measured not necessarily by the end lines—and only so when the vein passes across both end lines—but by bounding planes drawn parallel to the end lines passing through the claim at the points where it enters into, and departs from, the same. It would seem, therefore, necessarily to follow that the extralateral right depends inter alia upon the extent of the apex within the surface lines, and, while the end lines of the claim as fixed by the location are the end lines of all veins apexing within its exterior boundaries, the planes which bound such rights of different veins may be as different as the extent of their respective apices, though all such planes must be drawn vertically downward parallel with the end lines. It makes no difference in what portion of the patented claim the apex is. Its extralateral rights under this rule can be easily ascertained. The apex of a secondary vein need not be in the same portion as is the apex of the discovery vein. The statute does not say so."

In that case the discovery vein intersected one end line and on its course followed lengthwise of the claim for some distance and then departed through a side line, and the contention was made that no extralateral rights could be claimed for secondary veins apexing in the patented boundaries of the claim beyond the point where the discovery vein departed from the side line. This contention was rejected by the court, and it was held that the apex of a secondary vein need not be in the same portion of the claim as the apex of the discovery vein and that for all veins, both discovery and secondary, the owner of a mining claim has extralateral rights for so much thereof as apex within his surface boundary lines.

Finding no error in the record that will warrant a reversal of the judgment, it is affirmed.

BENNETT v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1912.)

No. 2,178.

1. COMMERCE (§ 47*)—TRANSPORTATION OF PERSONS—REGULATION BY CONGRESS.

Transportation of persons as well as of property is "commerce," and Congress may regulate their interstate transportation.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. § 47.*

For other definitions, see Words and Phrases, vol. 2, pp. 1287–1298; vol. 8, pp. 7606–7607.]

2. COMMERCE (§ 55*)—"REGULATE"—INCLUDES POWER TO PROHIBIT.

The constitutional power of Congress to "regulate" interstate commerce includes the power to prohibit, in cases where such prohibition is in aid of the lawful protection of the public.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 72–102; Dec. Dig. § 55.*

For other definitions, see Words and Phrases, vol. 7, pp. 6041–6047; vol. 8, p. 7782.]

3. COMMERCE (§ 47*)—INTERSTATE TRANSPORTATION OF PERSONS—WHITE SLAVE ACT—CONSTITUTIONALITY.

Act June 25, 1910, c. 395, 36 Stat. 825, commonly known as the "White Slave Act," which forbids the inducing of a person to come into a state, with unlawful purpose by the inducer and in aid of such unlawful purpose, is not unconstitutional as an invasion of the police power of the state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. § 47.*]

4. COMMERCE (§ 82*)—INDICTMENT AND INFORMATION (§ 180*)—VARIANCE—DESIGNATION OF PERSON OTHER THAN DEFENDANT.

An indictment, charging defendant with inducing the interstate transportation for an unlawful purpose of Opal Clark, and evidence that the woman transported was known to defendant as Jeanette Clark, and that her real name was entirely different, did not constitute a variance, in view of the fact that the record clearly indicated the identity of the woman named in the indictment with the woman whom defendant must

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

have known to be the one intended to be named and with the woman who was actually transported.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 47; Dec. Dig. § 82;* Indictment and Information, Cent. Dig. §§ 551–556; Dec. Dig. § 180.*]

5. INDICTMENT AND INFORMATION (§ 173*)—MISNOMER—VARIANCE.

That the true name of the person charged with the offense was proved to be not the same as that given in the indictment is not a fatal variance, where defendant was not misled, and the record would protect him against another prosecution.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 539; Dec. Dig. § 173.*]

6. INDICTMENT AND INFORMATION (§ 180*)—VARIANCE.

That the offense is charged as committed with reference to two named persons, and proved as to one only, is not a fatal variance, where accused was not misled, and the record will protect against another prosecution.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 551–556; Dec. Dig. § 180.*]

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

Della Bennett was convicted of violation of the white slave act, and she brings error. Affirmed.

Respondent was, upon her plea of not guilty, convicted of violating the act of June 25, 1910, commonly known as the "White Slave Act." The testimony indicated that she was the keeper of a house of prostitution in Cincinnati; that in the summer of 1910, a former inmate of her house, then known to her by the name of Jeanette Clark, was in a similar house in Chicago; that respondent sent to Jeanette Clark several letters and telegrams asking her to return and bring other girls with her; that finally respondent sent railroad tickets for this purpose, and Jeanette Clark and Eva Parks used the tickets to come from Chicago to Cincinnati, and entered and remained in the Bennett house. The errors assigned are upon the constitutionality of the law and upon some questions of evidence.

Max Levy, for plaintiff in error.

Thomas H. Darby, Asst. U. S. Atty. (Sherman T. McPherson, U. S. Atty., on the brief), for the United States.

Before WARRINGTON, KNAPPEN and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). It is clear that the power of Congress to pass this statute must be found in its power to regulate commerce. The arguments of counsel for plaintiff in error, as we understand them, are that commodities only, and not persons, can be the subject of commerce; that persons cannot be prohibited from traveling from one state to another because of some intention they may have; that the woman herself is not by this act forbidden to travel, and it cannot be a criminal act to aid an unforbidden act; and that the law is an invasion of the police powers of the states.

[1] It cannot now be doubted that transportation, of persons as well as of property, is "commerce," and that Congress may regulate the interstate transportation of persons. Glouchester Ferry Co. v.

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

Pennsylvania, 114 U. S. 196, 203, 5 Sup. Ct. 826, 29 L. Ed. 158; Covington Bridge Co. v. Kentucky, 154 U. S. 204, 217, 14 Sup. Ct. 1087, 38 L. Ed. 962. See, also, the cases involving passenger traffic under the interstate commerce acts.

[2] It is also settled that the constitutional power to regulate includes the power to prohibit, in cases where such prohibition is in aid of the lawful protection of the public. The Lottery Case, 188 U. S. 321, 354, 23 Sup. Ct. 321, 47 L. Ed. 492.

We think it a mistake to assume that this statute does not prohibit, and so impliedly permits, the primary act and yet punishes as a crime a merely incidental wrong. The act does not undertake to prohibit the woman from traveling from one state to another of her own volition, and in the supposed exercise of her inherent personal rights, no matter what her purpose as to her future conduct may be. This conclusion is emphasized by observing that the woman traveling may be perfectly innocent of any intended immorality, and that the act cannot be intended to interfere with liberty of travel by such person. The primary thing forbidden is the inducing of a person to come into the state, with unlawful purpose by the inducer and in aid of such unlawful purpose, but without direct regard to the innate character or purpose of the person induced. It is this primary thing, and the incidental transportation by the carrier, which are forbidden and penalized.

[3] We do not find in the statute either the purpose or the effect to interfere with the police powers of the state. The law is directed only against the inducing or performing of interstate transportation; and this entire subject-matter is obviously not within the scope of the police power of any state; hence its exercise cannot be an invasion of such power. It may well be assumed that the laws of all states prohibit, as those of Ohio do, the various ultimate acts of immorality referred to in this statute, and it follows that the law in question is in aid of the complete and effective exercise by the states of their respective police powers, and is of the same class as many acts of Congress in recent years having the same general purpose. See enumeration of such acts in U. S. v. Hoke (D. C.) 187 Fed. 992, 1000, 1003.

We conclude that the act is not open to the constitutional objections presented.

[4] Respondent urges that while she was indicted for causing the interstate transportation of Opal Clark, and it was not alleged that Opal Clark had, in fact or by repute, any other name, the evidence showed the transportation of a woman who was known to respondent as Jeanette Clark, and whose real name was wholly different. This is said to be a variance between allegation and proof, and we are cited to cases in text-books and reports to the effect that the indictment should contain the true name of the individual affected by the criminal act. It is not necessary to review these cases. Some of them were decided under stricter rules of pleading than this court has applied. The essential things involved are that the record should be in such shape as to protect the respondent against a second prosecution for what is really the same offense, and as fairly to inform respondent of the crime intended to be alleged. These considerations involve the

question of the identity of the person named—either actual identity or identity as supposed by respondent. Whatever obstacles, if any, there might be in afterwards interpreting and applying the record of indictment and judgment by parol testimony, as must be and is done with reference to civil judgments, we find in this case that the bill of exceptions is now a part of the record as much as is the indictment or the judgment, and that by the whole record there clearly appears the entire identity of the person named in the indictment with the person whom respondent must have known to be the one intended to be named and with the person who was actually transported. This leaves no possible ground for prejudice resulting from the double variance between the name used in the indictment and the name known to respondent and the real name.

[5, 6] Respondent further urges that while the indictment charges the transporting of two persons for the purpose stated, the proof wholly failed as to one of them. This also amounts to a claim of variance between allegation and proof. If we accept the claim that the proof did so fail, still we would not think the variance fatal. The violation of the statute is complete if one person is transported, and the fact that two persons are named in the same count, instead of basing a separate count upon the travel of each person, should not be fatal to a conviction. It is true that where two persons are named as the subject of the offense, and it is proved as to one of them only, there is a seeming variance, but it is really a failure of proof as to a thing which it was not necessary to allege. The only points here, which are of substance and not of form, are, as with reference to the last matter discussed, the question of misleading the respondent and the question of protection against a future prosecution. It is clear that respondent would not be misled unless there were two occasions so as to give rise to some ambiguity, and no such thing here appears. It is true, also, that, as to the person concerning whom the proof failed, the record would show a conviction which was in so far really unauthorized, but the protection against a future prosecution would be just as perfect, and it cannot be presumed that the action of the trial court, in possession of all the facts, would be prejudicially affected in the matter of sentence. In these respects, the case is within the rule that a general conviction and sentence upon several counts will not be disturbed because all but one of the counts are bad, provided the good count supports the sentence. Claassen v. U. S., 142 U. S. 140, 146, 12 Sup. Ct. 169, 35 L. Ed. 966; Hardesty v. U. S. (C. C. A. 6) 168 Fed. 25, 26, 93 C. C. A. 417.

The judgment will be affirmed.

HARRIS et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1912.)

No. 2,177.

COMMERCE (§ 82*)—VIOLATION OF WHITE SLAVE ACT—EVIDENCE—SUFFICIENCY.

On a prosecution for inducing the interstate transportation of women for unlawful purposes, evidence examined, and *held* to support a conviction.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 47; Dec. Dig. § 82.*]

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

Emma Harris and another were convicted of violation of the white slave act, and they bring error. Affirmed.

Max Levy, for plaintiffs in error.

Thomas H. Darby, Asst. U. S. Atty. (Sherman T. McPherson, U. S. Atty., on the brief), for the United States.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. This case presents no question not disposed of by our opinion in the accompanying case of Bennett v. United States, 194 Fed. 630, save this: Was respondent Harris entitled to an instructed acquittal because of the failure of sufficient evidence to support a verdict of guilty?

In this case, two women came from Charleston, W. Va., and entered and remained for a time in the house of prostitution kept by Harris, in Cincinnati. There is no direct evidence that she had anything to do with inducing or aiding them to come, and support for this conclusion is to be found only in the circumstances. The evidence tended to show that respondent Green, an inmate of the same house, went from Cincinnati to Covington, and then, after a couple of days, to Charleston, arriving there in the morning; that on the same afternoon she started back for Cincinnati; that she furnished money to pay transportation for the two Charleston women who came with her; that they all went together to the Harris house the next morning; that a day or two later, the trunks of the Charleston women followed them to the Harris house with C. O. D. charges, including bills due from them to the keeper of the Charleston house of the same kind where they had been living; that Harris paid these C. O. D. charges and charged the same on her book against the Charleston women; and that such book, when later exhibited to them, also contained the charge for their railroad tickets from Charleston. Inasmuch as there was nothing unlawful, under this statute, in receiving these women or advancing the charges on their baggage, conviction must rest upon the theory that respondent Green went to Charleston and advanced the railroad fare while acting as the agent for the respondent Harris. This is explicitly denied by respondent Green, as a witness. The cir-

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

cumstance that she went away and soon returned with the other women is consistent with this theory of guilt, but it is not seriously inconsistent with the theory that Green acted for herself only; and respondent's counsel therefore say that absolutely essential support for the verdict must be found, if at all, in the proof indicating that she charged this railroad fare against the Charleston women in her account with them; and further say that such evidence of this fact as appears in this case—the testimony of a witness with a grievance who claims to have seen the entry in a book not otherwise shown to exist—is evidence so easily fabricated and so far relates to a fact which might be consistent with innocence, that a verdict based thereon should not be allowed to stand. This argument by respondents' counsel rests on a confusion between the fact and the evidence of that fact. The agency is the essential fact, the existence of the book entry is one item of evidence, and we do not feel at liberty to set aside the verdict in this case for this reason. We think the question whether, under all the evidence, Green was acting for Harris, was a question for the jury. The weakness of the proof of the book entry was to be considered in connection with all the circumstances, including Harris' occupation, the likelihood that she might desire and send for more inmates, the reasonableness of the story told by Green, and all the other surrounding facts. The keeper of such a resort, who receives inmates, knowing that they have just come from another state and knowing the purpose for which they came, and who then advances them money incident to their journey, and who finds that a jury has concluded that she instigated the journey, cannot say that the verdict is without support because the jury's conclusion is drawn from circumstances which, in another environment, might not have led to the same inference. The probative force of such environment, as supporting or as contradicting the words of a witness, pertains to an issue of fact and not to one of law.

It follows that the conviction and sentence will be affirmed.

SPENCER et al. v. TAYLOR CREEK DITCH CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1912.)

No. 1,918.

1. CORPORATIONS (§ 566*)—INSOLVENCY AND RECEIVERS—PRIORITY OF CLAIMS—DISPLACEMENT OF MORTGAGES.

A court of equity has no authority to displace mortgage liens on the property of a private corporation, for which it has appointed a receiver, in favor of unsecured claims for labor or supplies furnished to the corporation after the execution of the mortgages, but nearly a year prior to the appointment of the receiver, and used in making improvements and repairs on its property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2283–2286; Dec. Dig. § 566.*]

2. RECEIVERS (§ 200*)—COMPENSATION—LIABILITY OF FUND—PROCEEDS OF MORTGAGED PROPERTY.

The refusal to allow compensation to a receiver and his counsel out of the proceeds of mortgaged property *held* justified under the facts shown,

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

where the receiver was not appointed at the instance of the mortgagee, and rendered no service to the mortgaged property.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 397–399, 401; Dec. Dig. § 200.*]

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

Suit in equity by the Taylor Creek Ditch Company against the T. T. Lane Company, T. T. Lane, and the Northwestern Development Company, in which W. G. Spencer, Charles M. Sheafe, receiver of the T. T. Lane Company, and others, intervened. From a supplemental decree, interveners appeal. Affirmed.

This is an appeal from a supplemental decree of the District Court for the District of Alaska, Second Division, adjudging and decreeing that certain interveners in a suit for the foreclosure of two mortgages upon certain mining property in Alaska have no liens upon the mortgaged property superior to that of the mortgagee, and that the receiver of the property, appointed at the instance of the interveners and his counsel, have no right to their compensation as receiver and counsel for receiver, respectively, paid from the proceeds of sale realized upon the decree entered in the foreclosure suit. The foreclosure suit was brought by the Taylor Creek Ditch Company, as the assignee and holder of two notes—one dated September 29, 1904, for $8,000, and the other, October 9, 1905, for $32,000; the first executed by one T. T. Lane to one N. B. Solner, and the second by the T. T. Lane Company to Anna G. Lane. The first note was secured by an instrument executed by T. T. Lane and delivered with the note to N. B. Solner, purporting to be a deed of certain mining property in Alaska, but the instrument was, in fact, a mortgage executed to secure the payment of the note. The note was payable on or before October 1, 1905. The second note was secured by a mortgage executed by the T. T. Lane Company, a corporation organized under the laws of the state of Nevada, to which T. T. Lane had transferred all the property described in the previous mentioned deed. The mortgage was delivered with the note to Anna G. Lane. It included the property described in the deed and other property, and secured the first note as well as other indebtedness and advances under the second note. The second note was payable on or before one year after date. The second mortgage, after describing the various properties conveyed, contained the following "after-acquired property clause": "And, also, all other water rights, titles and interests therein belonging to, or hereafter acquired by first party; and, also all and singular all the personal property now owned, or hereafter acquired by the party of the first part. Also, all the choses in action, rights in law and in equity, contracts and interests now owned or hereafter acquired by the said party of the first part." The mortgaged premises included a large number of unpatented placer mining claims, water rights, and ditches, including ditches designated as the Henry creek and Coffee creek ditches, for the appropriation and diversion of running water for mining purposes, together with certain personal property. The T. T. Lane Company defaulted in the payment of its note, and foreclosure proceedings followed. In the meantime the Taylor Creek Ditch Company had succeeded to the rights of the mortgagees in the property.

The foreclosure suit was commenced on June 22, 1907, by the Taylor Creek Ditch Company against T. T. Lane, the T. T. Lane Company, and the Northwestern Development Company, a subsequent mortgagee. Thereafter, and in a suit then pending in the same court wherein W. G. Spencer was plaintiff, and the T. T. Lane Company was defendant, Charles M. Sheafe was appointed receiver for the T. T. Lane Company. Prior to August 29, 1907, the receiver filed an answer to the foreclosure suit on behalf of the T. T. Lane Company, and on August 29, 1907, a stipulation was filed in the foreclosure suit signed by the attorneys for the respective parties and for the receiver, in which it was provided that the plaintiff might apply for, and procure to be rendered by the court, a decree of foreclosure of the mortgages set forth in the com-

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

plaint, and directing that said property be sold as provided by law, and that at least $25,000 of the proceeds of such sale, besides the cost of the sale, be paid to the United States marshal in a certified check, and that said marshal deposit said check in the registry of the court to await the court's application and distribution thereof by its supplemental decree; that the decree should in express terms reserve for subsequent determination and for adjudication by the court's supplemental decree all defenses, interventions, issues, and controversies set up by any answers or interventions filed therein previously to the entry of such decree of foreclosure, or thereafter and not less than one week prior to the time of the submission of such reserved matters to the determination of the court; that said decree of foreclosure should provide that the net proceeds of such sale should be paid into the registry of the court, and should be applied and distributed under and in conformity with the court's determination and adjudication of such reserved matters in and by such supplementary decree. It was further stipulated that an order be made extending the receivership of the property of the T. T. Lane Company as ordered in the suit wherein W. G. Spencer was plaintiff to the foreclosure suit, and directing that said receiver be joined as a party defendant, with leave to appear and answer the complaint; that the receiver's answer already filed in the name and on behalf of the T. T. Lane Company should stand as the answer of the receiver on behalf of the defendant company and its creditors generally and stockholders; and that the receiver have leave to file a complaint in intervention, setting up the claims of certain unsecured creditors of the T. T. Lane Company for labor performed, supplies, materials, and transportation furnished for and to the said T. T. Lane Company by said creditors subsequent to the making of the mortgages involved in the suit, for which equitable liens were claimed by such creditors paramount and prior to such mortgages. The stipulation further provided that the Taylor Creek Ditch Company and the Northwestern Development Company should reserve the right to contest the application of the receiver to be joined as a party defendant in the suit, and to answer or otherwise defend in said action, or file a complaint in intervention on behalf of the creditors of the T. T. Lane Company, and also to have the right to contest the right of any creditor or creditors of the T. T. Lane Company to appear and plead in said suit by intervention or otherwise. Pursuant to the stipulation, the foreclosure decree was entered on September 5, 1907, awarding judgment in favor of the plaintiff on its two mortgages in the total sum of $35,255.70, and ordering the mortgaged property to be sold to satisfy such judgment. The decree also contained the agreed reservations for supplemental decree, and on October 7, 1907, the mortgaged properties were sold under the decree, and purchased by the plaintiff as a whole for a lump sum, being the amount of the mortgage indebtedness, together with interest and costs. Of the proceeds of such sale $25,000 was placed in the registry of the court, subject to the disposition to be made of that sum by the supplemental decree. Subsequent to the decree the receiver filed a complaint in intervention, and W. G. Spencer and other creditors of the T. T. Lane Company filed also an amended complaint in intervention. The amended complaint in intervention represented claims. These claims for labor performed and supplies delivered in the season of 1906 may be classified as follows: (1) For labor and supplies for the construction of the Henry creek ditch, $16,214.36; (2) for labor for the repair and maintenance of Coffee and Arctic creek ditches, $1,747; (3) for labor performed in doing assessment work on sundry unnamed, unpatented mining claims, $1,828.50, making a total of $19,789.86.

The Taylor Creek Ditch Company demurred to the complaint, and, the demurrers being sustained by the court, the complainants elected to stand on the sufficiency of their respective complaints, and thereupon the supplementary decree was entered, from which the present appeal is prosecuted.

Thomas Shepard, for appellants.

Metson, Drew & Mackenzie and E. H. Ryan, for appellees.

Before ROSS and MORROW, Circuit Judges, and WOLVERTON, District Judge.

MORROW, Circuit Judge (after stating the facts as above). The first objection urged against the complaint in intervention is that while the allegations are reasonably full and explicit in alleging an enhancement in value of the Henry creek ditch, and the preservation of that particular water right by the indebtedness incurred for the labor and supplies used in its construction, there is nothing by way of allegation connecting that work with the mortgaged property as a whole, or indicating what, if any, mining claims were rendered more valuable thereby, or what, if any, of the other ditches or water rights covered by the mortgage were thereby improved, or how or to what extent, if at all, the other mortgaged property was conserved or preserved from deterioration or loss or forfeiture by such labor and supplies used in its construction.

This objection is based upon the fact that the mortgaged property included a number of water rights, ditches, and mining claims, and was sold as a whole, and that the money remaining in the registry of the court represents a part of the whole property, and not any specific part. It is objected, further, that it is not alleged in the complaint of intervention that the Arctic creek ditch, for the repair and maintenance of which labor claims were incorporated in the complaint, is one of the ditches and water rights covered by the mortgage; that there is no segregation of the labor performed on the Coffee creek ditch and labor performed on the Arctic creek ditch; that it is not alleged that the labor performed was necessary for the preservation of those ditches, or was for the benefit or enhancement in value or preservation of the remainder of the mortgaged property. It is further objected that it is not alleged on what particular claims of the more than 150 mining claims covered by the mortgage the assessment work was performed, or that such claims were covered by the mortgage, or that the work was necessary to preserve them from loss or forfeiture, or, if necessary, in what respect the preservation of these claims benefited, preserved, or enhanced the value of the remainder of the mortgaged property. We are of opinion that these objections are sufficient to sustain the demurrer to the complaint in intervention; but, as it may be possible to amend the complaint so as to avoid these objections, we will pass to consideration of other objections that go more directly to the merits of the case.

[1] Before considering these objections, a restatement of certain facts will more clearly present the questions to be determined. In September, 1904, one T. T. Lane executed a note to one L. B. Solner in the sum of $8,000. To secure the payment of this note, Lane executed and delivered to Solner a deed to certain mining property, including a large number of unpatented placer mining claims, together with water rights, ditches, and personal property. The deed was in fact a mortgage. The note was payable on or before October 1, 1905, but was not paid by that date. In the meantime Lane had transferred all of the mining property, ditches, and water rights described in the deed to the T. T. Lane Company, a corporation organized under the laws of the state of Nevada. On October 9, 1905, the T. T. Lane Company executed and delivered to Anna G. Lane a note for $32,000,

together with a mortgage to secure the payment of the same. The mortgage included the property described in the previous mentioned deed, together with all after-acquired titles and interests, personal property, water rights, choses in action, rights in law or in equity, contracts and interests, and secured the payment of the first note, as well as other indebtedness and advances to be made under the second note. The second note was payable on or before one year after date. The T. T. Lane Company defaulted in the payment of the note, and on June 22, 1907, the Taylor Creek Ditch Company, having succeeded to the interests of the mortgagees, filed its suit in foreclosure upon both mortgages. The parties to these transactions are all private individuals except the second mortgagor, which is a private corporation.

The complaint in intervention alleges that during the mining season of 1906 the T. T. Lane Company was engaged in constructing the Henry creek ditch and in maintaining and repairing the Coffee creek and Arctic creek ditches, and in doing assessment work on certain placer mining claims. For the labor employed and supplies and transportation used in this work the company incurred an indebtedness of $19,789.86, which has not been paid. The claims constituting this indebtedness are the matters alleged in the amended complaint in intervention, and it is contended that these unpaid claims have a preferred right of payment over the mortgages in the distribution of the proceeds of the foreclosure sale.

The general rule is that a fixed legal right under a mortgage cannot be impaired by any equities subsequently arising. To this rule there are some exceptions, among others: (1) Claims for current operating expenses where railroads have defaulted in their obligations and receivers have been appointed. Pomeroy in his Equity Jurisprudence states the rule in such cases as follows:

"In cases of railroad receiverships, and perhaps in a few other special instances, priority is allowed to certain claims for operating expenses incurred within a reasonable time before the appointment of a receiver. The controlling principle appears to be that a railroad, having public duties to discharge, must be kept a going concern while in the hands of the court, and that to that end debts due its employés and other current debts incurred for its ordinary operations, which it is not usually practicable to pay in cash, and which are therefore payable on short terms, should be paid as they would have been paid if the court had not taken away from the corporation the control of the railroad. A cessation of the railroad's operations by failure to pay promptly the operatives or such other debts as railroads must necessarily incur for their ordinary, current operations must be prevented. Every railroad motgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. It is frequently stated that the right to preference depends upon a diversion to the use of the mortgagees of funds which should properly be applied to the payment of current expenses. It is not necessary, however, that the funds be used to pay the mortgage debt, principal, or interest. And it would seem that the better rule is that no diversion whatever need be shown. The practical reasons for the rule allowing preferences are as strong in both cases; for it is equally as important to keep the road a going concern where there has, or has not, been such diversion." Pomeroy's Equity Jurisprudence (3d Ed.) § 224.

It will not be necessary to follow the development of this doctrine of priority for current expenses in the operation of railroads as it has

been defined and limited in the Supreme Court of the United States commencing with Fosdick v. Schall (1878) 99 U. S. 235, 25 L. Ed. 339, and proceeding through numerous cases down to Gregg v. Metropolitan Trust Co. (1905) 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717. But in Wood v. Guarantee, etc., Co., 128 U. S. 416, 421, 9 Sup. Ct. 131, 32 L. Ed. 472, the court refers to the fact that the doctrine of Fosdick v. Schall had never yet been applied in any case except that of a railroad, and, as a reason for such a limitation, the court points out that the case lays great emphasis on the consideration that a railroad is a peculiar property of a public nature and discharging a great public work, and that there is a broad distinction between such a case and that of a private concern; and in Kneeland v. American Loan & Trust Co., 136 U. S. 89, 97, 10 Sup. Ct. 950, 953 (34 L. Ed. 379), the Supreme Court cautioned the lower federal courts against too great an extension of the doctrine, saying:

"The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. * * * No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

The objection that these observations of the court were not necessary to the determination of the cases in which they were made, and therefore not binding, ignores their general character and obvious soundness in dealing with alleged equities brought forward to supersede contract obligations and displace vested liens. The defaulting corporation in the present case is not a railroad corporation, and not even a public corporation under the laws of Alaska, nor are its operations of such a character that they may be considered analogous to the operations of a railroad or other public corporation.

The case of the Atlantic Trust Co. v. Woodbridge Canal & Irr. Co. (C. C.) 79 Fed. 39, 42, is cited among others as an exception to the rule limiting such priorities to railroad cases, but the claims allowed in that case were admitted to priority over the mortgage expressly upon the ground that, under the laws of the state of California, irrigation companies, like railroad companies, were quasi public corporations, and the claims in that case were accordingly limited to those incurred

for operation; that is to say, to those expenses required in keeping the irrigation works a going concern for the benefit of the public, while claims for construction as well as those for repairs and improvements were disallowed. The court referred to the law of the state that the use of water for irrigation was a public use, and, being a public use, it was as essential to the interest of the public that an irrigation company should be kept a going concern as that a railroad company should be kept a going concern. The use of water by the T. T. Lane Company was a private use, and the operations of its ditches were for the benefit of private property. The public had, therefore, no interest in keeping the corporation a going concern.

But, aside from the character of the corporation, if we turn to the claims themselves in the present case, we find that they do not measure up to the standard required of claims admitted to priority over mortgages in the case of defaulting railroads. They are not claims for current expenses; that is to say, for expenses which in the ordinary course of business would have been paid by the corporation out of the current income had not the court interfered and appointed a receiver of the property. In High on Receivers (4th Ed.) § 394h, the author states the law with respect to such claims as follows:

"Claims of general creditors of a railway company, which have been incurred prior to the receivership, and which do not fall within the class of current expenses for the ordinary operation and maintenance of the road, such as necessary labor, supplies, materials or equipment, and which do not, therefore, have any special equities entitling them to payment out of current income, will not be preferred out of the earnings of the receiver, or out of the proceeds of the foreclosure sale. The allowance of claims, which results in the displacement of the priority of mortgage liens, is to be regarded as the exception and not as the rule, and such claims will not be given a preference unless they may fairly and reasonably be regarded as debts incurred in the ordinary, daily operation and maintenance of the road. And where the expense is an extraordinary one, incurred outside the ordinary course of the business of the road, such as for original construction or reconstruction, or for extraordinary repairs, or for extensions or permanent improvements, the preference will not be granted."

Furthermore, stale claims are not allowed for expenses incurred prior to the appointment of a receiver. Such claims to be admitted to priority must have been incurred within a reasonable time before the receivership to be admitted as "current expenses." In Thomas v. Railway Co. (C. C.) 36 Fed. 818, 819, Mr. Justice Harlan, sitting in circuit, in 1888 stated a rule of limitation which has been observed by the courts ever since. He said:

"The general rule that has obtained in this circuit for many years, though not fully or expressly formulated in any published decision, has been not to charge the income of mortgaged property accruing during a receivership, or the proceeds of the sale of such property with general debts for labor, supplies, and equipment, back of the six months immediately preceding the appointment of a receiver. While the court has not, perhaps, committed itself against applying a different and more liberal rule, when the special circumstances or equities of the case demand such a course, the general rule is as just stated; and I am unwilling in this case, and at this late day, to depart from it. Besides, I am of the opinion that, under the circumstances that usually attend the administration of railroad property by the courts, through receivers, the rule stated is a wise and salutary one. It would not do to

charge the income of mortgaged railroad property, managed by a receiver, or the property itself, with every debt incurred in all its previous history for labor, supplies, or equipment. As was said in Fosdick v. Schall, the business of all railroad companies is, to a greater or less extent, done on credit. Those who perform labor, or furnish supplies and equipment, usually expect and contract to be paid within a reasonable time; and they do not ordinarily perform labor, or furnish supplies or equipment, after the railroad company has failed to pay within such time for what has been previously done or furnished. Expenses incurred within such reasonable time constitute what are called 'current expenses,' which ought, if possible. to be paid out of the receipts during the same period. When, therefore, debts of that character remain unsettled, or are not put in suit, for such a time as would be deemed unreasonable, it may be fairly presumed that the creditors have ceased to look to current receipts for payment, and have accepted the position of general creditors who, as such would have no claim for indemnity upon any special part of the income."

In the present case the receiver was appointed by the court in the original action about July 1, 1907. The amended complaint in intervention in this case was filed October 31, 1908. The claims are for expenses incurred by the corporation in the mining season of 1906. The corporation must have been in default for more than a year with respect to many of these claims when the original action was commenced, and not less than nine months with respect to any of them. We are not aware of any case that would admit to priority claims of this character.

Another exception to the rule that a fixed legal right cannot be impaired by equities subsequently arising are the legal rights created by the lien laws in force at the time of the execution of the mortgage. These laws enter into and become a part of the contract. But in this case no such rights were acquired by the interveners. Their failure to do so is explained as follows in their complaint:

"These intervening complainants severally requested of the said T. T. Lane Company at sundry times and insistently during the autumn of the year 1906 the payment of the said indebtedness so due and owing to them, respectively, and in each instance they were assured by T. T. Lane (one of the defendants herein), then the president of said T. T. Lane Company, that if they would wait patiently and take no steps or proceedings to enforce their respective claims for said indebtedness, nor in any way embarrass said company in its affairs, said company could and would raise the necessary money to pay all of said indebtedness during the winter of 1906–07; and thereupon these intervening complainants and other persons similarly situated—all of whom were, respectively, entitled under the laws of the district of Alaska to statutory liens upon said ditch for the security of their claims upon filing claims or notices of such liens within sixty (60) days after they had respectively ceased to labor thereon or furnish supplies, etc., thereto—relying upon the assurances aforesaid, refrained from taking any steps or proceedings to enforce their several claims, or doing anything to embarrass said company and refrained from making or filing any claims or notices of said liens upon said ditches, etc., to which they were entitled as aforesaid, until said statutory period of sixty days within which said claims or notices of liens must be filed had expired, and, if these intervening complainants had not been deceived and misled by said assurances, they would have filed their respective claims and notices of such liens, and would have perfected their said liens, and the same would have thereupon become and constituted liens upon said ditches and said water rights, prior and paramount, to the lien of said mortgage."

It appears from this allegation that the complaining interveners relying upon the personal assurances of T. T. Lane, the president of

the T. T. Lane Company, that their claims would be paid waived the right to acquire a statutory lien that would have been prior and paramount to the lien of the mortgage, and now, having failed to realize upon the personal assurances of the president of the company, they seek an equally effective equitable lien on the property. We know of no rule that will give them such a remedy under the circumstances.

[2] It is contended, further, that the court erred in refusing compensation to the receiver and his counsel out of the funds in the registry of the court. It appears from the record that the receiver was not appointed at the instance, nor was the appointment in the interest of the mortgagee, and that he has rendered no service to the mortgaged property. It appears, further, that the receiver was allowed by the court for himself and his counsel compensation for the services rendered with respect to certain property that came into his hands; that this allowance was the entire proceeds of such property over and above the necessary expenses. We do not think, under the circumstances, the receiver or his counsel is entitled to any compensation out of the fund now in the registry of the court.

It follows from these considerations that the complaint in intervention did not state facts sufficient to entitle the interveners to a priority, and that neither the receiver or his counsel is entitled to compensation in these proceedings.

The supplemental decree of the court below will, therefore, be affirmed.

DONOVAN-HOPKA-NINNEMAN CO., Limited, et al. v. HOPE LUMBER MFG. CO.

(Circuit Court of Appeals, Ninth Circuit. March 11, 1912.)

No. 1,925.

1. PUBLIC LANDS (§ 114*)—GRANTS—RIPARIAN RIGHTS.
   Rights of owners of lands bordering an inland navigable lake, being governed by the laws of the state, subject to the paramount public right of navigation, a federal patent to such lands does not convey anything below the ordinary high-water mark.

   [Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 314–322; Dec. Dig. § 114.*]

2. NAVIGABLE WATERS (§ 36*)—WATERS AND WATER COURSES (§ 89*)—RIPARIAN RIGHTS.
   In Idaho, a riparian owner on navigable water takes title to the thread of the stream, or lake, subject to the public right of navigation.

   [Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180–200; Dec. Dig. § 36;* Boundaries, Cent. Dig. §§ 108–112, 115–117, 121, 122; Waters and Water Courses, Cent. Dig. §§ 91, 92; Dec. Dig. § 89.*]

3. NAVIGABLE WATERS (§ 46*)—RIPARIAN RIGHTS—SEPARABLE CHARACTER.
   Riparian rights incident to ownership of lands in Idaho bordering on a navigable lake are separable from the lands by conveyance, condemnation, relinquishment, or prescription.

   [Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 283–293; Dec. Dig. § 46.*]

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

4. NAVIGABLE WATERS (§ 46*)—RIPARIAN RIGHTS—ESTOPPEL.
Plaintiff is not estopped to claim riparian rights conveyed apart from the lands to which they were appurtenant, where each party had notice of the other's claims and of their dispute as to what their legal rights were.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 283–293; Dec. Dig. § 46.*]

5. NAVIGABLE WATERS (§ 37*)—RIPARIAN RIGHTS—CONVEYANCE.
A deed to all the riparian and water rights in front of and belonging to specified lots bordering a navigable lake, fixing the average high-water line for five years as the division line, passed title to the soil under the lake to the middle thereof.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201–227, 285; Dec. Dig. § 37;* Boundaries, Cent. Dig. §§ 108–112, 115–117, 121, 122.]

6. NAVIGABLE WATERS (§ 36*)—RIPARIAN RIGHTS—EJECTMENT.
Ejectment lies to oust possession of the soil under a lake and structures erected thereon.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180–200; Dec. Dig. § 36.*]

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

Action by the Hope Lumber Manufacturing Company against the Donovan-Hopka-Ninneman Company, Limited, and others. Judgment for plaintiff, and defendants bring error. Affirmed.

The defendant in error, a corporation of the state of Montana, was the plaintiff in the court below. The individual plaintiffs in error were citizens of the state of Idaho, of which state the Donovan-Hopka-Ninneman Company, Limited, was a corporation and also a citizen. The complaint in the action contained two counts, both of which set forth the jurisdictional facts and that the plaintiff had complied with the laws of the state of Idaho authorizing it to own and hold property and to carry on and conduct business in that state, and the first count of which also alleged: That the plaintiff ever since January 2, 1908, has been the owner and entitled to the possession and exclusive use and enjoyment "of the following described real estate situated in the county of Bonner, state of Idaho, and particularly described as follows, to wit: All the riparian and water rights and privileges in front of and appurtenant to lots five (5) and six (6), in section one (1), township fifty-six (56) north of range one (1) east of the Boise meridian, and all those portions of said lots five (5) and six (6), aforesaid, lying below the average of high-water mark on said lots, the said lots five and six forming a portion of the east shore of Lake Pend d'Oreille, in the said county of Bonner, state of Idaho, which said Lake Pend d'Oreille is now, and at all times has been a fresh-water navigable lake. That the said riparian rights and privileges so owned by this plaintiff include the right and privilege to exclusively use and enjoy the lands bordering on said lake below the high-water mark of said lake, and extending out into the said lake so far as the same may without interfering with or obstructing the free navigation of said lake by the public, and include the right to use the waters of said lake in front of said land for all purposes, and in such manner as a riparian proprietor has the right to use the same. That the said high-water mark to which the rights of this plaintiff in front of said premises extended during said times, and now extend, is the average of the high-water line during the five years prior and next preceding the 25th day of September, 1901."

It is next alleged in the first count of the complaint that on or about the 3d day of February, 1909, while the plaintiff was so the owner, and in, and entitled to the exclusive possession and enjoyment of the properties, rights, and privileges above described, the defendants to the action "entered upon the

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

said waters and lands lying beneath the said lake and below said high-water mark, in front of said lots 5 and 6, and wrongfully and unlawfully ejected and ousted plaintiff therefrom," and proceeded to erect a mill, booms, piers, tramways, and other things thereon, and have ever since wrongfully withheld the possession of the premises from the plaintiff, to its damage in the sum of $10,000.

The prayer of the first count is for the recovery of the possession of the premises and rights described, and for the amount of damages alleged and costs.

In the second count the plaintiff made substantially the same allegations in respect to its ownership of the property rights and privileges described in the first count, and further alleged that on or about February 3, 1909, the defendants wrongfully and against the will of the plaintiff "entered upon the said waters of Pend d'Oreille Lake lying in front of the said lots 5 and 6 above described, and being the waters upon which plaintiff owned and possessed the rights above named, and upon the lands lying below the high-water mark, and the waters in front of said land, and proceeded to use the same, and to drive piling into the said waters and land beneath the same, and to construct log booms thereon, and that ever since said last-named date the said defendants have continued to unlawfully enter and trespass upon the said lands and waters, and upon plaintiff's rights therein, in the manner aforesaid," to the plaintiff's damage in the sum of $10,000, for which the plaintiff prayed judgment with its costs.

After the overruling of the defendants' demurrer to the complaint, they filed an answer thereto, by which they put in issue the plaintiff's alleged ownership of the property and rights in question, and their ejectment of the plaintiff therefrom, or any wrongful or unlawful entry, although they admit in their answer that they did enter upon and use the property in question. By their answer they also set up as affirmative defenses that the deed under which the plaintiff claims title was and is void, and that the plaintiff had no easement or other right in or to any part of the said lots 5 and 6. The answer further alleged that the defendants' predecessors in interest purchased on the 14th day of April, 1902, from one F. B. Carter, the then owner of lots 5 and 6 referred to in the complaint, that portion thereof described as follows, to wit: "Thirty-three acres situated on the southwest side of the Northern Pacific Railroad Company's right of way and bounded on the southwest by Lake Pend d'Oreille, being all the lake shore and lake front of said lots bordering upon or being in said Lake Pend d'Oreille."

The answer next alleged that the defendants' predecessors in interest, with the knowledge, consent, and acquiescence of the plaintiff and its predecessors in interest, erected a sawmill of large value upon a portion of the said lots so purchased by them and a boom in front of the defendants' said property, which boom it was necessary to fasten to the shore, and which boom is being maintained and operated by the defendants with the consent of the War Department of the United States; that the plaintiff and its predecessors in interest had full knowledge of the construction and maintenance of both mill and boom and made no objection thereto, but, on the contrary, acquiesced therein.

The plaintiff put in issue the affirmative allegations of the answer, and the cause came on for trial before the court with a jury. During the examination of the witness Donovan, the defendant was permitted by the court to amend its answer by setting up as a further defense to the action the following:

"That at all the times and dates mentioned in the complaint and answer herein the state of Idaho was the owner of all the water and water rights in the state of Idaho, save and except as and when said water and water rights or portions thereof were or are appropriated and actually used for a beneficial purpose.

"That at all the times and dates mentioned in the complaint and answer herein defendant corporation and its predecessors in interest were, and said corporation now is, the owner of all that portion of lots 5 and 6 mentioned and described in the pleadings herein, bordering on Lake Pend d'Oreille and between the average or ordinary high-water mark and the right of way of

the Northern Pacific Railroad Company (which right of way is a considerable distance from the shore of said lake) and the defendant corporation now is the owner, and the predecessors of defendant corporation have at all times been the owners, of all of said lots below said average or ordinary high-water mark, including the bed of said lake and all of said lots under water at any time, and the defendant corporation and its predecessors in interest are the only persons having any rights to the use of the soil of said lots or of the bed of the lake, or any part or portion of said lots extending into said lake, for the purpose of having or maintaining a log or other boom, piling, sawmill, or any other matter or thing.

"That the predecessors in interest of defendant corporation made use of the water of said lake in front of and over a portion of said lots for booming and floating logs in the year 1903. That defendant corporation, in the latter part of the year 1907, commenced the construction of a sawmill on a portion of said lot 6, and completed said sawmill in the early part of the year 1908, and floated large quantities of logs on and in the water of said lake and in front of and over portions of said lots, and ran and operated said mill from the date of its completion until it burned, during the night of August 8, 1908. That during the years 1908, 1909, and 1910, and the latter part of the year 1907, defendant corporation maintained log booms in the water covering portions of said lots. That in the year 1908 defendant corporation put piling in said water and near the ordinary low-water mark of and on said lots 5 and 6, and around said mill. That as soon as defendant corporation was financially able to so do, it constructed a new mill on the site of the first mill, and put piling in said lake, and on said lots some distance from the shore, for boom purposes, and to facilitate the operation of said mill. That no other person or corporation has ever used the water or appropriated the water of said lake within the area between the outer piling and the shore of or on said lots 5 and 6, for the purpose, or any purpose, to which defendant corporation has used said water. That the water or area last above mentioned is not in excess of that reasonably necessary for the operation of said mill, or the uses to which defendant corporation has put said water.

"That defendant corporation intended to and has appropriated the water, water rights, and right to use the water of said lake on or in front of portions of said lots 5 and 6 out to and beyond said outer piling, and has put said water and water area to a beneficial and valuable use.

"That in the construction of said mills and the booms, pilings, and improvements, and appropriating and putting said water to a beneficial use, defendant corporation has expended about $20,000."

Upon the conclusion of the evidence in the case the trial court instructed the jury to return a verdict for the plaintiff upon both causes of action set out in the complaint, but submitted to it the question as to the amount of damages sustained by the plaintiff. The jury returned a verdict for the plaintiff as directed and fixed the amount of damages at the nominal sum of $1, in accordance with which verdict judgment was entered.

H. M. Stephens and Peter Johnson, for plaintiffs in error.

Henry C. Stiff, Thomas C. Marshall, Elmer E. Hershey, C. F. Kelley, and L. O. Evans, for defendant in error.

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

ROSS, Circuit Judge (after stating the facts as above). The defendant in error (plaintiff below) acquired its alleged rights in and to the property in question under a deed from one Kenneth Ross, who acquired whatever rights he had thereto under a deed to him from an Idaho corporation styled Hope Lumber Company, which company acquired its rights in the property, if any, under a deed executed to it on the 25th day of September, 1901, by Frank B. Carter, who under-

took to convey thereby to the Hope Lumber Company "all the following described lots, pieces, or parcels of land, situated in the county of Kootenai and state of Idaho and known and described as follows, to wit: All the riparian and water right in front of and belonging to lots (5) five and (6) six, Sec. (1) one, township (56) fifty-six north of range (1) one east, and it is agreed that the average of high-water line for the past (5) five years shall be the division line."

Carter's rights in and to the property in question, whatever they were, were derived solely by virtue of a deed to him made by the Northern Pacific Railroad Company, which company had theretofore received a patent from the United States conveying to it lots 5 and 6 of the section mentioned under and by virtue of the grant made to it by Congress; one of the boundaries of the lots being Lake Pend d'Oreille, which is a fresh-water navigable lake, situated wholly within the state of Idaho. In his deed to the Hope Lumber Company Carter did not, as will be seen from the description above quoted, convey any portion of lots 5 and 6, but, on the contrary, retained them and subsequently conveyed portions thereof to the predecessors in interest of the plaintiff in error (defendant below), as will subsequently be shown. He undertook to convey to the Hope Lumber Company only "all the riparian and water right in front of and belonging to" lots 5 and 6; the deed reciting that "it is agreed that the average of high-water line for the past (5) five years shall be the division line."

Some time after the deed made by Carter to the Hope Lumber Company and on April 14, 1902, he executed a deed (confirmed by a still later deed) conveying all those portions of the said lots 5 and 6 lying south of the Northern Pacific Railroad Company's right of way (being those portions thereof bordering on the Lake Pend d'Oreille) to Donovan, Hopka & Ninneman, at the time being a mercantile firm in Hope, Idaho, and being the predecessors in interest of the plaintiff in error, and under which deed the plaintiff in error and its predecessors in interest entered upon the soil and waters in front of lots 5 and 6 and constructed a mill, and afterwards a second mill (the first having been burned), a wharf, and other structures used in the manufacture, sale, and shipment of lumber.

There was conflicting evidence given on behalf of the respective parties regarding the average high-water line of the lake in front of lots 5 and 6 during the five years immediately preceding the date of the execution of the deed from Carter to the Hope Lumber Company; the highest line being given as 17 feet above and the lowest 14 feet above the line of extreme low water. And there was evidence also given to the effect that the extreme low-water line was fixed by the elevation of the lake, given as 2,051 feet.

On the trial the court expressed doubt as to whether the plaintiff could maintain ejectment, saying:

"The evidence is not clearly in harmony with the description as set forth in the complaint. There is an express allegation of the conveyance of the soil, and I overruled the demurrer on that ground. The construction of the deed is not free from grave difficulty, but I have concluded to take the view that it conveys all the interest which the grantor had, in the boundary lines of the description. Taking the entire deed together, my conclusion is that

such was the intention of the parties fairly to be gathered from the deed; but the conclusion is not free from difficulty."

The court finally gave to the jury these two instructions:

"Gentlemen of the jury, in the view which I have taken of the law of this case, from the undisputed testimony, it becomes my duty to say to you that the plaintiff is entitled to recover upon the first cause of action. A form of verdict has been prepared, which it will be your duty to find and the duty of your foreman to sign: 'We, the jury impaneled and sworn to try the above-entitled cause, find for the plaintiff on all the material issues on the first cause of action, and find that the "average of high-water line" referred to in the deed offered in evidence by plaintiff, and referred to and alleged in the complaint as a part of the description of the premises in controversy, as follows, to-wit, at an elevation of 2,062 feet above sea level.' So that so far as this first phase of the case is concerned, I am assuming the responsibility myself and will relieve you from any difficulty. It will be your duty to return this verdict.

"Now, as to the second cause of action, the plaintiff asks for damages for being deprived of the use of the property in controversy during the period elapsing from the time it was excluded from the use thereof (I think it is claimed by the plaintiff that it was some time in February, 1909, but the date is for you to determine) from the date when it was excluded from the use of this property, if it was excluded (and that is for you to find), up until the date of this suit, which is June 15, 1909. Your verdict upon that cause of action cannot exceed $5,000, which, as I understand, is the highest estimate any witness placed upon the damages, and cannot be less than $1. So that your verdict must be in favor of the plaintiff for at least $1, and cannot exceed $5,000."

As has been stated, the jury returned a verdict for the plaintiff as directed and fixed its damage at the nominal sum of $1.

[1] By its patent the United States did not undertake to convey anything below ordinary high-water mark. Barney v. Keokuk, 94 U. S. 324, 338, 24 L. Ed. 224; Packer v. Bird, 137 U. S. 661, 11 Sup. Ct. 210, 34 L. Ed. 819. The incidental riparian rights to the waters in front of those lots and to the use of the soil under them for certain purposes, the grantee of such title held and enjoyed as owner of the upland only. The law in respect to the rights that accrue to the owner of lands in this country bordering on navigable waters beyond the reach of the tides, whether of rivers or lakes, is well settled. Such rights are governed by the laws of the several states, subject to the paramount public right of navigation. Weems Steamboat Co. v. People's Company, 214 U. S. 345, 29 Sup. Ct. 661, 53 L. Ed. 1024, 16 Ann. Cas. 1222; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; Yates v. Milwaukee, 10 Wall. 497, 19 L. Ed. 984; and the numerous cases cited in the opinions in those cases.

"The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. As an incident of such ownership the right of the riparian owner, where the waters are above the influence of the tides, will be limited according to the law of the state, either to low or high water mark, or will extend to the middle of the stream." Packer v. Bird, 137 U. S. 661-669, 11 Sup. Ct. 210, 212, 34 L. Ed. 819.

[2] The law of the state of Idaho, as established by the Supreme Court of that state, is that the riparian owner upon the streams and lakes of Idaho (all of which are unaffected by the tides), whether navigable or nonnavigable, takes title to the thread of the stream or lake, as the case may be, subject to the public right of navigation. Johnson v. Johnson, 14 Idaho, 561, 95 Pac. 499, 24 L. R. A. (N. S.) 1240; Lattig v. Scott, 17 Idaho, 506, 107 Pac. 47.

It necessarily results, therefore, that it must be here held that Carter got, as an incident of the conveyance of lots 5 and 6 by the Northern Pacific Railroad Company to him under its patent from the government, title to the waters in front of those lots and to the soil covered by them to the thread of the lake, subject to the public right of navigation. But such title he received and held only as riparian owner of lots 5 and 6 and as a mere incident of the title to those lots conveyed by the United States.

[3] The real questions in the case, therefore, are: First, whether those incidental and appurtenant rights were separable from the land to which they were thus attached, and, if so, whether they passed by the deed executed by Carter to the Hope Lumber Company; in which event the further questions of estoppel and the right of the plaintiff to maintain the action of ejectment.

In support of their contention that the incidental and appurtenant rights referred to were inseparable from the riparian land, the counsel for the plaintiffs in error cite, among other cases, Illinois Central Railroad Co. v. Illinois, 146 U. S. 387–445, 13 Sup. Ct. 110, 36 L. Ed. 1018, and Potomac Steamboat Co. v. Upper Potomac S. Co., 109 U. S. 672, 3 Sup. Ct. 445, 4 Sup. Ct. 15, 27 L. Ed. 1070.

In the case of Illinois Central Railroad Co. v. Illinois, 146 U. S. 387–445, 13 Sup. Ct. 110, 115 (36 L. Ed. 1018), the Supreme Court said:

"The construction of a pier or the extension of any land into navigable waters for a railroad or other purposes, by one not the owner of lands on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. Those rights are incident to riparian ownership. They exist with such ownership and pass with the transfer of the land. And the land must not only be contiguous to the water, but in contact with it. Proximity without contact is insufficient. The riparian right attaches to land on the border of navigable water without any declaration to that effect from the former owner, and its designation in a conveyance by him would be surplusage. See Gould on Waters, § 148, and authorities there cited.

"The riparian proprietor is entitled, among other rights, as held in Yates v. Milwaukee, 10 Wall. 497, 504 [19 L. Ed. 984], to access to the navigable part of the water on the front of which lies his land, and for that purpose to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may prescribe for the protection of the rights of the public."

The case of Potomac Steamboat Co. v. Upper Potomac S. Co., 109 U. S. 672, 3 Sup. Ct. 445, 4 Sup. Ct. 15, 27 L. Ed. 1070, was a bill in equity to restrain the defendants below, who were the appellees in the Supreme Court, from constructing piers and docks on the Potomac river, at the city of Washington. The plaintiffs, being in possession of a tract of land bounded by Water street, which was on the margin of

the river, claimed that the riparian rights on the side of the street opposite to their tract attached to it. The defendants denied the plaintiffs' title to such riparian rights, and justified their own acts under a license from the commissioners of the District of Columbia, who claimed title to the river front and riparian rights through deeds vesting the fee simple of Water street, in the city of Washington, in the United States. In the course of its opinion, the court said:

"The decisive circumstance in the present case is that the United States became the riparian proprietor, and succeeded to all the riparian rights of Notley Young, by becoming the owner in fee simple absolute of the strip of land that adjoined the river, and intervened between it and what remained to the original proprietor, Notley Young, after that conveyance; and the successors to his title had no other or greater rights in Water street, or the land on which it was laid out and eventually made, than any other individual members of the public. While it remained a street, it was subject to their use as a highway merely, over which to pass and repass, and without the consent of the United States as proprietor was subject to no private use whatever. The right of wharfage remained appurtenant to it, because, as land adjacent to the river, that right was annexed to it by law, and could be exercised on it by the proprietor; but was severed, by the severance of the title, from the remainder of the original tract, to the whole of which it had formerly pertained."

These decisions fall far short of holding that such riparian rights cannot be severed from the riparian land and conveyed by its owner to third parties while retaining the land to which they were theretofore appurtenant.

The counsel for the plaintiffs in error also cite in support of their contention the case of Lake Superior Land Co. v. Emerson et al., 38 Minn. 406, 38 N. W. 200, 8 Am. St. Rep. 679, in which both parties claimed under the same original grantor, who owned a tract of land in Minnesota bordering on Lake Superior, which, under the law of that state, extended only to low-water mark; the soil under the water below that mark being the property of the state. The court in that case did distinctly hold that such riparian and appurtenant rights were not separable from the riparian land out of which they grew. "Riparian rights incident or appurtenant to no land cannot exist," said the court. The first decision of the same court in the subsequent case of Hanford et al. v. St. Paul & D. R. Co., 43 Minn. 104, 42 N. W. 596, 7 L. R. A. 722, was to the same effect; but upon full reconsideration of the last-mentioned case, reported in 44 N. W. 1144, the court overruled its former decisions, and after reviewing a large number of cases said, among other things:

"We have thus considered: That the riparian proprietor has the exclusive right—absolute, as respects every one but the state, and limited only by the public interests of the state for purposes connected with navigation—to improve, reclaim, and occupy the submerged land, out to the point of navigability, for any private purpose, as he might do if it were his separate estate; that this right, even though it may never have been exercised, is recognized and protected by the law as property, of which he cannot be deprived even by the state without just compensation. That the enjoyment of the right—the use of the premises—need not be associated with the use of the upland. That it is for the interest of the state that such waste lands be improved and rendered profitable, while the state is not concerned as to whether the owner of the adjacent upland, or some person to whom he may release his right, make the improvement and enjoy the private benefit. That the rights of other per-

sons are not involved in the question. That when the land has been reclaimed it may be conveyed, according to most of the authorities, apart from the original upland. And that, according to other authorities, the riparian right may be transferred to and enjoyed by the owner of the next adjacent riparian estate. From these considerations, as well as from the authorities cited bearing directly upon the question, we think that the quality of alienability should be deemed to belong to this kind of property, as it does to property in general. See opinion of Bramwell, B., in Nuttall v. Bracewell, L. R. 2 Exch. 1, 11. The only reason opposed to this is the technical one that the right grows out of, and, until severed, is incident to, a riparian estate. We have come to feel that this is unsatisfactory, as a reason why such property should be deemed inseparable from the parent estate, and incapable of a separate existence. If the right in question were created out of, or enjoyed at the expense of, some other estate or property, and were measured and limited by the needs or use peculiar to the riparian estate to which it is annexed, there would be ground for others to urge that the right could not be changed or transferred so as to enlarge the scope of a grant or contract, or so as to prejudice the party complaining. But no such conditions exist. The rights of no one are affected by allowing the riparian owner to convey away this part of his property, as he may his other property. It is only an abstract question whether the right originating in custom, and having originally attached as an incident to his riparian lands, may now be sold and conveyed, and be enjoyed by the purchaser. It is for the interest of the riparian owner that he be allowed to dispose of or use his private property at his own discretion. It is for the interest of the public that such property be subject to purchase and use, where the owner may be incapable of improving it. No one is interested in opposing such unrestricted alienability and use. Although we have become convinced that the better reason is opposed to our former decision upon this point in Land Co. v. Emerson, 38 Minn. 406, 38 N. W. 200, 8 Am. St. Rep. 679, we should have deemed it better that a rule of property, although so recently declared, should not be disturbed, were it not that it is supposed that the result of that decision, if adhered to, would be very seriously prejudicial to the tenure of a large amount of very valuable property, which for a long time has been deemed and treated as alienable and enjoyable apart from the riparian lands, and which, according to our present opinion, was rightfully so treated prior to our decision in the Emerson Case."

While there is undoubtedly some conflict in the authorities upon the subject, the decided weight of authority is to the effect that the incidental and riparian rights of the riparian proprietor referred to may be severed from the riparian land by grant, by condemnation, by relinquishment, or by prescription. See the large number of cases cited in Farnam on Water Rights, vol. 3, § 724 et seq., including the cases of Gould v. Stafford, 91 Cal. 146, 27 Pac. 543, McCann v. Oregon R. & N. Co., 13 Or. 455, 11 Pac. 236, Parker v. West Coast Packing Co., 17 Or. 510, 21 Pac. 822, 5 L. R. A. 61, and Welch v. Oregon R. & N. Co., 34 Or. 447, 56 Pac. 417.

[4-6] In respect to the question of estoppel, we are of the opinion that the court below was right in its conclusion that the plaintiff was not estopped from the assertion of its rights, for the reason that the record shows that each of the parties to the action had not only constructive but actual notice of the claims of the other, and actual knowledge of the dispute as to what the law governing the case really was and took the chance of the result of the controversy. And since by virtue of the law of the state of Idaho, as has been above shown, the common grantor of the respective parties to the action took title to the soil in front of lots 5 and 6 to the middle of the lake, subject to the public right of navigation, the deed from Carter to the plaintiff's

predecessor in interest passed his title to such soil below the high-water mark therein designated, for which, together with the physical structures erected thereon by the defendants, the action of ejectment is properly maintainable.

It results that the judgment must be and is affirmed.

WEIGEL v. BROWN.

(Circuit Court of Appeals, Eighth Circuit. March 11, 1912.)

No. 3,645.

(Syllabus by the Court.)

1. FALSE IMPRISONMENT (§ 12*)—JUSTIFICATION—ORDER OR PROCESS VOID ON ITS FACE.

Neither the unauthorized order of a judge or a justice nor the process of a court of limited jurisdiction which shows on its face that its command is without his or its jurisdiction furnishes any justification for officers or others who obey or act under it.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 12.*]

2. FALSE IMPRISONMENT (§ 12*)—JUSTIFICATION—ORDER OR PROCESS VALID ON ITS FACE.

An officer to whom there comes for execution the process, fair and valid on its face, of a court having general jurisdiction in certain cases to command that which the process directs, is thereby protected from personal liability in executing it, although the command may be erroneous or in excess of the jurisdiction of the court in the particular case.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 12.*]

3. FALSE IMPRISONMENT (§ 8*)—JUSTIFICATION—JUDGMENT OF CONVICTION.

A certified copy of the judgment of conviction is the only warrant for the confinement of a prisoner convicted of an offense under the statutes of Arkansas.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 68–73; Dec. Dig. § 8.*]

4. FALSE IMPRISONMENT (§ 8*)—JUSTIFICATION—COMMITMENT.

A fine and costs is the limit of the punishment for assault and battery under the laws of Arkansas, and confinement for default in payment is limited to the time required to discharge the fine and costs at the rate of 75 cents per day. A justice of the peace lawfully adjudged the plaintiff guilty of assault and battery and fined him $10 and costs, which under the law authorized his confinement for 36 days. A commitment signed by this justice which neither contained a certified copy of the judgment nor conformed to the judgment, but which commanded the plaintiff's imprisonment for 60 days more than the time prescribed by the judgment and limited his credit on his fine to 50 cents a day during his imprisonment, came to the jailer who received the prisoner and delivered him to the contractor for convict labor who confined him thereunder 78 days and whipped him.

Held, the commitment was unauthorized and void on its face, and furnished no justification for the complainant's confinement or whipping.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 68–73; Dec. Dig. § 8.*]

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

5. FALSE IMPRISONMENT (§ 10*)—EVIDENCE (§ 96*)—ESTOPPEL TO ASSERT LIABILITY—PRESUMPTION AND BURDEN OF PROOF.
A prisoner is not estopped from recovering damages for false imprisonment by his failure to give notice to the person who confines him of the illegality of his confinement.
The legal presumption is that every infringement of the right to liberty and the pursuit of happiness is unlawful, and the burden is on him who infringes it to see that his action is not illegal, and to justify it.
[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 74; Dec. Dig. § 10;* Evidence, Cent. Dig. §§ 119–121; Dec. Dig. § 96.*]

6. CONDUCT OF TRIAL—CHARGE OF COURT.
A general conduct of the trial and the entire charge of the court considered, and *held* neither unjust nor unfair.

7. FALSE IMPRISONMENT (§ 31*)—ACTIONS—EVIDENCE—VALUE OF SERVICES.
Where the statutes of a state by various provisions estimate the value of the labor of convicts at 75 cents per day, and there was testimony in the case that the contractor for convict labor, by agreement with the convict, let him go for 10 or 12 days for $4.25, there was substantial evidence of the value of his services.
[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 108; Dec. Dig. § 31.*]

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

Action by Antone Brown against E. N. Weigel. Judgment for plaintiff, and defendant brings error. Affirmed.

Will Akers and F. T. Vaughan, for plaintiff in error.

Lewis Rhoton (De E. Bradshaw and T. E. Helm, on the brief), for defendant in error.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

SANBORN, Circuit Judge. The laws of the state of Arkansas empower the county court of any county in that state to let the labor of persons convicted and sentenced to the county jail to a contractor on condition that he agrees to maintain, keep, and work them (sections 1080 et seq., Kirby's Digest 1904), and they authorize the contractor to whip any such prisoner with a strap 2 feet long and 3½ inches wide, attached to a wooden handle, with 10 licks once in 24 hours for his refusal to work. Rule 3 of the Prison Board. The county court of Pulaski county made a contract of this nature with the defendant below, E. N. Weigel. Antone Brown, the plaintiff, had been charged with assault and battery, tried, convicted, sentenced to pay a fine of $10 and costs, and committed to the jail in default of payment by a justice of the peace, and he had been delivered to the defendant Weigel, who had worked and whipped him. The limit of the punishment for the offense of assault and battery, with which alone Brown was charged and of which alone he was convicted, was a fine. No authority was given to the justice to punish that offense with imprisonment (section 1585), and the statutes of Arkansas expressly provided that, where a prisoner failed to pay his fines and costs, the contractor might keep and work him for such time as at the rate of 75 cents per day would discharge them (section 1091), and that the defendant

should not be held in confinement for a fine for a longer period than at the rate of one day for each 75 cents of the fine (section 2463). The plaintiff sued the contractor for false imprisonment and unlawful whipping. Weigel defended under a commitment signed by the justice who rendered the judgment. There was a verdict and judgment for the plaintiff for $2,500, and Weigel specifies many alleged errors in the trial, the chief of which is that the court below ruled that the commitment which the defendant below offered in evidence constituted no justification of the confinement and whipping of the plaintiff by the defendant. The additional facts material to the disposition of this complaint are these:

The plaintiff was confined 78 days. He admitted and alleged in his pleading that he was convicted of assault and battery, fined $10 and costs, in all $17, and committed to the county jail by the judgment of the justice of the peace, and that this fact justified the contractor in holding him at the rate of 75 cents a day during 36 days. In view of this admission, the court below held that he could recover nothing for his imprisonment and lawful whipping during these days, but that the commitment under which alone Weigel justified was void on its face gave him no protection, and that he was liable in damages for the confinement and whipping of the prisoner during the remaining 42 days that he held him. The statutes of Arkansas provided that "where a judgment of death or confinement, either in the penitentiary or county jail, is pronounced, a certified copy thereof must be furnished forthwith to the sheriff, who shall thereupon execute it, and no other warrant or authority is necessary to its execution." Section 2455. "The sheriff in executing a judgment of confinement shall deliver the defendant with a certified copy of the judgment to the keeper of the penitentiary, or to the jailer, according to the judgment." Section 2461. "The defendant shall not be held in confinement for a fine for a longer period than at the rate of one day for each 75 cents of the fine." Section 2463.

There was no evidence that any certified copy of the judgment of the justice was ever delivered to the sheriff, the jailer, or the contractor. The commitment on which the defendant relies did not correctly recite, nor did it correspond with, the judgment of the justice. That judgment was that Brown was convicted of assault and battery, and that he pay a fine of $10 and costs, and be committed to the county jail in default of payment. The commitment recited that Brown was convicted of assault and battery, adjudged to be confined in the county jail for 60 days, to pay a fine of $10 and $18.50 as costs, and it directed the officer, in default of payment of the fine and costs, to deliver him to the jailer "to be imprisoned in the manner provided by law, until the fine and costs are paid, not exceeding, however, one day for every 50 cents of said fine and costs remaining unpaid." This commitment was signed by the justice who rendered the judgment. The 60 days imprisonment there recited and the confinement until at the rate of 50 cents a day the fine and the costs were paid were not only dehors the judgment rendered, but they were beyond the power of the justice to inflict in the case of which he had jurisdic-

tion under the statutes of Arkansas. The justice was a witness at the trial. He was repeatedly asked whether or not this 60 days imprisonment was in the commitment when he signed it, and his answer invariably was that he would not testify; that, if he put it in there, he knew better.

[3] Much argument is presented and many authorities are cited to show that when a judicial officer who has jurisdiction of the subject-matter and of the parties, in good faith and in the exercise of his powers as a judge, decides that he has the power to render it, and renders a judgment or sentence in excess of his jurisdiction, he incurs no liability to respond in damages to the party injured thereby. Lange v. Benedict, 73 N. Y. 12, 25, 29 Am. Rep. 80; Clark v. Holdridge, 58 Barb. (N. Y.) 61; Butler v. Potter, 17 Johns. (N. Y.) 145; McIntosh v. Bullard, 95 Ark. 232, 129 S. W. 85. The proposition has no relevancy to the issues in this case. In the trial and decision of the issue whether or not Brown was guilty of assault and battery and the imposition of the sentence rendered, the justice exercised his judicial powers. That judgment was within his jurisdiction and lawful. When he had rendered it, the exercise of those powers in that case ceased. If he had subsequently issued the certified copy of that judgment which the statutes prescribed as the authority for the sheriff and jailer to confine Brown, he would have been exercising a mere clerical or ministerial power, the power of acting as his own clerk. His issue of the commitment which he signed was a mere clerical or ministerial act. In its issue he exercised none of the powers of a judge. The counsel in this case have cited no statute which gave this justice any authority to issue this commitment and a search of the laws of Arkansas has disclosed none. The certified copy of the judgment required by the sections of the statutes which have been cited seems to be the only authorized warrant for the confinement of a person in that state.

[4] If, however, the justice had authority to issue a commitment, an indispensable condition precedent to its issue or its validity was that it should conform to the judgment upon which it was founded and to the law under which it was issued, and this commitment did neither. It committed the plaintiff to jail for 60 days and limited his credit on his fine and costs to 50 cents a day, contrary to the statutes of the state and in violation of the rule of law that a commitment may never authorize a severer punishment than the judgment on which it is founded. The stream may not rise higher than its source. As the issue of the commitment was not a judicial but a mere clerical or ministerial act, and as the justice testified that, if he inserted in it the authority to imprison Brown for 60 days and the limitation of his credit on his fine to 50 cents a day he knew better, it is certain that, if the justice were a defendant in this case, he could not escape liability for the damages which the plaintiff has suffered from his unlawful act.

[2] Counsel invoke the rule that an officer to whom there comes for execution the process, fair and valid on its face, of a court having general jurisdiction to command that which the process directs is thereby protected from personal liability in executing it, although the

command of the court may be erroneous or in excess of its jurisdiction in the particular case. Jennings v. Thompson, 54 N. J. Law, 55, 22 Atl. 1008; Martin v. Collins, 165 Mass. 256, 43 N. E. 91; Douglass v. Stahl, 71 Ark. 236, 240, 241, 72 S. W. 568. But this rule fails to reach the case in hand. This commitment was neither fair nor valid on its face. On the other hand, it was void on its face because it was not, nor did it purport to contain, that certified copy of the judgment which the statutes of Arkansas make the only warrant or authority for the confinement of a prisoner, because it disclosed on its face that the crime of which Brown was convicted was assault and battery and committed him to imprisonment for 60 days when a fine was the only punishment which the court that tried him could inflict upon him under the laws of Arkansas, because it authorized his confinement, until at the rate of 50 cents a day his fine and costs were paid, in violation of the express command of the statute that no prisoner should be held in confinement for a fine for a longer period than would discharge it at the rate of 75 cents for each day.

[1] Neither the unauthorized command of a judge or justice nor the process of a court of limited jurisdiction which shows on its face that its command is without his or its jurisdiction and void furnishes any protection to officers or others who obey it or act under it. Piper v. Pearson, 2 Gray (Mass.) 120, 61 Am. Dec. 438; Ex parte Baldwin, 60 Cal. 432, 435; Allen v. Gray, 11 Conn. 95; Hoit v. Hook, 14 Mass. 210, 213; Sandford v. Nichols, 13 Mass. 286, 289, 7 Am. Dec. 151; Tracy v. Swartwout, 10 Pet. (35 U. S.) 80, 94, 9 L. Ed. 354; Casselini v. Booth, 77 Vt. 255, 59 Atl. 833. There was no error in the ruling of the court that the commitment here in question furnished no justification of the contractor for confining and whipping the plaintiff.

The second complaint of the trial is that the court excluded evidence of the character of the assault and battery of which Brown was convicted, of the person upon whom it was committed, and of the fact that the first charge against him was of an assault with intent to commit a rape. None of this evidence, however, had any relevancy to the issues in this case. They were whether or not the confinement and whipping were justified by the commitment, and, if they were not, the amount of the damages the plaintiff was entitled to recover. The evidence here offered was too remote and inconsequential to be competent on the question of damages, and it had no tendency to establish the claim of either party on the other issue.

[5] It is specified as error that the court refused to instruct the jury that if the plaintiff knew, or could have known by the exercise of ordinary diligence, that the restraint recited in the commitment was for a longer period than authorized by law for a conviction for an assault and battery and failed to inform the defendant of that fact and to take legal steps for his release, and there was no neglect of the defendant in failing to ascertain the fact, the defendant might assume that the commitment was correct and the plaintiff could not recover, that the court also committed error in that it failed to instruct the jury that the plaintiff could have obtained his release by writ of habeas cor-

pus, and that, if they found that he knew he was being detained longer than the statute authorized and failed to do this, or to notify the defendant of his unlawful detention, this should be taken into consideration in determining the amount of his damages.

But there was no error in these rulings. The inalienable right to liberty and the pursuit of happiness demands itself and no one is estopped from recovering it or damages for its infringement by his silence in the face of lawless and resistless might. The legal presumption is that every infringement of that right is unlawful, and the burden is on him who inflicts it to justify his action. The Constitution perpetually cries its stern and forbidding warning that no person shall be deprived of life, liberty, or property without due process of law. And whoever, under such statutes as have been cited in this case, confines and inflicts corporal punishment upon a person, must see to it that he at least has process that is not void on its face to protect him in his course. Dynes v. Hoover, 20 How. 65, 80, 15 L. Ed. 838. After the time during which the defendant could lawfully hold the plaintiff had expired, his agent, pursuant to general directions which the defendant had given him, whipped the plaintiff with a leather strap attached to a wooden handle while two other prisoners held him. What an absurdity it would be for a court to deliberately hold that Brown was estopped from recovering damages for this unlawful confinement and beating because this helpless victim did not cry out to his tormentor that his act was unlawful, and did not thereby probably subject himself to a severer whipping and greater suffering.

[6] Counsel complain that the general conduct of the trial, the statements of the judge during the admission of the evidence, and his charge at its close were partial and calculated unduly to influence the jury to decide the case in favor of the plaintiff and to give him excessive damages. The statements of the judge and his charge have been read and thoughtfully considered, but we find nothing in them to sustain this complaint. The trouble with the patient and commendable endeavors of counsel to defend their client in this case was the facts which the case presents. On the main issue these facts present no defense for him, the evidence would have sustained a peremptory instruction for the jury to return a verdict for the plaintiff, and the only real question for them to consider was the amount of the damages. There could, therefore, have been no unlawful partiality for the plaintiff in the trial of the chief issue, for the law settled that against the defendant. On the question of the measure of damages the case for the plaintiff was so strong that it would have been grievous error to have minimized it or to have treated it lightly. A citizen was adjudged guilty of assault and battery and fined $10 and costs which a confinement of 36 days would have discharged at the rate of 75 cents a day according to law. Some one caused an unauthorized commitment to issue commanding this man's imprisonment 60 days more. That commitment was void on its face. So far as we have been able to discover, a certified copy of the judgment is the only warrant for holding a person in confinement on conviction of an offense under the laws of the state of Arkansas, and, if the commit-

ment could have been lawfully issued, this one did not follow the judgment and disclosed on its face that its command was violative of the law. For 42 days the defendant was confined and worked and once during that time he was whipped by the defendant without warrant or authority of law. It was these facts and their effect on the minds of a jury of 12 men which caused them and which ought to have caused them to return a verdict for substantial damages. No court could fairly present the law applicable to these facts without disclosing the gravity of the wrong inflicted upon the plaintiff, and we find nothing in the conduct of the trial, the statements of the judge, or his charge to the jury that was either unjust or unfair to the defendant. Times Publishing Co. v. Carlisle, 94 Fed. 762, 779, 36 C. C. A. 475, 492.

[7] Finally, complaint is made that the court instructed the jury that the plaintiff was entitled to recover of the defendant the reasonable value of his services during the 42 days when he was unlawfully confined, in the absence of evidence of that value. But the statutes of Arkansas provided that, when convicts were worked on roads, bridges, or other county improvements by order of the county court, they should each receive 75 cents per day (section 1103), that a person convicted of a misdemeanor and fined might be worked by a contractor as many days as would discharge his fine and costs at the rate of 75 cents per day (section 1092), and that, when the punishment of an offense is a fine, imprisonment shall not exceed one day for each 75 cents of the fine and costs (sections 2443, 2463). The plaintiff Brown testified, although his testimony was contradicted, that the agent of the defendant had $4.25 of his money, and that for that amount of money he let him go for 10 or 12 days. In view of this testimony and the provisions of the statutes which have been cited, we cannot hold that there was no substantial evidence of the value of Brown's services during the 42 days he was unlawfully confined, and the judgment below must be affirmed.

It is so ordered.

In re RANSFORD.

In re J. W. FLEMING CO.

(Circuit Court of Appeals, Sixth Circuit. March 13, 1912.)

No. 2,147.

1. LIENS (§ 1*)—DEFINITION.

In the strict legal sense, a "lien" is a right in one person to detain that which is in his possession belonging to another until certain demands of such person in possession are satisfied.

[Ed. Note.—For other cases, see Liens, Cent. Dig. §§ 1, 4, 23; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 5, pp. 4144–4153; vol. 8, p. 7707.]

2. ATTACHMENT (§ 177*)—EFFECT OF LEVY—CREATION OF LIEN.

In the strict legal sense, an attachment on mesne process does not constitute a lien, but the charge or incumbrance created by seizing property

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

under an attachment to await the result of a suit is denominated a lien, and such is its usual designation.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 524–527; Dec. Dig. § 177.*]

3. BANKRUPTCY (§ 200*)—LIENS—GARNISHEE JUDGMENT.

Under Bankruptcy Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), which provides that all levies, judgments, attachments, or other liens, obtained through legal proceedings against an insolvent within four months of the filing of a petition in bankruptcy, shall be void in case he is adjudged a bankrupt, a lien acquired by a judgment against a bank, as garnishee, for the amount of funds which the principal defendant had on deposit, was voided by the institution within four months of bankruptcy proceedings against him, and the property passed to his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 289, 296–300, 306–316; Dec. Dig. § 200.*]

4. NOVATION (§ 1*)—DEFINITION.

"Novation" is defined to be the substitution by mutual agreement of one debtor or of one creditor for another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 1; Dec. Dig. § 1;* Payment, Cent. Dig. § 20.

For other definitions, see Words and Phrases, vol. 5, pp. 4848–4851; vol. 8, p. 7733.]

5. NOVATION (§ 1*)—REQUISITES.

The requisites of a novation are (1) a valid prior obligation to be displaced, (2) the consent of all the parties to the substitution, (3) a sufficient consideration, (4) the extinction of the old obligation, and (5) the creation of a valid new one.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 1; Dec. Dig. § 1;* Payment, Cent. Dig. § 20.]

6. BANKRUPTCY (§ 188*)—LIENS—GARNISHEE JUDGMENT—NOVATION.

Under Comp. Laws Mich. § 10,635, which provides that a judgment against a garnishee shall discharge him from all demands by the principal defendant for all money or property paid or delivered by force of the judgment, a judgment against a bank, as garnishee, for the amount of funds which the principal defendant had on deposit, did not amount to a novation, so as to entitle the plaintiff to such funds as against the principal defendant's trustee in bankruptcy; the adjudication having occurred within four months.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286–295; Dec. Dig. § 188.*]

7. BANKRUPTCY (§ 217*)—SUMMARY PROCEEDINGS—GARNISHEE JUDGMENT—ENJOINING COLLECTION.

The District Court has jurisdiction to enjoin in a summary proceeding the collection of a garnishee judgment; the principal defendant having been adjudicated a bankrupt within four months.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 323, 330, 340; Dec. Dig. § 217.*]

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

In the matter of J. W. Fleming Company, bankrupt. On petition of Thomas Ransford to review an order of the District Court enjoining the collection of a garnishee judgment. Order affirmed.

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

Alex. Sutherland (C. J. Chaddock, on the brief), for petitioner.
Richard C. Goodspeed, for respondent.

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

SATER, District Judge. The petitioner seeks a review of an order made by the District Court in a bankruptcy proceeding enjoining him from the collection of his garnishee judgment.

Ransford sued the Fleming Company, a Michigan corporation, in the state court, on its indebtedness to him, and at the same time garnished the National Lumberman's Bank of Muskegon, Mich. (hereinafter called the bank), in which the Fleming Company had deposited its funds. Judgment was rendered in his favor on October 22, 1910, against the principal defendant for $568.85, and two days later he obtained judgment against the bank, as garnishee, for the same amount. He thereupon caused an execution to issue against the bank. Before any action was taken thereon and within four months of the time Ransford brought his action against the Fleming Company, an involuntary petition in bankruptcy was filed against such company in the District Court of the Western District of Michigan, and at or about the same time Ransford was restrained from proceeding further against the bank. On a final hearing, the District Court adjudged that the right to the possession of the funds in the bank passed to the bankrupt's estate on the adjudication of bankruptcy, and that the trustee was authorized and directed to collect the same. Ransford was at the same time enjoined from further prosecution of his garnishment proceedings. He then brought the case here for review.

The petitioner's insistence is that by virtue of his judgment against the bank he was substituted for the principal defendant as its creditor to the amount of his judgment against it, in the place and to the exclusion of the Fleming Company, and remitted solely to the bank for the satisfaction of his claim—in short, that the garnishee judgment resulted in a novation. He bases this contention on the rule announced in Neely v. Rood, 54 Mich. 134, 19 N. W. 920, 52 Am. Rep. 802, that, "where money is deposited in a bank, it becomes the money of the bank, and the bank is then the depositor's debtor for its amount," and on the provisions of the Michigan statute which authorize personal judgment against the garnishee, if his disclosure shows an indebtedness from him to the principal defendant, whereas, if his disclosure reveals goods and chattels belonging to the principal defendant, the creditor, broadly stated, must exhaust such property and not that of the garnishee, to satisfy his debt, unless the garnishee refuses to deliver the defendant's property as required by statute. His position is necessarily untenable, if, as was held by the trial judge, garnishment of and judgment against the bank created only a qualified lien in his favor on the debt owing by it to the Fleming Company to an extent sufficient to satisfy his judgment.

[1, 2] We concur in the conclusion reached by the court below. In the strict legal sense, a lien is a right in one person to detain that which is in his possession belonging to another, until certain demands

of such person so in possession are satisfied. Jones on Liens, § 3. In that sense, an attachment on mesne process does not constitute a lien (Jones on Liens, § 12), but the charge or incumbrance created by seizing property under an attachment to await the result of a suit is denominated a lien (Peck v. Jenness, 7 How. 612, 622, 12 L. Ed. 841), and such is its usual designation (Drake on Attachments, § 532 [7th Ed.]; 20 Cyc. 1058; Jones on Liens, § 2; 14 Am. & Eng. Law, 867).

[3] Subdivision "c" of section 67 of the Bankruptcy Act, however, includes an attachment upon mesne process among liens created by or obtained in or pursuant to any suit or proceedings at law or in equity. Subdivision "f" provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt."

An attachment is thus specifically designated as a lien.

Garnishment process accomplishes in effect the same result as an attachment. In Bethel v. Judge of Superior Court of Detroit, 57 Mich. 379, 24 N. W. 112, it was held that garnishment process is in the nature of an equitable attachment of assets belonging to the principal defendant, but held by a third person, the purpose of which process is to apply such assets in the discharge of the defendant's debt. The phrase "legal proceedings," occurring in subdivision "f," applies to proceedings in garnishment and includes any proceeding in a court of justice by which a party pursues a remedy which the law affords him, and the charge or incumbrance created by garnishment proceedings is one of the "other liens" mentioned in such subdivision, and such it has been held to be. Re McCartney (D. C.) 109 Fed. 621; Re Beals (D. C.) 116 Fed. 530; Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417; Klipstein & Co. v. Allen-Miles Co., 136 Fed. 385, 69 C. C. A. 229 (C. C. A. 5); Loveland on Bank. (3d Ed.) 545. Garnishment does not create a lien upon effects or credits in the same sense that attachment by direct seizure creates a lien upon property, but it does create a lien of such a character that, so long as it continues and the garnishee seeks to preserve his own rights, he cannot pay to the principal defendant, nor can the principal defendant collect his debt from him. The inchoate lien created by it takes effect from the time of service and can be perfected only by judgment, on the rendition of which the garnishee becomes a judgment debtor of the creditor; but the lien is not absolute, but a qualified one, which might at any time be divested by the payment of the judgment by the debtor or by any one acting in his interest. As between the judgment creditor and the bank, while the judgment against the latter remained in force, the indebtedness from the bank could not be appropriated to the payment of the Fleming Company's debts as against the rights of the judgment creditor, but it had not absolutely become his property. The sheriff had been commanded to enforce payment of sufficient of the indebtedness to satisfy the petitioner's judgment; but the time within which that was to be done had not elapsed, and the execution was still in his hands unexecuted. The rights of the petitioner were still subject to interception. The case thus falls within the rule

announced in Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555. Under section 67f of the Bankruptcy Act, the lien acquired by the petitioner was voided and wholly discharged by the institution of the bankruptcy proceedings, and the property passed to the trustee in bankruptcy as a part of the bankrupt's estate.

[4] Aside from the fact that the operation of the garnishee judgment as a qualified lien precludes the existence of a novation, there is another aspect of the case which overthrows the petitioner's contention in this respect. "Novation" is defined to be:

"The substitution by mutual agreement of one debtor or of one creditor for another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished." 29 Cyc. 1130; Guichard v. Brande, 57 Wis. 534, 15 N. W. 764; Fuller & Rice Lumber Co. v. Houseman, 117 Mich. 553, 76 N. W. 77; Dean v. Ellis, 108 Mich. 240, 65 N. W. 971.

[5] The requisites of a novation are (1) a valid prior obligation to be displaced, (2) the consent of all the parties to the substitution, (3) a sufficient consideration, (4) the extinction of the old obligation, and (5) the creation of a valid new one. Piehl v. Piehl, 138 Mich. 515, 101 N. W. 628; Clark v. Billings, 59 Ind. 508, 509.

[6] To constitute a novation in the true sense, the petitioner's judgment must be considered and treated as a contract, but to do so is to run counter to the decided preponderance of authorities. 23 Cyc. 673, 674; Black on Judgments, §§ 7–11; 17 Am. & Eng. Ency. Law, 763, 764. In Wattles v. Wayne Circuit Judge, 117 Mich. 662, 665, 76 N. W. 115, 116 (72 Am. St. Rep. 590), it was said that "judgments are invariably classified with contracts with reference to remedies upon them"; but the petitioner is not seeking a remedy on his judgment. The law implies a promise on the part of a judgment debtor to pay a judgment that has been recovered against him, but a judgment differs from a contract in that it lacks the mutual assent of the parties, which is essential to a valid contract, and is usually against the will of the debtor. 17 Am. & Eng. Ency. Law, 764; Evans-Snider-Buhl v. McFadden, 105 Fed. 293, 299, 44 C. C. A. 494, 58 L. R. A. 900. The petitioner, therefore, insists that his garnishee judgment resulted in a novation, not by virtue of the consent of himself, the bank, and the principal defendant, but by operation of the law of Michigan, as declared in Neely v. Rood and the statutes on garnishment. The fallacy of this claim is exposed by the provisions of section 10,635, Comp. L. Mich., and the logical results following therefrom. That section is as follows:

"The judgment against any person, as a garnishee, shall acquit and discharge such garnishee * * * from all demands by the principal defendant * * * for all such money or property, as aforesaid, paid or delivered by the garnishee by force of such payment (judgment); and if any garnishee shall be sued therefor or for anything done by virtue of the provisions of this chapter, he may, under the general issue, give the special matter in evidence."

Without entering at length into a consideration of all the reasons that may be assigned for the conclusion reached, suffice it to say that under the state law it is not the rendition of the garnishee judgment that extinguishes the old debt—the debt of the principal defendant—

and absolutely absolves the garnishee from liability to him to the extent of the judgment, but the payment of the judgment by the garnishee defendant. If payment is not made by him, the old debt still subsists as an enforceable claim. The principal defendant remains liable and execution may issue against him for any part of the judgment not recovered from the garnishee. The principal debtor has also the legal right, at any time prior to payment by the garnishee, to satisfy his debt, and, should he do so, he may be restored to his entire claim against his original debtor, the garnishee, and may proceed to collect as if the judgment had not intervened. He may sue the garnishee for the sum due him, notwithstanding the garnishment proceedings. The garnishee, if judgment has not been rendered against him, may plead the pendency of such proceedings in abatement of the suit, but if judgment be obtained against him by the attaching creditor at any time before judgment in the principal defendant's suit is rendered, the garnishee may plead such judgment as an absolute bar to such defendant's action. Grosslight v. Crisup, 58 Mich. 531, 25 N. W. 505. If, however, the judgment against the garnishee be thereafter satisfied by the principal defendant or in his behalf, thereby lifting the charge or lien on the funds in the garnishee's hands and restoring the control of the same to him, his plea in bar does not avail, and a recovery may be had against him. Harris v. Chamberlain, 126 Mich. 280, 85 N. W. 728. The judgment creditor may at the time of bringing his original suit or thereafter, if it be deemed advisable, cause a series of writs of garnishment to issue against different creditors of the principal defendant and may have different judgments in his favor, although he can have but one satisfaction of his debt. As the petitioner's judgment against the bank did not exonerate the Fleming Company from liability to him, and could not do so until paid by the bank, it did not operate as a novation. 29 Cyc. 1134.

If judgment against the garnishee operates as a satisfaction of the debt against the principal defendant and compels the creditor to look to the garnishee alone for payment, the garnishment law would often prove a snare to entrap the creditor. Should the garnishee fail, the creditor would go empty-handed, although the principal defendant might be abundantly able to pay. A creditor could not safely take judgment against a garnishee of doubtful financial responsibility, if the mere rendition of a garnishment judgment discharges, pro tanto, the principal debt.

[7] The objection that, by reason of the alleged adverse nature of the claim made by petitioner, the District Court had no jurisdiction to entertain summary proceedings, by way of injunction, cannot be sustained. It follows, from what has been said in the opinion, that the petitioner was not in adverse possession, actual or constructive, of the fund in question. The proceeding in the District Court was a controversy between the trustee in bankruptcy and the petitioner, as to which was entitled to receive payment from the garnishee defendant of the indebtedness primarily owing to the bankrupt's estate. The rights of a garnishing creditor can be no greater than those of an attaching creditor, and as the rights of the latter are voided by a bank-

ruptcy proceeding, the same must be true of those of the former. The title to the indebtedness of the bank was in the trustee (Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. ——, decided by the Supreme Court December 18, 1911), and we think for the purposes of this suit the debt should be regarded as constructively in his possession, and that the District Court had jurisdiction to proceed summarily to determine the rights of the parties.

There is no error in the record, and the court below is affirmed.

ALLEN v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 27, 1912.)

No. 1,070.

1. PERJURY (§ 15*)—TWICE IN JEOPARDY FOR SAME OFFENSE.

One may be convicted of perjury for testifying falsely in his own behalf on his trial for counterfeiting of which he is acquitted, and is not thereby twice put in jeopardy for the same offense, but the government should not institute a prosecution for perjury on substantially the same evidence presented on the trial for counterfeiting.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 62; Dec. Dig. § 15.*]

2. PERJURY (§ 37*)—EVIDENCE—INSTRUCTIONS.

Where, on a trial for perjury, no witness directly testified to the falsity of the testimony of accused, and there was no direct written evidence springing from accused proving the falsity of his testimony nor any admission established by evidence, inconsistent with his innocence, the action of the court in charging that a conviction was authorized if the testimony of the prosecution irresistibly led the jury to the conclusion beyond a reasonable doubt, that accused swore falsely and contrary to what he necessarily knew to be the truth, and in refusing to charge that to convict, the falsity of the testimony must be proved by two credible witnesses or by one witness and corroborative circumstances, was reversible error.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 134–138; Dec. Dig. § 37.*]

In Error to the District Court of the United States for the Western District of North Carolina, at Greensboro.

Sidna Allen was convicted of perjury, and brings error. Reversed.

Walter S. Tipton and J. C. Buxton (Watson, Buxton & Watson, on the brief), for plaintiff in error.

A. L. Coble, Asst. U. S. Atty. (A. E. Holton, U. S. Atty., on the brief), for the United States.

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

ROSE, District Judge. The plaintiff in error was the defendant below. He will be called the defendant. The defendant in error will be referred to as the government. The circumstances are peculiar. A year before the present indictment was returned, the defendant and

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

one Dickins had been jointly indicted in the court below for (1) making counterfeit $20 gold pieces; (2) having such coins in their possession with intent to defraud; and (3) passing or attempting to pass some of such coins on particular individuals. To such indictment Dickins pleaded guilty. The defendant stood his trial. It was proved that the defendant and Dickins lived close together in Carroll county, Va. They had been for some time closely associated. The defendant had in writing ordered machinery which could be used to make counterfeit coins. He had paid for this machinery by his personal check. Dickins had invented a wagon brake. The defendant had a half interest in the patent therefor. In February, 1910, they came together to Winston-Salem, N. C. Their avowed purpose was to sell rights under the brake patent. While in Winston-Salem, Dickins passed or attempted to pass two of the counterfeit coins, one upon a prostitute, the other upon a hack driver. As a result of his offering one of the coins to the latter, he was arrested. At the time he attempted to pass these coins, and when he was arrested, the defendant was waiting for him at a railroad station in Winston-Salem. There were many other facts and circumstances offered in evidence. Some of these tended to show that the defendant and Dickins were acting in concert. There was testimony that some man who answered more or less closely to the description of the defendant had after the arrest of Dickins made an unsuccessful attempt to recover from the prostitute the coin which had been passed upon her. The defendant took the stand in his own behalf. He admitted everything to which those government witnesses, who had positively identified him, had sworn. He gave an explanation of all such circumstances consistent with his lack of any knowledge of or participation in any illegal act of Dickins. He denied that he had ever visited the prostitute in question, or had ever had any communication of any kind with her. He was acquitted.

About 12 months afterwards, the indictment now before us was found. By it he is charged with perjury in having sworn at his trial for counterfeiting that he was not guilty of the counterfeiting charge; that he did not have the counterfeit coins in his possession, nor did he attempt to pass them; that he had nothing to do with the counterfeit money that Dickins made and passed; that he did not know that Dickins had in his possession in Winston-Salem a counterfeit coin; that he did not make or aid and abet Dickins in the manufacture of counterfeit coins; and that he was in Winston-Salem on February 10, 1910, only for the purpose of selling a patent wagon brake. At the trial of the defendant for perjury, the testimony on both sides was in all substantial respects the same as that which had been given when he was called upon to answer the indictment for counterfeiting. It is true that the government did prove two additional attempts of Dickins to pass the counterfeit coins. When making one of these attempts, it was shown that Dickins had a companion. Such companion did not look unlike the defendant, but the witness would not swear that it was in fact the defendant. The defendant was convicted.

A number of assignments of error are made. The most important are intended to raise the questions (1) whether such a prosecution

can be maintained at all; and (2) whether the defendant can be properly convicted when no witness has testified that what the defendant had sworn in the first trial was false, and when it is not shown that the defendant has ever in writing or otherwise made any representation necessarily inconsistent with the truthfulness of the evidence for the giving of which he was put upon his trial.

[1] The defendant says that he has been twice put in jeopardy *for the same offense.* With this contention we cannot agree. Passing or trying to pass in February counterfeit coins upon various residents of Winston-Salem is *not* the *same offense* as forswearing one's self in June in the United States District Court at Greensboro. State v. Vandemark, 77 Conn. 201, 58 Atl. 715, 1 Ann. Cas. 161; State v. Williams, 60 Kan. 838, 58 Pac. 476; Hutcherson v. State, 33 Tex. Cr. R. 67, 24 S. W. 908; State v. Bevill, 79 Kan. 524, 100 Pac. 476, 131 Am. St. Rep. 345, 17 Ann. Cas. 753; State v. Cary, 159 Ind. 504, 65 N. E. 527; People v. Albers, 137 Mich. 679, 100 N. W. 908; State v. Caywood, 96 Iowa, 372, 65 N. W. 385. In every one of these cases, the defendant was held properly convicted of perjury while testifying in his own behalf when under prosecution for an offense of which he was acquitted. It is true that the right to convict for perjury committed under such circumstances has been denied. U. S. v. Butler (D. C.) 38 Fed. 498; Cooper v. Commonwealth, 106 Ky. 909, 51 S. W. 789, 59 S. W. 524, 45 L. R. A. 216, 90 Am. St. Rep. 275; Petit v. Commonwealth (Ky.) 57 S. W. 14.

But in none of those cases was it held that the prosecution for perjury put the defendant a second time in jeopardy for the same offense. Indeed, Judge, afterwards Mr. Justice, Brown who decided United States v. Butler, supra, pointed out that it was impossible to hold that the defendant was being tried twice for the same crime. If that were true, a defendant testifying in his own behalf in a criminal trial could safely swear to anything he pleased. He could never be punished for perjury so committed. Autre fois convict is as conclusive a plea as autre fois acquit. But the learned judge was of opinion that, wherever the nature of the perjury alleged was such that the real issue of fact to be passed upon by the jury sworn in the perjury case was necessarily the same which had been already decided by the jury in the first case adversely to the contention upon which the government must stand in the perjury prosecution, the matter was res adjudicata. In spite of the great weight which the sound learning and broad wisdom of Mr. Justice Brown give to any of his judicial deliverances, his reasoning in this case has failed to secure general acceptance. The highest courts of Connecticut, Indiana, Michigan, Iowa, and Kansas have expressly declined to follow it. It has been adopted by the Court of Appeals of Kentucky. The reasons why a verdict of acquittal in a criminal case should not necessarily bar a subsequent prosecution of the defendant for perjury committed by him when testifying as a witness in his own behalf are forcibly stated by the Supreme Court of Michigan in People v. Albers, supra. As there argued, public policy may require the recognition of the right sometimes to institute such prosecution. If so much

be granted, it may be neither easy nor safe to lay down a fixed and unvarying rule of law defining the circumstances under which such prosecutions may or may not be undertaken. For the purposes of this case, it is enough to say that it is very hard to imagine any state of things which would justify an indictment for perjury of an acquitted defendant against whom the government offers no other substantial evidence than that which had been before the jury which had found him not guilty. The government and its prosecuting officers should not discredit the verdicts and judgments of its own courts by seeking to induce one jury to find that another gave a wrong verdict upon what is in all material respects the same testimony. The record in the case at bar suggests that the able and experienced attorney for the United States when he began the prosecution for perjury had some reason to think that one of the new witnesses to the passing by Dickins of counterfeit coins would be able to identify the defendant as the person who was with him when such attempt was made. After it was found that such identification could not be had, it would have been better to have gone no further with the case. It is unnecessary for us to decide whether upon this record as it stands and as a matter of law we would upon this ground be justified in reversing the judgment of the court below. It will have to be set aside for reasons which, unless other evidence shall be forthcoming, will preclude a verdict for the government in any new trial which may be had.

[2] As already stated, no witness testified to anything which was absolutely inconsistent with defendant's innocence. No admission of his which showed him to be guilty was offered in evidence against him. The defendant prayed the court to instruct the jury that, in order to convict him, the falsity of his oath must be proved by two credible witnesses, or by one such witness and corroborative circumstances sufficient to turn the scale against the defendant's oath. The learned judge declined to give this instruction or others of similar import. He told the jury that such had been the rule of the common law, but that it did not apply in a case like the present. He added:

"This case depends largely upon circumstantial evidence. * * * The law of circumstantial evidence is not supplanted by the rule of the common law which I have stated, but in an indictment for perjury, if the prosecution has introduced testimony showing circumstances which are well connected, strong, cogent, and convincing, which irresistibly lead the minds of the jury to the conclusion beyond a reasonable doubt that the defendant swore falsely as charged in the indictment, that he swore contrary to what he necessarily knew to be the truth, not only is the jury warranted in returning a verdict of guilty under such circumstances, but it would be their duty to do so."

To the refusal of the instructions asked for by him and to the portion of the charge of the learned judge above referred the defendant duly excepted and has assigned error. Such assignments must be sustained. In trials for treason and perjury almost alone are now to be found any survival of the practice of arbitrarily measuring the probative value of evidence by the number of witnesses. It is true that in perjury the requirements of the rule are not now what they once were. There is no question that there are cases in which neither the two witnesses of the earlier law nor the one witness with strong

corroboration of the later are required to support a conviction. The courts and the text-writers have said that the oath of a living witness to the falsity of the statement in question is not indispensable—

"(1) where the falsehood of the matter sworn by the prisoner is directly proved by documentary or written evidence springing from himself with circumstances showing the corrupt intent; (2) in cases where the matter so sworn is contradicted by a public record, proved to have been well known to the prisoner when he took the oath, the oath only being proved to have been taken; and (3) in cases where the party is charged with taking an oath contrary to what he must have known necessarily to be true, the falsehood being shown by his own letters relating to the fact sworn to, or by any other written testimony existing and being found in his possession and which has been treated by him as containing the evidence of the fact recited in it." United States v. Wood, 14 Pet. 440, 441, 10 L. Ed. 527; 1 Greenleaf on Evidence, § 258.

It may well be that a conviction might be sustained under still other circumstances, although the living witness was not forthcoming. If so, the evidence that the defendant had in fact forsworn himself must be direct and positive. If true, it must demonstrate the defendant's guilt. Such was the testimony held sufficient in People v. Doody, 172 N. Y. 165, 64 N. E. 807. We have examined the other authorities relied on by the government. None of them sustain its contention. We have already quoted from Greenleaf on Evidence. 30 Cyc. 1452, in so many words declares:

"Positive and direct evidence is absolutely necessary in a perjury case. Circumstantial evidence standing alone is never sufficient."

In Beach v. State, 32 Tex. Cr. R. 240, 22 S. W. 976, the facts proved were absolutely inconsistent with the innocence of the accused. The court there, it is true, says that two witnesses need not swear directly adversely to the fact sworn by the defendant. It is sufficient when the facts conclusively demonstrate his guilt. It, however, shows the sense in which it intends its words to be understood by citing as its authority for them United States v. Wood, supra. The most recent text-writers recognize that to convict of perjury the government must produce testimony of a more direct and positive character than is required to justify a verdict of guilty of other offenses. There is no suggestion that the rule as laid down in Greenleaf and in United States v. Wood, supra, is not in substance still binding on the courts. 3 Wigmore on Evidence, § 2040; 2 Chamberlayne's Modern Law of Evidence, § 989.

In this case no witness directly swore to the falsity of any of the testimony for the giving of which the defendant was indicted. Nor is there any direct written evidence springing from himself which proves any of that testimony to be untrue. No admission or action of his established by the evidence is logically inconsistent with his innocence. Under such circumstances the refusal of the instructions asked for by him and the giving of the portion of the charge above quoted constituted prejudicial error.

The judgment of the lower court will have to be reversed.

SPRING GARDEN INS. CO. OF PHILADELPHIA, PA., v. WOOD et al.

(Circuit Court of Appeals, Fourth Circuit. February 14, 1912.)

No. 1,043.

1. TRIAL (§ 420*)—WAIVER OF ERROR—REFUSAL TO DIRECT VERDICT—INSTRUCTIONS.

Where, in an action on a fire policy, issued by an agent of insurer for his own benefit in a fictitious name, insurer moved for a directed verdict on all the evidence, including that showing that the agent had failed to notify insurer that the policy had been taken out for his own benefit, and that the agent, suing in his name, had produced in proof a policy issued to a fictitious person, and by bill of exceptions excepted to the refusal to direct a verdict, an instruction, given by consent of the parties, that insurer could only avail itself of the defenses pleaded, and that any testimony as to the failure of the agent to give the name of the owner of the property was not to be considered in determining insurer's liability, referred only to the defenses available after the refusal to direct a verdict, and insurer on writ of error could avail itself of the error in the refusal to direct a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 983; Dec. Dig. § 420.*]

2. INSURANCE (§ 81*)—FIRE INSURANCE—OBLIGATION OF AGENT ISSUING POLICY FOR HIS OWN BENEFIT.

An agent of a fire insurance company, who issues a policy to himself for his own benefit, must inform the company of the risk, including his ownership of the property, or the policy is not enforceable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 106; Dec. Dig. § 81.*]

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

Action by T. Gilbert Wood, who sues for the benefit of himself and others, against the Spring Garden Insurance Company of Philadelphia, Pa. There was a verdict for plaintiffs, and defendant brings error. Reversed, and remanded for new trial.

George Bryan, for plaintiff in error.

James R. Caskie and George E. Caskie (Caskie & Caskie, on the brief), for defendants in error.

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

SMITH, District Judge. The defendant in error, T. Gilbert Wood, was the agent of the Spring Garden Insurance Company of Philadelphia, at Burkeville, Va. As the agent of that company he issued a policy of insurance, dated 24th of December, 1909, upon a piece of property known as the Haytokah Inn, situated in Burkeville, Va. In his report to the company, which he was required to make whenever a policy was issued, he wrote under the column for the insertion of the name of the insured simply the words "Haytokah Inn." This name was simply a designation of the property, and not the name of a firm or company. Wood was the owner of the Haytokah Inn, but did not in his report to the company communicate to them that fact. The

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

property having been destroyed by fire on the 2d of February, 1910, Wood brought action in his own name against the Spring Garden Insurance Company to recover the amount of the policy. The action was brought in the circuit court for the county of Nottoway, Va., but was by the defendant duly removed to the Circuit Court of the United States for the Eastern District of Virginia.

To this proceeding the defendant filed two special pleas. The first was a plea that there had been a breach of the condition in the policy that the entire policy should be void if the insured had or should thereafter procure or make any other contract of insurance, whether valid or not, on the property covered in whole or in part by the policy. The other special plea was a plea of nonpayment of the premium for the policy.

When the case was called for trial, it was agreed and entered in open court that the defendant should withdraw its pleas, theretofore filed, with the understanding that it should be allowed to make the same defenses under the general issue that it might have done under the special pleas, and then for its plea plead the general issue of not guilty. It is contended by the defendant in error (plaintiff below) that this limited the plaintiff in error (defendant below) to such defenses only as it could have set up under the special pleas; but the language of the agreement does not bear that construction. On the contrary, it would seem to bear the construction that the defendant should be allowed to plead the general issue, and in addition to such defense as could be availed of under the general issue it should have the right to avail itself of any defense that it could have done under the special pleas.

[1] After the conclusion of all the evidence the defendant, by its attorney, moved the court to instruct the jury to render a verdict in its behalf, which the court overruled, and rendered certain instructions to the jury, and among others the following (numbered 6) in the following words:

"By consent of the parties, the following charge is given: The court instructs the jury that the defendant company can only avail itself of the defenses pleaded; and any testimony as to the failure of the insured to give the name of the owner of the building in question, on the daily report, is not to be considered in determining the liability of the company, but may be considered in determining the credibility of the witnesses."

It is claimed by the defendant in error (plaintiff below) that under this consent instruction the plaintiff in error (defendant below) was debarred from making any question that the plaintiff had failed in his proof, inasmuch as he had sued upon the policy as issued to T. Gilbert Wood, and had produced to support his allegation a policy made to the Haytokah Inn, which was not the designation of any person, firm, or corporation, and, furthermore, was debarred under this consent instruction from insisting by way of defense that the plaintiff, although the agent of the company, had failed to notify the company that he was the real party in interest as the owner of the property, but, on the contrary, had notified the company, that the insurance was issued to a different party, to wit, Haytokah Inn.

The counsel for the plaintiff in error (defendant below) insists, un-

der the practice existing in the state of Virginia in similar cases at law, that this question was made by him when he moved the court below to instruct the jury to find a verdict in defendant's behalf at the close of the testimony; that that motion was made upon all the evidence, and necessarily included the question that he was entitled to have the jury so instructed, because it appeared from all the testimony that the plaintiff, although the agent of the company, had failed to notify the company that the policy of insurance had been taken out for his own benefit, and because the plaintiff, although suing in his own name, had produced in proof of his claim the policy issued, not to himself, but to the Haytokah Inn, a fictitious person, and insists that his question is covered by his bill of exception No. 1, in which he excepts to the action of the judge below in refusing to direct a verdict. He insists, further, that the instruction No. 6, to which reference has been made, referred only to what defenses the plaintiff in error (the defendant below) could avail himself of under the testimony in the case after the judge had refused to grant the motion to direct a verdict. In the opinion of this court, this contention of the counsel for the plaintiff in error is correct, that under his bill of exception No. 1, he duly excepted to the failure of the court to direct a verdict upon the grounds stated, and that he is entitled to make the question in this court.

[2] The position of an agent of an insurance company who issues a policy to himself is one that calls for the utmost frankness of dealing between himself and his company. He has a right to apply to his company to insure his property; but, when he is dealing with himself, he should be careful to see that there can be no question as to the fact that his principal is fully informed of the risk, and especially of that material element in the risk involved in the ownership of the property. The defendant in error, as the plaintiff below, sued upon a contract made with himself. To support his allegation he produced the policy made to the Haytokah Inn. In the opinion of this court he was not entitled to recover upon this policy, unless he could show clearly that his principal was advised, when as its agent he sought to make it accept the policy and undertake the risk, that the words "Haytokah Inn" referred to T. Gilbert Wood, and that he was in reality the beneficiary.

It follows from this that under the evidence at the trial below the court should have granted the defendant's motion for a peremptory instruction on this point, and that the judgment below must be reversed, and the cause remanded for a new trial in accordance with this decision.

Reversed.

RED STAR TOWING & TRANSPORTATION CO. v. SNARE & TRIEST CO.

(Circuit Court of Appeals, Second Circuit. January 29, 1912.)

No. 138.

NAVIGABLE WATERS (§ 19*)—OBSTRUCTION—LIABILITY FOR INJURY TO VESSEL.

Authority to store piles required in the construction of a bridge at the side of the stream to be bridged between high and low watermark is not authority to allow them to remain there submerged at high water without any buoy or other mark, and a contractor so doing is chargeable with negligence, and liable for an injury to a vessel which runs upon them, where the master had no knowledge that they were there.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 59–63, 68–72; Dec. Dig. § 19.*]

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

Suit in admiralty by the Red Star Towing & Transportation Company against the Snare & Triest Company. Decree for libelant, and respondent appeals. Affirmed.

Appeal from a final decree awarding damages to the libelant for injuries sustained on December 11, 1905, by its steam tug C. F. Roe in collision with a bunch of submerged piles belonging to the respondent in the waters of Flushing creek, Long Island.

In 1903 the United States government approved the location of a new bridge across Flushing creek and authorized the city of New York to construct the same. Thereafter the city of New York entered into a contract with the respondent for the building of such bridge and, in prosecution of the work, the respondent stored piles on the flats on the westerly side of the creek a short distance from the bridge location; that being the only available place. Most, if not all, of the piles were submerged at high water but they were visible at low water.

The steam tug C. F. Roe in navigating said creek attempted to turn in the vicinity of the submerged piles and ran upon them, receiving the injuries complained of.

The only question presented upon this appeal is the correctness of the interlocutory decree holding respondent liable.

Other material facts are stated in the opinion.

Hitchings & Dow (H. M. Hitchings, of counsel), for appellant.

James J. Macklin (De Lagnel Berier, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). We may assume at the outset that the grant of authority to obstruct permanently the navigation of the stream by the building of the bridge was broad enough to permit its temporary obstruction by the storage of necessary materials. We may take it for granted that the respondent is right in contending that it was authorized to place the piles at the location in question.

But authority to obstruct a navigable stream by building the abutments of a bridge which can be seen and avoided, is not authority to leave such abutments when unfinished and below the surface of the water without any mark or warning. Authority to obstruct navigable

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

waters by building a breakwater is not authority to leave the new construction without a light. Harrison v. Hughes, 125 Fed. 860, 60 C. C. A. 442. Authority to store piles at the side of a creek or river is not authority to allow them to remain submerged at high water without any buoy or other mark. In other words, it does not follow from the fact that the respondent was authorized to place the piles where it did that it owed no obligation with respect to them. On the contrary, it was bound to so mark them that vessels navigating the creek would not run upon them without warning; and, in our opinion, this duty was not affected in the slightest degree by the fact that the piles were placed between high and low watermark. They constituted an obstruction to vessels navigating the creek at high water and such vessels were entitled to protection.

In our opinion also the respondent failed in the performance of its duty to mark the piles. No buoys were placed over them and we are not satisfied that there was anything at high tide to indicate their presence. If there were any floating piles, they were insufficient to serve as a warning. They would not show that others were hidden and, in themselves, were not especially dangerous. The respondent was guilty of negligence.

With respect to the claim of negligence on the part of the vessel: There is no proof that the master of the tug had any actual knowledge of the submerged piles, and we do not think that he was charged with notice of them. He testified that he had navigated at that place only at high water. He was hardly bound to know of a temporary obstruction of this nature.

The decree of the District Court is affirmed with interest and costs.

THE T. N. WELLINGTON.

(Circuit Court of Appeals, Second Circuit. January 29, 1912.)

No. 168.

COLLISION (§ 102*)—STEAM VESSELS MEETING IN BRIDGE DRAW—MUTUAL FAULT.

Two steam vessels, which came into collision when passing through the draw of a bridge on Harlem River in the evening, after exchanging signals to pass port and port, both *held* in fault; one, which was moving slowly against the tide close to the north side of the center pier, for not reversing to permit the other to pass across her bow to the port side, and the other for not porting more and allowing for the set of the tide, which carried her down upon the other's bow.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 102.*]

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

Suit in admiralty for collision by Thomas Airey, owner of the steam launch Oconee, against the steam tug T. N. Wellington, David J. Conroy, claimant. Decree for half damages, and claimant appeals. Affirmed.

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

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

On the evening of September 25, 1909, occurred the "night parade" of vessels as part of the Hudson-Fulton celebration. At about 7 p. m. the tug Wellington and the launch Oconee came in collision at Spuyten Duyvil bridge, and the Oconee received such injuries that she subsequently sank and became a total loss. The tide was ebb, and running out of the Harlem River at the rate of at least six miles an hour. Most of the witnesses put the speed even higher. The tugs Castle Point and Wellington had come in from the Hudson river, and were lying near each other waiting for the Spuyten Duyvil drawbridge to open. This bridge is 300 feet long; that is, 150 feet on each side of the pivot on which it revolves. When open and lying approximately east and west, it rests upon the center "pin" or center "pier," which is about 330 feet long. In response to whistles blown by the Castle Point the draw opened, the northerly end swinging to the east. The Castle Point proceeded through the southerly draw. The Wellington, which was near the westerly end of the center pier, entered the channel of the draw as the bridge began to swing, and according to her own statement kept close to the center pier, going against the tide under one bell. Her boilers were in bad condition, and she was able to make no more than 10 miles an hour in slack water. It is therefore obvious that under one bell and against a 6-mile tide she must have gone very slowly. The estimate of her own officers is not over 3 miles an hour, and the average estimate is nearer 2. The Oconee is a launch 30 feet long. It was in charge of the libelant, who, though not a licensed waterman or pilot, testified to long experience with launches, and manifested on the witness stand quite sufficient familiarity with the rules of the road and the customs of navigation.

The witnesses from the Wellington declare generally that when their vessel entered the draw the Oconee was one of a large fleet of small pleasure boats waiting on the southerly side of the Harlem to go out into the Hudson river and view the parade. This testimony seems to me based upon no special observation of the Oconee, and there is nothing in the evidence to cast doubt upon the statements of the Oconee's witnesses that when the draw began to open she was lying from 50 to 150 feet eastward of the easterly end of the center pier, intending to go through the northerly channel when the draw was opened. The Wellington, advancing through the northerly channel and keeping close to the center pier, did not see the Oconee until she had gotten to the middle thereof. Her master then saw both the running lights of the launch, and testifies that the latter was in such a position that her pilot should have seen both of his lights. The navigator of the Oconee did not see any lights on the Wellington, but it was not yet dark enough to prevent his knowing (as he testified) that he and the tug were approaching head and head. In this position the vessels exchanged a signal of one blast. The Wellington's master testifies that he followed the one blast almost immediately with an alarm whistle. The master of the Wellington did not hear the Oconee's whistle; but there can, I think, be no doubt that it was blown. The engineer of the Wellington testified in rather a confused manner; but it is my opinion that his testimony compels the conclusion that the Wellington did not reverse before collision, It is obvious that reversal at slow speed and while progressing against a strong tide would have had instantaneous effect.

The Oconee, on giving and receiving the single whistle signals, ported her helm, intending to pass diagonally across the bow of the Wellington and go through the channel of the draw on that tug's port side. The launch was in the full strength of the ebb tide. She evidently ported only enough to pass very close to the easterly end of the drawbridge center pier. She did so pass, and within a few feet of that center pier the bow of the Wellington struck her port side from 10 to 15 feet forward of the stern.

The case is, in my opinion, one of special circumstances; but there was an undoubted agreement between these vessels, evidenced by the exchange of single whistles, that they should pass port to port. It was the duty of the Wellington to facilitate this maneuver by giving the Oconee room, and

it was equally the duty of the Oconee to recognize the effect of her position in the tide, and also the fact that the Wellington was so close to the center pier that no porting of her wheel would or could enable her to substantially change her position. In my judgment, the Wellington was at fault for not reversing earlier, and not permitting the Oconee to get on her port side before she advanced beyond the easterly end of the center pier. I think it equally clear that the Oconee was at fault for not porting more and not allowing for the tide set, which contributed materially towards carrying her down on the Wellington's bow. Of course, the moment she ported, the tide had more effect upon her broadside.

In making these findings it is not overlooked that according to the testimony of the Oconee's owner the Wellington was considerably further from the center pier than has been found. I think the weight of evidence is against him on this point. The relation of the vessels to each other at the moment of collision is found to have been as testified to by Messrs. Jewett and McCarthy, witnesses from different sides, both apparently cool-headed and intelligent men, and who agreed absolutely on this point.

The libelant may have a decree for half damages.

Harrington, Bigham & Englar (H. S. Harrington, of counsel), for appellant.

James Forrester, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Decree affirmed, upon the opinion of the District Judge.

BLOCK et al. v. CITY OF MERIDIAN et al.

(Circuit Court of Appeals, Fifth Circuit. March 26, 1912. Rehearing Denied April 13, 1912.)

No. 2,306.

MUNICIPAL CORPORATIONS (§ 244*)—CONTRACTS—REQUISITES.

Where, in an action against a city, the contract sued on was one that could only be made valid by an ordinance which could only take effect after being published for ten entire days, and it appeared that publication was stopped before the ten days had expired, and the contract was abandoned by agreement of the parties, plaintiff could not recover thereon.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 678–681, 683; Dec. Dig. § 244.*]

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

Action by I. D. Block and others against the City of Meridian and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. Hirsh and G. Q. Hall, for plaintiffs in error.

C. T. Williamson, Wm. H. Armbrecht, W. E. Baskin, and R. E. Wilbourn, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The contract sued on was one that could only be made valid by an ordinance. An ordinance, under the law con-

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

trolling the city of Meridian, does not take effect till notice thereof is published for ten entire days. Publication of the ordinance contract sued on was not so made, but the contract was abandoned, and the publication stopped before the expiration of the ten days from the date of the tentative agreement between the parties. There is nothing in the record in this case to estop the city from making this defense.

Without commenting on the other defenses presented, some of which were referred to by the learned judge presiding in the Circuit Court (see note at end of case), we are of the opinion that the verdict was properly directed for the defendant.

Affirmed.

NOTE.—The opinion above mentioned is as follows:

NILES, District Judge. In the motion that was made here on last Saturday afternoon to exclude the testimony and for a peremptory instruction, the grounds in the motion as set forth are that the evidence wholly fails to establish that the alleged ordinance contract for which this suit was brought had ever been published and printed and posted as required by the city of Meridian and in the manner and for the length of time as required by the charter, and is, therefore, not binding upon the municipality, which is by virtue of the terms of its charter permitted to enter into contracts of this nature only in the manner set forth and prescribed by its charter, to wit, by the adoption of an ordinance and its publication in a newspaper for ten entire days and by posting in three or more public places in the city of Meridian within said time, and that there has been no proof of any publication under the authority of the municipality for the required length of time.

They ask the court to exclude the evidence on the further ground that the charter of the city of Meridian, introduced in evidence, discloses that the city of Meridian is without power and authority, and was on May 5, 1905, without power, from the Legislature of the state of Mississippi, to enter into such contract with the plaintiff's principal, I. W. Ullman, and his associates, and without authority to grant any franchise to the individual, I. W. Ullman, and his associates, and the alleged ordinance contract is ultra vires, null and void; that the evidence affirmatively establishes that, before any lawful publication had been made of this ordinance, the further publication of it was by agreement of the parties stopped, and the terms of the ordinance abrogated and annulled by the agreement of the parties, and there is total failure to establish the existence of any contract; that the evidence establishes a variance between the proof and the declaration in this: That the declaration sued upon an invitation for bids that required the parties to state the rate that they would charge consumers for electricity, and the bid sued upon and filed with the declaration states specifically the rate that the bidder, I. W. Ullman, said he would charge consumers for electricity, and on the witness stand the witness denies that such was the bid, and says that that bid was abrogated, and he would not have entered into such a contract. Further, upon the ground that the minds of the parties appear from the evidence never to have met on any binding contract relative to this matter, in this: That the invitation for bids required the bidder to state what he would charge consumers for electricity, and the bid that was shown by the proof to have been filed by I. W. Ullman and offered in evidence disclosed that he did state in that bid what rate he would charge consumers, and the ordinance on which he sues omits any reference to that material element of invitation for bids and the bid, and appears not to have embodied what were the negotiations between the parties as evidenced by the invitation for bids and the bids, and, therefore, the minds of the parties never met, and they did not include in their alleged ordinance contract the matters and things with reference to which they were undertaking to contract.

The Pennsylvania Case states that contracts entered into by municipalities

must be executed in the manner provided by the statute conferring the authority, * * * and an ordinance is wholly inoperative where such provision of the statute has not been complied with. I will sustain the motion and instruct the jury to find for the defendant.

You can have 30, 60, or 90 days in which to prepare your bill of exceptions.

JACKSON v. WHITE et al.

(Circuit Court of Appeals, Fourth Circuit. February 12, 1912.)

No. 953.

1. ACCOUNT STATED (§ 12*)—PROCEEDINGS TO SURCHARGE AND FALSIFY ACCOUNTS—EQUITABLE RULES.

The chancery rules governing proceedings to surcharge and falsify accounts are applicable only where an account has been stated between the parties, or where something equivalent thereto has been done.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 73–76; Dec. Dig. § 12.*]

2. ACCOUNT STATED (§ 1*)—ACTS CONSTITUTING.

A statement made by an agent showing the sums paid out by a principal not tendered as a formal account does not become an account stated; he not being prepared to say that he did not give the statement on condition that it should not be used against the principal.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 1–8; Dec Dig. § 1.*]

3. MONEY RECEIVED (§ 1*)—LIABILITY.

Where one has without right the money of another, the law presumes that he received it for the latter, and holds it for his use, and he must be decreed to pay it over.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 1; Dec. Dig. § 1.*]

On petition for rehearing. Denied.

For former opinion, see 188 Fed. 775, 110 C. C. A. 481.

James S. McCluer (Seth T. McCormick, on the brief), for appellant.

William Beard and William H. Wolfe, Jr. (V. B. Archer and B. M. Ambler, on the brief), for appellees.

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

ROSE, District Judge. [1] Appellees are in error in supposing that we have ignored or modified the chancery rules regarding proceedings to surcharge and falsify accounts. These rules are applicable only where an account has been stated between the parties or where something legally equivalent thereto has been done. 1 Daniell's Chancery Pleading & Practice (6th Ed.) 666 et seq.; 2 Daniell's Chancery Pleading & Practice, 1252, 1253.

[2] Under the circumstances of this case, appellant had a right to ask for an accounting. It does not appear that prior to the filing of her bill the appellees ever stated an account with her. It is true that Mr. Flannigan, a witness for them, says that, when he was trying on their behalf to effect a compromise of her claims, he gave her hus-

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

band and agent a statement of the sums paid out by the Citizens' Trust & Guaranty Company. He does not claim to have tendered it to her as a formal account. He is not prepared to say that he did not give it to her upon condition that it should not be used against the appellees. Such a paper did not thereby become an account stated. When in the progress of this cause an accounting was had, it appeared that much money had been paid out to persons other than appellees. The appellant sought to attack many of these payments. We have affirmed the action of the lower court in overruling her objections to every one of them. In the course of the accounting, it, however, appeared that there had been received by the appellees H. C. Jackson, Archer, and White certain sums aggregating $6,000, to which we have found they are not entitled; that is to say, the item of $3,000 received by H. C. Jackson, the $2,500 received by White, and the $500 received by Archer. A portion of this $6,000 belonged to the appellant.

[3] The appellees had it without right. The law presumes that they received it for appellant and now hold it for her use. It necessarily follows that they should be decreed to pay it to her.

We see no occasion to add anything to what we said in our original opinion as to the appellant's claim against H. C. Jackson under the contract which purports to bear date April 14, 1898. The statement in our opinion that the decree below did not require H. C. Jackson to repay $382.52 overpaid him for salary was, of course, an inadvertence. Our mandate will be modified so as to insure that he will not be called upon to pay that sum twice.

The petition for rehearing is hereby denied.

SHOE v. GEORGE F. CRAIG & CO.

(Circuit Court of Appeals, Third Circuit. February 14, 1912.)

No. 1,562.

1 SHIPPING (§ 194*)—GENERAL AVERAGE—TOWAGE CHARGES FOR SCHOONER.

A schooner on a voyage from Florida to Philadelphia with a cargo of lumber owned by a single consignee was disabled in a storm, and compelled to put in to Charleston, S. C., as a port of refuge. The owner, whose place of business was in Philadelphia, and but a few blocks from that of the consignee, was at once notified, and, without consulting or even notifying the consignee, sent a tug to Charleston, and had the schooner towed to Philadelphia. There was no occasion for haste, and the vessel was in fact in such condition that the cargo was endangered by the voyage. *Held*, that it was the duty of her owner to consult with the owner of the cargo before taking such action, and that not having done so, but having acted solely in the interest of the vessel and her freight, he was not entitled to require the cargo owner to contribute to the towage as a general average charge.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 613–617; Dec. Dig. § 194.*

General average, see notes to Pacific Mail S. S. Co. v. New York H. & R. Min. Co., 20 C. C. A. 357; The Santa Anna, 84 C. C. A. 316; British & Foreign Marine Ins. Co. v. Maldonado & Co., 106 C. C. A. 133.]

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

2. ADMIRALTY (§ 122*)—COSTS.

Where the respondent in a suit in admiralty denies all liability, and there is a substantial recovery against him although not for the full amount demanded, he should, in the absence of special circumstances, be taxed with all the costs.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 797–827; Dec. Dig. § 122.*]

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

Suit in admiralty by Bonaparte Shoe, managing owner of the schooner Matilda Borda, against George F. Craig & Co. Decree for libelant for part damages, and he appeals. Modified and affirmed.

For opinion below, see Shoe v. Craig, 189 Fed. 227.

Lewis, Adler & Laws, for appellant.

Theo. M. Etting and Howard M. Long, for appellee.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. [1] In the court below, Bonaparte Shoe, managing owner of the schooner Matilda Borda, filed a libel against Craig & Co. to enforce contribution in general average. While en route from Fernandina, Fla., that vessel, having for her sole freight a cargo of lumber for Craig & Co. at Philadelphia, was disabled by a violent storm, and compelled to bear away to Charleston, S. C., her nearest port of refuge. From there she was subsequently towed to Philadelphia. The full facts of the case are set forth at length in the opinion of the court below reported in 189 Fed. 227, and need not be restated. The principal item in dispute finally proved to be $1,200, the tug's charge for towage, though by their answer the respondents denied that "the sum of $1,045.15, as alleged, is due, or that any other sum is due by the respondents to the libelant." From a decree in libelant's favor for $356.10, but without full costs, and which disallowed the towage item entirely, libelant appealed to this court.

Whatever might be our views on the interesting question of the right of a disabled sailing vessel to enforce contribution for steam towage, a maritime practice which is strengthening and is justly regarded with favor (Lowndes on General Average [4th Ed.] 232), we do not find the facts of this case call for its application. Here the cargo was owned by a single person—a very different case from a mixed cargo owned by numerous and scattered persons. There was no impelling call on the master for prompt action and decision. The managing owner, who was in Philadelphia, was notified at once, and took entire charge of the vessel's movements. The cargo owners were also in Philadelphia, and their place of business was close to that of the managing owner's, but the latter did not inform Craig & Co. of the vessel's plight or confer with them in any way. The injury to the vessel was such that, even when repaired, towing her to Philadelphia subjected the cargo, if the weather proved bad, to such grave peril as deserved the consideration of a cargo owner before being

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

undertaken. There was ample time for considerate and deliberate conference and determination by all parties concerned, so much time, in fact, that the tug was sent from Philadelphia to Charleston before the towing was undertaken. Under such circumstances, we are constrained to conclude that the managing owner, instead of considering himself the representative of both vessel and cargo and acting as such, wholly ignored the cargo and its owners, and acted in the interest of the vessel alone. We agree with the finding of the court below that, after reaching Charleston, the master and owner of the schooner "were acting solely in the interest of the freight, and were mainly anxious to finish her voyage in order to save the full amount." The acts of the master and owner in ignoring the cargo owner and treating the whole situation solely from the standpoint of their own interests were so at variance with their duty as representative of all interests that no equitable basis exists for the enforcement of rights whose foundation is considerate regard for the common weal. It may be true in this case that the managing owner's course in towing the damaged vessel home fortunately benefited the cargo owners, but that course was undertaken solely for the benefit of the vessel and might have resulted most disastrously to the owners whose cargo, without their acquiescence, or even knowledge, was thus subjected to an avoidable peril. We are therefore of opinion the court below rightly refused to include towage service in its decree.

[2] As, however, the cargo owners by their pleadings denied all liability, and the decree, from which they took no appeal, was against them for a substantial sum, we see no reason why, in the absence of any special consideration to the contrary, full costs should not follow the decree. With this modification of costs for the libelant in the court below the decree is affirmed, with costs.

GOULD & EBERHARDT v. CINCINNATI SHAPER CO.

(Circuit Court of Appeals, Sixth Circuit. January 3, 1912.)

No. 2,150.

1. PATENTS (26*)—INVENTION—COMBINATION OF OLD ELEMENTS.

The bringing together of previously separated parts in a unitary organization, so that they act together and produce a more beneficial result than when the parts operate separately, may be invention; but where the elements operate in no different way, and have no different relation to each other when in a self-contained form than when one element is detached, such combination is not invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. § 26.*

Patentability of combinations of old elements as dependent on result attained, see note to National Tube Co. v. Aikens, 91 C. C. A. 123.]

2. PATENTS (§ 328*)—INVENTION—CRANK PLANER.

The Eberhardt patent, No. 541,475, for a crank planer, covers a combination of old elements, which, in view of the prior art, involved no more than mere mechanical skill, and is void for lack of invention.

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

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

Suit in equity by Gould & Eberhardt against the Cincinnati Shaper Company. Decree for defendant, and complainants appeal. Affirmed.

Following is the opinion of the Circuit Court by Sater, District Judge:

The bill charges the infringement of patent No. 541,475, granted June 25, 1895, to the complainant's assignors. The patent issued for certain new and useful improvements in crank planers, known also as "shaping machines." The specification recites among other things, that "the present invention relates * * * to a means for bracing the work-holding vise or table," and it is such means only that is involved in this proceeding.

The working parts of the machine are supported by the column or box frame *A*, on which is mounted a reciprocating ram *B*, carrying at its forward end a cutting tool *d'*. *C* is the cross-head or rail upon the front of the frame. *F* is a table attached to the front of the saddle and formed with vertical faces *F'* having horizontal slots *G*. The table is secured in any convenient manner to the saddle *D*, which is hooked over the rail or cross-head at its upper end and bears against the face of the rail at its lower end so as to give sufficient bearing surface to hold the table in position, and is designed to permit the table to travel with its upper surface in a predetermined plane of movement. The rail is vertically adjustable by means of a screw *N* supported at its lower extremity on a projection from the column or frame *A*, and is operated by gears. By means of the screw the table may be so adjusted as to accommodate the height of the particular metallic work-piece which is about to be or is actually being cut. The work-piece is firmly secured in the desired position by means of a vise *H* resting on the table.

As thus far described, the device is of a common type, known and used long prior to the date of the patent in question. In the operation of such shapers, as the cutting tool travels over the face of the working piece, there is present a thrust horizontal and outward from the machine, and also a downward deflection or downward bearing tendency at the outward end of the work table. This tendency, however, under given conditions, as stated by the witness See, is absent, and the cutting tool then lifts or tends to lift the work-piece upward. The arrangement of the saddle on the rail or cross-head is intended to prevent the downward bearing or downward deflecting tendency, which, when present, operates against precision in the work. The patentees, to overcome such deflection when it occurs, and to afford additional support and rigidity to the table, added to the usual and well-known type of machine by extending the base of its supporting column or frame forward beneath the table, and near the outer extremity of such extended base placed an adjustable sliding standard or leg *L*. The upper end of the leg is secured to the table. Its lower end is provided at its bottom with a sliding foot, which slides on the extended portion of the machine base. The patentees in their specification describe the standard or leg and its purpose thus:

"The foot of the standard is shown with sharp angles at its corners *m*, and is freely movable upon the bed plate *J* while the saddle *D* is fed longitudinally along the cross-head *C*, during the operation of the machine. The table and vise are thus supported against the thrust of the tool, and the cut is more perfectly parallel with the bed plate than if the table were allowed to yield. The standard is made with a vertical face where it is fitted against the table *F*, and such vertical face adapts it to apply adjustably to any portion of the table when the cross-head is raised or lowered. The shape of the table is therefore immaterial, and a single bolt hole in the table would operate adjustably to secure the standard in conjunction with the slot therein. * * * The sharp corners upon the foot of the standard *L* are adapted, as the foot slides over the surface of the bed plate *J*, to push the chips and grit before it and thus prevent the same from crowding under the standard and pressing it upward; which would affect the horizontality of the table *F* and vise *H*. The slots *K* are provided in the bed plate chiefly to permit the escape of the

chips and grit from beneath such foot as it is pushed along by the sharp corners *m*."

The only features of the patent with which we are concerned are the adjustable leg and the extension of the machine base beneath the table as a support for such leg. The claims alleged to be infringed are 5 and 6. Claim 5 is as follows, the numerals being inserted to indicate the elements of the combination claimed:

"In a crank planer, the combination, with (1) the frame having (2) the crosshead *C* provided with (3) means for adjusting the same vertically upon the frame, and having (4) a saddle movable thereon with (5) the table *F*, of (6) the base having a bed plate projected beneath the table *F*, and (7) a standard bolted adjustably to the table and fitted at its lower end to slide upon the bed plate, substantially as herein set forth."

The sixth claim is phrased differently from the fifth but the only difference that need be noted relates to the standard. In the former the leg is described as "a slotted standard *L* bolted adjustably to such table and having a foot adapted to slide upon the bed plate." The sixth claim will not be further noticed, for the two following reasons: Complainant's expert in rebuttal, cross-question 284, eliminates the alleged infringement of that claim, and there can be no infringement of it, in any event, if there is none as to claim 5.

The answer denies infringement. It asserts prior use, want of utility and of acquiescence on the part of the public in the patent, want of novelty and of patentable invention. In oral argument defendant's counsel said: "This is one of those cases in which, if the patent is good for anything at all, our structure would come within the proper purview of the invention, if there is any." It follows, therefore, that, if the patent is valid, infringement exists.

The prior Eberhardt patent, No. 409,941, issued August 27, 1889, is for essentially the same device as that covered by the patent in suit, excepting that it does not cover the extended base and adjustable standard or leg. The complainant's machine found a considerable market, and to that extent has supplanted other shapers. It has not, however, monopolized the trade. It has rather taken its place among other planers or shapers as a desirable machine. The several catalogues, photographs, and other exhibits in evidence, including the catalogues of the complainant, show various types and sizes of shapers which are manufactured and sold having substantially the characteristics, excepting in the two respects under consideration, of the machine alleged to be infringed. The absence of a supporting leg and an extended base does not imply a defective or faulty machine. It is incredible that the usual type of machine, wanting such extended base and support, would be manufactured or would be bought by consumers, unless there was a demand for it, or if it failed to do the work required of it. The value of the support and extended base arises in the performance of heavy work and in operating on a heavy work-piece. The ordinary well-known machine possesses great strength and rigidity and manifestly answers the purpose of usage in ordinary work, and its table in the performance of such work does not deflect or bend downward so as to interfere with its accuracy. I am satisfied that the witness See is correct in his statement that the use of a supporting leg or standard is advisable or necessary only in heavy work, and with a heavy work-piece. The adjustable leg and the supporting extended base may be and doubtless are conveniences which may be used or not, as circumstances require; but that they are deemed essential in all instances or in the performance of the greater part of the work to which such machines are applied is refuted by the continuous manufacture and sale of machines not having them, and gives color at least to the statement that the extended base and supporting standard are good selling points rather than necessities.

The use of a support, by whatever name it may be called, to bear heavy pressure or immovable loads, and to meet emergencies, would suggest and has suggested itself to mechanics operating such machines. It does not require mechanical education or the inventive faculty to discover the propriety, and, in some instances, the necessity of the use of such mechanical expedients. Examples of such usage appear in Day's Exhibits 1 and 4, Johnson's Exhibit 1, the Niles boring machine, and the radial drill with extra leg. But it is said that the supports shown in the above-mentioned Day and Johnson ex-

hibits rest on a base specially constructed, constituting no part of the machine itself, and that bases may not be truly constructed and do not form any part of a portable complete self-contained machine. Portability is not mentioned either in the specification or the claims of the patent, nor does it appear that the use of supporting bases which are not integral parts of the machine in anywise interferes with the efficiency of the shapers in connection with which the temporary supports were used to carry heavy loads, or with the precision of their work. If the support rests on a continuous base, the difference lies rather in providing a continuous foundation for the shaper than separate foundations for the support of the machine and of the leg, respectively. In either event the foundation would have to be truly built to insure accuracy in the machine's finished product. The separate foundation and prop perform the same office, and are instrumental in effecting the same result, as those constituting a part of the complainant's machine. Invention or discovery is not involved in making the base a unit, instead of divisible into two parts. The Richards patent, No. 258,120, issued May 1, 1882, discloses a planer with a base extended beneath an adjustable table which carries the work. For the vertical adjustment of the table is a screw, which also acts as a support which transmits the downward bearing strain of the table and its load to the extended base.

In the Fox patent, No. 489,734, issued January 10, 1893, the work-holding structure is vertically adjusted upon the frame of the planer by means of a vertical screw. The base of the frame extends outward beneath the table, and bears the superimposed strain of the table and the work-piece. Brainard's patent, No. 255,409, bearing date of March 28, 1882, shows an elevating screw for vertically adjusting the table in the device. It rests upon a projection of the base of the machine frame. From the necessity of the case it bears the downward strain of the table whenever the operating of the machine creates a downward thrust. Another prior device in which the supporting adjustable screws or standards transmit downward strains and thrusts to the base frame extended outward beneath the working table is seen in the Niles boring machine. The characteristics of this machine are given in detail by the witness See, and the respects in which the complainant's machine resembles it as to parts and the office which such parts perform, are pointed out.

Adjustable supports or standards appear in some of the above specifically cited devices. Other illustrations are seen in the Glad patent, No. 144,530, dated November 11, 1873, the Reagan patent, No. 104,201, issued June 14, 1870, the Day Exhibits (drawings) 3 and 4, the Day Exhibit 2, and Johnson Exhibit 1.

When complainant's expert was first on the witness stand, cross-question 23, having reference to the Johnson Exhibit, was propounded to him. The question and answer, on account of their significance, are quoted as follows:

"XQ. 23. Would a bed plate, located as the bed plate *J* in Fig. 1 of the patent, separated from the frame of the machine, but rigidly fixed in a horizontal plane exactly parallel with the planes of the horizontal movements of the table, and provided with the adjustable support attached to the table and arranged to move on the bed plate and rigidly support the table in the same horizontal plane, come within the claims of the patent?

"A. It would not be included literally in the terms of the claims; but it might be construed or regarded by the court as an equivalent for the terms of the claim because it would perform most of the function which can be performed by the structure of the claims.

"The suggested structure would not include that feature of the claims which is specified in the words 'the base having a bed plate projected beneath the table *F*,' as in claim 5, or the words 'the frame having a base provided with the plane bed plate *J*,' as in claim 6.

"The proposed structure would support the table in precisely the same manner and by the same combination of operative elements as the structure defined in the claims; but the proposed structure would not constitute a self-contained portable machine, such as is produced by the structure of the claims.

"As this portability constitutes the only difference between the two structures, and is not in any way included in the essential parts necessary to sup-

port the table, it seems to me that the portability may be ignored, and the proposed structure regarded as practically within the claims of the patent.

"I do not, however, make such a contention at the present time, as it would be the function of the court alone to determine whether or not the two structures would be mechanical equivalents."

My disposition was to dispose of this case on the oral arguments. I have, however, examined the entire record and read all of the briefs. My conclusion is that the complainant's device did not involve invention, and is only such an obvious improvement as would suggest itself to a mechanic skilled in the art. For this reason, the bill is dismissed, at complainant's cost. An order may be taken accordingly.

W. R. Wood (Wood & Wood, on the brief), for appellant.

Arthur Stem, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. This is a suit for infringement of United States patent No. 541,475 to Eberhardt, June 25, 1895, for improvements in crank planers. In the Circuit Court the claim involved was held invalid for lack of invention, and the bill dismissed. In crank planers or shapers, of the type to which the improvements in question pertain, the metal to be planed is held by a vise supported on a heavy metal table on a plane slightly below that of the cutting tool, which is carried across the surface of the work by a power-propelled reciprocating ram. To enable the tool to make successive parallel movements across the face of the metal to be planed, the table is connected at its rear end to a saddle, which is fed horizontally to the frame of the machine (and at right angles to the movement of the ram), along and bearing against a cross-head attached to the machine frame; the former being vertically adjustable by a screw. The specification states that "the strain of the tool upon any work-piece fastened in the vise or upon the table tends to thrust the table downward," and the Eberhardt invention, so far as the claim sued on is concerned, relates to "a means for bracing the work-holding vise or table." This means consists of a standard clamped to the table (adjustable as to height) by a bolt inserted through a slot in the standard into one of a series of parallel slots on the vertical face of the table (but one slot in the table being absolutely necessary); the standard being made to rest and slide upon the bed plate of the frame of the machine, which is extended for the purpose so as to come under, and parallel to, the table and cross-head. The specification states that:

"The table and vise are thus supported against the thrust of the tool, and the cut is more perfectly parallel with the bed plate than if the table were allowed to yield."

The only claim involved reads as follows:

"5. In a crank planer, the combination, with the frame having the cross-head *C* provided with means for adjusting the same vertically upon the frame, and having a saddle movable thereon with the table *F*, of the base having a bed plate projected beneath the table *F*, and a standard bolted adjustably to the table and fitted at its lower end to slide upon the bed plate, substantially as herein set forth."

No complete anticipation is found in either patent disclosure or use. The only question we are required to consider is whether, in view of the prior art, the combination stated in the claim involves invention.

The only elements of the combination claimed to be novel are the table-supporting standard clamped as above stated and the extended bed plate on which the standard slides. Bed plates projected forward so as to extend under, and parallel to, the table, and cross-head were not new. Examples are found in the Day No. 7 and Juengst shapers and in the Niles radial drill, in neither of which machines, however, is the table supported by a standard; the bed plate extensions there found being presumably used (in part at least) for clamping thereto work too high to be carried on the table. Nor was it new to support the table by a leg resting on the projected bed plate, as was done in both the Fox and Richards metal planers, and in the Brainard gear-cutting machine. In neither of these machines, however, were the standards bolted adjustably to the table, nor did they slide on the extended bed plate. Neither were they located at the extreme outer edge of the table, and so did not perhaps protect against the thrust of the tool as effectively as in the device in question. But it was not even new to support the table by a standard bolted adjustably thereto, substantially as in the device of the patent in suit, sliding on a bed plate which was under the table, but was not extended from or connected with the frame bed plate. Such device is shown in Johnson's shaper and in the Day Exhibit No. 2, in both of which the standard has a roller foot. The Eberhardt device is an advance upon the prior art only in that it uses the extended bed plate, which was old, as the foundation on which the standard (also old) slides (rather than rolls), instead of employing a separate bed plate. This step was certainly a short one. It is, however, ably and forcefully urged that the step was an important one, because of the necessity to the effective support of the table that the plate supporting the standard be always in a plane parallel to that of the cross-head, and because of the difficulty of maintaining such parallelism unless the supporting plate be a rigid extension of the frame bed plate. This unitary or "self-contained" feature has undoubted advantages.

The evidence also indicates that, apart from the "self-contained" feature, the device in suit has utility, being especially useful where the metal to be worked is very heavy or the thrust of the tool unusually great; and that it has been favorably received by manufacturers and users, having to a large extent taken the place of the old construction.

[1] It is insisted by complainant that the considerations above stated show invention, as distinguished from mere mechanical skill. Ordinarily the mere making in one piece of a device, or part of a device, formerly made in two pieces, is not invention. But the bringing together of previously separated parts in a unitary organization, so that they act together and produce a more beneficial result than when the parts operate separately, may be invention. But where, as here, the elements operate in no different way, and have no different relation to each other when in a self-contained form than when one element is

detached, such combination is not invention. Standard Caster Co. v. Caster Socket Co. (C. C. A. 6) 113 Fed. 162, 51 C. C. A. 109; National Tube Co. v. Aiken (C. C. A. 6) 163 Fed. 254, 261, 91 C. C. A. 114; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, decided by this court November 7, 1911.

The considerations of prior demand, unsuccessful attempts to supply the demand, utility, and public favor, are evidence of invention, and in an otherwise doubtful case might turn the scale in favor of its existence. But neither or all of these considerations, regardless of all others, necessarily prove invention, the existence of which is always ultimately a question of fact, to be determined upon a consideration of all applicable facts and conditions.

[2] Having in mind all the considerations urged by defendant, and taking into account the prior art, it is clear to our minds that the use of the projected bed plate, in connection with the table-supporting standard resting thereon, involved no more than mechanical skill, and that the combination in question is void for lack of invention.

The decree of the Circuit Court is affirmed.

SHEFFIELD CAR CO. v. D'ARCY.

(Circuit Court of Appeals, Sixth Circuit. February 13, 1912.)

No. 2,155.

1. PATENTS (§ 328*)—INVENTION—SPRING CUSHION STRUCTURE.

The D'Arcy patent, No. 726,817, for a spring cushion structure, claim 3, which covers a combination in such a structure of "an upright helically-coiled spring and a strip of sheet metal with inturned opposite edges folded onto and embracing the opposite sides of the bottom coil of said spring, whereby said spring is supported and retained in position," fairly construing such language, refers broadly to the function of the metal strip in such combination in supporting and retaining the spring in an upright position by folding over the inturned edges to embrace the bottom coil of the spring, without including as a limiting element of the combination the separate function of the strip as a cross-piece in the seat or cushion frame, and, as so broadly construed, the claim was fully anticipated by the Crandall patent, No. 1,412, for a bed spring, which shows a series of sheet metal plates attached to a wooden slat, each retaining and supporting a single spring in the same manner as the strip of the D'Arcy patent. If the claim be construed as including the function of the metal strip as a cross-piece, still no patentable invention was involved in uniting the plates of the Crandall device into a single metallic strip, and giving it the functions of both the plates and a metallic cross-piece well known in the art.

2. PATENTS (§ 26*)—INVENTION—COMBINATION OF OLD ELEMENTS.

A combination of old elements to be patentable must produce a new force, effect, or result as the product of the combined forces as distinguished from a mere aggregation of the results of the old elements, each working out its separate effect.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. § 26.*

Patentability of combinations of old elements as dependent on results attained, see note to National Tube Co. v. Aiken, 91 C. C. A. 123.]

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

3. PATENTS (§ 26*)—INVENTION—COMBINATION.

Although a device formerly made in two pieces is made in one piece if the elements operate in no different way, and have no different relation to each other when in a self-contained form than when one element is detached, the combination is not patentable.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. § 26.*]

4. PATENTS (§ 324*)—REVERSAL—DISPOSITION OF CAUSE.

On a broad appeal taken under Act March 3, 1891, c. 517, § 7, 26 Stat. 828 (U. S. Comp. St. 1901, p. 550), from an interlocutory decree of a Circuit Court granting an injunction, and ordering an accounting in a patent case, the Circuit Court of Appeals may, in order to save both parties from the expense of further litigation, not merely reverse so much of the decree as awarded an injunction, but may also consider and decide the case on the merits, and direct a final decree dismissing the bill.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 600–606; Dec Dig. § 324.*

Review of interlocutory decree granting or refusing injunction in patent case in Circuit Court of Appeals see notes to Gill & Fisher v. Browne, 3 C. C. A. 572; Southern Pac. Co. v. Earl, 27 C. C. A. 189; New York, N. H. & H. R. Co. v. Sayles, 32 C. C. A. 484.]

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

Suit in equity by Frank P. D'Arcy against the Sheffield Car Company. Decree for complainant, and defendant appeals. Reversed.

Francis C. Lowthorp, for appellant.

F. L. Chappell (Chappell & Earl, on the brief), for appellee.

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

SANFORD, District Judge. This suit was brought by the appellee, Frank P. D'Arcy, by bill in equity, against the appellant, the Sheffield Car Company, for the alleged infringement of letters patent No. 726,817, for improvements in springs, issued to said D'Arcy April 28, 1903, on an application originally filed October 2, 1902. The defenses were that D'Arcy was not the original inventor of the patented structure, that the patent was void for anticipation and want of patentable invention, and noninfringement. After a hearing on pleadings and proof, a decree was entered adjudging and decreeing that D'Arcy's patent was good and valid, and that he was its original inventor, that the defendant had infringed the third claim of this patent, but had not infringed its other claims, and dismissing the bill as to all claims of the patent except the third, but as to that claim ordering a reference for the ascertainment of profits and damages and perpetually enjoining further infringement. From the provisions of this interlocutory decree adjudging the infringement of the third claim of this patent and awarding an injunction and ordering an accounting, the defendant prayed an appeal to this court; and a broad appeal from the decree was thereupon allowed it by the Circuit Court.

The invention claimed by D'Arcy relates to improvements in spring cushion structures for seats and the like. The structure disclosed in

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

the specification and drawing of his patent consists of a series of cross-strips of flat sheet metal, fixed transversely in a substantially rectangular seat frame, each cross-strip having mounted upon it a row of spiral springs in an upright position, which are held to the cross-strip and supported and retained in position by turning inward the opposite edges of the cross-strip and folding them back so as to embrace the opposite sides of the bottom coil of each of the springs.

Fig. 1 in the drawings, which is a plan view of the spring structure as applied to a cushion for carriage seats, showing the cross-strips *B*—which are also designated in the specification "supporting-strips"—and the upright spiral springs *C* mounted thereon, and Fig. 3, which is a detailed perspective view of a cross-strip *B*, showing the manner of securing a spring *C* thereto, are here reproduced.

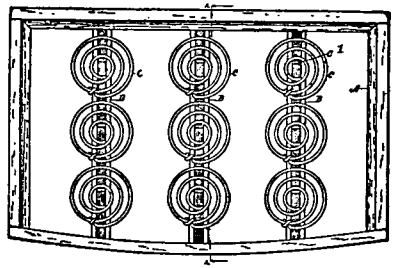


Fig 1

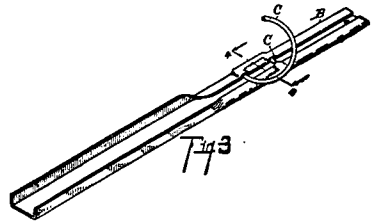


Fig 3

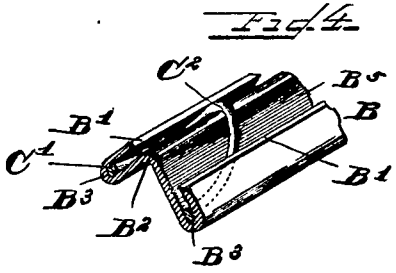
The specification refers to this cross-strip *B* and the method of supporting and retaining the springs thereby as follows:

"A strip *B* of sheet metal is provided for each row of springs *C*. * * * The edges of this strip are folded back onto the same and parallel therewith, forming channels or grooves at each side. The springs *C* * * * are secured within this channel-shaped groove, the coil *C'* of the spring being conformed thereto, so that it supports the spring in an upright position above the strip, the spring being retained by being grasped by the folded-back edges of the cross-strip. The springs are very securely supported in position, and, owing to the very firm grasp of the cross-strips on the bottom coils, they are efficiently supported independently of each other without any danger of tipping or becoming displaced, and owing to the fact that the bottom coil is conformed there is no chance for twisting or turning the springs, which might possibly tend to loosen them and wear the covering. * * * I perferably form the sheet-metal cross-strips *B* in the form of channel-irons or roll the edges over as in forming seams. The * * * bottom coil (of the springs *C*) being conformed and the edges of the strips *B* rolled or stamped down upon the same * * * holds the springs so that they are always supported in an upright position and twisting and turning or other movement in the cushion is prevented. * * *"

Claim 3 of D'Arcy's patent, which is the claim directly involved under this appeal, is as follows:

"3. In a spring-cushion structure, the combination of an upright helically-coiled spring; a strip of sheet metal with inturned opposite edges folded onto and embracing the opposite sides of the bottom coil of said spring, whereby said spring is supported and retained in position."

The device manufactured and sold by the defendant, which the court below held to be an infringement of claim 3 of D'Arcy's patent, is made under letters patent No. 711,611, issued to Emil A. Hoefer, as inventor, and others, October 14, 1902, on an application filed July 18, 1902, for improvements in spring seats. The structure disclosed by the Hoefer patent consists likewise of a series of sheet metal cross-strips fixed transversely in a seat frame, on which spiral springs are likewise mounted, these cross-strips, however, being of angular form, that is, raised in the center so as to present in cross-section the form of an inverted U or V, and having their edges turned upward, towards the apex, so as to form trough-like stirrups, the lower coils of the springs being bent upward in the middle so that they may be seated astride the apex of the cross-pieces and inserted in and secured by the trough-like stirrups formed by the upturned edges of the cross-pieces, which embrace and secure them substantially as in the D'Arcy device. Fig. 4 of the drawings of this patent, which is a sectional detail of a cross-piece *B*, showing its angular form, and the lower coil of a spring *C* inserted therein, is here reproduced:



It is clear, however, that the difference between the flat form of the cross-strip in the D'Arcy patent and the angular form of the cross-strip in the Hoefer patent does not involve patentable invention. Murray v. D'Arcy (6th Cir.) 161 Fed. 352, 354, 88 C. C. A. 364. And it is not disputed by the defendant that if D'Arcy was in fact the original inventor of the device disclosed in these two patents, and if claim 3 of the D'Arcy patent be not otherwise void, it is infringed by the device manufactured and sold by the defendant under the Hoefer patent.

It is earnestly insisted, however, by the defendant that as the Hoefer patent antedates the D'Arcy patent, both in the date of application and in the date of issue, the burden of proof rested upon D'Arcy, in order to avoid the effect of the Hoefer patent as a complete anticipation, to establish the priority of his invention beyond a reasonable doubt by analogy to the rule laid down in the Barbed Wire Patent, 143 U. S.

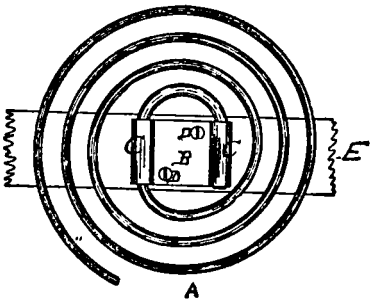
275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154, and Columbus Chain Co. v. Standard Chain Co. (6th Cir.) 148 Fed. 622, 78 C. C. A. 394; and that under the doctrine of Christie v. Seybold (6th Cir.) 55 Fed. 69, 5 C. C. A. 33, and Automatic Weighing Mach. Co. v. Pneumatic Scale Corp. (1st Cir.) 166 Fed. 288, 92 C. C. A. 206, he has failed to sustain the burden resting upon him to show both that he had conceived the structure of his patent prior to the date of Hoefer's conception of his patented structure, and that he had thereafter exercised reasonable diligence in the reduction of his invention to practice. The court below, upon consideration of the entire evidence, was of opinion that D'Arcy had sustained the burden of proof resting upon him in these respects. In the view which we take of this case, however, we do not deem it necessary to determine the questions of law and fact which arise under this contention of the defendant, for the reason that we are of the opinion that independently of the question of priority of invention as between D'Arcy and Hoefer, claim 3 of the D'Arcy patent must, without regard to the Hoefer patent, be held, in view of the prior state of the art, to be void for anticipation and want of patentable invention.

[1] In the first place, we are of the opinion that the language of claim 3 of D'Arcy's patent, which sets forth his claim to the combination in a spring structure, of "an upright helically-coiled spring" and "a strip of sheet metal with inturned opposite edges folded onto and embracing the opposite sides and bottom coil of said spring, whereby said spring is supported and retained in position," when fairly and reasonably construed, refers broadly to the function of a metal strip, in such combination of a metal strip and spring, in supporting and retaining the spring in an upright position by folding over the inturned edges of the strip so as to embrace the bottom coil of the spring, without including, as a limiting element of the combination claimed, the separate function of the metal strip as a cross-piece, holding a row of spiral springs thus supported apart, and retaining them in their proper position in a seat frame. This appears from the use of both the words "strip" and "spring" in the singular number, from the absence of any reference to the metal strip as a cross-piece, and from the omission of the seat frame as an element of the combination for which the claim is made. And, while there might be on its face some ambiguity in the use of the phrase "whereby said spring is * * * retained in position," we think this is removed by reference to the statement in the specification, above quoted, that the coil of the spring is secured within the channel-shaped groove of the metal strip and conformed thereto, "so that it supports the spring in an upright position above the strip, the spring being retained by being grasped by the folded-back edges of the cross-strip;" this phrase clearly indicating that the word "retained" is used in the sense merely that the spring is "retained" in position on the metal strip by being grasped by its folded-back edges. This construction of the third claim of the patent is made the more evident, when the language of this claim is contrasted with that of the first claim of the D'Arcy patent, which, although not itself directly involved under this appeal, may, under the general rule that a patent, as any other written instrument, is to be construed as a whole and due

effect given to all its parts, be looked to for the purpose of aiding in the proper construction of the third claim. See National Cash Register Co. v. Register Co. (3d Cir.) 53 Fed. 367, 370, 3 C. C. A. 559; Anderson Foundry v. Potts (7th Cir.) 108 Fed. 379, 383, 47 C. C. A. 409, and Lamson Consolidated Co. v. Hillman (7th Cir.) 123 Fed. 416, 419, 59 C. C. A. 510. The first claim of the D'Arcy patent is for the combination in a spring structure "of a frame *A;* conical springs with coils *C'* at the bottom confined to the cross-strips; sheet-metal cross-strips *B* with inturned edges folded onto the bottom coils of said springs to clamp the same, co-acting for the purpose specified." When the language of claim 3 is contrasted with that of claim 1, in which is thus set forth the function of the strips *B* as cross-strips coacting with the springs and the frame as elements of the combination claimed, the absence in claim 3 of any reference to the frame as an element of the combination claimed, of any reference to more than one spring supported and retained by the metal strip, of any reference to the metal strip as a "cross-piece," and of any reference to the coaction between the frame, metal strip, and the frame in the combination claimed, we are constrained to conclude that claim 3 of the patent was, by the language used, intended to cover broadly the function of the metal strip as a direct support and retention of the upright spring, and without including, as a part of the combination claimed, the added function of the metal strip as a "cross-strip" for the purpose of retaining the several springs in their proper position in the frame.

And thus construed, we are of the opinion that claim 3 of the D'Arcy patent was clearly anticipated by letters patent No. 114,112, issued April 25, 1871, to Delos V. Crandall, on improvements in bed springs, relating to the means for attaching helical springs to bed springs, rails, etc. This patent disclosed a method of securing coiled bed springs to a slat or rail by means of a metal plate, having its ends bent over the two opposite sides of the spring, and itself secured to the slat by means of screws or rivets. Fig. 1 of the drawing giving a top plan view of Crandall's improved bed spring, and showing the spring *C,* the metal plate *B* and the slat *E,* is here reproduced:

Fig. 1.



Obviously the inturned end of the metal plate *B* in Crandall's patent, embracing the bottom coil of the supported spring, completely

anticipates the use of the inturned edge of the metal strip *B* in the D'Arcy patent, as a means of securing the lower coil of the spring and retaining it in an upright position. And, as the fact that in the Crandall patent the metal plate was itself screwed or riveted to a slat or cross-piece does not prevent the Crandall device from being a complete anticipation of the function of D'Arcy's metal strip under claim 3 of his patent, we are therefore of opinion that this claim was in its essential features completely anticipated by the Crandall device.

But in the second place, even if claim 3 of the D'Arcy patent should be construed so as to include the function of the metal strip as a cross-piece retaining a series of springs in the frame, we are nevertheless of the opinion that in view of the prior state of the art, as disclosed in other patents, the improvement thus made by combining integrally in one metal strip the function of Crandall's metal plate securing the individual springs, and the function of a metal cross-strip retaining a series of springs in the frame, did not involve patentable invention. Not only was the use of a cross-piece connecting a series of springs disclosed in the Crandall patent itself, in which it appeared in the form of a wooden slat, but the specific use in spring structures of metal bars or cross-pieces supporting and retaining a series of springs in the frame of a spring structure, was itself old in the art, being disclosed among other instances, in the L. C. Boyington patent, No. 181,816, issued September 5, 1875, on spring bed bottoms, the Charles C. Bailey patent, No. 239,694, issued April 5, 1881, on spring cushion supports for carriage seat backs, and the James H. Cloyes patent, No. 604,368, issued May 24, 1898, on spring seats.

It is evident, therefore, that the alleged invention consisted essentially in merely enlarging and adapting the metal plate of Crandall's device, so as to combine integrally in one device a metallic strip having in itself the functions of Crandall's metal plate in securing the several springs by enfolding their bottom coils within its inturned edges, and the ordinary and well-known function of a metal bar or cross-piece retaining a series of springs in place in the frame of a spring structure. Such enlargement and adoption of the metal plate of the Crandall patent so as to give it the added function of the ordinary cross-piece, that had not only appeared in the form of a wooden slat in the Crandall device, but was also well known in the prior art in a metallic form, did not, however, in our opinion, call for the exercise of inventive faculties, but involved merely the mechanical skill of one versed in the art.

In Standard Caster & Wheel Co. v. Socket Co., 113 Fed. 162, 166, 51 C. C. A. 109, in which it was held by this court that the substitution for a separate riveted spring in a caster socket of a spring made integrally with the socket did not amount to invention, Judge (now Mr. Justice) Lurton, delivering the opinion of the court, after reviewing the cases of Krementz v. Cottle Co., 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558, Howard v. Stove Works, 150 U. S. 164, 14 Sup. Ct. 68, 37 L. Ed. 1039, and Manufacturing Co. v. Holtzer (1st Cir.) 67 Fed. 907, 15 C. C. A. 63, said:

"The conclusion from all the cases must be that the mere making in one piece of a device formerly made in two parts mechanically attached is not

invention. The exception to the general rule must depend upon special facts indicating the presence of the inventive faculty in a degree greater than the mere mechanical knowledge exhibited by so simple an improvement."

In Thomas v. Railroad Co., 149 Fed. 753, 79 C. C. A. 89, it was held by this court that a device consisting in its essential features of a U-bolt applied to a stake on the sides of a car, which instead of being applied to the end of the stake, as usual, was applied higher up, and which, instead of extending directly inwards, so as to be secured to the side, was lengthened and extended inward and downward, so as to be secured to the bottom part, and to serve also as a stay rod, was void on its face for lack of patentable novelty, both the U-bolt and stay rod separately being well-known mechanical devices in common use.

And in the recent case of Edward Hilker Mop Co. v. U. S. Mop Co., 191 Fed. 613, it was held by this court that having adopted a metallic handle extension in place of the lower end of a wooden mop handle, to adopt in the same connection the collar of the old wooden handled mop, carrying the wringer mechanism, as the collar and ferrule of the handle and metal extensions carrying the same wringer mechanism, and thus performing the same function as the old collar and in the same way, but with only the added function of holding the handle and extensions in connection and alignment, was the natural and obvious thing to do, and did not, under the circumstances, involve invention, but merely mechanical skill.

[2] It is, furthermore, clear that a combination of old elements, to be patentable, must produce a new force, effect, or result as the product of the combined forces, as distinguished from a mere aggregation of the results of the old elements, each working out its separate effect, and that a combination consisting merely of old parts and of old results, without the addition of any new and distinct function, is not patentable. Reckendorfer v. Faber, 92 U. S. 347, 357, 23 L. Ed. 719; Goodyear Rubber Co. v. Rubber Wheel Co. (6th Cir.) 116 Fed. 363, 369, 53 C. C. A. 583; National Cash Register Co. v. Register Co. (3d Cir.) supra, 53 Fed. at page 371, 3 C. C. A. at page 559. This doctrine applies, not merely when the old elements are separately used in the combination, but also when they are integrally combined in one device involving mere mechanical knowledge and producing no new result differing from the aggregate result of the former separate elements.

[3] Although a device formerly made in two pieces is made in one piece, if "the elements operate in no different way, and have no different relation to each other when in a self-contained form than when one element is detached, such combination is not invention." Gould v. Cincinnati Shaper Co., 194 Fed. 680, decided by this court January 3, 1912; and cases cited.

In the light of these decisions we are constrained to hold that, even if claim 3 of the D'Arcy patent be construed as referring to the functions of the metal strip as a cross-piece, as it, in effect, merely extended and enlarged the metal plate of the Crandall device, so as to combine integrally in one device the function of that metal plate as a means of securing the springs attached thereto, and the function of a metallic cross-piece, old in the art, as a means of retaining a series of springs

in their place in the frame of a spring structure, giving no new result differing from that obtained by a separate metallic cross-piece with the Crandall metal plates riveted thereon, it involved merely mechanical skill, and not invention, and is accordingly void.

[4] And being of opinion for the foregoing reasons that claim 3 of the D'Arcy patent is void both on account of anticipation and for want of patentable invention, without considering in detail the numerous assignments of error filed by the appellant, in which the grounds of error relied on are repeated in many variant forms differing only slightly in phraseology, or determining other questions raised in the briefs and arguments, which in the view we take of the case are not material to the determination of the ultimate question involved under this appeal, we necessarily conclude that the court below was in error in awarding the injunction under the decree from which the defendant has appealed.

However, on a broad appeal taken under section 7 of the judiciary act of March 3, 1891 (chapter 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550]), from an interlocutory decree of a Circuit Court granting an injunction and ordering an accounting in a patent case, this court, as was held in Smith v. Vulcan Iron Works, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810, may, in order to save both parties from the expense of further litigation, not merely reverse so much of the decree below as awarded an injunction, but may also consider and decide the case on its merits and direct a final decree dismissing the bill; and, as the grounds of this opinion are conclusive of all the questions that are relevant under the pleadings and proof as to the validity and infringement of claim 3 of the D'Arcy patent, we conclude that we should, in the present case, not merely reverse so much of the decree below as awarded the injunction, as was done on an appeal from a preliminary injunction in American Carriage Co. v. Wyeth (6th Cir.) 139 Fed. 389, 392, 71 C. C. A. 485, or reverse the decree appealed from and remand the cause for further proceedings consistent with the opinion, as was done in Buser v. Machine Co. (6th Cir.) 151 Fed. 478, 496, 81 C. C. A. 16, but should also direct the dismissal of all that part of complainant's bill relating to claim 3 of the complainant's patent, as was done in Western Electric Co. v. Electric Co. (6th Cir.) 108 Fed. 953, 957, 48 C. C. A. 159.

So much of the decree of the Circuit Court appealed from as relates to claim 3 of the D'Arcy patent will accordingly be reversed, with costs, and the cause will be remanded to that court, with directions to dismiss so much of the complainant's bill as relates to said claim 3, with costs.

PLUNGER ELEVATOR CO. v. PARK et al.

(Circuit Court of Appeals, Third Circuit. February 12, 1912.)

No. 1,527.

PATENTS (§ 328*)—INFRINGEMENT—VALVE CONTROLLER FOR ELEVATORS.
The Jansson patent, No. 777,635, for mechanism for operating automatic valves on elevators, *held* not infringed.

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

Suit in equity by the Plunger Elevator Company against William G. and David E. Park. Decree for defendants, and complainant appeals. Affirmed.

Frank T. Brown and Francis A. Hopkins, for appellant.

Edwards, Sager & Wooster, for appellees.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case the Plunger Elevator Company, owners of patent No. 777,635, granted December 13, 1904, to Jansson, for mechanism for operating automatic valves on elevators, charged William G. Park et al. with infringing claims 17, 18, 19, and 21 thereof, in the use by them of an elevator built by the Standard Plunger Elevator Company, under patent to Larsson, No. 924,798. The court below found the respondents did not infringe, and entered a decree dismissing the bill. Thereupon complainant appealed.

The case is wholly one of fact, and no legal principles are involved. As the opinion below fully discusses the device, we limit ourselves to a brief statement of the conclusions we have reached. In automatic devices for stopping elevators, the factor of safety is the positive control of the elevator valve, which will absolutely insure stoppage of the car before it strikes the upper or lower end of the inclosing frame. A merely relative or retarded valve control will not prevent accidents. The patent in question recognized the necessity of positive valve control and claimed to have solved it, saying:

"The chief object of my invention is to provide a simple and *positive* device for operating such valve at *predetermined* points," etc.

Moreover, the patentee's device sought to control the movement of the car, at both the upper and lower end of the car run by the use of a single rope connection between the car and the valve controller—a simplified mechanism, which, if successful, was very valuable. But his device, while theoretically workable on paper, did not prove practical in operation, as the court found, saying:

"Consideration of all the evidence leads to the conclusion that the design of the patent in suit will not answer the purpose for which it was intended; that is, to effect positive movement or operation of the automatic stop device. This is confirmed by the fact that although the plaintiff has installed many elevators in different parts of the country, it has not used the design of the patent in suit."

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

Without entering into a discussion of the mechanism by which the valve is controlled, we may add that we also find that the movement of the bight of the rope is neither positive nor always the same, and is inherently incapable of insuring that positive, absolutely essential, valve movement and control, without which the limbs and lives of passengers are endangered. Moreover, as we have said, the patent discloses a single rope between the car and the valve controller, while the respondents use duplicate rope systems, each separate, one being employed in going up, the other in going down, and the two using substantially four times as much rope as in complainant's device. This combination is, therefore, different from that of the patent.

Agreeing, as we do, with the conclusion reached by the court below, its decree is affirmed.

PHŒNIX KNITTING WORKS v. HYGIENIC FLEECED UNDERWEAR CO.

(Circuit Court of Appeals, Third Circuit. January 8, 1912.)

No. 77 (1,563).

PATENTS (§ 328*)—INVENTION—DESIGN FOR MUFFLER.

The only feature of the design shown in the Mead patent, No. 39,347, for a design for a neck scarf, which was subject to patent under Rev. St. § 4929, as amended by Act May 9, 1902, c. 783, 32 Stat. 193 (U. S. Comp. St. Supp. 1909, p. 1274), which authorizes the granting of a patent for a "new, original and ornamental" design, was in the configuration and surface ornamentation of the two connected aprons forming the front portion of the scarf; the connecting neck portion being functional only and not visible when the scarf is worn. As so construed, the patent is void for lack of invention and novelty in view of the prior art.

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

Suit in equity by the Phœnix Knitting Works against the Hygienic Fleeced Underwear Company Decree (194 Fed. 717) for defendant, and complainant appeals. Affirmed.

Henry N. Paul, Jr., and F. E. Dennett, for appellant.

Hector T. Fenton, for appellee.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge. The appellant, a corporation of the state of Wisconsin, was complainant in the court below, in a bill in equity alleging ownership, by assignment from one Joseph Mead, the patentee, of design patent No. 39,347, dated June 9, 1908, entitled "Design for a Neck Scarf," and charging defendant (the appellee) with infringement thereof by the manufacture and sale of knitted mufflers and neck scarfs bearing said alleged design. The defendant's answer, inter alia, denied the validity of the patent, for want of patentable novelty and by reason of anticipation. Replication was filed by the complainant thereto, and proofs taken on both sides, as set

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

forth in the record now before us. The learned judge of the court below, after a clearly written opinion setting forth the invalidity of the patent for want of invention and patentable novelty, decreed the injunction, pendente lite, theretofore granted, to be dissolved and that the bill be dismissed for want of equity. From this decree, the appeal to this court has been taken.

The Revised Statutes, § 4929, as amended by the act of May 9, 1902, provides as follows:

"Any person who has invented any new, original, and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law and other due proceedings had, the same as in cases of inventions or discoveries covered by section forty-eight hundred and eighty-six, obtain a patent therefor."

Under the statute, as thus amended, the patent sued on was issued, and its validity must be tested by the spirit and meaning of the legislative language. Whether the plain requirement of the statute has been complied with, that the design should be new, original and *ornamental,* in order to be patentable, must be considered at the threshold of this case, as in every other. No description accompanies the drawing or design which illustrates the invention of the patentee. The specification merely states that Joseph Mead has—

"invented a new, original and ornamental design for neck scarfs, of which the following is a specification reference being had to the accompanying drawing forming part hereof.

"The figure is a plain view of a scarf showing my new design.

"I claim the ornamental design for a neck scarf as shown."

It is apparent from the words "of which the following is a specification," that a detailed description and specification of what was claimed as the invention of the patentee, was intended to be subjoined. No specification or description does follow, and the reference "to the accompanying drawing forming part hereof" is without meaning, as the drawing is the only mode by which the design is suggested or exhibited. It appears, however, from the file wrapper, that a description of the design accompanied the application, as part of the specification, as would be supposed from the language we have quoted, which it immediately followed. The description is:

"The design consists in two ornamental connected aprons, each of which aprons is provided with a scalloped longitudinal edge and two transverse series of stitching at angles to each other, each series of stitches being located between opposing scallops."

Then follows the claim, as in the patent. Upon this specification the Patent Office, acting upon what seems to have been for some time a settled practice, suggested that if a proper drawing was filed, the detailed description would be surplusage and should be canceled. Accordingly, the applicant filed a corrected drawing, as shown in the patent, and removed from his specification the paragraph embodying the descriptive matter.

We do not criticize this practice of the Patent Office, as the novelty and beauty or ornamental character of a design may in most cases be best illustrated by a drawing without the aid of a description. The language of this description is however, here referred to for the bearing it has upon the question raised by the principal contention of the appellee, viz., that the invention embodied in the design was a unitary conception including the configuration of the article of manufacture, as shown in the drawing, and its surface ornamentation.

The configuration shown in the drawing is one that obtained in neckwear long prior to the date of the patent in suit, as is plainly shown in the specifications and drawings of the patent to Erskine, dated January 20, 1891. In the specifications of this patent, the patentee says:

"My invention relates exclusively to what are known as four-in-hand scarfs, in which there is a narrow neck portion, or band, and a wide scarf portion proper, the latter being from two to three times as wide as the former."

The patentee then claims as his invention a new mode of construction of these, at that time, common forms or configurations of neckwear, known as four-in-hand scarfs.

The narrow or neck portion of the scarf, as shown in the illustration of the patent in suit, as well as in the exactly similar configurations of neck scarfs exhibited in the illustration of the Erskine patent, as also in the well known four-in-hand scarfs to which Erskine refers, is purely functional. It connects what Erskine calls the "wide scarf portions proper," and by reason of its narrowness encircles the neck without showing above the collar or coat of the wearer but holds in place the wide ends or "scarf portions proper," which alone are visible when the scarf is in use and display everything which can be called ornamental in the design. Necessarily by these ends alone, thus ornamented, an appeal can be made to the eye of the observer. Upon these connected ends or aprons is displayed the ornamentation described in the rejected specification which we have quoted. That specification, though rejected, is significant in disclosing what the patentee himself thought to be his "new, original and ornamental design." "The design," he says, "consists in two ornamental connected aprons, each of which aprons is provided with," etc. It is clear that the connecting link between the two aprons is merely functional. It is necessary to hold the two broad ends or aprons in their proper place, and when so holding them, this link is invisible. To quote the language of the learned counsel for the appellant, utilitarian functions and structural considerations influence and confuse the mind by their consideration and lead it away from that alone which the design patent should cover.

It is not necessary to pass upon the question how far configuration of an article of manufacture, under other circumsatnces, may constitute, in whole or in part, an ornamental design, within the meaning of the amended statute, but when it is so claimed, surely the configuration must be such as to appeal to the eye of the observer as ornamental. It seems somewhat absurd to claim such configuration as part of an ornamental design which is only visible when the article to which it pertains is not in use. When in use, it is the surface ornamentation alone that appeals to the eye, and the connecting neck band might be supplied in other ways than by a narrowed portion of the material of which the scarf is made. The design must be ornamental when the scarf is on the neck of the wearer, and not be such as to only fulfill its purpose as an ornamental design when it is lying flat upon a table. The general understanding, that the essence of the design covered by the patent consisted of the ornamental appearance exhibited by the transverse series of diagonal stitches displayed on the broad and visible ends of the scarf, with scalloped edges, as described in the rejected specification, is also evidenced by the claim of the appellant, that it is manufacturing under this patent scarfs, differing widely in respect to the enclosing and invisible neck band, but, having the ornamented ends or aprons illustrated in the patent in suit; and such scarfs manufactured by the defendant are produced as evidence of infringement.

In this connection, it should not pass unnoticed that section 4929 of the Revised Statutes (U. S. Comp. St. 1901, p. 3398), before the amendment of May, 1902, spoke of any person who invented a "new and original design for a manufacture," the word "ornamental" being absent. It also included, as patentable, "any new, *useful* and original shape or configuration of any article of manufacture." It is apparent, therefore, that the language of the section, as amended, has restricted the scope of design patents as to shape and configuration, and it is not entirely clear what part, if any, shape and configuration may play as the basis for a design patent. However this may be, we have no difficulty in deciding, apart from the restrictions of the amended Act, that, under the facts peculiar to this case, the design for which a patent was granted is confined to the surface ornamentation in the scarf proper, and does not extend to the configuration, including the narrow neck band, which is never visible when the scarf is in the position for which it was intended.

If, however, our view as to this were different, it would still remain true that the configuration was old in the art of making neckwear many years before the date of the patent in suit, and the only invention that could have been claimed by the patentee, would have been for an ornamental design for such an article of manufacture; that is, a surface ornamentation to be applied to a neck scarf of this old configuration, and if the design of such surface ornamentation had been new and original with the patentee, he would be entitled to the protection of his patent from all appropriation of such design for the use specified in the patent. Unfortunately for the patentee in this case, the precise ornamental design illustrated by the drawing of his

patent and described in the canceled specification accompanying his application, appears in the exhibit of the Harrison muffler, whose public use for some months at least prior to the date of the patent has been, we think, sufficiently proved. The identity of the design of the patent in suit, as applied to the aprons or broad ends of the scarf illustrated in the drawing, with the ornamental design which characterizes the Harrison muffler, is perfectly apparent to the eye in the exhibits of the same side by side, in the record. It is true that the Harrison muffler is a straight muffler, with no narrow middle neck band, and the ornamental design is carried through from end to end, but it is clear that the application of this particular design to the scarf ends of the old four-in-hand blank does not involve patentable invention. As said in a case quoted by Judge Blodgett (Western Elec. Mfg. Co. v. Odell et al. [D. C.] 18 Fed. 321):

"The adaptation of old devices or forms to new purposes, however convenient, useful or beautiful they may be in their new *rôle*, is not invention. * * * For example, if one should paint upon a familiar vase a copy of Stuart's portrait of Washington, it would not be patentable, because both elements of the combination—the portrait and the vase—are old; but if any new and original impression, or ornament, were placed upon the same vase, it would fall within the express language of the section."

The section alluded to was the section of the Revised Statutes before the amendment of 1902.

The Harrison muffler, cut out in the middle so as to form a neck band, will show precisely the scarf of the drawing, with the two aprons mentioned by the patentee in his canceled description, with identically the same surface ornamentation. We do not think patentable invention can be attributed to the taking of the old ornamental design of the Harrison muffler and applying it to the still older configuration of the four-in-hand scarf.

In view of the thorough and satisfactory discussion of this and other points by the learned judge of the court below, it is unnecessary to further prolong this opinion.

The judgment below is therefore affirmed.

PHŒNIX KNITTING WORKS v. LOUER BROS.

(Circuit Court, N. D. Illinois. September 14, 1910.)

No. 30,073.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DESIGN FOR NECK SCARF.

The Mead design patent, No. 39,347, for a design for a neck scarf, is not void because no specification was filed showing the method of making the article which is sufficiently shown by the drawing. Also, *held* infringed on motion for preliminary injunction.

In Equity. Suit by the Phœnix Knitting Works against Louer Brothers. On motion for preliminary injunction. Motion granted.

See, also, 194 Fed. 696.

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

Walter H. Chamberlain, Winkler, Flanders, Bottum & Fawsett, and Leverett C. Wheeler, for complainant.

Charles W. Hills and John G. Elliott, for defendants.

SANBORN, District Judge (sitting as Circuit Judge). The three usual requisites for a temporary injunction being shown—that is, patent adjudicated, title in complainant, and infringement—defendants present several defenses to the granting of the motion. These are invalidity of the patent, collusion and fraud between the parties to the adjudication, and new evidence showing anticipation. Collusion and fraud are positively denied under oath by those against whom they are charged, and evidence to support the charges is mainly inferential or circumstantial. As the record stands, the charges are disproved.

As to validity of the patent: This is a design patent for a neck scarf. The applicant described the design as consisting of two ornamental connected aprons, each provided with a scalloped longitudinal edge and two transverse series of stitching at angles to each other, each series of stitches being located between opposing scallops; and claimed "the ornamental design for a neck scarf as shown." A drawing was submitted showing sharp corners of the serrated edges of the aprons. The examiner required a new drawing properly showing the design, and added that if a proper drawing was filed the detailed description would be surplusage and should be canceled. The applicant thereupon filed a new drawing, showing blunt corners such as would naturally result from the stitching as described in the specification; which was, pursuant to the examiner's requirement, canceled by the applicant.

It is now urged by counsel for defendants that the patent statute requires a description or specification of the method of making the article to which the design applies. It is said that this is necessary to prevent dispute and uncertainty as to what the design really covers, and that the practice of the Patent Office in requiring specifications in design patent cases to be struck out puts upon the courts the burden of determining what the invention really is. Section 4929, R. S. U. S. (U. S. Comp. St. 1901, p. 3398), relating to design patents, provides that the same proceedings shall be had as in other cases; and section 4933 (page 3399) provides that all the regulations and provisions which apply to patents for obtaining or protecting patents for inventions shall apply to patents for designs. What reason exists for the practice of the office in dispensing with specifications is unknown. It would seem to be an unsafe and doubtful practice. However, no court has ever held a design patent void, upon this ground alone.

In Tompkins Co. v. New York Woven Wire Mattress Co., 159 Fed. 133, 86 C. C. A. 323, the Court of Appeals for the Second Circuit held a design patent void on other grounds, saying that the statute requires a full, clear specification, and that it might be doubted whether the patentee had complied with the statute. This was the case of a miniature design for a bed spring, which had to be enlarged in actual use, and there was much doubt as to how the enlargement was to be made. In the present case the drawing of the design sufficiently indicates the

method of construction of the muffler, so that the specification, as the examiner held, is surplusage; in other words, the description is contained in the drawing.

The new evidence of the prior art adds nothing to what was before Judge Quarles in the suit where the patent was sustained. Such evidence is presented by affidavit. It is not so full, clear, and free from doubt as to justify a ruling different from that reached by him.

A preliminary injunction will issue as prayed for in the motion.

PHŒNIX KNITTING WORKS v. HYGIENIC FLEECED UNDERWEAR CO.

(Circuit Court, E. D. Pennsylvania. January 6, 1911.)

No. 605.

PATENTS (§ 328*)—INFRINGEMENT—DESIGN FOR NECK SCARF.

The Mead design patent, No. 39,347, for a design for a neck scarf, *held* valid and infringed on motion for preliminary injunction.

In Equity. Suit by the Phœnix Knitting Works against the Hygienic Fleeced Underwear Company. On motion for preliminary injunction. Motion granted. Dissolved on final hearing, 194 Fed. 703.

Winkler, Flanders, Bottum & Fawsett, Henry N. Paul, Jr., and Joseph C. Fraley, for complainant.

Hector T. Fenton, for defendant.

HOLLAND, District Judge. The design patent in suit was sustained on final hearing by the United States Circuit Court, Eastern District of Wisconsin. Phœnix Knitting Works v. Bradley Knitting Co. (C. C.) 181 Fed. 163. Following this decision, this court granted a preliminary injunction on the patent, in the case of Phœnix Knitting Works v. Grushlaw (C. C.) 181 Fed. 166, which order was affirmed by the Circuit Court of Appeals of this circuit. 183 Fed. 222, 105 C. C. A. 484. A number of other courts have granted preliminary injunctions on this design patent.

The suit is instituted for the purpose of restraining an infringement, and on this motion for a preliminary injunction there are in evidence 11 neck scarfs, of various colors and styles which the defendant is making. Ten of these are made in imitation of the plaintiff's design, that is, the body or attractive feature of which is the herringbone stitch and serrated edge, possessing, however, other ornamental features in addition to those shown in the patent, in that certain openwork lines have been produced running the length of the scarf. This is made by causing certain needles to omit knitting. This feature does not materially disturb or alter the attractiveness resulting from the herringbone stitch, which is the ground work and body of the defendant's neck scarf, and gives it its attractiveness; the additional features, in our judgment, adding nothing to the attractive appearance of the scarf. The pleasing impression of the whole article, as we view it, is still due to the zigzag knitting copied from the complainant's design.

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

The openwork lines running lengthwise of the scarf are not sufficient to avoid an infringement; it is simply a slight change, no doubt intended to avoid the responsibility for copying the patent. The scarf or green muffler marked "273 as 278 S. M." is admittedly not an infringement.

A preliminary injunction will be awarded against the defendant, pending the determination of this cause, to restrain it from making, using, or selling neck scarfs similar to any of those found in the complainant's exhibits of defendant's neck scarfs, excepting the one marked "273 as 278 S. M." The defendant, however, has gone to the expense of making quite a number of designs, and, in order that it may be protected against any loss, should the patent not be sustained on final hearing, the complainant will be required to give bond in the sum of $10,000 to the defendant, conditioned for the payment of any damage which may result to the defendant by reason of the issuing of this preliminary injunction against it.

Let a decree be prepared accordingly.

PHŒNIX KNITTING WORKS v. HYGIENIC FLEECED UNDERWEAR CO.

(Circuit Court, E. D. Pennsylvania. September 13, 1911.)

No. 605.

1. PATENTS (§ 28*)—PATENTABILITY OF DESIGN—INVENTION.
   The exercise of the inventive faculty is as essential to the validity of a design patent as to a mechanical patent, and the mere transferring of an old design to a new article does not constitute patentable invention.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 33; Dec. Dig. § 28.*]

2. PATENTS (§ 328*)—ANTICIPATION—DESIGN FOR NECK SCARF.
   The Mead design patent, No. 39,347, for a design for a neck scarf, is limited to the serrated edge of the scarf aprons and the herringbone stitch, which produces the same, as shown in the drawings, and as so limited is void for anticipation.

In Equity. Suit by the Phœnix Knitting Works against the Hygienic Fleeced Underwear Company. On final hearing. Decree for defendant.

See, also, 194 Fed. 702; 194 Fed. 696.

F. E. Dennett and Henry N. Paul, for complainant.
Hector T. Fenton, for defendant.

WITMER, District Judge. The complainant owning design patent No. 39,347, for a neck scarf or muffler, issued under date of June 9, 1908, to Joseph Mead of Milwaukee, Wis., and assigned to the plaintiff several days thereafter, sues the defendant, the Hygienic Fleeced Underwear Company, in equity, for alleged infringement, and praying for an accounting and injunction. The answer denies infringement of any exclusive rights validly secured by said patent to the complainant.

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

The validity of the patent was sustained in a contested case. Phœnix Knitting Works v. Bradley Knitting Company (C. C.) 181 Fed. 163. Following this decision, it appears that injunctions have been secured against other infringers in other districts. Among these suits were several in this court, one of which (Phœnix Knitting Works v. Grushlaw [C. C.] 181 Fed. 166) resulted in a decision which on appeal was affirmed by the Court of Appeals (183 Fed. 222, 105 C. C. A. 484) sustaining the propriety of the issuance of a preliminary injunction.

The patent was also before this court in the present case upon a preliminary injunction motion, and an opinion was rendered by Judge Holland, 194 Fed. 702, finding, so far as concerned the motion, that the defendant's neck scarfs infringed the patent. Since then Judge Killits, sitting at Cleveland, in the Northern district of Ohio, in a well-considered opinion not yet reported, reviewing the history of the litigation on this patent and distinguishing prior decisions rendered, no doubt benefited by an accumulation of researches, in a hotly contested case between the complainants and Nathan J. Rich et al., declared the patent invalid because of appearing anticipation.

Notwithstanding these decisions, their validity or importance as res adjudicata are only pursuasive as they appear based on well-settled principles of law supported by the evidence of the case. "Comity pursuades; it does not command." Mast v. Stover, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856.

This case is now before the court for final hearing, on what may be considered an opinion and remand from the appellate tribunal which leaves the court perfectly free, notwithstanding anything said in prior decisions, to consider the case de novo on evidence then appearing and others cumulative; the appellate court's opinion in the Grushlaw Case concluding:

"Notwithstanding anything that may have been said herein, it should be distinctly understood that it is not intended thereby to express any definite or controlling opinion upon either the question of the validity of the patent or its infringement."

In what, then, consists this new and useful invention or discovery given by the patentee to the public for which he in return claims exclusive right? The alleged invention is entitled in the specification a "design for a neck scarf," and the entire specification consists of the following words:

"Be it known that I, Joseph Mead, a citizen of the United States, residing at Milwaukee, * * * state of Wisconsin, have invented a new, original, and ornamental design for neck scarfs, of which the following is a specification, reference being had to the accompanying drawing, forming a part hereof. The figure is a plain view of a scarf showing my new design. I claim: The ornamental design for a neck scarf, as shown."

It will be observed that this specification contains no description whatever, save by implication from the words "ornamental design" and "as shown"; the alleged novelty is said to be contained in something shown in the drawing, in the nature of an ornamental surface appearance given to a known article of manufacture, known as a neck

scarf. Referring to the drawing to ascertain what this is, we see what is alleged in the specification to be "a plain view of a scarf"; and its characteristic features are obviously not the narrow central neck portion, for that has only to do with function and constitutes no part of a design, but the two similar end portions or breast aprons, and these we see are shown as alternating inclined lines with serrations on each selvage edge, though both the specification and drawing are wholly devoid of any description or even the most remote suggestion that the article is to be knitted material; and, unless this is presumed to be known to those skilled in the art, the patent is bad on its face for lack of disclosure sufficient to produce the "ornamental design," which is "shown" and alleged to be patented thereby.

After a detailed history of the procedure in the Patent Office pertaining to the grant, Judge Killits expressed the conclusion, in which we concur, that:

"The patent, if valid at all, should be construed as within the narrow limits of the drawing only, and that all that is patented, if anything, is the construction of a scalloped longitudinal edge and two transverse series of stitching at angles to each other, each series of stitches being located between opposing scallops," as specified in the original application presented.

The elimination of this detailed verbal specification and the permission to allow the patent to rest upon the drawing alone has been the source of much speculation as to its scope.

The complainant concedes that:

"The public are at liberty to make as many of them (neck scarfs) as they please, provided they refrain from using the characteristic zigzag stitch design including the scalloped edge effect" shown in the patent.

It is furthermore beyond dispute that the former is produced by a knitting stitch known as a full cardigan or herringbone stitch, and that the latter follows as a necessary result of the use of such stitch in knitted garments.

It is obvious therefore that the general shape of Mead's design is not involved, which is furthermore observed from the action of the examiner who failed to pass the application until satisfied that the novelty lay only in the ornamentation of the "aprons" by special arrangements of the stitchings.

This is also admitted by counsel for the patentees in reply to the comment of the examiner, to wit:

"This application has been further considered in connection with the amendment of April 16, 1908, and the claim presented is held to be lacking in invention and novelty in view of what is shown in the patents to Henry Boob, 114,397, May 2, 1871, improvements in knitted fabrics; J. H. Fleisch, 236,570, January 11, 1881, neck scarf; and W. B. Erkstein, 445,137, January 20, 1891, neck scarf."

To this criticism counsel for the applicant replied as follows:

"The references cited by the examiner have been carefully considered, and, as understood, fail to show applicant's design for neck scarf.

"Patent to Boob shows a knitted fabric, but the stitching is entirely different from the stitching of the fabric shown in the neck scarf filed as an exhibit with this application.

"Patent to Fleisch, No. 236,570, and patent to Erkstein, No. 445,137, both show neck scarfs, the enlarged ends of which are united by a relatively

narrow connecting web. Neither of the patents, however, show the enlarged ends of the scarf scalloped, as in applicant's device."

The alleged new design therefore may safely be said to reside in the surface ornamentation shown in the drawing which is claimed to show the use or employment, in the manufacturer's product, of a series of transversely disposed zigzag stitches, called "full cardigan" or "herringbone" stitches, which in alternating collocation necessarily produce a serrated or saw cut appearance on each selvage edge of the scarf apron.

It was well said by Judge Holland, on motion for preliminary injunction, that 10 of the 11 neck scarfs in evidence manufactured by the defendant are very like the plaintiff's design; "that is, the body or attractive feature of which is the herringbone stitch and serrated edge, possessing, however, other ornamental features in addition to these shown in the patent." These are no doubt an infringement of the alleged patent.

That the defense aims at the very root of this patent, arguing that the necessary effect of a series of such alternating stitches, disposed transversely to the length of a scarf, is obvious; but, if not, the United States patent granted to Bickford in 1872 for "improvements in knit fabrics and methods of knittings" clearly shows it. Fabrics knitted according to the Bickford method as described in his patent papers, and offered in the case before us for illustration, show "scalloped longitudinal edges" and "series of transverse stitchings at angles to each other," and it must be kept in mind that Mead does not claim a peculiar stitch, but only the result or appearance.

The proofs also establish a like appearance resulting from a similar method of knitting, employed long before the plaintiff's alleged patent, in the knitting of sweater sleeve blanks shown in the record on page 121, also in the fabric shown on page 117, and in the knit jacket made therefrom and shown on page 119, though in the two latter the stitches are larger and the saw cut effect less marked; but it is characteristic, and the difference is merely one of degree which is not material. The first two only of these prior uses were before the Court of Appeals in the Grushlaw Case, though we think that case went off merely on the question of whether or not the granting of the provisional injunction was an abuse of discretion in the trial judge, and was not in any sense a decision on the merits as stated, notwithstanding its criticism of the sweater sleeve blank, as a mere blank which when finished into a sleeve no longer plainly showed the saw cut edges, though it will not be denied will continue to show the alternating series of herringbone stitches which necessarily produce these edges.

[1] Again, although it appearing that the stitch or method of knitting, anticipating the design, was used in the manufacture of wearing apparel other than neck scarfs or mufflers, we think that it is equally certain that the mere transferring of an old design to a new and analogous use is not patentable design invention.

"The exercise of the inventive or originative faculty is required, and a person cannot be permitted to select an existing form, and simply put it to a new use, any more than he can be permitted to patent the double use of

a machine." Smith v. Saddle Co., 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606; Hammond v. Stockton, 70 Fed. 716, 17 C. C. A. 356; Cary v. Neal, 98 Fed. 617, 39 C. C. A. 189; American Co. v. Newgold, 113 Fed. 877, 51 C. C. A. 501.

"The exercise of the inventive faculty is just as essential to the validity of a design patent as it is to that of a patent for a mechanism." Myers v. Sternheim, 97 Fed. 625, 38 C. C. A. 345.

To be patentable it "must be original," and it must be the result of the "inventive," not the "imitative," faculty. Untermeyer v. Freund, 58 Fed. 205, 7 C. C. A. 183.

On this question of "double use" the late Judge Green, of the New Jersey district, in Mfg. Co. v. Harness Co. (C. C.) 45 Fed. 582, stated the principle as follows:

"I think it may be taken as settled that, to sustain a design patent, there must be exhibited in a production of the design an exercise of the inventive or originative faculty. * * * It follows necessarily that the adaptation of old devices, or of old forms or designs, though never so beautiful, to new purposes or ornamentation, however exquisite the result, is not invention. It is not begotten of originality. And so it is forbidden for one to choose an existing design, simply to devote it to a new use, and, because of such new use, successfully to claim the benefits of the patent laws.

"Certainly a total lack of novelty and originality in the complainant's design is clearly shown. There is, indeed, an adaptation of old designs to new purposes, but that is not invention. * * * It is apparent that this patent cannot be sustained. The design which is its subject may be beautiful; it certainly is not novel, nor is it original with the patentee."

[2] It will be admitted that these cases do not improve the conditions of analogous subjects; however that may be, we have in the present record a knitted fabric of the same stitches, in the same series, with two saw cut selvage edges and applicable to analogous use, including scarfs, jackets, etc. Surely it cannot involve patentable novelty to make a scarf, and of this fabric, rather than make of it the knitted jacket, or chest protector, of analogous use, as shown in the record. There can be no reasonable doubt that the design shown in these exhibits are the same in substance and effect as Mead's design of the patent in suit applied to an analogous use. Any doubt of anticipation that hypercriticism may involve is, however, removed by the remaining exhibit of prior art as shown in the Harrison scarf. In it is contained the identical design of the Mead patent, applied to the same subject-matter before the alleged invention. The one is practically a facsimile of the other save so far as lies in the shape of the neck part, which is not only old and functional in character and clearly not a part of the ornamental design patented to Mead.

A decree may be entered to the effect: First, that defendant has not infringed upon any of the rights of complainant under the Mead design patent, No. 39,347, in and by the sale of the mufflers, or neck scarf, in evidence, by reason of the invalidity of said patent; second, that the preliminary injunction heretofore entered in this case be dissolved, and that the defendant recover costs, which shall include reasonable expense for printing of defendant's record. Let the decree save complainant's exceptions and right of appeal.

PHŒNIX KNITTING WORKS v. RICH et al.

(Circuit Court, N. D. Ohio, E. D. July 22, 1911.)

No. 8,013.

1. PATENTS (§ 99*)—DESIGNS—SUFFICIENCY OF APPLICATION.

The practice of the Patent Office in requiring the omission of a detailed verbal specification from applications for design patents is not to be commended, it being doubtful whether such an application meets the requirements of Rev. St. § 4886 (U. S. Comp. St. 1901, p. 3382), and section 4929 as amended by Act May 9, 1902, c. 783, 32 Stat. 193 (U. S. Comp. St. Supp. 1909, p. 1274), that all applications shall contain a "written description" of the invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 133–139; Dec. Dig. § 99.*]

2. PATENTS (§ 252*)—DESIGNS—INFRINGEMENT.

When a design invention consists in nothing more than the bringing together of elements old in the art with slight modifications of shape in adapting or adjusting them to each other, the patentable novelty is only in the slight departure of form, and any subsequent use of the same basic elements with a variation of form of adaptation departing, to the discernment of an ordinary observer, from the slight change employed in the patent, is not an infringement.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 252.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DESIGN FOR NECK SCARF.

The Mead design patent, No. 39,347, for a design for a neck scarf, is limited to the combination of a scalloped longitudinal edge and two transverse series of stitching at angles to each other in a scarf of the general kind described and is void for anticipation. Also, *held* not infringed, as so construed, if conceded validity.

In Equity. Suit by the Phœnix Knitting Works against Nathan J. Rich and others. On final hearing. Decree for defendants.

See, also, 194 Fed. 696.

Hoyt, Dustin, Kelley, McKeehan & Andrews and Flanders, Bottum, Fawsett & Bottum (F. H. Bottum and F. E. Dennett, of counsel), for complainant.

J. H. Sampliner and Albert Lynn Lawrence, for defendants.

KILLITS, District Judge. The complainant, the Phœnix Knitting Works, as assignee of design patent No. 39,347, for a neck scarf or muffler, granted June 9, 1908, sues the defendants Nathan J. Rich, Henry Rich, and Samuel S. Sampliner, as N. J. Rich & Co., in equity, for alleged infringements and accounting and injunction. The answer denies both infringement and validity of the patent as for a new and original design.

The patent in question was adjudicated in the case of the complainant versus Bradley Knitting Company, by the Circuit Court of the Eastern District of Wisconsin in an opinion by Judge Quarles, reported in 181 Fed. 163. From this decision no appeal was taken; a commercial arrangement having been entered into between the parties to that case.

The opinion of Judge Quarles was followed by this court, Judge Tayler sitting, in the granting of a preliminary injunction in this case,

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

and by Judge Holland of the Eastern district of Pennsylvania, in granting preliminary injunctions in two cases (Phœnix Knitting Works v. Grushlaw [C. C.] 181 Fed. 166, and Phœnix Knitting Works v. Hygienic Fleeced Underwear Co., 194 Fed. 702, opinion filed January 6, 1911), and by the Circuit Court of the Northern District of Illinois, Eastern Division, Judge Sanborn sitting, in granting a preliminary injunction in Phœnix Knitting Works v. Louer Brothers, 194 Fed. 700.

The case before this court is apparently the most hotly contested of all the actions, and, by stipulation, practically all the evidence in the other cases has been brought into this case, together with much additional testimony, so that we have a wider range of testimony and more facts to consider than were before either of the courts referred to.

It is logical to first determine the scope of the patent under consideration. The application was filed February 17, 1908. The declaration and specification read as follows:

"To all whom it may concern: Be it known that I, Joseph Mead, a citizen of the United States, residing at Milwaukee in the county of Milwaukee, state of Wisconsin, have invented a new, original and ornamental design for neck scarfs of which the following is a specification, reference being had to the accompanying drawing, forming part thereof.

"The figure is a plan view of a scarf showing my new design.

"The design consists in two ornamental connected aprons, each of which aprons is provided with a scalloped longitudinal edge and two transverse series of stitching at angles to each other, each series of stitches being located between opposing scallops.

"I claim the ornamental design for a neck scarf as shown."

The file wrapper and contents disclose that this application met with these vicissitudes:

First, an exhibit was required. This was submitted.

Then objection was made by the examiner as follows:

"The drawing does not properly show applicant's neck scarf, and a new drawing clearly showing the design as disclosed by the exhibit filed is required, when further consideration will be given the application. If a proper drawing be filed, the present detailed description would be surplusage and should be canceled."

It appears that the specific objection to the original drawing was that the apices of the scallops were too sharp or angular to be the result of knitting in yarn; the exhibit submitted showing the scallops rounded naturally at their points. This trifling correction was made satisfactory to the examiner in charge.

Then, acting upon the examiner's suggestion quoted above, that portion of the specification which reads:

"The design consists in two ornamental connected aprons, each of which aprons is provided with a scalloped longitudinal edge and two transverse series of stitching at angles to each other, each series of stitches being located between opposing scallops"

—was stricken out. With the record in this condition, this comment was made by the examiner:

"This application has been further considered in connection with the amendment of April 16, 1908, and the claim presented is held to be lacking in

invention and novelty in view of what is shown in the patents to Henry Boot, 114,397, May 2, 1871, improvement in knitted fabrics; J. H. Fleisch, 236,570, January 11, 1881, neck scarf; and W. B. Erskine, 445,137, January 20, 1891, neck scarf."

To this criticism counsel for the applicant replied as follows; the underscoring being ours:

"The references cited by the examiner have been carefully considered and, as understood, fail to show applicant's design for neck scarf.

"Patent to Boot shows a knitted fabric, but the stitching is entirely different from the stitching of the fabric shown in the neck scarf filed as an exhibit with this application.

"Patent to Fleisch, No. 236,570, and patent to Erskine, No. 445,137, both show neck scarfs, the enlarged ends of which are united by a relatively narrow connecting web: Neither of the patents, however, show the *enlarged ends of the scarf scalloped, as in applicant's device.*

"It is thought that the applicant's design sufficiently differentiates from the neck scarfs shown in the references cited as to enable an ordinary person to readily distinguish between them.

"In view of a recent oral interview with the examiner, during which the references cited were fully discussed, reconsideration is respectfully requested."

This moved the examiner, and the patent was allowed to issue June 9, 1908. As granted it reads simply:

"Be it known that I, Joseph Mead, a citizen of the United States, residing at Milwaukee, in the county of Milwaukee, state of Wisconsin, have invented a new, original, and ornamental design for neck scarfs, of which the following is a specification, reference being had to the accompanying drawing, forming part thereof.

"The figure is a plan view of a scarf showing my new design.

"I claim the ornamental design for a neck scarf, as shown."

[1] Reaching the conclusions hereafter set forth, we need not discuss the attacks made by defendants upon the patent for alleged technical irregularities; but we are entirely in accord with Judge Sanborn in his opinion in the Louer Brothers Case and with the court in Tompkins v. New York Woven Wire Mattress Co., 159 Fed. 133, 86 C. C. A. 323, in criticising the practice of the Patent Office in requiring the elimination of the detailed verbal specification and permitting the patent to depend for specification simply upon the drawing alone. With those courts, we doubt very much whether the amended application complied with the statute requiring a full and clear specification. There should be no more room for speculation as to the scope of a design patent, when the claims and specifications are under consideration, than in case of a mechanical invention.

However that may be, we are clear from this detailed history of the procedure in the office in this case that this patent, if valid at all, should be construed as within the narrow limits of the drawing only, and that all that is patented, if anything, is the combination of a "scalloped longitudinal edge and two transverse series of stitching at angles to each other, each series of stitches being located between opposing scallops." Judge Quarles, in the case referred to, evidently considered that the general shape of Mead's design was not involved, for he allowed an injunction against a scarf which differed decidedly and erratically in the neck piece, because, only, that the two "ornamental

connected aprons" were similar to Mead's, and it is to be observed that the examiner did not pass the application until satisfied that the novelty lay only in the ornamentation of the "aprons" by special arrangement of the stitching. It was conceded in argument that the "scalloped longitudinal edge" is the natural result of so changing the setting of the knitting needles as to get the effect of "two transverse series of stitching at angles to each other."

The form of the scarf as shown in the drawing is clearly anticipated by a British patent granted in 1861 to one Tolhausen, patent for "improvements in comforters, neckties, cravats, and the like articles of garment for the neck and chest." Tolhausen's declaration describes his invention as follows:

"These improved comforters are made up of a comparatively narrow band of silk, cloth, or other suitable material, which band surrounds the neck or throat, and its two ends joining at the front part of the throat widen out into two wide scarflike flaps or shirts, with which the wearer covers his chest, by either crossing the said flaps, or laying them parallel (more or less overflapping) on his bosom. At the point where the narrow throat band merges into the wider flaps, the comforter is united by means of a studd or button, or a breast pin, or a clasp, or any other suitable locking device."

This language is a very graphic description of the form of the Mead scarf.

In some degree also this form is anticipated by a British patent, granted in 1906, to one Briggs, who says:

"My invention relates to improvements in ties, scarves, mufflers, and all knitted neckwear, and in the manufacture of the same, and has for its object the shaping and fashioning of such articles combined with particular methods of forming them, as shall render them much more comfortable and convenient in use and of far better appearance than hitherto.

"The invention essentially consists of forming these articles, whether of wool, silk, cotton, or any combination of same, or other fiber, with a narrower and thinner portion at the back of the neck. This enables these articles accommodating themselves better to the nape of the neck."

Aside from the references made by the patent examiner quoted above as in apparent conflict with Mead's alleged invention, we are referred to a patent granted to Bickford in 1872 by the United States, for "improvement in knit fabrics and methods of knitting." Fabrics knitted according to the Bickford method as described in his patent papers, and offered in the case before us for illustration, show "scalloped longitudinal edges" and "series of transverse stitching at angles to each other." It must be kept in mind that Mead does not claim a peculiar stitch, but only an appearance or result, and his specification, which now is the drawing alone, does not indicate any particular stitch, except as to result.

There has been introduced in evidence also by defendants a book put out in 1903, called the "Priscilla Crochet Book," in which a stitch practically identical in appearance with that shown in Mead's drawing is illustrated and described.

The case of Smith v. Whitman Saddle Company, 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606, assists the court in its conclusion that this patent, if at all valid, is limited to simply the exact design as

shown, and we quote this language from the opinion, at page 680 of 148 U. S., at page 770 of 13 Sup. Ct. (37 L. Ed. 606):

"The experienced judge by whom this case was decided conceded that the design of the patent in question did show prominent features of the Granger and Jenifer saddles, and united two halves of old trees, but he said: 'A mechanic may take the leg of one stove, and the cap of another, and the door of another, and make a new design which has no element of invention; but it does not follow that the result of the thought of a mechanic who has fused together two diverse shapes, which were made upon different principles, so that new lines and curves and a harmonious and novel whole are produced, which possesses a new grace and which has a utility resultant from the new shape, exhibits no invention.' And he held that this was effected by the patentee, and that the shape that he produced was therefore patentable. But we cannot concur in this view."

So that, if this may be said to be the law as applied to design patents, Mead could not be said to exhibit invention by simply combining elements that were old and common to such articles as neck mufflers. In the case of Smith v. Whitman Saddle Company, however, the Supreme Court found patentability in the mere fact that, in joining to the rear half of the Jenifer saddle the front half of the Granger form of saddle, there was a drop of the pommel at the rear somewhat sharper than in the Granger saddle, saying:

"The shape of the front end being old, the sharp drop of the pommel at the rear seems to constitute what was new and to be material."

However, they find that the saddles of the defendants, "while they have the slight curved drop at the rear of the pommel, similar to the Granger saddle, do not have the accentuated drop of the patent, which 'falls nearly perpendicularly several inches,' and has a 'straight inner side'"; and, because of this slight difference between the contending articles, the court holds that the defendants' design was not an infringement upon complainant's.

[2] The moral of this saddle case, as applied to the case at bar, is that, when a design invention consists in nothing more than the bringing together of elements old in the art with slight modification of shape in adapting them or adjusting them to each other, the patentable novelty is only in the slight departures of form, and that any subsequent use of the same basic elements with a variation of form of adaptation departing, to the discernment of an ordinary observer, from the slight change employed in the patent, is not an infringement. The case of Gorham Company v. White, 14 Wall. 511, 20 L. Ed. 731, hereafter cited, is not in conflict with this principle, for in it the patentability of the Gorham design of spoon handle as novel and original in all its elements was not at all considered; the sole question raised being whether White's design infringed.

Our conclusion, therefore, is that only an approximately intimate copy of Mead's "scalloped longitudinal edge with two transverse series of stitching at angles to each other" infringes whatever is valid in his patent, and that this consideration releases all of defendant's numbers save the three which Judge Tayler found to be substantial copies. Scarfs of the patterns which defendant was allowed to make under the preliminary order in this case upon a bond being given which have

straight longitudinal edges, although within the edge scallops appear, or which, being serrated or scalloped on edges, have the "two transverse series of stitching at angles to each other" interrupted by a change of needles to produce special longitudinal ornamentation of stitching on the flat surfaces of the "aprons," seem to us to be as striking departures from Mead's novel combination of old elements as that sustained as noninfringing in the saddle case above cited. This seems to be also the idea of the Patent Office, for since June, 1908, several design patents have been granted to Mead and assigned to complainant and to defendant Sampliner, assigned to defendant N. J. Rich & Co., for scarfs which differ from the original Mead design only in the stitching ornamentation. We notice, also, that, generally speaking, when infringements have been held in cases of obvious departures from the complaining design, as in the Gorham-White Case, the question of the novelty of the first design was not raised. A notable example is cited by complainant in Ashley v. Tatum Co. (C. C.) 181 Fed. 840, the inkwell case, decided by Judge Hand, in the Southern district of New York. In that case the two contending inkwells differed materially in appearance in detail, although the same radical departure from the lines of all other inkwells was common to both. The court there specifically found that there was no evidence before it showing that any one, before the complainant, had ever made an inkwell approximating in shape that in the complainant's patent, which was therefore basic in design. Mead, however, cannot be said to have a basic design patent in this case any more than could the complainant in Smith v. Whitman Saddle Company, supra.

[3] The question now remains to be considered whether the patent is valid even within these narrow limits. The law (section 4929, Rev. St., as amended [U. S. Comp. St. Supp. 1909, p. 1274]) says:

"Any person who has invented any new, original, and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, or more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law and other due proceedings had, the same as in cases of inventions or discoveries covered by section 4886, obtain a patent therefor."

Simonds' Law of Patents, commenting upon this section, says, at page 212:

"For a time it was the practice of the Patent Office to grant these design patents for almost any subject-matter presented, and with little or no inquiry as to whether any degree of patentable origination had been exercised. It is now tolerably well settled that design patents stand on as high a plane as utility patents, and require as high a degree of exercise of the inventive or originative faculty. In patentable designs a person cannot be permitted to select an existing form, and simply put it to a new use, any more than he can be permitted to take a patent for a mere double use of a machine; but the selection and adaptation of an existing form may amount to patentable design, as the adaptation of an existing mechanical device may amount to patentable invention."

The Supreme Court, in the leading case of Gorham Company v. White, 14 Wall. 511, says, on page 526 (20 L. Ed. 731):

"We are now prepared to inquire what is the true test of identity of design. Plainly, it must be sameness of appearance, and mere difference of lines in

the drawing or sketch, a greater or smaller number of lines, or slight variances in configuration, if sufficient to change the effect upon the eye, will not destroy the substantial identity. * * * If, then, identity of appearance * * * is the main test of substantial identity of design, the only remaining question upon this part of the case is whether it is essential that the appearance should be the same to the eye of an expert. The court below was of opinion that the test of a patent for a design is not the eye of an ordinary observer. * * * With this we cannot concur. Such a test would destroy all the protection which the act of Congress intended to give. * * * Experts, therefore, are not the persons to be deceived. Much less than that which would be substantial identity in their eyes would be indistinguishable in the eyes of men generally, of observers of ordinary acuteness, bringing to the examination of the articles upon which the design has been placed that degree of observation which men of ordinary intelligence give. It is persons of the latter class who are the principal purchasers of the articles to which designs have given novel appearances, and if they are misled, and induced to purchase what is not the article they supposed it to be, * * * the patentees are injured, and that advantage of a market which the patent was granted to secure is destroyed. * * * We hold, therefore, that if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other."

As suggested heretofore, it must be remembered that in this case the novelty of the Gorham design, in all its elements, was not in question in any form, wherefore the language we quote has little application to sustain a patent in a case where both novelty and originality are attacked. We quote the opinion here, however, because we believe the law is well stated by complainant, on page 77 of its brief, in this language:

"The test of novelty of a design, the test of infringement of a patented design, and the test of anticipation of a patented design are each and all the same simple test. Do the designs look alike to the eye of an ordinary observer—and not whether careful scrutiny and inspection will reveal differences."

It is easy to see why the same criterion operates to the same end in each of the three situations. Applying this principle to the facts before us, and recalling our conclusion that, if at all, the validity of the patent can only be upheld upon the appearance of the scalloped or serrated edges in connection with the two transverse series of stitching at right angles to each other, let us consider the testimony before us tending to show anticipation.

A large number of mufflers and neck scarfs which the evidence very conclusively shows were manufactured and in more or less use long prior to the date of Mead's application were produced before the court. They disclose forms or stitching, or both, resembling with more or less approximation that of the Mead design. Passing those of less consequence, we refer first to the Trask and Williamson mufflers, which were before the Illinois court, and which exhibit serrated or scalloped edges and zigzag stitches at least suggestive of the Mead design.

But the most important testimony, and that which is entirely new, not having been produced before either of the other courts, is exhibited in the Wilkinson scarf, shown to have been knitted in quantities prior to 1891, a large neck muffler the ends of which have a stitch and edge

answering very closely to the illustration of the Mead design, although the scarf itself is very much larger, and in the Thierfelder and Miller scarfs. Thierfelder, indeed, testified by affidavit in the Chicago case; but what was there but incompletely brought to the attention of the court is now before this court in the testimony of nine witnesses, who give their evidence in so artless a way, referring to domestic matters and other homely incidents for verification of dates and corroboration of statements, that the court is compelled to assume that they are intending to truthfully enlighten it. From them we learn that in the winter of 1904–05, Thierfelder, who was a knitter in a small way by occupation, produced in small quantities a scarf, a sample of which appears in this case as "Thierfelder's Sample Narrowed Neck Muffler No. 2." Considering only the enlarged ends or "aprons," as the term is used in Mead's original specification, we easily conclude that this fabric, supplied with a clasp and neatly folded in a carton, could readily pass to the ordinary observer for a muffler made after Mead's design.

Among the exhibits accompanying the testimony touching the Thierfelder production is a bill dated September 9, 1905, rendered by the United States Fastener Company, of Boston, to William Thierfelder, Kenosha, Wis., for ten gross of fasteners or studs, to be used on his mufflers, and the testimony is that his product was sold and publicly worn in his neighborhood in 1905.

Through the testimony of six witnesses, by deposition, we learn that one Max Miller, a manufacturer of knit goods in Brooklyn, N. Y., in the winter of 1905–06, made mufflers which he sold to the retail trade, among others to the witness Max Myres. Two mufflers said to be of this manufacture are produced in "Defendants' Exhibit Mrs. Miller's Muffler" and "Defendants' Exhibit Miller Muffler." Barring a little carelessness in knitting one of the enlarged ends or "aprons" in the latter, because of which the "scalloped longitudinal edge" on one side became straightened out, these articles are sufficiently similar to the Mead design as to lead a nonexpert to conclude, after superficial observation, that the same idea was followed in each.

We are aware that it is incumbent upon defendants to prove anticipation by very clear and very satisfactory evidence, and that the testimony must be rigidly scrutinized; but we think that this test is very fairly met. The witnesses speaking of these products cannot all be falsifying, and their testimony, fortified by the exhibits which they produce, is so clearly to the point that it can be explained away on no other hypothesis than that they must be totally disbelieved. There is no suggestion in the record that they are other than disinterested witnesses, and the court is not at liberty to discredit them upon whim alone.

We have alluded to the fact that there are many patents covering mufflers and neck scarfs and like articles involving various phases of the Mead design, reaching backward over a large space of time, and that neither form nor stitch was new in 1908. In Michigan, in central New York, in Philadelphia, in Eastern New York, in Wisconsin, the record shows neck mufflers of all sorts approximating to a more or

less degree the shape or stitching of the Mead muffler were being manufactured years before the date of Mead's application. These facts are very strongly corroborative of the claim of Myres and Miller, in Brooklyn, that the latter manufactured at the time he said he did the Miller mufflers, and of Thierfelder and his family and friends in Wisconsin that he manufactured "Thierfelder Sample No. 2."

Mead came into the art when the shape was old, the stitch was old, and the application of each to a neck muffler was old, and it is easy to see how entirely probable it is that likewise his special idea was both old and common to the knitting business.

We conclude, therefore, that the patent is invalid because of the anticipations shown on the record. In this conclusion we are in conflict with the Circuit Court of the Eastern District of Wisconsin and the courts which have followed that court.

The court in the case of Phœnix Knitting Works v. Bradley Knitting Co. (C. C.) 181 Fed. 164, seems to have been very much impressed by the extensive market enjoyed by the complainant for its scarf, and it has been urged to us as one of the evidences of novelty that the complainants have marketed half a million dozen of their mufflers, showing extreme popularity for their styles. We are not impressed with this fact as an evidence of the novelty of the Mead design in opposition to the apparent anticipations shown in evidence, for the reason that the market enjoyed by the complainant is plainly the fruit, as shown by the testimony, of very shrewd and extensive advertising. We suppose it is true that a design which by mere merit attains quick and great popularity must have the grace of novelty; but a great popular demand which is stimulated and worked up by much money and ingenuity spent in advertising does not go far in suggesting the same attribute.

Judge Quarles, in the case referred to, uses this language:

"The court was strongly impressed, while examining the complainant's samples and the various advertisements thereof in newspapers and magazines, that there is something very attractive about complainant's design. It is difficult to describe the peculiar elements which produce this effect. It may, in the language of the trade, be said to be 'jaunty,' 'natty,' 'smart,' 'neat.' Its lines are graceful. It is not the zigzag stitch alone, it is not the color nor the serrated edges, but what the French would call the 'tout ensemble,' that is responsible for this pleasing effect. Other scarfs have been exhibited showing various features that seem quite like the scarf of Mead; but they do not awaken the pleasing impression that is so marked in the complainant's design. Some are clumsy and coarse, and none of them approximate the complainant's design as to the general effect on the eye of the ordinary observer."

Judge Holland, in Phœnix Knitting Works v. Grushlaw (C. C.) 181 Fed. 167, quoted this language with approval and evidently because it had made much impression upon him.

Studying this case with the enlarged record before us, and applying to the case the decisions referred to, we are unable to see any substantial difference between the alleged anticipations brought to the attention of the court in this case for the first time and the Mead design as put upon the market by the complainant, except as to the "neat," "natty," "jaunty," "smart" way in which the complainant manufactured the latter and boxed it for the market—characteristics which

seem to have left so great an impression upon the Wisconsin and Pennsylvania courts. But Mead did not get a patent for "neatness" and "jauntiness" and "smartness" and "nattiness," but for a combination of a serrated or scalloped edged scarf with two transverse series of stitching at angles to each other, and it would seem to us that it would be carrying the patent law exceedingly far to put the premium of an exclusive right upon mere delicacy and taste in the manufacture and preparation for the market of a device which otherwise is not novel. Mere polish of an old idea is not invention.

A decree may be entered to the effect: First, that defendants have not infringed upon any of the rights of complainant under the Mead design patent, No. 39,347, in and by the manufacture or sale of mufflers known as defendants' Nos. 7,200, 7,201, 7,202, 7,001, 7,000, 7,300, 7,119, 7,115, 7,113, 7,212, 7,211, 7,210, 7,204, 7,213, 7,101, 7,100, 7,104, 7,112, 7,114, 7,103, 7,203, 7,116, 7,111, 7,118, 7,500, respectively; second, that defendants have not infringed upon any of the rights of complainant as alleged in its bill by reason of the invalidity of said Mead design patent, No. 39,347, for anticipation of all its claims; that the preliminary injunction and the permissive order heretofore entered in this case be dissolved; that defendants' bond heretofore required by the court be dissolved; and that defendants recover costs, which shall include the reasonable expense of printing defendants' record. Defendants' motion for reference to take an account for damages sustained by defendants because of the preliminary injunction is passed for future consideration. Let the decree save complainant's exceptions and right of appeal.

PHŒNIX KNITTING WORKS et al. v. HYGIENIC FLEECED UNDERWEAR CO.

(Circuit Court, E. D. Pennsylvania. October 9, 1911.)

No. 597.

1. PATENTS (§ 81*)—PRIOR USE—EVIDENCE.

In order to establish prior use of an invention to defeat a patent, the date of the alleged anticipation must be shown by evidence that is clear, certain, and precise, and beyond a reasonable doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 104; Dec. Dig. § 81.*]

2. PATENTS (§ 168*)—VALIDITY—CHANGE IN LANGUAGE OF CLAIM.

A claim of a patent is not invalid because its language was changed to meet the views of the examiner in the Patent Office, where the invention covered is the same described and claimed in the application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 244; Dec. Dig. § 168.*

Amendment of application, see notes to Cleveland Foundry Co. v. Detroit Vapor Stove Co., 68 C. C. A. 239; Hestonville, M. & F. Pass. Ry. v. McDuffee, 109 C. C. A. 613.]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MUFFLER.

The Mead patent, No. 963,235, for an improvement in mufflers, *held* not anticipated, valid, and infringed.

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

In Equity. Suit by the Phœnix Knitting Works and the Bradley Knitting Company against the Hygienic Fleeced Underwear Company. On final hearing. Decree for complainants.

See, also, 194 Fed. 696.

Winkler, Flander, Bottum & Fawsett, Henry N. Paul, and Joseph C. Fraley, for complainants.

Hector T. Fenton, for defendant.

WITMER, District Judge. The complainants in their bill allege that they are the owners, by assignment from one Joseph S. Mead, of letters patent No. 963,235, dated July 5, 1910, issued by the United States Patent Office on application, filed August 9, 1909, for an improvement in mufflers. The bill contains the usual averments that said alleged improvement constituted an invention; that it was not previously patented or otherwise known, nor in prior public use by others; that said complainants had introduced it into extensive public use; concluding with a charge of infringement by defendant and praying for an accounting and the issuing of injunctions, both preliminary and perpetual. The defendant's answer denies that the invention was novel, that it embodies patentable subject-matter, and that the claim is infringed. Whether it was infringed depends upon the scope and character of the patent in suit, the result to be accomplished, and how it compares with the product of the defendant.

The invention is adequately described in the specification of the patent and is sufficiently set forth in claim 1, which reads as follows:

"1. As a new article of manufacture, a knit scarf consisting in the combination of two elongated rectangular end members and a central V-shaped member, formed integrally, and having parallel upper and lower marginal edges."

The result to be accomplished by providing the neck portion of a muffler with a V-shaped angle, it seems, is twofold: The offset portion is adapted to extend downwardly along the back of the wearer, when the muffler is adjusted about the neck, and the point or apex of the angle has a tendency to draw inwardly toward the back and cause this portion to lie flat against the back of the wearer, thus tending to prevent the neck portion from wrinkling or folding into a mere rope around the neck, and furthermore to protect the glands or side of the neck.

The muffler, of the patent in suit, is centrally offset in a V-shaped angle, substantially identical with the central part of the neck portion of the mufflers produced, as manufactured by the defendant. In the patent, it is true, the angular offset of the neck portion is not so marked or extensive as appears in the defendant's mufflers, and as shown by the Tyrrell, Meyers, and Rosenfelt applications, compared by the examiner of the Patent Office on interference with the Joseph S. Mead; but I do not consider this difference as material. The real invention embodied in all these exhibits, while slightly differing in form, discloses one invention in substance which is covered by claim 1 of the patent. The rule was stated by Mr. Justice Clifford, in delivering judgment in the case of Machine Co. v. Murphy, 97 U. S. 120–125, 24 L. Ed. 935, where he said that:

"In determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do or what office or function they perform, and to find that one thing is substantially the same as another, if it perform substantially the same function in substantially the same way, to obtain the same result; always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result."

Tested by this rule, the charge of infringement made against the defendant is clearly made out.

The defendant has set up two alleged anticipating patents, to wit: United States letters patent to J. C. Scott, No. 885,872, dated April 28, 1908, and applied for December 20, 1907; and Canadian letters patent to A. B. Tyrrell, No. 112,770, dated June 30, 1908. The depositions of Joseph S. Mead, corroborated by William Weimer and Herman Gardner, although bearing in mind that the same character of conclusive and convincing proof is required of a patentee seeking to establish an earlier date of invention as is required of a defendant seeking to establish an anticipating date, show conclusively that the Mead invention was made not later than April, 1907, when scarfs or mufflers fully embodying it were produced at the factory of one of the complainants and sold to the public. Hence the applications for the Scott and Tyrrell patents following this date do not anticipate.

[1] The defendant made an effort to prove alleged purchase and resales of mufflers, in 1906, of the type in suit, by a certain New York dealer, Max M. Myers. No book entries or records of any kind in relation to the transaction are produced. The mufflers were sold to a person in Alaska; hence a full description of the same also rests in memory. The transaction, if it did occur, may have been at a later date. It is such a common experience that witnesses called to prove an anticipation make a mistake in their dates, where they are testifying solely from recollection and not from dated records, that very little reliance whatever is to be placed upon such testimony. It is a familiar rule that, in order to prove an instance of prior use of an invention, the date of the alleged anticipation must be clear, certain, and precise beyond any reasonable doubt. The testimony of the witnesses offered does not afford the proof required for the purpose intended.

The established principle in weighing such evidence is thus stated by the Supreme Court of the United States:

"The burden of proof is upon the defendants to establish this defense. For the grant of letters patent is prima facie evidence that the patentee is the first inventor of the device described in the letters patent and of its novelty. Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486 [23 L. Ed. 952]; Lehnbeuter v. Holthaus, 105 U. S. 94 [26 L. Ed. 939]. Not only is the burden of proof to make good this defense upon the party setting it up, but it has been held that 'every reasonable doubt should be resolved against him.' Coffin v. Ogden, 18 Wall. 120, 124 [21 L. Ed. 821]; Washburn v. Gould, 3 Story, 122, 142 [Fed. Cas. No. 17,214]." Cantrell v. Wallick, 117 U. S. 695, 6 Sup. Ct. 973, 29 L. Ed. 1017.

Nonpatentability is asserted in the answer upon the ground that the central V-shaped portion of said muffler involved no inventive idea, but was the result of common mechanical skill. The claim in this particular bearing the approval of the Patent Office, not in a mere formal way, but after careful examination brought about by contest, lends weight against such assertion.

It may be true, as defendant asserts, that this invention, when once disclosed, is apparently quite obvious and simple. This is the case with many inventions. The inference is often, indeed usually, fallacious, since the important consideration is: If so simple, why had it not been done before?

It appears that from 4,000,000 to 5,000,000 of these patented neck scarfs were sold during the past year, and that they met with instant favor when produced. It is not likely that a scarf, for which there appears to be such a demand, would not have been placed upon the market long before if it could have been produced by persons of ordinary skill.

The record however furthermore discloses that an expert knitter, engaged by the defendant in the manufacture of such garments, realizing the need and importance of a shaped neck muffler, after some experiments, was unable to produce such to his satisfaction until knowledge was communicated to him of the plaintiff's invention.

[2] Nor is the patent invalid because of claim 1 having been read into it by the examiner on which the several applications were placed on interference. This claim did no violence to the oath appended to the application. By it the examiner only expressed in different words and phrases the invention described and claimed by Mead in his application filed, and of those competing with him. The case differs, in this particular, from Steward v. Am. Lava Co., 215 U. S. 161, 30 Sup. Ct. 46, 54 L. Ed. 139, cited by defendant's counsel, wherein it was decided that an oath was required to sustain the amendment. This for the reason, as said by Mr. Justice Holmes:

"It appears to us plain that Dolan's attorney introduced not merely the theory, but the mode of applying it, for the first time, in the amended specifications; or, in other words, then for the first time pointed to an invention. * * * This being so, the amendment required an oath that Dolan might have found it difficult to take, and for want of it the patent is void."

[3] The conclusion of the court is that the patent is valid, and that claim 1 thereof has been infringed by the manufacture and sale of defendant's mufflers. It follows that the complainants are entitled to the relief sought by their bill, and that defendant should be enjoined from further infringement, which is, accordingly, so ordered and adjudged, with costs of suit to be taxed against the defendant. The usual reference may be had, if desired, by complainants.

PHŒNIX KNITTING WORKS et al. v. RICH et al.

(Circuit Court, N. D. Ohio, E. D. November 27, 1911.)

No. 8,068.

1. PATENTS (§ 162*)—CONSTRUCTION—EFFECT OF PROCEEDINGS IN PATENT OFFICE.

An applicant cannot obtain favorable action by the Patent Office on the theory advanced to the examiner that the invention consists of but a narrow distinction from the inventions previously patented or articles in common use, and, after securing a patent, insist that it should be given by the courts a broad construction such as was refused by the Patent Office and abandoned there by the applicant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 237; Dec. Dig. § 162.*

Conclusiveness and effect of decisions of Patent Office in proceedings on applications, see note to Novelty Glass Mfg. Co. v. Brookfield, 95 C. C. A. 530.]

2. PATENTS (§ 328*)—ANTICIPATION—MUFFLER.

The Mead patent, No. 963,235, for a knitted neck scarf or muffler having a V-shaped neck portion extending downward in the back, is void for anticipation in the prior art.

3. PATENTS (§ 325*)—SUITS FOR INFRINGEMENT—COSTS—UNNECESSARY EXPENSE.

A defendant in a patent suit, whose counsel were compelled, without adequate reason, to go from Milwaukee to Denver to take the deposition of the patentee, although his place of business was in Milwaukee, and he was there a few days previously, and after the service of notice to take other testimony there, *held* entitled to have the unnecessary expense so incurred taxed as costs against complainant.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 325.*]

In Equity. Suit by the Phœnix Knitting Works and the Bradley Knitting Company against Nathan J. Rich, Henry J. Rich, and Samuel S. Sampliner, doing business under the firm name of N. J. Rich & Company. On final hearing. Decree for defendants.

Hoyt, Dustin, Kelley, McKeehan & Andrews, Flanders, Bottum, Fawsett & Bottum, and Erwin & Wheeler (A. C. Dustin, F. H. Bottum, L. C. Wheeler, and F. E. Dennett, of counsel), for complainants.

J. H. Sampliner and Albert Lynn Lawrence, for defendants.

KILLITS, District Judge. The complainants sue as assignees of letters patent, dated July 5, 1910, No. 963,235, issued on an application filed August 9, 1909, to Joseph S. Mead, for an improvement in mufflers. The bill contains the customary allegations to establish the validity of the patent, that the invention was in extensive public use, and that the defendants infringed, including a prayer for an accounting and an injunction, preliminary and perpetual. The answer denies the novelty of the invention, that it embodies patentable matter, and that the defendants infringe. No temporary injunction was urged, and the case is before the court on the merits.

This patent was adjudicated at the suit of the complainants against the Hygienic Fleeced Underwear Company, in the Eastern district of Pennsylvania, opinion by Witmer, J., filed October 9, 1911 (194 Fed.

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

717), and it is one of several patents, design as well as mechanical, recently issued by the patent office upon the subject of a style of neck muffler now quite popular, one of which was before this court in the suit of Phœnix Knitting Works v. Rich et al., 194 Fed. 708, the present defendants, and declared invalid in an opinion filed. The record in the Pennslyvania case is before us, and from it and the opinion of the court it is clearly apparent that we have a more extensive set of facts and a much more serious defense to consider than were before the court in that case.

The patent at bar contains three claims, and underwent a peculiar experience in the Patent Office, which is urged to the court as one of the grounds of invalidity. The description of the alleged invention, verbal as well as drafted, discloses a neck muffler, with a central neck band, in four well-defined sections, the two central sections forming a V, integrally connecting with narrower horizontal sections, which integrally connect with end sections or aprons, which are designed to overlap and extend and cover the chest of the wearer, the point of the V in the central neck portion performing the triple function of a covering to the upper part of the wearer's spine, of affording a better adjustment around the wearer's neck, and of securing, through the pressure of the coat collar thereon, its retention in position. The inventor also claimed that this peculiar construction lessened the liability of stretching or distortion through wear. The specifications also disclaim any limitation to the precise formation and arrangement of the several parts, but claim protection for such manifest modifications as were within the principle and spirit of the invention.

The claims as originally framed in the application were substantially within the limitations of the invention as described. During the progress of the case through the Patent Office, under rule 96, the examiner in charge suggested, for the purpose of declaring an interference, that the first claim be withdrawn, and that a claim which was present in three other pending applications be substituted for claim No. 1, in the following language:

"As a new manufacture, a knit scarf consisting in the combination of two elongated rectangular end members and a central V-shaped member formed integrally and having parallel upper and lower marginal edges."

The applicant accepting this suggestion, an interference was declared with the applications of Meyers, Rosenfeld, and Tyrrell (two of the last).

It is quite apparent that these four alleged inventors were dealing with substantially the same alleged invention. During the progress of the interference, Meyers became in default, and Rosenfeld and Tyrrell (the former abandoning his attorneys and accepting the latter's counsel) yielded to Mead; Rosenfeld conceding priority to Mead, and Tyrrell abandoning the subject-matter of the issue.

At first Rosenfeld was represented by counsel in Detroit. His concession, however, was executed in Milwaukee, the home of the Phœnix Knitting Works, in the presence of counsel for Tyrrell and for Mead. Tyrrell was an officer of the Bradley Knitting Company, and,

upon the allowance of the patent to Mead under these circumstances, the Bradley Knitting Company became joint owner with the Phœnix Knitting Works, of which corporation Mead was vice president.

The facts give the court very little reason to overindulge the presumption that allowance by the Patent Office is a prima facie establishment of the novelty of the invention and identity of the inventor. They are too redolent of an amicable adjustment, if not of a juggling, and all the more suggestive in view of the fierce competition in the knitting art over the subject-matter. The effect was to read into the Mead patent the only claim which is worthy of the court's serious attention, and which, in its terms, is plainly at some variance with the description of his invention.

Three mufflers are offered by the complainant as samples of the styles which they claim the right to make under this patent. Complainant's Exhibit No. 1 is a muffler which answers the description of the patent, having six plainly marked sections, four in the neck portion, as described. It meets the terminology of claims 2 and 3.

Exhibit No. 2 is a muffler with three sections to the neck portion, the outer sections being diagonal to the apron extremities with which they are integrally connected, but separated from each other by a horizontal central portion, forming a U-shape for the neck. It can come under no claim of the patent, and is so divergent from any description that, if it is under the patent, it must be regarded as within the reservation, a mere modification without material departure from the principle and spirit of the invention.

These two exhibits are the manufacture of the Phœnix Knitting Works. The third exhibit is made up of four parts; the apron extremities and neck portion consisting of two sections, forming a large V. It is a product of the Bradley Knitting Company.

Three mufflers of the defendant are alleged to be infringements. One, defendants' "illustrative Exhibit," we may dismiss, because it is conceded that the only attempt made by defendant to manufacture it was in the making of one solely for illustrative purposes in this case and subsequent to the filing of the complaint. It is substantially identical with complainants' Exhibit No. 1, and defendants are not attempting to otherwise make it.

Another is a substantial copy of the Bradley manufacture, having a large V-neck, with no horizontal sections in the neck portion. If claim No. 1 in the patent is valid, it is a clear infringement.

The remaining article alleged for infringement is a U-neck muffler, upon which the Patent Office has granted defendants' assignor a patent.

In the view we take of the state of the art prior to Mead's application, and the limitation which must be placed on the construction of Mead's patent, if valid at all (which will be hereafter discussed), we may dismiss once for all, as noninfringing defendants' U-shape muffler, upon the principle that what is claimed to be an infringement on a patent would be held to be an anticipation if offered for that purpose, for its construction and shape is clearly a more material departure from the lines of the Mead muffler, as described in his patent,

than are several of the constructions offered for our consideration as anticipations.

[1] We believe it to be a correct principle that one cannot obtain favorable action by the Patent Office upon the theory advanced to the examiner that the invention consists of but a narrow distinction from the inventions previously patented or articles in common use, and, after obtaining a patent upon this line of argument, insist that it should be given by the courts a broad construction such as was refused by the Patent Office and abandoned there by the applicant.

The history of claim 1 illustrates our position. The Tyrrell application was filed eight months earlier than Mead's. Within a month, by amendment, what appears now as claim 1 in the Mead patent was added to Tyrrell's claims. The examiner, nearly two months before Mead applied, rejected the Tyrrell application, saying that claim 1 was anticipated by a patent issued to Scott and by the Pick (British) patent, hereafter considered by us. In a statement to the examiner in chief, the examiner comments:

"All that appellant appears to have done is to construct a muffler of the form shown by Pick, of knit fabric, instead of from the material specified by said Pick patent. The use of knit fabric for the construction of scarfs and mufflers is as old as the use of these articles of apparel. The patent to Scott shows a knit structure and was cited for this purpose alone.

"To merely knit a muffler of the old and well-known form shown by Pick from cloth or fur would certainly involve nothing more than the substitution of one well-known material for another. Appellant appears to rely entirely on some slight changes in the design of his structure over that of Pick. * * * It is perfectly plain that they are matters of design only and have no place in an application for a mechanical patent.

"The substitution of one material for another necessarily carries with it certain slight changes in the design of the article produced. The useful features of applicant's scarf, namely, the rectangular end members, and the pointed V-shaped neck portion extending downward in the back, are clearly shown by Pick and are fully capable of performing all the functions claimed for them by appellant."

On appeal, counsel for Tyrrell, who are of counsel for complainants in this case, urged upon the examiners in chief, among other things, this:

"Owing to its angular V-shaped central portion, it is adapted to be more easily and cheaply manufactured by the knitting process than scarfs having a curved or semicircular portion."

Upon this, and other arguments pertinent to the description of Tyrrell's invention, but not consistent with Mead's description, either verbal or pictorial, the examiners in chief allowed the claim to Tyrrell in this language:

"This claim is specific to the construction shown in the drawings and differs considerably from the neck scarfs shown in the references."

We interpret this to mean that all that is allowed is precisely the construction shown in the drawings (Tyrrell's, not Mead's); and the language which we have quoted, both from the arguments of counsel and the decision of the board, very clearly excludes the idea that a claim was then contemplated which should cover a manufacture with a U-shaped neck portion.

Two or three days later, the examiner, ignoring the plain dissimilitude between Tyrrell's claim 1, allowed by his superiors over his rejection only on the narrow basis that it was specific to Tyrrell's described construction, and the muffler Mead is talking about in his application, invited the latter, as above stated, to adopt it, and thus gave it a breadth of application then for which neither its originators ever contended, nor the examiners in chief granted. Plainly, if the board acted advisedly in Tyrrell's case, in giving a reason for overruling the examiner and allowing the claim then, had the examiner rejected this claim if original with Mead, they would have sustained him, for a greater reason existed for declaring it inapplicable in Mead's case than Tyrrell's, and the criterion of distinction which the reasoning of the examiners in chief sets up but more vividly discloses the inapplicability of the claim to Mead's alleged invention. This manifest improvident dragging of Mead's case into the interference between the other three applicants, who were really on common ground, became subsequently a special providence to complainants in this case through the treaty, noted above, between Rosenfeld, Tyrrell, and Mead; the two earlier applicants yielding to the later (Mead) the honors of invention after the Seattle man (Meyers) lost heart. Much opportunity as there exists here to question the patent before us, we are pleased to assume, for the purposes of this case, that claim 1 is validly a part of it, and thus escape the otherwise necessary consideration of the trivial technicalities and microscopic distinctions indulged in the administration of the patent law which are making a patent right something of a joke in popular estimation, and which cause a question if it is a subject for national congratulation that we have passed the million mark in the issue, in which fact debate is possible whether the proof is of the inventive genius of our people or of a phenomenal capacity for hair splitting; for there is left in this case, to its determination, the comparatively easy task of weighing the evidence upon the subject of the field open to Mead's fertile and inventive brain.

In Elliott v. Youngstown Co., 181 Fed. 349, 104 C. C. A. 179, the court remarks:

"The fact that so many persons caught the idea goes rather to prove that it was simple and obvious, and not that it required inventive genius to conceive. It is not like the case where the art is waiting for the device, and inventors striving unsuccessfully to produce it."

The pertinency of this observation to this case is obvious when we recall the fact that at the same time several men, who lived in widely scattered portions of the country, were in the Patent Office simultaneously claiming this alleged invention.

These coincidences may be explained by the state of the prior art, which is well exhibited by the record in this case. So great a contrast in defenses exists between the record here, and that before the court at Philadelphia, that some ground is afforded for the suspicion that just enough was made in the latter court to present an adjudication on the apparent merits. We have had, in Phœnix Knitting Works v. Rich et al., 194 Fed. 708, involving Mead's design patent, a somewhat

similar experience, and were compelled in that case, because of a larger record and more complete defense, to differ with the Circuit Court for the Eastern District of Wisconsin and hold the patent then under consideration invalid. The Wisconsin case (Phœnix Knitting Works v. Bradley Knitting Company [C. C.] 181 Fed. 163) was between the two complainants in the case at bar, then in apparent adverse relation, and represented therein by counsel as adversaries who now with their clients join in prosecuting the suit against the defendants herein.

We have alluded above to the fact that the interference involving the application for the patent in suit was resolved in Mead's favor by the surrender in the home city of Mead's company, of his rivals, Tyrrell and Rosenfeld. It is interesting to note that this took place six weeks before Judge Quarles' decision of the case in 181 Fed., which may account for the feebleness of a defense which enabled the court to find the design patent valid. Within a month after this decision was had, and just a week after the allowance of the Mead patent now under consideration, the adversaries in that action became the joint assignees of Mead's rights thereunder. The parallel of frail defenses between the Wisconsin and Pennsylvania cases may be a mere coincidence. If so, it becomes all the more remarkable when we compare the record of the latter with that before us dealing with the same patent and the same contention.

[2] In the answer to the bill in the case at bar it is alleged, among other things that the Mead device was anticipated by a muffler sold by Max Myres of New York. In the Philadelphia case the same defense was offered. In March, 1911, for use in this case, as well as in the design case heretofore decided by this court, the depositions of six witnesses were taken on this subject, and their testimony is before us for consideration. In April a stipulation was entered into between counsel for complainant and defendant in the Philadelphia case that the testimony of four of these witnesses as taken for this court might be used there on behalf of the defendant. The witnesses whose testimony was not stipulated in that case were the manufacturer who made the article sold by Myres, and his wife. The names of these witnesses and the importance of their testimony were clearly indicated in the depositions used before Judge Witmer, and why all of the evidence then in deposition which was available was not employed for the defense of the Hygienic Fleeced Underwear Company is incomprehensible. The court says of the Max Myres muffler that it was of the "type in suit," and, although regarding the testimony as thus important, rejected it, for the purposes of the case before it, because it was not clearly proven to the court's judgment that the transaction occurred before Mead's alleged invention. How it would have been regarded with the corroboration of the omitted depositions is another question.

In deciding Phœnix Knitting Works v. Rich et al., 194 Fed. 708, we accepted these depositions with others as proving anticipation of the Mead design, making this comment, pertinent here as applied solely to this testimony:

"We are aware that it is incumbent upon defendants to prove anticipation by very clear and very satisfactory evidence, and that the testimony must be rigidly scrutinized; but we think that this test is very fairly met. The witnesses speaking of these products cannot all be falsifying, and their testimony fortified by the exhibits which they produce, is so clearly to the point that it can be explained away on no other hypothesis than that they must be totally disbelieved. There is no suggestion in the record that they are other than disinterested witnesses, and the court is not at liberty to discredit them upon whim alone."

Applying to the proper consideration of the testimony of the four witnesses on this point whom Judge Witmer considered that of Mr. Miller and his wife, not in the Philadelphia record, we are compelled to find that, in the early part of 1906, Miller made and sold to Myres a quantity of mufflers which are plainly within claim 1 of the Mead patent and clear anticipations thereof. The witnesses testify with a wealth of references to domestic matters, places of residence and business, and other details, easily susceptible of disproof if false, and, their six depositions being unimpeached and read together, establish both fact and date, unless we arbitrarily reject them as credible witnesses which we cannot do.

Undoubtedly the court must scrutinize carefully the testimony offered to establish a prior use, and the rule should be observed that in such testimony the evidence must appear superior to a mere preponderance and must prove the priority strictly; but there is no hard and fast rule which would exclude such testimony as that touching the Myres muffler, and, bearing in mind the conditions under which these witnesses testified and the fair opportunity offered by the character of their testimony to impeach them, if that were possible, we are minded to accept it for what it purports to be worth. As in Sipp v. Atwood, 142 Fed. 149, 154, 73 C. C. A. 367, the subject-matter is "so simple in character that it is impossible to believe that an ordinarily intelligent man could be mistaken" as to its exact form and function.

Credence of this Myres testimony is assisted by the fact already noticed that at least three applicants were simultaneously before the Patent Office with his construction, one of whom (Meyers), separated from him by the continent, had made and sold a muffler of very nearly the same pattern before Mead applied, and also, by the state of the prior art, which was such as to give rise naturally to the application of V-neck shapes to knitted mufflers.

Stryker, in 1874 (No. 148,389), patented a fur collar which embodies in its shape the suggestion of Tyrrell's V-neck. The Stryker design in knitting is an illustrative exhibit in this case. Pick, in 1878, patented (No. 208,034) a cloth tippet or Victorine, having previously obtained a British patent, in a shape sufficiently suggestive to cause the examiner to use it as a controlling reference for the rejection of Tyrrell's application as we have seen above. Flues, in 1870, was granted a design patent (No. 3,987) for a shawl mantle which is in the shape altogether of Tyrrell's V-neck, a knit illustration of which is before us. Bickford, in a patent allowed him in 1872 (No. 131,387) for "improvements in knit fabrics and methods of knitting," shows in

his figure 1 what is substantially one-half of Tyrrell's V-neck muffler. The figure is manifestly incomplete, and is plainly intended to be suggestive of what might be accomplished by following the patentee's methods. Any one of most ordinary intelligence, in the fierce competition of the muffler business, could see the V-neck in Bickford's design. Several other early patents, less suggestive but still embodying the germ of the idea, are before us also. The industry of defendants' counsel has also disclosed a "crochet kerchief" illustrated in an 1868 issue of "Harper's Bazaar," which has a "bias upper edge," disclosing an effect producing Mead's and Tyrrell's results in neck adjustment, and presenting an adjusted appearance very similar in the drawing to Mead's figure 2. Solomon Meyers, the Seattle man, who, three weeks before Mead, applied for a patent on a construction with a V-neck, blunting the point of the V by a few horizontal stitches, says that the idea came to him because in 1904 he was employed in the Blauvelt factory in Newark, N. J., where was knitted a sweater with a V-shaped opening faced with an integrally knitted facing, which follows the lines of Bickford's figure 1, and which is before us in an illustrative exhibit. Tyrrell also obtained a patent in Canada, more than a year before Mead's application, for an identical V-neck muffler. Thierfelder, at Kenosha, Wis., in 1904, produced and sold a muffler with serrated or V-shaped edges about the neck portion, effecting the same result touching distortion about the neck as is claimed for Mead's invention, and in his testimony remarks that:

"There are different sizes of zigzag. There is five round and six round, and you might make a zigzag two hundred round."

Tyrrell's V-neck is clearly the result of a number of "zigzag" rounds in knitting.

None of the foregoing testimony was before the Pennsylvania court, except, as we have noted, part of that relating to the Max Myres mufflers, and Tyrrell's Canadian patent, which, upon the evidence before that court, was very properly there disregarded because the date of its application is subsequent to Mead's proved use of his invention. The Pick (British) patent was, indeed, pleaded in defense in the Hygienic case, but not brought to the court's attention, although considered so important by the examiner in rejecting the V-neck claim. And, as further suggesting the fragility of the defense before Judge Witmer's court, we note that, of the six witnesses for complainant in rebuttal, five, who alone speak to the important issue of anticipation, including Mead himself, were not even cross-examined.

We admit the cogency of the reasoning upon the record before the court in the Eastern district of Pennsylvania of the opinion in that case; its conclusions could hardly have been otherwise. But the different and more ample facts in testimony before us deprive the judgment of that court of the persuasiveness which, under other circumstances, it would be entitled to. That court undoubtedly acted upon the assumption that all the light obtainable was before it; we are able to see clearly that such was not the case. Whether the absence of easily obtained testimony of importance was due to a purpose, or

mere oversight, we ought not to venture an opinion; the result is the same in any event.

Some question also arises whether Mead actually applied for his patent (August 9, 1909) within the two years limitation. In cross-examination, Q. 82 and answer are as follows:

"Q. 82. I find in the preliminary statement that you 'reduced said invention to practice on or about the first part of the month of April, 1907.' Will you please state what you did at that time to warrant you in stating under oath that you had reduced the invention to practice? A. As soon as it came out, I immediately went out to get orders on it."

And some testimony of Wiener, his colleague, as an officer of the Phœnix Works, tends to support the claim that the invention was public prior to August, 1907. However, we feel that we are giving the rule requiring strict proof of anticipation full honor when we hold that anticipation of this invention is established by the evidence in this case.

Of course, it is not invention to substitute one material for another to produce the same result, and the modifications in the Tyrrell-Mead pattern from those existing in the above references are so simple as manifestly not to require the faculty of invention. American Roll Paper Co. v. Weston, 59 Fed. 147, 8 C. C. A. 56.

In the words of the court, in Lee v. Hart (C. C.) 43 Fed. 670:

"If the improvement had been a complex mechanism, if the essence of the invention had been the nice adjustment of parts to produce a result, or if the thing to be done required genius of a superior order, the testimony would have been insufficient."

As this court says, we must not forget "that it requires less testimony to establish a fact which was very likely to have occurred than to establish an improbable theory."

Our conclusion, therefore, is that the bill should be dismissed.

[3] Two matters remain to be disposed of. Over the objection of counsel for defendant, they were required to go from Milwaukee to Denver, Colo., to take the deposition of Mead, whose place of business was in Milwaukee, whereat he had been but a short time before the taking of the depositions and after notice had been served, although within a few days after his presence in Milwaukee defendants were required to be there for the taking of depositions on behalf of the complainants, notice for which was previously given. We think that it was very easy to have saved the defendants the additional expense of proceeding from Milwaukee to Denver for the purpose of taking this deposition, and that the excuse given to the court therefor is inadequate. Wherefore we grant the motion of the defendants that an audit should be had of its reasonable expense in this behalf, to be taxed as part of the costs against the complainants in this case. So much scandal has been occasioned by the oppressive expense of patent litigation that this court, for one, feels the advisability of suggesting that litigants treat each other fairly in this behalf.

We shall also tax against the complainants the reasonable costs of printing defendants' record.

STARR v. HOUSER et al.

(Circuit Court, S. D. Ohio, W. D. July 18, 1911.)

No. 6,566.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ELLIPSOGRAPH.

The Starr patents, No. 533,095, for an ellipsograph, No. 683,809, for an ellipsograph having a bevel cutting tool for making picture mats, etc., and No. 766,158, for an ellipsograph with a tool for cutting glass or metal, were not anticipated, and all disclose invention of high order; also all *held* infringed.

In Equity. Suit by Ferdinand W. Starr against Charles C. Houser and the Historical Publishing Company. On final hearing. Decree for complainant.

Obed C. Billman, for complainant.
Wood & Wood and Gottschall & Turner, for defendants.

HOLLISTER, District Judge. The complainant is the patentee under letters patent No. 533,095 of an apparatus known as "Starr's ellipsograph." The object of the invention is the construction of an instrument adapted to drawing a great variety of forms, as parallel lines, angular, circular, radial, elliptic, square, etc., and it was, and is, the first successful attempt at drawing, with a machine, geometrically accurate ellipses of predetermined size or form, and is capable of drawing parallel lines and straight lines at right angles to each other representing the major and minor axes of ellipses, and in doing so it is not necessary to readjust the apparatus during the operation. No other machine prior to this invention had been able to accomplish this. It may be deduced from the testimony that this apparatus was the first commercially successful ellipsograph known to the art.

The apparatus has gone into extensive use, and was introduced, not by extensive advertising and methods through which a market is sometimes created for patented articles, but by the inventor himself, who by personally going from place to place and practically demonstrating to those engaged in the business of such a character as to need or find useful a machine having this machine's capabilities has made a market through the merit of the apparatus itself. It is indeed a wonderful invention, and while it is not a pioneer invention, strictly speaking, in that others had previously patented ellipsographs, yet its value and its capabilities were so far superior in method of operation and achievement to any apparatus known to the art that it marks a distinct and very great advance in the art. It marks the long step between failure and success and evidences inventive genius of a high order. In determining questions of infringement it is therefore entitled to include a wide range of mechanical equivalents.

The object of the complainant's second invention, evidenced by letters patent No. 683,809, was to improve upon his ellipsograph by producing an instrument which would not only draw or outline the particular form or figure to be produced, but would cut the same from

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

the material upon which the instrument is worked, making the edge beveled; it being especially adapted for cutting mats for pictures or similar outline work. The cutting of the material in the particular predetermined form for which it may be set is done by the sharp blade of a metal tool taking the place of the pencil or pen used in drawing in the first patent; the edge of the tool being inclined laterally with its cutting edge extended rearwardly from its swivel mount and constituting means for free bevel cutting. The prior art discloses cutting tools with their cutting edges extended rearwardly from the swivel mounts and capable of bevel curve cutting, but the prior art does not disclose a tool inclined laterally with its cutting edge extended rearwardly, and adapted for bevel cutting only, and so disposed in its adjustment to the movements and impulse of the ellipsograph as in trailing and following lines of least resistance will automatically bevel cut circles, ellipses, etc., in the form and size for which the apparatus is set through predetermined intention. The combination of such a tool and swivel mount and lateral inclination of the cutting edge of the blade extending rearwardly therefrom and constituting the means for free bevel cutting with the means for outlining various curved figures was new, and of great value. The motion imparted to such a tool so mounted by the mechanism of the ellipsograph is of such a character as that the bevel cutting is and must be geometrically correct and of predetermined exact size and form by the setting of the machine to bring about the accomplishment of the shape and size of the beveled aperture desired. The claims in this patent deal also with various improvements in the means by which this really wonderful result is attained.

The complainant's third patent, as evidenced by letters patent No. 766,158, is for a machine in many of its elements substantially like the subject-matter of his second invention, the difference between the two being that in that patent the cutter is one adapted to cut in beveled directions only, while the apparatus described in the third patent is adapted for cutting in glass or similar substances where no bevel is necessary, and involves the combination of a free trailing cutter with a guided and directed cutter carrier moving in a predetermined curved path. It is found upon a comparison of the devices disclosed in the prior art that the claims 9, 10, 12, and 13 in this patent have no counterpart in any instrument theretofore devised. The novelty of these devices and combinations is, it seems to me, well established by the evidence in the case.

Defendants' apparatus will be found to accomplish the same purposes as the complainant's, but not with equal facility and ease of operation, though it does not appear that the defendants' apparatus is capable of drawing straight lines at right angles to each other forming the major and minor axes in an ellipse. Indeed, the defendants' expert witness who testified concerning anticipations of the complainant's ellipsograph in the prior art did not discover upon first examination and prior to his second cross-examination that complainant's apparatus was capable of a mechanical feat so extraordinary, and it was not until he had made further investigation of what complainant's

machine could do that he perceived it was capable of more than upon first examination had been clear to him; in other words, he did not fully understand the machine when he testified of anticipations in the prior art. He at first testified that it was incapable of such use.

While defendant's machine differs in appearance from "Starr's ellipsograph" and parts of it are different in form and method of operation from Starr's ellipsograph, yet it can be seen upon comparison of the parts that the differently shaped and differently operated parts, nevertheless, by their juxtaposition and operation upon each other involve the same mechanical principles exemplified by Starr's machine.

If the various elements of defendants' machine in their correlative operation are marked with letters and the same elements of complainant's are marked with the same letters, it will be seen that the complainant's combination of—

(1) the sliding-bar *D*;
(2) the shaft *L* with its integral guide arms,
(3) the sliding shaft *I*,
(4) the arm *H*,
(5) the spiral spring *s*, to elevate the several parts,
(6) the operating and depressing arm *K*, and
(7) the pencil holder (*G*)
(said parts being adapted to produce continuous broken lines, substantially as described),

is found in the defendants' machine, and they are arranged and cooperate on the same principle to produce the same results as are produced by complainant's ellipsograph, or, at least, are mechanical equivalents thereof. It admits of little doubt that the Henninger tool positioned for bevel curve cutting is described in claims 1 to 5, inclusive, of Starr's second patent. The purpose of the tool is to make a beveled curved cut of geometrical accuracy when impelled by mechanism to give it direction. That was the purpose of the invention and its description in those claims and the combination of the ellipsograph with such a tool for cutting glass, thin sheets of metal, leather, etc., would be and is infringed by defendants' machine.

Without elaborating further, I find that all of the claims sued upon, set forth in these three patents, have been infringed by both of the defendants, and that the circumstances of infringement are aggravated, and of such a character as to justify the award to the complainant of triple damages as authorized by law.

COMMERCIAL & SAVINGS BANK v. ROBERT H. JENKS LUMBER CO.

(Circuit Court, N. D. Ohio, E. D. December 21, 1911.)

No. 8,123.

1. BANKS AND BANKING (§ 179*)—LOANS—SECURITY.
Where a note given to a bank for a loan of $20,000 declared that the maker had deposited collateral as security for the payment of the note and every other liability of the undersigned to the bank, direct or con-

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

tingent, due or to become due, or which might thereafter be contracted or existing, followed by a specific description of the collateral, such collateral was pledged to secure not only the $20,000 note, but also the other indebtedness of the maker to the bank.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 179.*]

2. CORPORATIONS (§ 566*)—INSOLVENCY—SECURED CLAIMS.

Where an insolvent corporation deposited collaterals with claimant bank as security for its entire indebtedness, the bank on administration of the corporation's estate in equity was entitled to prove its claim for the full amount of its debt and to receive dividends up to the balance due after crediting the proceeds of the sale of the collaterals.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2283–2286; Dec. Dig. § 566.*]

In Equity. Action by the Commercial & Savings Bank against the Robert H. Jenks Lumber Company. Judgment for complainant.

W. H. Marlatt, for Union Nat. Bank.

Frederick L. Taft, for other banks.

Holding, Masten, Duncan & Leckie, for receiver of Robert H. Jenks Lumber Co.

DAY, District Judge. The receiver of the Robert H. Jenks Lumber Company asks instructions of the court upon the following state of facts:

That in January, 1910, the Lumber Company was indebted to the Union National Bank of Cleveland, Ohio, in the sum of about $42,500. That at said time the Lumber Company borrowed from the bank the further sum of $20,000, and then and there made and delivered to the bank its promissory note in the amount of $20,000, and at the same time delivered to the bank certificates for 304 shares of the capital stock of the Cuyahoga Lumber Company. That in said note it was stated that said shares of stock were delivered to said bank as collateral security "for the payment of this and for other liabilities of the undersigned to said bank, direct or contingent, due or to become due, or which may hereafter be contracted or exist."

That the aforesaid note of $20,000 was, from time to time, renewed by other notes containing the same provision made by said Lumber Company and delivered to said bank, the last renewal note being dated January 30, 1911, and during all of which time the bank retained possession of the certificates of said shares of stock. That the aforesaid 304 shares of the capital stock of the Cuyahoga Lumber Company was of a market value in excess of $30,000, and that as receiver he is willing to pay the aforesaid $20,000 with accrued interest thereon, in consideration of the surrender to him by the bank of said note and said certificates for said 304 shares, but that the bank is unwilling so to do and claims that said certificates were delivered to it as collateral security for the payment of all indebtedness of the Robert H. Jenks Lumber Company to it, and that by virtue of the provisions of said note it is entitled to retain possession of said certificates until the full value of said shares of stock has been paid to it, and upon failure to pay said full value it has full right

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

to exercise its lawful rights as pledgee, in accordance with the provision in said note contained, and to sell and dispose of the shares of stock and to apply the full amount realized from such sale toward the liquidation of the aforesaid indebtedness to it, which the bank claims was $63,508.55, and the bank asks that its claim be allowed in full without first applying the collateral or the proceeds thereof in payment of the indebtedness.

[1] A copy of the note referred to in this petition of the receiver, is as follows:

"$20,000.00. Cleveland, Ohio, Jan. 30th, 1911.

"Sixty days after date, for value received, we promise to pay to the order of the Union National Bank of Cleveland, Ohio, at its office twenty thousand dollars, together with interest at the rate of six per cent. per annum after maturity until paid; the undersigned having herewith deposited as collateral security for the payment of this and every other liability of the undersigned to said bank, direct or contingent, due or to become due, or which may hereafter be contracted or existing, the following property, namely:

304 shares the Cuyahoga Lumber Co. stock
Ctfs #176 to 186 inc. 25 shares each
" 187 29 shares

together with all other securities in the possession of said bank belonging to the undersigned or in which the undersigned has an interest, hereby agreeing to deliver to said bank additional securities to its satisfaction upon demand of said bank, also hereby giving to said bank a lien for the amount of all said liabilities of the undersigned to said bank upon all property or securities which now are or may hereafter be pledged as collateral with said bank by the undersigned, or in the possession of said bank in which the undersigned has any interest, and, also upon any balance of the deposit account of the undersigned with said bank. On the nonperformance of this promise, or upon the nonpayment of any liability above mentioned, or upon failure of the undersigned forthwith to furnish satisfactory additional securities on demand, at the option of said bank or of its president or cashier, this obligation shall become immediately due and payable less a proper rebate of interest, and then and in every such case full power and authority are hereby given to said bank to sell, assign and deliver the whole of said securities or any part thereof or any substitutes therefor or any addition thereto through the stock exchange or broker or at private sale, without either advertisement or notice, the same being hereby expressly waived; or said bank, at its option, may sell the whole or any part of said securities or property at public sale upon ten days notice, published in any newspaper printed in the city of Cleveland, at which public sale said bank itself may purchase the same or any part thereof free from any right of redemption on the part of the undersigned, which is hereby expressly waived and released. In case of sale for any cause, after deducting all costs and expenses of every kind, said bank may apply the residue of the proceeds of such sale as it shall deem proper, toward the payment of any one or more or all of the liabilities of the undersigned to said bank, whether due or not due, returning the overplus, if any, to the undersigned, who agree to be and remain liable to said bank for any and every deficiency after application as aforesaid, upon this and all other of said liabilities; the undersigned hereby authorizing the transfer or assignment of said securities and property to the purchaser thereof.

"The Robert H. Jenks Lumber Co.
"A. B. Lambert, Treas."

It is the claim of the Union National Bank that it has a right to hold the 304 shares of the capital stock of the Cuyahoga Lumber Company as collateral, not only for the $20,000 set forth in the note, but also for the other indebtedness of the Jenks Lumber Company to the bank at the time of the loaning of the $20,000 mentioned in

this note. It is also contended by the bank that it is entitled to file its full claim with the receiver and share pro rata with the unsecured creditors in the general distribution.

Two questions then arise: First, was this collateral given to secure the payment of the $20,000 note alone, or was it given to secure the payment of this note and the other indebtedness of the Lumber Company to the bank? Second, can the Union National Bank share pro rata with the unsecured creditors in the general distribution upon its entire debt, or must it first exhaust its collateral and prove up its claim for the remaining balance?

In my opinion, after a careful consideration of the entire situation presented by the petition of the receiver and the briefs filed, the parties intended that this collateral was given to secure not only the $20,000 note, but also to secure the other indebtedness of the Lumber Company to the bank. The words used in the note appear to be plain and unambiguous, for in the note it is stated:

"The undersigned having herewith deposited as collateral security for the payment of this and every other liability of the undersigned to said bank, direct or contingent, due or to become due, or which may hereafter be contracted or existing."

Then the collateral is specifically described.

Considering the fact that this Lumber Company was a large borrower of the bank, and considering this plain and precise language, which could not be any plainer, there seems but little doubt but that the Union National Bank has a right to hold these 304 shares of capital stock of the Cuyahoga Lumber Company as collateral, not only for the $20,000 set forth in the specific note above referred to, but also for the indebtedness of every kind of the Robert H. Jenks Lumber Company to the bank. Language not as comprehensive nor as specific as that employed in this note in question has been held by several of the highest courts of the states to mean that the collateral was not given for the specific indebtedness of the note alone, but for all of the indebtedness. Buchanan v. National Bank, 78 Ill. 500; Selma Bridge Company v. Harris, 132 Ala. 179, 31 South. 508; Merchants' National Bank of Savannah v. Demere, 92 Ga. 736, 19 S. E. 38; Stanley v. Chicago Trust & Savings Bank, 165 Ill. 295, 46 N. E. 273; Boardman v. Holmes, 124 Mass. 438; Leonard v. Administrator of Kebler, 50 Ohio St. 444, 34 N. E. 659.

That this was the understanding of the parties is perhaps made plainer when it is understood that, at the time of this borrowing, Robert H. Jenks was a director of the bank.

[2] The second contention of the bank is that it shall be allowed to file its entire claim and share pro rata with the unsecured creditors in the general distribution. This presents a very interesting question which has been most ably discussed by the respective counsel in this case and in their briefs filed with me. This same question was considered by the Circuit Court of Appeals for this circuit in the case of the Chemical National Bank v. Armstrong, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231. The opinion was delivered by Judge Taft and was most complete in dealing with the question now under con-

sideration. All of the various authorities were commented upon. The facts in this Armstrong Case arose in connection with an insolvent bank, and the court held that its creditors could not be required, in proving up their claims, to allow credit for any collections made after the date of the declared insolvency, from collateral securities held by them. The court said, in part:

"The right which a creditor of the bank had before suspension of levying an execution to satisfy his judgment is gone, and for it is substituted a fixed and definite interest in the assets as a security for the payment of his debt, which it is the purpose of the banking act to reduce to money and apply on his debt with all convenient speed. We see no reason why this does not apply as well to creditors who hold collateral as to those who are unsecured. It is well settled that the holding of collateral does not prevent a creditor from enforcing his claim in the ordinary way by judgment and execution against a debtor without deduction for his collateral. Lewis v. U. S., 92 U. S. 618 [23 L. Ed. 513].

"When a secured creditor is required by the transfer of the assets in trust for winding up purposes to forego his right to satisfy his entire debt out of the property of the bank by levy and execution, why should there be substituted for that right anything less than that which unsecured creditors gain by yielding up the same right?

"The secured creditor enjoys precisely the same advantage over an unsecured creditor with respect to the collateral, that he did before the suspension. With reference to obtaining satisfaction out of the general assets of the bank before suspension, their rights are equal. So must their rights be after sequestration of the assets for ratable distribution.

"A secured creditor has two securities for the payment of his debt, one of which he held in common with all the creditors, the other of which he had obtained by lawful contract from his debtor. It is a rule of equity that, where a creditor holds two securities, one of which he has in common with the others, and the other of which he holds for his sole use, he may be required to collect his debt first out of the security for his sole benefit, so that those who hold in common with him may have more to apply to their debts. But this rule can never be invoked where he who has the two securities cannot pay himself in full out of both. He was given the two securities to pay his debt, and he cannot be deprived of this primary equity for the benefit of some one else who is less fortunate in his security. 3 Pomeroy, Eq. Jur. § 1414; Story, Eq. Jur. § 564b. Nor can the bankruptcy act apply to the administration of any estate by the equity side of this court."

Again, in the case of Cook County National Bank v. U. S., 107 U. S. 445, 2 Sup. Ct. 561, 27 L. Ed. 537, Mr. Justice Field, referring to the bankruptcy law, said:

"That enactment was dealing with the estates of persons adjudged to be insolvent under that law, and covers only the distribution of their estates; it has no further reach.

"The rule in bankruptcy was not the rule in equity because it ignored the rights belonging to the secured creditor before the bankruptcy took place, and materially modified and reduced the advantage over unsecured creditors which in the original contract of pledge the debtor had intended to secure him.

"The great weight of authority in England and this country is strongly opposed to the view that a creditor with collateral should be deprived of the right to prove for his full claim against an insolvent estate."

This question was again considered in the case of Merrill v. National Bank of Jacksonville, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640, Mr. Justice Field in his opinion stating:

"We concur with the court (Justice Brown and Circuit Judges Taft and Lurton in Chemical National Bank v. Armstrong, 59 Fed. 372 [8 C. C. A. 155,

28 L. R. A. 231]) in the proposition that the assets of an insolvent debtor are held under insolvency proceedings in trust for the benefit of all his creditors, and that a creditor on proof of his claim acquires a vested interest in the trust fund. A secured creditor is not to be cut off from his right in the common fund because he has taken security which common creditors have not. The creditor looks to the debtor to repay the money borrowed and to the collateral to accomplish this in whole or in part, and he cannot be deprived either of what his debtor's general ability to pay may yield or of the particular security he has taken.

"We think the collateral is security for the whole debt and every part of it, and is applicable to any balance that remains after payment from other sources as to the original amount due; and that the assumption is unreasonable that the creditor does not rely on the responsibility of his debtor according to his promise.

"The rule in bankruptcy goes on the principle of election; that is to say, the secured creditor was not allowed to prove his whole debt unless he gave up any security held by him on the estate which he sought to prove, * * * but it was only under bankruptcy laws that such election could be compelled. Tayloe v. Thomson, 5 Pet. 358-369, 8 L. Ed. 154.

"Whatever Congress may have authorized to enact by reason of its power to pass uniform laws on the subject of bankruptcies, it is very clear that it did not intend to impinge upon contracts existing between creditors and debtors, yet it is obvious that the bankruptcy rule converts what on its face gives the secured creditor an equal right with the other creditors into a preference against him, and hence takes away a right which he already had. This a court of equity should never do unless required by statute, at the time the indebtedness was created.

"Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of the insolvency, irrespective of the question whether particular creditors have security or not. When secured creditors have received payment in full, their right to dividends and their right to retain their securities cease; but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before."

This decision was followed by the Supreme Court of the United States in the case of Aldrich v. Chemical National Bank, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611.

Counsel for the receiver, in their brief comment upon these decisions, very ably endeavor to distinguish them from the situation presented by the matter now under consideration.

The contention is made that both the Lumber Company and the bank are engaged in doing business in Ohio; that the collateral contract is an Ohio contract and would ordinarily be construed and enforced according to the Ohio laws; furthermore, that the bankruptcy law would compel the bank to release the pledge before it could prove for the whole amount or retain its security account for its value and prove for the balance after deducting the value. They assert that the case of Bank v. Armstrong, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231, was decided before Congress enacted the present bankruptcy law, and that the decision in this Armstrong Case was solely upon the question of the right of a creditor under the national bank act.

These contentions are all worthy of serious consideration, but obviously the rule of law to be applied in a state court and the rule as applicable in a bankruptcy court and the manner of proving secured claims differ greatly. As was said by Mr. Justice Field in the case of

Cook County National Bank v. U. S., 107 U. S. 445, 2 Sup. Ct. 561, 27 L. Ed. 537, referring to the bankruptcy law:

"That enactment was dealing with the estates of persons charged to be insolvent under that law, and covers only the distribution of their estates; it has no further reach."

And the application of the bankruptcy law in reference to the proving of this claim would not be an equitable application of the law. It would not be a rule in equity, and this matter arises in an equity court, because the bankruptcy law, in so far as it applies to a claim like the one in question, ignores the rights belonging to the secured creditor before the bankruptcy takes place, and modifies and reduces the advantage over unsecured creditors which in the original contract which the Lumber Company made had been intended to secure the bank.

As was said by Judge Taft in the case of Chemical National Bank v. Armstrong, after he had considered all of the authorities bearing on the situation, such as the one which is before me:

"The exact point which is common to all the foregoing authorities, and which they all sustain, is that a creditor who has proved his claim against an insolvent estate under administration can collect his dividends without any deduction from his claim as proven for collections made from collateral after his proof of claim is filed."

As was said in the case of Wheeler v. Walton & Whann Co. (C. C.) 72 Fed. 967:

"This question must be decided according to the rules and practice which have been settled and recognized by courts of equity, without reference to statutory requirements. 'It is a settled principle of equity that the creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor.' Lewis v. U. S., 92 U. S. 623 [23 L. Ed. 513]. * * *

"It is a mistake to suppose that the bank (which was a creditor) will not be entitled to a dividend until it has exhausted the securities or surrendered them. The twentieth section of the bankruptcy act of 1867 (since repealed) required a creditor to sell, release, or deliver up his collaterals before he could prove any part of his debt; but that requirement was never applicable outside of that law. Bisph. Eq. § 343."

So it was held, in London & San Francisco Bank v. Willamette Steam Mill (C. C.) 80 Fed. 226, that the state laws relating to insolvency did not control the federal courts in receivership cases in respect to the right of a creditor holding collateral security to receive dividends without his surrendering his collateral. To the same effect is the case of New York Security & Trust Co. v. Lombard Investment Co. (C. C.) 73 Fed. 537; Doe v. Northwestern Coal & Transportation Co. (C. C.) 78 Fed. 62.

The case of Lewis, Trustee, v. U. S., 92 U. S. 618, 23 L. Ed. 513, which I have before referred to, distinctly holds that in an equity court a creditor holding collaterals is not bound to apply them before enforcing his direct remedy against the debtor.

It seems to me that this is a well-settled principle of law. It works no hardship, but gives to the secured creditor the right which should be his. Were the law otherwise, this right would not be preserved to such a creditor. The bankruptcy act applies only to such estates

as come under its provisions; it was never intended that this act should govern the administration of equitable doctrines by courts of equity.

Bearing in mind that the bankruptcy act was passed for the specific purpose and relates to the administration of estates under that act, and it does not apply to the administration of affairs in a court of equity, no confusion of opposing rules arises, and the courts will have no difficulty whatsoever in administering bankrupt affairs under bankruptcy rules in a court of bankruptcy, and applying well-settled principles of equity to matters arising in a court of equity.

I am therefore of the opinion that this collateral security deposited with the bank was held by the bank for all of the indebtedness of the Robert H. Jenks Lumber Company, and that the Union National Bank should be permitted to prove its full claim and file the same with the receiver for the amount which was due at the time of the insolvency.

COMMERCIAL & SAVINGS BANK v. ROBERT H. JENKS LUMBER CO.

(District Court, N. D. Ohio. January 3, 1912.)

No. 8,123.

1. BILLS AND NOTES (§ 267*)—OBLIGATIONS OF MAKER AND INDORSER.
While the maker of a note is absolutely bound for its payment, the undertaking of an indorser is conditional that, if the maker refuses to make good the undertaking, the indorser will pay the amount, provided the holder exercises due diligence in making presentation, protest, etc.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 620, 629; Dec. Dig. § 267.*]

2. CORPORATIONS (§ 565*)—INSOLVENCY—RECEIVERS—CLAIMS.
The P. H. Lumber Company, a Michigan corporation, executed a note payable to the J. Lumber Company, which indorsed it to claimant bank. After the appointment of a receiver for the J. Lumber Company, the P. H. Lumber Company, and other Michigan corporations standing in the same relation to the J. Company, were unable to obtain accommodations from banks, and therefore became financially embarrassed, and in danger of being forced into bankruptcy, whereupon these corporations made a proposition to their creditors to pay 60 per cent. on the dollar of the face of the notes, which was accepted and consummated. *Held* that, since claimant bank at the time of the appointment of the receiver for the J. Lumber Company had a vested equitable estate in such a proportion of its property as the amount expressed in the note bore to the entire amount of all the provable claims against the lumber company's estate, the bank was entitled to the same proportion of the proceeds and dividends from that property as any of the other creditors of the J. Company, and was hence entitled to prove its claim for the full amount of the note, and to receive dividends until the 40 per cent. balance due thereon was paid.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 565.*]

In Equity. Action by the Commercial & Savings Bank against the Robert H. Jenks Lumber Company. On petition for instructions to receiver.

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

Frederick L. Taft and W. H. Marlatt, for Antwerp Exchange Bank Co. and others.

Holding, Masten, Duncan & Leckie, for receiver of Robert H. Jenks Lumber Co.

DAY, District Judge. In this matter the receiver filed a petition for instructions as to how he should deal with a note made by the Port Huron Lumber Company, payable to the Robert H. Jenks Lumber Company for $350.84, and indorsed by the payee and discounted by the Antwerp Exchange Bank Company, of Antwerp, Ohio, now owner and holder of the note, no part of which had been paid up to the time of the appointment of the receiver, nor until after claim filed herein.

It is recited in the petition that the Port Huron Lumber Company is a corporation of Michigan, part of the stock of which company is owned by the Robert H. Jenks Lumber Company. It is further represented that, after the appointment of the receiver herein, the Port Huron Lumber Company, and other Michigan corporations standing in the same relation to the Robert H. Jenks Lumber Company, were unable to obtain accommodations from banks, and therefore became financially embarrassed and in danger of being forced into bankruptcy. Thereupon the Michigan corporations made a proposition to their creditors, among them the Antwerp Exchange Bank Company, to pay 60 cents on the dollar of the face of the notes. Thereafter the receiver petitioned this court for authority to assent to the aforesaid agreement, without prejudice to the claims of the bank or the other creditors.

Now it appears that on the 4th day of August, 1911, Judge Killits, of this jurisdiction, approved an order providing, among other things, as follows:

"Any creditors of the said the Port Huron Lumber Company and the South Park Lumber Company, holding notes of either of said companies, and bearing the indorsements of the Robert H. Jenks Lumber Company, are hereby permitted to accept a settlement from either of said companies for 60 per cent. of the value of their claims, without prejudice to his or its claim against the Robert H. Jenks Lumber Company upon such indorsement, and said receiver is hereby directed to assent thereto, provided that no dividends shall be paid by such receiver to any such creditor upon such indorsement in an amount exceeding 40 per cent. of his claim upon such notes."

This order was granted upon application for a receiver in an ex parte proceeding, and will not be considered as prejudicing the rights of the Antwerp Bank in any particular. Nor, on the other hand, do I think this order should in any way interfere with any of the rights of the other creditors of this estate. It should be borne in mind that the matter in question is not under consideration in a bankruptcy court, and that the rules applicable to the filing of claims and the distribution of estates in equity courts apply.

Settlement was accordingly made by the bank and the other creditors, and they now claim that having filed their claims in this proceeding and before settlement with the makers of the notes, and the settlement having been made without prejudice to their rights to make

claim against the Robert H. Jenks Lumber Company for the full amount of their indebtedness, their claims should be allowed in full; they to be paid dividends on said amount until they shall have received 40 per cent. of their claims.

[1] The maker of this note in question is the Port Huron Lumber Company, and the Robert H. Jenks Lumber Company, the payee, was the indorser. Now the maker of a note is absolutely bound for its payment. Brent v. Bank, 1 Pet. 89, 92, 7 L. Ed. 65; Cox v. National Bank, 100 U. S. 704, 25 L. Ed. 739. And it must also be understood that the undertaking of an indorser of a note is not absolutely like that of the maker of a note, but conditional that, if the maker refuses to make good the undertaking, the indorser will pay the amount, provided the holder exercises due diligence in making presentation, protest, etc. Cox v. National Bank, 100 U. S. 704, 25 L. Ed. 739; Shaw v. Railroad Company, 101 U. S. 557, 25 L. Ed. 892.

Counsel for the receiver largely rely upon the case of In re Pulsifer (D. C.) 14 Fed. 247, and the case of In re Howard, 12 Fed. Cas. 625–627. The Howard Case was the opinion of a register in bankruptcy sustained by a district judge, and clearly related to an estate in bankruptcy, as did the Pulsifer Case.

Much reliance is placed upon the case of Commissioners of Shawnee County v. Hurley, 169 Fed. 92, 94 C. C. A. 362. In that case is involved the relationship of principal and surety. And after a very careful consideration, I cannot see how it can be distinguished from the matter before the court for consideration. Judge Sanborn in delivering the opinion of the court proceeds upon the theory which is applicable here, namely, that the filing of a petition in bankruptcy vests in each creditor of the bankrupt an equitable estate in such a proportion of his property as the creditor's claim bears to the entire amount of the provable claims.

This same view is taken by Justice Holmes in rendering the opinion of the court in the case of Sexton, Trustee, v. Dreyfus, 219 U. S. 339, 345, 31 Sup. Ct. 256, 55 L. Ed. 244. The learned justice takes the view that, at the time of the filing of the petition in bankruptcy, at that very moment the creditors acquired a right in rem against the assets, citing Chemical National Bank v. Armstrong, 59 Fed. 372, 378, 8 C. C. A. 155, 28 L. R. A. 231; Merrill v. National Bank of Jacksonville, 173 U. S. 131, 140, 19 Sup. Ct. 360, 43 L. Ed. 646. Both cases cited by Justice Holmes were in reference to the administration of estates in a court of equity.

[2] Now, when the receiver was appointed in this case, at the time of the appointment of the receiver, the Robert H. Jenks Lumber Company, as indorser, was liable for the entire amount expressed on the face of this note, when the holder of the note exercised due diligence in the requisites of demand, presentation, protest, etc. In other words, at the time this receiver was appointed, there vested in the Antwerp Bank an equitable estate in such a proportion of the property of the Robert H. Jenks Lumber Company as the amount expressed in the note, the amount then owing on this note, bears to

the entire amount of all the provable claims against the estate of the Robert H. Jenks Lumber Company, and it appears to me that the bank is entitled to the same proportion of the proceeds and dividends from that property as any other creditors, until this claim is paid in full, because its equitable estate in this property is not diminished or changed by the settlement of payment which it received from the Port Huron Lumber Company. Board of County Commissioners v. Hurley, 169 Fed. 92–95, 94 C. C. A. 362; Merrill v. National Bank of Jacksonville, 173 U. S. 131, 147, 19 Sup. Ct. 360, 43 L. Ed. 640; Chemical National Bank v. Armstrong, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231.

It is true that in the case of the Board of County Commissioners v. Hurley there existed the relation of principal and surety, but, in so far as the question of proving this claim is concerned, I can see no distinction; for when the note was protested the rights of the parties were fixed, the obligation of the indorser was fixed, and, the estate of the indorser being in the hands of a receiver, the only recourse which the holder of the note could have would be to rely upon the estate in the hands of the receiver—or, in other words, the appointment of this receiver vested in the bank an equitable estate and in such a proportion of the estate as the claim of the Antwerp Bank bore to the entire amount of the provable claims.

The rule contended for by the attorneys for the bank has been applied with favor in the Circuit Court of Appeals in this jurisdiction, including Chemical National Bank v. Armstrong, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231, Mr. Justice Brown and Circuit Judges Taft and Lurton, composing the court. The opinion was delivered by Judge Taft, who very ably and thoroughly discusses the principle, with a citation of all the authorities. The court came to the conclusion that the estates of insolvent debtors are held under insolvency proceedings in trust for the benefit of all the creditors, and that the creditors, on proving their claims, acquire a vested interest in the trust fund, and that the creditors' rights to dividends are to be determined by the amount due at the time their interest in the estate becomes vested, and are not subject to subsequent change. To the same effect is the case of Merrill v. National Bank of Jacksonville, 173 U. S. 131, 147, 19 Sup. Ct. 360, 367 (43 L. Ed. 640), where Chief Justice Fuller says:

"Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of insolvency, irrespective of the question whether particular creditors have security or not. When secured creditors have received payment in full, their right to dividends and their right to retain their securities cease; but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before, though through redemption or subrogation or the realization of a surplus they may be benefited."

Now, in this case, counsel for the trustee argue that the Antwerp National Bank should be limited to a dividend on the unpaid balance of the note or of its claim, and argue that the relation of maker and indorser is different from that of principal and surety. I fail to see this distinction as applied to the filing of this claim in a court of

equity. It was the obligation of the Jenks Lumber Company to pay such part of the note as the maker did not pay, upon proper protest and presentment of this note, and, when the receiver was appointed in this case, that obligation extended to the entire face of the note. It is true that, if the Jenks Lumber Company had not gone into the hands of a receiver, they would only have been liable for the portion of the note which was not paid by the maker; but, after the filing of this suit and the appointment of a receiver therein, the claim against the Jenks Lumber Company and the claim against the estate were not identical, as was said by Judge Sanborn in the case of Board of County Commissioners v. Hurley, 169 Fed. 92, 96, 94 C. C. A. 362, 366:

"The former was a chose in action; the latter was an equitable estate. The one was a claim in personam; the other a claim in rem. * * * The latter was an equitable right to such a share of the property of the bankrupt as its amount at the filing of the petition bore to the amount of all the provable claims against that property. It drew no interest after the petition was filed because it was an equitable estate and not a personal claim, and, while subsequent payments by the principal debtor reduced the claim against Devlin, they did not affect the equitable estate in his property which the county held until the full payment of that claim had been received by it."

So in the matter here presented, the payment by the Port Huron Lumber Company reduced the claim against the Jenks Lumber Company; but this payment of 60 per cent. on the note did not affect the equitable estate in the property in the hands of the receiver until the holder of the note, the Antwerp Bank, had received the full amount of its claim. It is quite easy to confuse the application of this principle. It is true that, after the Antwerp Bank settled with the maker of this note for 60 per cent. of the note, the amount for which the indorser, the Jenks Lumber Company, or its estate in the hands of a receiver, was liable for, was only 40 per cent. of the face of the note, and that is true whether there is a receivership or not; but in realizing upon this unpaid balance, by virtue of the decisions in the cases I have before referred to, the claimant, the Antwerp Bank, is entitled to receive dividends on the face of its claim because it had a vested interest in the entire estate in rem at the time of the appointment of the receiver. It has a claim for 40 per cent. of the face of this note, and in realizing upon that claim it can receive dividends upon the entire face of the note until this 40 per cent. balance is paid, and no longer.

In reference to the rule contended for by counsel for the receiver, as was said in the case in 169 Fed., 94 C. C. A. (Board of County Com'rs v. Hurley):

"That rule would require a reconsideration and reallowance of the claims of creditors upon which any third party is liable every time he makes a payment, or at least before each dividend after such payment has been made. It would result in much confusion and delay," etc.

The application of the rule contended for by the Antwerp Bank is not inequitable, and the rule contended for by counsel for the receiver, and all the other creditors of the Jenks Lumber Company, would take out of the estate of the Jenks Lumber Company the divi-

dends which the Antwerp Bank would otherwise receive, solely because the Antwerp Bank, after the appointment of the receiver, collected a certain part of the debt from the principal debtor. The Jenks Lumber Company agreed as indorser with all the obligations of an indorser that this note would be paid. These obligations have been fixed. It is entirely equitable that the claim should be proved and dividends received, as contended by counsel for the Antwerp Exchange Bank Company, and it is accordingly ordered that the Antwerp Exchange Bank Company be allowed to prove its claim for the full amount and receive dividends until the 40 per cent. balance due on this note is paid.

THE GLEN ISLAND.

(District Court, S. D. New York. February 2, 1912.)

MARITIME LIENS (§ 37*)—PRIORITY—LIENS FOR TORTS AND FOR REPAIRS AND SUPPLIES.

Maritime liens for repairs and supplies furnished to a vessel subsequent to the attachment of a lien for a tort, as for collision or negligent towage, are entitled to preference over such lien, and those for supplies or repairs furnished after the expiration of the voyage on which the tort was committed, which in case of a harbor vessel may be equitably estimated and fixed as continuing for 40 days, take precedence over those arising during such voyage, or estimated time, while those in each class are entitled to share pro rata.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 58–70; Dec. Dig. § 37.*

Maritime liens for torts, see note to The Anaces, 34 C. C. A. 565.]

In Admiralty. Suit by the Chelsea Iron Works against the steam tug Glen Island, with 11 other actions against the same tug. On determination of priority of liens.

Each of the libels above mentioned asserts a lien against the tug, which has been sold under decree obtained in the first cause. All the libels were filed before sale. One is for seaman's wages, and is admittedly entitled to preference. One libel (that of Pendleton) claims damages for negligent towage occurring on July 26, 1910. All the other libels are either for repairs or supplies, and it is admitted that most of the repairs were executed and supplies furnished subsequent to the date of the alleged negligent towage. The fund produced by sale and in court is sufficient to pay all claims for wages, supplies, and repairs, but is not sufficient also to discharge the alleged towage damage. Libelants who proved their claims before the Commissioner and obtained final decree moved for payment, asserting that, even if Pendleton's claim be good, and good for the entire amount demanded, it must as matter of law be postponed to repair and supply claims accruing after the alleged negligent towage.

Mr. Martin, for Pendleton.

Messrs. Zabriskie, Matteson, Alexander, French, Baird, Cleary, Potter, Beecher, and Phlippeau, for sundry libelants for repairs and supplies.

HOUGH, District Judge (after stating the facts as above). Until The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969,

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

several points of law more or less applicable to the facts herein were thought well supported by authority in this circuit. Thus: (1) A lien for pure tort, e. g., collision, ranked all antecedent liens ex contractu (The R. S. Carter [C. C.] 40 Fed. 331, Blatchford, J.), except (2) seaman's wages (citations in Stevens Case, supra, 170 U. S. 119, 18 Sup. Ct. 544, 42 L. Ed. 969). But (3) a lien for negligent towage did not rest wholly or principally on tort, but arose quasi ex contractu from the negligent performance of contract, wherefore it was inferior to wholly contractual and beneficial liens earlier in date (The J. G. Stevens in trial court [D. C.] 58 Fed. 792, Benedict, J.), even arising on the same voyage, which (4) in the case of harbor vessels might be equitably estimated and fixed at 40 days (The Gratitude [D. C.] 42 Fed. 299, Brown, J.). Finally (5) these rules had no application as between two nearly cotemporaneous torts. The Frank G. Fowler (C. C.) 17 Fed. 653, Blatchford, J.

The answer of the Supreme Court to the question certified in 170 U. S. 113, 119, 18 Sup. Ct. 544, 42 L. Ed. 969, changed these rulings in one respect only, viz., it reversed the third; it being held that negligent towage gave rise to a lien as completely founded on tort as that for negligent collision. Rule 1 was positively affirmed, and the exception in favor of seamen impliedly approved. The other local rulings above stated were not disturbed, enlarged, or approved.

It thus appears that the leading case of The Stevens does not touch the question here, viz., whether liens for repairs and supplies accruing subsequent to a lien for pure tort rank with, above, or below such tort lien. This question will be considered without any reference to the accusations of laches contained in some of the papers submitted. Libelants are nearly equal in sloth.

It was said in The Stevens, supra, that two English decisions (The Aline, 1 W. Robinson, 111, and The Bold Buccleugh, 7 Moo. P. C. 267) held that the liens for repairs made after collision, in so far as they increase the value of the vessel, may be preferred to a lien for damages by the collision. 170 U. S. 120, 18 Sup. Ct. 544, 42 L. Ed. 969. This apparently means that the two cases cited held the same thing. The facts in The Aline are fairly summarized by Brown, J., in The Young America (D. C.) 30 Fed. at 789; but in The Bold Buccleugh, Sir John Jervis declared those facts to be that:

"There was a bottomry bond before and after the collision, and the court held that the claim for damage in a proceeding in rem must be preferred to the first bondholder, but was not entitled against the second bondholder to the increased value of the vessel by reason of repairs effected at his cost."

This is a singular misunderstanding of the evidence before Dr. Lushington, and on this misstatement Jervis, J., makes the following declaration of law:

"The interest of the first bondholder took effect from the period when his lien attached. He was, so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done without reference to his claim. So by the collision the interest of the (collision) claimant attached, and dating from that event the ship in which he was interested having been repaired was put in bottomry by the master acting for all parties, and he would be

bound by that transaction. This rule, which is simple and intelligible, is in our opinion applicable to all cases."

This is not the reasoning of The Aline; but I think it is true that, if the facts of that case had been as Sir John Jervis thought they were, Dr. Lushington would have held what the Privy Council declared to be the law.

There are at least two plainly recognizable lines of thought by which the usual admiralty rule of paying liens of the same class in the inverse order of their accrual is justified. One is the idea advanced in The Buccleugh, namely, that each person who acquires a jus in re becomes a sort of coproprietor in the res, and therefore subjects his claim to the next similar lien which attaches. This is a highly artificial style of reasoning, though interesting as furnishing internal evidence of the civilian origin of admiralty. The simpler, and therefore it is thought the better, reasoning is briefly adverted to by Blatchford, J., in The Fowler, supra, 17 Fed. at page 656. It is that the last beneficial service is the one that continues the activity of the ship as long as possible and therefore is to be preferred, supposing always that that which is produced or contributed to by the service is a *voyage*.

It makes no difference which theory be accepted, the logical result is that, since repairs and supplies are what enable the vessel to continue about her business after she has wronged another vessel, liens for those repairs and supplies are to be preferred to the lien for the wrong—a wrong committed by a res as yet unrepaired and unbenefited by the necessaries subsequently supplied. This is surely true after the party injured has had reasonable opportunity to enforce his tort lien by appropriate seizure, and thereby cut off the possibility of future liens, however beneficial to the res so seized. The Young America (D. C.) 30 Fed. 790.

It follows, therefore, that all the liens here in question and arising after the expiration of what may be called the voyage on which the Glen Island was engaged on July 26, 1910, are entitled to a preference over all claims of any kind arising on such voyage.

It remains to inquire whether any reason exists for disturbing the rule of The Gratitude, supra. This is mentioned because it was said at bar that not much has been heard of that rule in recent years, and its abandonment was suggested. No reason for such change is seen; it is just as true now as when The Gratitude was decided that in the interest of lienors generally some limit must be set measuring out periods of time within which claims of the same rank shall share pro rata, and the measure fixed by Brown, J., has in my judgment been justified by experience.

Since, therefore, the claim of the Pendleton libel for negligent towage is (under the authority of The Stevens, supra) superior to all antecedent repair and supply claims, the final inquiry is whether it has any preference over or ranks in equality with supplies furnished and repairs executed within 40 days from July 26, 1910.

That repairs and supplies procured upon the same voyage on which a collision happens, and after such collision, are superior in kind and preferred in rank to earlier damage claims, was in my opinion settled

law for centuries before Brown, J., so declared it in The Gratitude, 42 Fed. 300.

So far as repairs are concerned, The Aline, supra, is flat authority. The application of that case is not so plain where the earlier tort is of such a nature that it does not injure the offending ship; yet it is plain enough that repairs executed after a tort make the ship a different and better ship than she was when the wrong was done, and to such a situation whether the offending vessel be injured or not, the reasoning of Dr. Lushington applies, viz., that the tort claimant shall not absorb for his lien that which did not exist when the lien accrued. By hypothesis every repair upon a vessel puts into her the value of the repair; therefore shall the value of repairs be taken out before the tort claimant is permitted to proceed.

With supplies the case is only apparently different. The lien in every case attaches not only to the vessel, but "her tackle, apparel, and furniture," and these words are wide enough to include necessary supplies without which the ship is not fully furnished. Moreover, repairs and necessary supplies have long stood upon the same basis, and liens for both are equally justified by the reasoning referred to in The Frank Fowler.

It follows that, without calling in the aid of the doctrine of laches, the claim of the Pendleton is (1) subordinate to all claims of every kind herein mentioned accruing subsequent to a date forty days after July 26, 1910. This conclusion is based on the doctrine of voyages; and (2) it is also subordinate to all repair and supply claims arising within 40 days after July 26, 1910, because of the inherently inferior nature of prior tort demands depending upon collision or negligent towage, which wrongs are for legal purposes exactly alike. The standing of a tort lien owned by one injured in benefiting the vessel is not here considered.

The proceedings before the Commissioner may be regulated by this opinion, and orders of distribution will be signed in accordance herewith.

It may be that the proctors for claims earlier in date than July 26, 1910, will desire to contest the Pendleton libel, in which case the stipulation offered to me, and now directed to be filed regarding reservations for costs, may be enforced.

HULAC v. CHICAGO & N. W. RY. CO.

(District Court, D. Nebraska, Norfolk Division. March 16, 1912.)

No. 17.

REMOVAL OF CAUSES (§ 3*)—ACTIONS UNDER EMPLOYER'S LIABILITY ACT—CONSTRUCTION OF STATUTE.

The provision of Employer's Liability Act April 22, 1908, c. 149, § 6, 35 Stat. 66 (U. S. Comp. St. Supp. 1909, p. 1173), as amended by Act April 5, 1910, c. 143, § 1, 36 Stat. 291, that "no case arising under this act and brought in any state court of competent jurisdiction shall be re-

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

moved to any court of the United States," prevents the removal of such a case on any ground whatever.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.*]

At Law. Action by Edward V. Hulac against the Chicago & Northwestern Railway Company. On motion to remand to state court. Motion granted.

M. F. Harrington, for plaintiff.

B. H. Dunham and Herman Aye, for defendant.

THOMAS C. MUNGER, District Judge. This action was brought in the state court to recover for personal injuries, and is one that arose under section 6 of the act of Congress commonly called the "Employer's Liability Act," approved April 22, 1908 (Act April 22, 1908, c. 149, 35 Stat. 66 [U. S. Comp. St. Supp. 1909, p. 1173]), and amended by the act approved April 5, 1910 (36 Stat. 291, c. 143). The case was removed to this court on a petition alleging diversity of citizenship, and the plaintiff has moved to remand.

The cause of action arose before, but the action was begun after, the taking effect of the federal Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087). The defendant railway company claims that the prohibition against removal found at the close of section 28 of the Judicial Code does not apply to this case, because of the saving provision in section 299 of the Code, and further claims that the removal of the case is not forbidden by section 6 of the amendatory act above referred to, because Congress intended thereby to prevent removals only on the ground that the action arose under a law of the United States, and the case of Van Brimmer v. Texas & P. Ry. Co. (C. C.) 190 Fed. 394, is cited as sustaining this contention. I am unable to agree to the result reached in that decision.

The language of the act prohibiting the removal of such cases is clear and sweeping. It reads:

"And no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

There is no suggestion in the words thus used that a removal is forbidden only because the action arises under a law of the United States. The prohibitory clause was added as an amendment in the Senate of the United States, and accepted with very little debate. It is not conceivable that Congress did not understand the full import of the words of the amendment, and that no exception was expressed. That Congress did intend to forbid the removal of cases arising under the Employer's Liability Act, upon any ground, appears from the fact that the same Congress, at the following session, again forbade the removal of cases in section 28 of the Judicial Code, and this was by an amendment immediately following the re-enactment and codification of the law covering the whole subject of the right of removal.

It is a well-recognized fact in judicial history that plaintiffs, in actions brought by employés against railway companies for damages

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

resulting from personal injuries, have quite generally and for many years sought to bring and retain their actions in the state courts, and the fact is well attested by the multitude of applications to remand such cases which have been constantly presented to the federal courts. The expense of trials and of appeals in the federal courts have been deterrents, and the variance in the rules of law in such cases as applied in the state and federal courts has also been well understood. Congress has recognized, by the Employer's Liability Act, as well as by the Safety Appliance Acts, that these rules of law should be made more favorable to the injured servant. The purpose of Congress in the enactment of the Employer's Liability Act was the granting of additional rights to the servant, and the removal of existing defenses by the master in actions by injured employés against railway companies. One of the rights which Congress had in mind was the right of the servant to choose the forum in which his action should be litigated. The amendatory act of Congress gives concurrent jurisdiction to the courts of the United States with the courts of the states, and increases the number of districts in which the plaintiff may sue in the United States courts, and while thus enlarging the rights of the plaintiff, and in harmony with the general scope of the act, cuts down the rights of the railway company by forbidding a removal of the case upon any ground. Symonds v. St. Louis, etc., R. R. Co. (C. C.) 192 Fed. 353.

It follows that the case should be remanded to the state court, whether the question is to be determined by the provisions of section 28 of the Judicial Code, or by the provisions of section 6 of the amendatory Employer's Liability Act.

In re SWAIN CO.

In re ORMSBY.

(District Court, N. D. California, First Division. March 15, 1912.)

No. 6,461.

BANKRUPTCY (§ 348*)—PREFERRED CLAIMS—WAGES.

The steward of a bankrupt restaurant corporation, who was also a stockholder, director, and officer, but to whom no stock was ever issued, and who performed only formal duties as such officer, was entitled to priority of payment of wages earned in his capacity as steward under section 64b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), which gives priority to wages due to workmen.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. § 348.*]

In the matter of the Swain Company, bankrupt. On review of an order of the referee allowing the claim of Geo. O. Ormsby as preferred. Order affirmed.

Clarence A. Shuey, for trustee.

J. G. De Forest, for claimant.

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

DE HAVEN, District Judge. This is a proceeding to review an order of the referee, allowing the claim of Geo. O. Ormsby for the sum of $249.65 as a labor claim entitled to priority of payment. The trustee of the estate in bankruptcy objected to the allowance of such claim as one entitled to priority of payment, upon the ground that at the time of rendering the services referred to in his claim the claimant was a director and also the secretary of the bankrupt corporation. The matter in issue was submitted to the referee upon an agreed statement of facts. The following are the material facts so agreed upon:

"That said George O. Ormsby was one of the incorporators of said Swain Company, and that at the time of rendering said services as steward, for which his claim was filed, he was a director and the secretary of said company. * * * That claimant earned the sum set forth in his claim within three months prior to the filing of the petition in bankruptcy, and that said sum, and the whole thereof, was the wages earned as steward in the restaurant then conducted by said Swain Company. * * * That no part of the sum set forth in said claim was earned by said claimant as an incorporator, director, or secretary of said Swain Company, and that he never received or was promised any remuneration as such officer, and that his wages were earned as such steward, and in no other capacity. * * * That he was what is known as a 'dummy officer,' and served as such as a matter of accommodation to and upon the request of said F. A. Swain. That no stock was ever actually issued to claimant, and that he never prepared the minutes of meetings of directors or stockholders, but that he signed his name to minutes as such secretary, and that he performed no services as an officer of the corporation, other than the formal duties that devolved upon him by reason of holding such office. That he had no voice in the management or policy of said corporation, and no interest in it or in its affairs, other than that of an employé."

The sole question presented here is whether, upon the facts above stated, claimant is entitled to priority of payment for the services so rendered by him; the claimant having been, at the time of the rendition of such services, a stockholder and director, and also the secretary, of the bankrupt corporation. The trustee, in support of his contention that the claim should not have been so allowed, relies upon the cases of In re Grubbs-Wiley Co. (D. C.) 96 Fed. 183, and In re Caroline Cooperage Co. (D. C.) 97 Fed. 950. Whether those cases can or cannot be distinguished upon their facts from the one at bar I will not stop to inquire, as I am clearly of opinion that the referee properly allowed the claim of Ormsby as one entitled to priority of payment out of the estate of the bankrupt under subdivision "b," § 64, Bankruptcy Act. The facts agreed upon show that the claim was one for wages earned as a steward of the bankrupt's restaurant, and that no portion of such claim was for his services as director or secretary of said corporation. The referee, in passing upon the question, said:

"The identity of the corporation being distinguished from that of the individuals comprising its officers, through whom it acts, such officers may become its creditors or its debtors, and as individuals may contract with the corporation to become its servants, to perform clerical or manual labor; and where such services form no part of their duties as officers or directors, it seems to me that the claim for such services is in the same condition as that of any other person similarly employed."

I fully concur in this opinion of the referee, and the order under review will therefore be affirmed.

In re HAWLEY.

(District Court, W. D. Washington, N. D. March 28, 1912.)

No. 4,333.

BANKRUPTCY (§ 318*)—JURISDICTION—ALLOWANCE OF CLAIMS AGAINST UNITED STATES CONTRACTORS.

One furnishing materials to a subcontractor of a general contractor of the United States, who gave bond in conformity to Act Cong. Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1905, p. 493), whereby he assumed an obligation to pay all persons supplying labor or materials in the prosecution of the work, must, as required by the statute, intervene in a suit by the government, or, where the government does not sue on the bond, he must commence an independent action on the bond in the United States Circuit Court for the district in which the contract was to be performed, and the jurisdiction of that court is exclusive, and an unliquidated demand for such materials is not provable under the bankrupt law against the estate of the general contractor becoming a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. § 318.*]

In the matter of the bankruptcy of H. W. Hawley, a bankrupt. On petition for review of a referee's decision rejecting an unliquidated claim. Affirmed.

Kerr & McCord, for petitioner.

Bausman & Kelleher and James A. Snoddy, for respondents.

HANFORD, District Judge. The Roslyn Cascade Coal Company, a corporation, filed its claim against the above-named bankrupt, which, after a hearing before Hon. John P. Hoyt, as referee, has been rejected and disallowed. The material facts to be considered are that the bankrupt was a general contractor with the United States for the construction of certain governmental works at Sunnyside, Wash.; that one Angus Griffin was a subcontractor for part of said work, and the petitioner sold to him coal, which was used to produce steam for the engines employed in the carrying on of his work. The claim itself, as verified and filed, represents that the Roslyn Cascade Coal Company has an unsecured claim against the bankrupt estate for the price of coal sold and delivered to A. Griffin for use and benefit of H. W. Hawley, and no part of said debt has been paid, that there are no offsets or counterclaims, that no note has been received for such debt, and no judgment has been rendered thereon, and no manner of security whatever has been received.

The case appears to have been argued and decided by the referee upon a verbal statement of facts, which includes an admission, as a material fact, that Hawley, the bankrupt, as a contractor for public work of the United States government, gave a bond conforming to the requirements of the act of Congress of February 24, 1905 (33 U. S. Stat. 811; 10 F. S. A. 343; Compiled Stat. of the U. S. Supplement 1905, p. 493; Pierce's Fed. Code, § 9625), whereby the contractor assumed an obligation to promptly make payments to all per-

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

sons supplying him with labor or materials in the prosecution of the work undertaken. The bankrupt did not purchase the coal, nor promise to pay for it, nor become obligated to the vendor in any way or manner otherwise than as an obligor named in said bond. By a stipulation the case has been submitted to the court upon briefs without oral arguments, and the brief supporting the claim states the questions to be decided as follows:

"There are only two questions involved in this controversy: First, the question as to whether or not the coal used in the manner set out in claimant's petition is included in the expression 'labor and materials for the prosecution of the work provided for'; and, second, the question as to whether or not, in the event of this coal having been furnished to a subcontractor, instead of to the contractor, the validity of this claimant's claim would be affected."

It is apparent that the prosecution of this claim is equivalent to a suit upon the bond to enforce the obligation thereof in a court which does not have jurisdiction. The rights of the parties are defined by the statute which exacted the bond, and by that statute suppliers of materials used in the prosecution of contract work for the government, claiming the right to have recourse upon the bond, must proceed in a prescribed manner; that is to say, they must either intervene in a suit prosecuted by the government, or, if the government does not sue on the bond, they must within a limited time commence an independent suit upon the bond in the United States Circuit Court for the district in which the contract was to be performed and executed. The jurisdiction of that court is by an express provision of the statute made exclusive, and the statute also provides that only one action upon the bond shall be maintainable, and it must be so conducted that all demands against the obligors may be litigated and adjusted, and that the money recoverable shall be distributed pro rata, if the amount thereof shall be insufficient to pay the full amount of all the claims which may be proved. United States v. Congress Construction Co., 222 U. S. 199, 32 Sup. Ct. 44, 56 L. Ed. ——. There is no other way in which claims against the obligors can be liquidated, and an unliquidated claim is not provable against the estate of a bankrupt under the bankrupt law. For this reason the court is obliged to disallow this claim, without deciding either of the questions which have been argued.

Let an order be entered confirming the disallowance of the claim.

COOK v. ROBINSON et al.

(Circuit Court of Appeals, Ninth Circuit. March 18, 1912.)

No. 2,012.

1. GARNISHMENT (§ 171*)—QUESTIONS OF LAW OR FACT—MOTION TO DISMISS.
It was not necessary that a garnishee should have rested in order to have moved at the close of plaintiff's case to dismiss the proceedings.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 312; Dec. Dig. § 171.*]

2. GARNISHMENT (§ 143*)—GARNISHEE'S ANSWER—EFFECT.
Plaintiff could not claim that it was misled by the answer of a garnishee, where the garnishee's answer to interrogatories propounded by plaintiff set forth the real transaction.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 269; Dec. Dig. § 143.*]

3. APPEAL AND ERROR (§ 1010*)—REVIEW—QUESTIONS OF FACT—TRIAL TO COURT—CONCLUSIVENESS.
Where a case is tried to the court without a jury, the court's findings are conclusive on questions of fact, unless there is no evidence to support them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982; Dec. Dig. § 1010.*]

4. GARNISHMENT (§ 56*)—OWNERSHIP OF FUND—DEPOSITS IN BANK.
R., being indebted to H. and wife, with whom he was conducting certain mining operations, before leaving the mine district with a poke of gold, informed H. and wife that he intended to deposit the gold to their credit, asking the wife where she desired the deposit made and to execute a copy of her signature for that purpose. She gave R. her signature, and directed that he deposit the gold in a bank where he had an arrangement that the bank should take the dust, and give credit at the rate of $17.60 per ounce. R produced the gold to the vice president and manager of the bank on Sunday, and directed him to weigh it, and deposit the proceeds to the credit of H. and wife in specified amounts, and to issue certificates of deposit to each of them therefor. The vice president placed the poke in the vault, where it remained until the next day, when the bank was garnished in a suit against R. as it was weighing the gold, after which it executed and delivered the certificates of deposit to H. and wife as directed. *Held*, that R. in making the deposit and in contracting for the application of the credit to H. and wife was their agent, and that the dust became their property from the time of the deposit, and was not, therefore, subject to garnishment against R.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 110, 111; Dec. Dig. § 56.*]

5. PAYMENT (§ 65*)—DEPOSIT IN BANK—ASSENT OF CREDITOR—PRESUMPTION.
A deposit of gold dust in a bank to the credit of a creditor of the depositor being for the creditor's benefit, his assent to the deposit in payment of the debt will be presumed.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 162–175, 196–202; Dec. Dig. § 65.*]

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

Action by Henry Cook against C. J. Robinson and the Fairbanks Banking Company, garnishee. From a judgment in favor of the garnishee, plaintiff brings error. Affirmed.

On July 18, 1910, Henry Cook, the plaintiff in error, instituted an action against C. J. Robinson, one of the defendants in error, to recover upon two promissory notes, aggregating $10,000, together with accrued interest. On the same day an attachment issued, and a notice of garnishment was served upon the Fairbanks Banking Company, attaching all moneys, gold, and gold dust in the hands of the Banking Company belonging to Robinson. The garnishee made return that it did not have at the time any gold or gold dust in its hands belonging to Robinson. The plaintiff, not being satisfied with the return, procured on October 18, 1910, an order of court requiring the Banking Company, its officers, and employés to appear and be examined under oath concerning its reply to the notice of garnishment, and on the same date filed in said court allegations and interrogatories to be answered by such company. Issues having been duly formulated by answer of the banking company and reply thereto by plaintiff, a trial was had before the court, which, at the close of plaintiff's testimony and after reciting that the matter came on for hearing upon the application of the plaintiff for judgment against the garnishee, the plaintiff having closed his case, and the garnishee having moved for a dismissal upon the ground of failure of plaintiff to establish his allegations, rendered the following findings of fact and conclusions of law:

"(1) That on and prior to the 17th day of July, 1910, Charles J. Robinson, defendant in the above-entitled action, was indebted to Alice Howard and L. G. Howard, employés of said Robinson, in a sum of money aggregating approximately six thousand dollars ($6,000).

"(2) That on and prior to said day said Charles J. Robinson was indebted to plaintiff, Henry Cook, in the sum of ten thousand dollars ($10,000), with accrued interest.

"(3) That on the 16th day of July, 1910, said Robinson informed said Cook that he was unable to pay said Cook the moneys due to him at that time, and informed said Cook that the gold dust he (the said Robinson) then had in his possession, amounting to five thousand seven hundred ninety-three and $^{21}/_{100}$ dollars ($5,793.21), was to be paid to employés of said Robinson for wages due them.

"(4) That on the 16th or 17th of July, 1910, said Robinson notified the said Howards that the gold dust then in his possession amounting to the sum of five thousand seven hundred ninety-three and 21/100 dollars ($5,793.21) in value was to be paid to them on account of wages due to them, and at that time asked for and received instructions as to the disposition of said gold dust, and was by said Howards instructed to deposit same with the Fairbanks Banking Company at Fairbanks, Alaska, and to accept certificates of the deposit therefor, as follows, to wit: Certificate of deposit to Alice Howard in the sum of $3,150; certificate of deposit to L. G. Howard in the sum of $2,643.21, and said Alice Howard at that time delivered to said Charles J. Robinson for delivery to the Fairbanks Banking Company her signature as required by said Fairbanks Banking Company as a means of identification.

"(5) That thereafter, and on about noon of the 17th day of July, 1910, said Charles J. Robinson delivered all of said gold dust, of the value of five thousand seven hundred ninety-three and $^{21}/_{100}$ ($5,793.21) to J. A. Jackson, cashier of the Fairbanks Banking Company, and had said gold weighed at that time and instructed said Jackson that said gold dust was for Alice Howard and L. G. Howard, and that certificates of deposit therefor were to be issued to said Howards in the following sums, to wit: Alice Howard $3,150; L. G. Howard $2,643.21.

"(6) That, said day being Sunday and a nonbanking day, said gold dust was by said Jackson deposited in the vault of the Fairbanks Banking Company until Monday morning, the 18th day of July, 1910, at which time the gold dust teller took said gold dust from the vault, weighed the same, and ascertained the exact value thereof.

"(7) That thereafter a writ of attachment and notice of garnishment was

served upon the Fairbanks Banking Company in the above-entitled action on behalf of said plaintiff.

"(8) That certificates of deposit for the amount of said gold dust was thereafter made out by the proper officials of the bank in the amounts specified by said Robinson, delivered to said Howards, and were by them thereafter cashed.

"(9) That at the time said garnishment was levied upon said Fairbanks Banking Company no further act or thing was necessary to be done, respecting said gold dust, so far as ascertaining the weight or value thereof was concerned.

"(10) That said gold dust was at the time of the levying of said garnishment on said Fairbanks Banking Company the property of the Howards in the following sums, to wit: Alice Howard $3,150; L. G. Howard $2,643.21—and said Charles J. Robinson had no interest whatsoever in or to said gold dust or any part thereof, and the title thereto had passed to and had been vested in said Howards in the respective sums above set forth, and at the time of said levy of said attachment and notice of garnishment the Fairbanks Banking Company was not indebted to Charles J. Robinson in any sum whatsoever, and did not have in their possession any property of any nature or description belonging to said Robinson, save and except 4,000 shares of the capital stock of the Fairbanks Banking Company, which said stock had been theretofore pledged to said Fairbanks Banking Company to secure a note for $2,956, due and owing from said Robinson to said Fairbanks Banking Company.

"Conclusions of Law.

"The plaintiff above named is not entitled to any judgment against the Fairbanks Banking Company in any sum whatsoever, and the Fairbanks Banking Company, garnishee defendant, is entitled to an order of this court, dismissing said proceedings at the cost of the plaintiff above named."

The plaintiff excepted to findings 3, 4, 5, 7, 9, and 10, for the reason that there was not sufficient or any evidence to support them, which exceptions were overruled and judgment was rendered against plaintiff and favorable to the garnishee in so far as it pertained to the gold dust in controversy. Writ of error is prosecuted from the judgment. The entire evidence accompanies the record. The evidence adduced material to the controversy is, in substance, briefly stated, as follows:

The only witnesses called were Albert J. Jackson, vice president and manager of the Banking Company, D. B. Neil, the gold dust teller, and Robinson, the defendant. Jackson testified that he met Robinson, at his request by telephone, at the bank on the 17th day of July, 1910, which was Sunday; that Robinson delivered to him a poke of gold containing approximately 330 ounces; that the bank had a standing agreement with Robinson to take his gold dust, the same to be clean, and allow him at the rate of $17.60 per ounce therefor, it being merely a verbal understanding, and the dust in question was taken by witness under that understanding; that the dust was cleaned by the teller between 9 and 10 o'clock on Monday morning, being the following day; that the garnishment was served on the bank on Monday morning after the gold dust had been cleaned, and while it was in the process of being weighed or just after it had been weighed; that after the dust had been delivered to witness on the 17th witness relates that he weighed it up just to check with Robinson's weight, and put it back into the poke again and put it in the vault; that he made no entry in the books of the bank that day with reference to the matter; that witness told Mr. Neil, the teller, but after the garnishment had been served, "that that gold dust was to be made out for Alice and L. G. Howard," and that he "hadn't said anything to him before the garnishment was served." The witness continued, as interrogated: "Q. You notified him that the gold dust was to be what? A. I notified him that the gold dust was the property of Alice and L. G. Howard, and to be entered as such. Q. When did you notify him of that? That was after the garnishment was served? A. After the garnishment was served. I hadn't said anything to him about it before. I was waiting for Mr. Robinson. Q. You were wait-

ing for Mr. Robinson, and you waited until Mr. Robinson got there before there was any entry made in the books at all with reference to any entry so far as either Mr. and Mrs. Howard were concerned. Isn't that true? A. Yes. Q. Now, prior to the time that Mr. Robinson came to the bank on the morning of the 18th, which would be after the service of the notice of garnishment upon your bank, you had not issued a certificate of deposit? A. No, sir. Q. (continuing): To either Mr. or Mrs. Howard, had you? A. No, sir; I had not then. Q. Did you ever issue a certificate of deposit to them? A. Yes, sir; the teller did, Mr. Matheney did. Q. When I say 'you,' I mean the bank. Now, when was that done? A. On the morning of the 18th. Q. Were those certificates of deposit delivered to Mr. and Mrs. Howard? A. Not at that time. Q. Were they ever delivered to them? A. Yes, sir. Q. When? A. I think it was about the middle of September. Q. You held them quite a while. A. I held them quite a while; yes, sir. Q. I will ask you to state whether or not you saw either Mr. or Mrs. Howard on the 17th of July, 1910? A. I did not. Q. Did you see either Mr. or Mrs. Howard on the 18th of July, 1910? A. I did not. Q. Did you have any writing; that is, any written notification from either of them— A. I did not. Q. Did you have any understanding or any agreement of any kind with either Mr. or Mrs. Howard at any time prior to the time that this notice of garnishment was served upon you with reference to this gold dust in question or with reference to any credit that was due them from Mr. Robinson? A. I didn't know the Howards at all. No, sir; I had never heard from them at all. Q. (By Mr. Roth): Going back to the time this gold dust was delivered to you, I will ask you to state just exactly what Mr. Robinson told you at the time he delivered the gold dust to you. A. He gave me the poke of gold dust, and said: 'That is for the Howards. I want that placed to their credit.' I said: 'Do you want me to open an account with them?' He said: 'No; you better give them certificates of deposit.' He then told me, if I remember rightly, that there was $1,350 to go to Alice Howard's credit, and the balance to L. G. Whether he told me that on Sunday himself I couldn't state positively, but he did tell me that the money was for the Howards, to be placed to their credit, and I remember him saying on certificates of deposit for them. Ordinarily, if I had been making them out, I would have done it right then. As it was Sunday, I simply told him to come around in the morning and I would then make the certificates of deposit as he requested. He said: 'I have the signature of Mrs. Howard.' I said: 'That will be all right. You can bring that around in the morning and give it to me.' Q. And that you would attend to it in the morning? A. In the morning when he came around."

On cross-examination the witness continued: "Q. What steps did you immediately take at that time respecting the gold dust? A. After it was served, I remembered distinctly, of course, that Mr. Robinson had told me it was for the Howards, and I then telephoned to Mr. Robinson because I thought it was necessary to let him know what had happened, and, as soon as he came, he went with me to your office to consult with you relative to the matter. Q. What did you do as respects the gold dust immediately after this garnishment was served upon you, as respects Mr. Neil and his handling of the gold dust? A. I told Mr. Neil particularly that that dust was for the Howards, for Alice and L. G. Howard, that it belonged to them. I hadn't said anything to him before, and he would not have known but what it was Robinson's dust. He presumably would have implied that it was. Q. Was there any name on the poke when it was put in the safe? A. I am not positive. I think there was a tag on the poke with C. J. Robinson's name on it. Q. Does he usually attach a tag with his name on it to a poke? A. Yes; he generally does. I think the poke was tagged with the weight and C. J. Robinson's name on. Q. Those tags are put on the pokes solely for the purpose of identification? A. Solely for identification. Of the dust I made no entry. It was simply put in the vault, and I wanted something on the poke to know whose poke it was next morning. * * * Q. And he told you at the time he gave it to you that that gold dust was for the Howards? A. He told me it was for the Howards; yes. Q. You told him to come next morning, and you would give him certificates of deposit

for the Howards? A. I did; yes, sir. * * * Q. How long after the weighing of the gold dust was completed were the certificates of deposit issued? A. Why, practically, right away. Mr. Neil had weighed the gold dust. As I say, after fixing the valuation of the poke, he would then make out what we call a charge slip against the gold dust account and turn it over to the teller. He did so, and turned it over to the teller to make out these two certificates of deposit, which was done by Mr. Matheney. It was done practically the same time. Mr. Matheney might have been busy at that time and might have left that slip lying around on his desk until he was at liberty to make out the certificates of deposit. * * * Q. Did you ever enter any credit on Mr. Robinson's general account in the books of the bank of this gold dust? A. No, sir. Q. Was there ever any entry of it made to Mr. Robinson's credit in the bank? A. No, sir. * * * Q. The sum total of the gold dust that was deposited there was disposed of in your bank by issuing two certificates of deposit payable to Alice Howard for $3,150 and to L. G. Howard for the balance, was it not? A. Certainly, Q. Was that the only credit or only disposition that was made of the gold dust? A. Yes, sir; as the entries were made on our books."

D. B. Neil testified that he was the gold dust teller of the Fairbanks Banking Company; that on the morning of the 18th he took care of the gold dust that had been left in the bank the day before; that he found a poke of gold in the vault with a tag attached marked C. J. Robinson; that he took the dust from the vault and weighed it, the weight being 329.16 ounces; that he did not remember whether he cleaned the dust or not; that he made an entry in the bank books with reference to the dust in the gold dust book to the credit of C. J. Robinson; that at the time he was informed of the service of the garnishment he was working in the gold dust teller's cage, but could not say exactly what he was doing; that he thinks he then had all of Robinson's dust weighed. On cross-examination witness further testified: "Q. Isn't it a fact that just about the time or very shortly after you had made your record that that was the C. J. Robinson gold dust, wasn't it about that time that Mr. Jackson came to you and told you that that dust should be deposited to the Howards, and was not Robinson's gold dust? A. Yes; just shortly after. Yes. Q. Didn't he have you make out slips to be given to Mr. Matheney to make out the certificates of deposit for the specified amounts? A. Yes; I made out teller's checks to the Howards for certificates of deposit. * * * Q. And in this particular instance he came and notified you that that gold dust belonged to the Howards? A. To the Howards; yes, sir. Q. And did you make your record accordingly? A. I did. I corrected my book accordingly. * * * Q. When did you make the amendment, what you denominate the amendment or correction, adding Howard's name to that? A. It was in the forenoon. I couldn't say exactly the time. * * * Q. Did you do it immediately upon Mr. Jackson giving you those instructions? A. Yes, sir; I did it immediately upon Mr. Jackson giving me those instructions. Q. Do you know how long it was after you had weighed the gold dust? A. It couldn't have been very long, more than half an hour, I don't think, something like that."

C. J. Robinson testified that he brought in some gold dust in value about $6,000 from Dome Creek, and left it in the Fairbanks Banking Company's vault on Sunday, the 17th day of July, 1910; that he gave the gold dust to Mr. Jackson, who took it from witness and weighed it, this at the request of witness. Witness then says: "I told him (Jackson) I wanted to open two new accounts. I wanted to place it to the credit of Mrs. (evidently should be Mr.) and Mrs. Howard. Q. You wanted what placed to the credit of Mr. and Mrs. Howard? A. The gold dust. Q. Your gold dust? A. Yes. Q. What did he do? A. He said, 'All right,' took the poke from me, and he said, 'Come around to-morrow and attend to it.' I said: 'All right.' * * * Q. Who is this Mr. and Mrs. Howard? A. They have been in my employ nearly three years, working for me on Dome Creek. Q. What is Howard's name? A. L. G. Q. Did you owe L. G. Howard anything at that time? A. I did. Q. How much did you owe him? A. In the neighborhood of $2,600 or $2,700, I believe. Q. Is that the nearest you can get at it? A. I don't know just the exact amount. Q. What is Mrs. Howard's

name, Alice Howard? A. It is. Q. Did you owe her anything? A. I did. Q. How much did you owe her? A. Some $3,100 or $3,200. I owed her for three years' wages. Q. At that time? A. I did. * * * Q. Did you pay Mrs. Howard anything? A. I have just told you that I paid her nothing. Q. I mean out of this poke of gold? A. I credited her with $3,000. I think it was $3,150 that I credited her with. Q. When? A. In the morning, on Monday morning. Q. What time? A. About 10 o'clock, when I went there, at the time I went there. No; I think it was on Sunday that I gave her the $3,150, and the balance to go to L. G. Howard. I believe it was on Sunday when I told Jackson when I put the poke in there. I told him to give her, I think it was, $3,150, and the balance to L. G. Howard, and on Monday morning I gave him her signature which I had brought in with me for that purpose. Q. You gave who, Jackson? A. Yes. Q. Her signature? A. Yes, sir; I did. Q. Is that money placed to Mrs. Howard's credit, subject to her checks? A. I believe so. No; I told him to place it as a certificate of deposit. Q. Why did you want to give Jackson her signature then? A. When I left the creek, I asked her for her signature, and asked her how she wished her money deposited. That I was going to place this money to her credit. She said: 'All right.' I wanted to know what bank she wanted it in. She said the Fairbanks Banking Company. I asked her how she wanted it deposited. She did not know. I said: 'A certificate of deposit?' She said: 'Yes.' I said then: 'Give me your signature.' I was given it, and I brought it in and I gave it to Mr. Jackson in the presence of Mr. Clark on Monday morning the 18th day of July. * * * The balance of the money in the poke that I brought in was to be placed to his credit, which was done. * * * The balance of the poke was placed to Mr. Howard's credit when I brought it in on Sunday when I first gave it to Mr. Jackson; at least, that is, I presume when he placed it to his credit. I told him then that that is to be placed to the credit of Mr. and Mrs. Howard, and I gave him the signature of Mrs. Howard on the following morning."

In a further examination of the witness he was asked: "Q. Did Mr. Jackson give you a receipt for the gold dust when you took it there? A. No. My instruction to Mr. Jackson was to place to the credit of Mr. Howard— " And later: "Q. Now, you may state in detail, as near as you can remember, just what was said between you and Mr. Jackson about what disposition to make of this gold dust? A. I asked him to weigh my poke and to see how it corresponded with my weight. He done so. And I believe I made the remark: 'You are within five points of my weight.' I said I wanted to open two new accounts with him, the Howards. He said: 'Yes.' After weighing the dust, I said: 'Place to the credit of Alice Howard $3,150, and the balance to L. G.' He said: 'All right. Come around in the morning and fix it up.' I believe that was about the sum and gist of the conversation between us. * * * Q. Did you tell Mr. Jackson to issue to Mrs. Alice Howard a certificate of deposit for the amount that you speak of? A. Yes; I believe I did, stated that I wished it put in in the nature of a certificate of deposit. Q. That was on Sunday at the time that we have been talking about when you took the gold dust there? A. Yes. Q. Did you tell Mr. Jackson to issue a certificate of deposit for the balance to Mr. L. G. Howard? A. I believe I did. Q. That was the same time? A. That was the same time. Q. In the same conversation? A. Yes. Q. Did Mr. Jackson do that? A. He didn't do it then and there."

Stevens, Roth & Dignan, Metson, Drew & Mackenzie, and E. H. Ryan, for plaintiff in error.

Fink & White, for defendants in error.

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

WOLVERTON, District Judge (after stating the facts as above). [1] The first contention of plaintiff is that the garnishee's motion to dismiss the proceedings upon which the judgment is based at the close

of plaintiff's case was tantamount to a motion for a directed verdict, and, the garnishee not having rested its case, the motion should have been denied. The action of the District Court is fully sustained by the case of Bunt v. Sierra Butte Gold Mining Co., 138 U. S. 483, 11 Sup. Ct. 464, 34 L. Ed. 1031, which was an action to recover for personal injuries. There the defendant moved at the close of the plaintiff's case for a directed verdict in its favor, which was granted, and the judgment was affirmed, it being expressly declared that the court rightly directed a verdict for the defendant.

[2] The next contention is that the garnishee having tendered the issue nulla bona, without having pleaded matter in avoidance, it will not be heard to set up the right of the Howards to the proceeds of the gold dust, the subject of the controversy. This contention proceeds upon the hypothesis that Robinson first sold the gold dust to the bank, and that the bank received the proceeds to the credit of Robinson, and that thereafter, if the Howards acquired any interest therein whatever, Robinson transferred such proceeds to them, and that the garnishee cannot avail itself of the fact of such transfer without pleading it. A sufficient answer to this is, if the judgment is to stand, that plaintiff proved defendant's case, and from the showing made he was not entitled to recover as against the garnishee. The plaintiff could not have been misled by the answer for the garnishee's answer to the interrogatories propounded by plaintiff set forth the real transaction.

[3] The third contention relates to the findings of the court. The case having been tried without the intervention of a jury, the court's findings are conclusive of the questions of fact, unless it be that there is no evidence to support them. The rule is that the findings of fact of the court, whether special or general, will not be disturbed if there is any evidence upon which such findings could be made. Stanley v. Supervisors of Albany, 121 U. S. 535, 547, 7 Sup. Ct. 1234, 30 L. Ed. 1000; Hathaway v. First National Bank, 134 U. S. 494, 10 Sup. Ct. 608, 33 L. Ed. 1004; Lehnen v. Dickson, 148 U. S. 71, 73, 13 Sup. Ct. 481, 37 L. Ed. 373; and Dooley v. Pease, 180 U. S. 126, 131, 21 Sup. Ct. 329, 45 L. Ed. 457. It is not contended that the conclusions of law should have been different upon the facts found, but that the facts found are not supported by the evidence.

[4] The proposition that there was first a sale of the gold dust by Robinson to the bank does not seem to us to affect the case vitally. Robinson had been accustomed to take his dust to the bank, and through an understanding between the parties the bank took the dust, and, when weighed, allowed Robinson $17.60 per ounce for it, and credit was given as if Robinson had deposited so much money with the bank. So that under the usual way when Robinson took the dust to the bank he would have received credit for it as cash deposited. There is no evidence in the case tending to show that the gold dust in question was to be treated differently than had been usual theretofore, and we may assume for the purposes of this case that, when the dust was delivered to the manager of the bank by Robinson, a sale took place, leaving only the value to be determined by weighing, that there

was a conversion of the gold dust into money, and that henceforth the parties were dealing with the money, and not the dust. Even upon this premise the real question for consideration is, What did Robinson do with the money? Did he deposit it to his own credit, or did he deposit it to the credit of the Howards to apply to the payment of his indebtedness to them? It is strongly urged that the transaction—that is, what was done—did not amount to an appropriation of the money to the payment of Robinson's indebtedness to the Howards, but was only a deposit with instructions to the bank to make the payments through the issuance of the certificates of deposit, that, therefore, the proposed payments on the part of Robinson to the Howards were yet incomplete, and for what was to be done in the way of issuing the certificates the bank was constituted the agent of Robinson and not of the Howards, and that until the certificates were issued and accepted by the Howards the money remained the property of Robinson, subject to garnishment in the hands of the bank by plaintiff.

It is a principle of law perhaps beyond controversy that "where money is paid by A., into the hands of B., to remain at the disposal of C., the right to that money continues in A. until B. gives and C. takes credit for it, or B. actually pays it to C. Up to this period, B. is the agent of A. only, and A. may countermand the authority to make the payment." Trustees of Howard College v. Pace, 15 Ga. 486. In support of the principle the court quotes from Addison on Contracts, as follows:

"But in all cases where money is sent to one person, to be paid by him to another, to enable the person who is the object of the remittance, to maintain an action against the remittee, to recover the amount transmitted to him, there must be an express promise or assent, on the part of the latter, to pay over the money to the former, or hold it to his use, inasmuch as the mandate is revocable, so long as no such assent, promise, or engagement has been given or entered into"—citing authorities.

Thereupon the court further observes that:

"When, however, the assent has been given, and the attornment made, the order to pay the money, if founded on a precedent debt or other good consideration, becomes irrevocable."

So in a later case in the same court it is held that:

"When A. deposits money in a bank, with directions that it is to be paid out to a check which he has given, or will give to C., the money is still the money of A. until the bank either pays it, or promises C. to pay it, or unless it be deposited at the instance or procurement of C., or under an arrangement with him." Mayer & Lowenstein v. Chattahoochee National Bank, 51 Ga. 325.

The court then proceeds to the exceptions to the rule, about which it says:

"The exceptions to the rule are special cases, as where the person to whom the money is ordered to be paid is interested in the consideration, or has himself procured, or directed, or agreed, that the deposit shall be made for his benefit. In such cases the depositor may be considered only as the agent of the party at interest in making the deposit and in contracting with the bailee for its delivery or payment to the true owner or beneficiary, and he, the depositor, loses control over it immediately on the deposit. In fact, it is not his deposit at all, but left for the true owner as agent."

The principle is reaffirmed in Bluthenthal et al. v. Silverman, 113 Ga. 102, 38 S. E. 344. See, also, Kelly v. Roberts, 40 N. Y. 432; Peak v. Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90; Brockmeyer v. Washington National Bank, 40 Kan. 376, 19 Pac. 855; Simonton v. First National Bank of Minneapolis, 24 Minn. 216; and Witter v. Little, 66 Iowa, 431, 23 N. W. 909.

These cases, however, do not seem to meet the conditions here present. The court has found in epitome that Robinson, having certain gold dust in his possession, notified the Howards to whom he was indebted that it was to be paid to them, and at the same time asked and received instructions from them to deposit the same in the Fairbanks Banking Company bank, and to accept certificates of deposit therefor in an amount to each of the Howards as designated; that Robinson delivered the gold dust to the cashier of the bank, had it weighed, and instructed the cashier that it was for Alice and L. G. Howard, and that certificates of deposit were to be issued to the said Howards in sums designated, and that thereafter, the next day, notice of garnishment was served upon the bank attaching Robinson's property in the hands of the bank. These findings show that the Howards were not only not without notice of the intended deposit of the gold dust for their benefit, but that they had assented thereto by instructing Robinson that it be so deposited, and that he take certificates of deposit to be issued to them therefor. This brings the case directly within the exceptions to the rule as laid down in Mayer & Lowenstein v. Chattahoochee National Bank, supra. The Howards themselves agreed and directed that the deposit should be made for their benefit. In such a case under the exceptions the depositor bcomes the agent of the party for whose interest it is made, and he loses control over the deposit immediately it is made. When the deposit is made, the bank would thereupon become the agent of the party at interest. The dust had been deposited for the Howards, and the fact that the certificates of deposit were not issued to them at once did not change the relationship between them and the bank. The ownership of the dust or the money in its converted state immediately the deposit was made became the property of the Howards, and the bank's further duty in issuing the certificates of deposit was to the Howards, the same to be delivered to Robinson as their agent.

Now, as to whether there was any evidence to support the facts found by the court, Robinson says, in effect, that he owed the Howards for services, giving the amount approximately due to each; that when he left the creek—that is Dome Creek, where he was engaged in mining—he asked her, Mrs. Howard, for her signature, and how she wanted her money deposited, and stated that he was going to place this money to her credit; that she said all right, and further stated that she wanted it in the Fairbanks Banking Company's bank, and a certificate of deposit for it, and then gave Robinson her signature to be handed to the bank. Jackson's testimony is to the effect that Robinson delivered him the poke of gold and said that it was for the Howards, that he wanted it placed to their credit, and that the bank should issue certificates of deposit to them. The certificates were not then

made out, but would have been if it had not been on Sunday, a non-banking day. This is ample to support the findings of fact, at least as it pertained to Mrs. Howard.

[5] As it relates to Howard, the garnishee in its answer to plaintiff's interrogatory further states that:

"Mr. Robinson stated at the time that he had told the Howards that he was going to deposit the money to their credit under certificates of deposit."

This affords some evidence of Howard's assent to the deposit of the gold dust in payment of the debt due him although by nature hearsay, and perhaps self-serving. But without this, Howard being a creditor and the deposit being made in payment of Robinson's debt to Howard, the assent of Howard to the payment will be assumed.

It was said in Grove v. Brien, 8 How. 429, 439, 12 L. Ed. 1142, that:

"In the absence of all evidence to the contrary in case of an absolute assignment by a debtor to his creditor for the purpose of securing a pre-existing debt, an assent will be presumed on account of the benefit that he is to derive from it,"

—citing in support thereof Tompkins v. Wheeler, 16 Pet. 106, 10 L. Ed. 903, and Brooks v. Marbury, 11 Wheat. 78, 6 L. Ed. 423.

The Tompkins Case was where the debtor made a deed of assignment for the benefit of a part of his creditors only, and the court held that the presumption of law was that the grantees accepted the deed; and the Brook Case was analogous and attended with a like holding. If this is true in case of an assignment to secure a debt, it must also be true in case of a payment of the debt to a third party for the benefit of the creditor.

These considerations lead to an affirmance of the judgment of the District Court, and it is so ordered.

SWAGER v. SMITH.

(Circuit Court of Appeals, Fourth Circuit. March 14, 1912.)

No. 1,050.

1. COURTS (§ 372*)—FEDERAL COURTS—STATE LAW—CONCLUSIVENESS.

The validity of a deed of trust on personal property to confer a lien on the beneficiary as against the grantor's other creditors in bankruptcy proceedings depends on the law of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977–979; Dec. Dig. § 372.*

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

2. BANKRUPTCY (§ 184*)—DEED OF TRUST—PERSONAL PROPERTY—VALIDITY.

Where a deed of trust on the personal property in a hotel covered the contents of the pantry, wineroom, and bar supplies, which the grantor covenanted to keep up to a value of $2,500, and these goods which must perish and were consumed in the use thereof formed a very material part of the property covered by the deed, it was void under the law of West Virginia as against the grantor's other creditors in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275–277; Dec. Dig. § 184.*]

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

3. APPEAL AND ERROR (§ 878*)—CROSS-APPEAL.
Mere assertion of error in appellee's brief, where no cross-appeal was taken, was insufficient to confer jurisdiction on the appellate court to review the error alleged.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3573–3580; Dec. Dig. § 878.*]

Connor, District Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi, in Bankruptcy.

Action by J. Truman Swager against Harvey F. Smith, as trustee in bankruptcy of William H. Tompkins and another, trading as Tompkins & Geary. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

It appears from the evidence that J. Truman Swager was the owner of a hotel and restaurant in Clarksburg, W. Va., which he occupied and conducted personally. Desiring to discontinue the hotel business, he entered into a contract of the 4th day of April, 1908, with Robert A. Davis, at which time four separate papers were executed: (a) bill of sale of personal effects in consideration of $5,000; (b) a lease upon a rental of $200 per month; (c) an agreement respecting license; (d) a deed of trust—all constituting one transaction and to be delivered on the 1st day of June, 1908. Subsequently Robert A. Davis entered into an agreement with Tompkins and Geary to assign his interest in the Swager hotel, personal property, and real estate. Thereupon new agreements were entered into between J. Truman Swager and William H. Tompkins and John A. Geary, similar to, if not identical with, the original agreements with Davis. Possession of the hotel was retained by Swager until Tompkins and Geary delivered the deed of trust to him. The deed of trust, among other things, included the following: "All the furniture, fixtures and appliances in the bar situated on the first floor of said building and all the stock of liquors, beers, wines and ales." It appears that Tompkins & Geary bought considerable quantities of goods from different wholesale houses, and on the 23d day of October, 1908, a petition in bankruptcy was filed against them, and on the 6th day of November an amended petition was filed, and on the 9th day of January, 1909, they were adjudged bankrupts.

J. Truman Swager proved his claim of $4,000, purchase money secured by his deed of trust, and on April 23, 1909, the trustee filed his exceptions thereto, testimony was taken on behalf of Swager and on behalf of the trustee, and on the 9th day of March, 1910, the referee in bankruptcy sustained the exceptions to the claim of J. Truman Swager for the sum of $4,000, and refused the same as a secured claim and allowed it as a common or unsecured claim, from which J. Truman Swager took an appeal to the District Court, and that court sustained the rulings of the referee. The case now comes here on appeal from the judgment of the court below.

Edward G. Smith, for appellant.
Philip P. Steptoe and Harvey F. Smith, for appellee.

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

PRITCHARD, Circuit Judge (after stating the facts as above). [1] The question involved in the case at bar was passed upon by this court in the case of Ritchie County Bank v. McFarland, 183 Fed. 715, 106 C. C. A. 153; the court following in that case the decisions of the Supreme Court of West Virginia. That we are governed by the law of that state in this instance in passing upon the validity of the deed of

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

trust in question is borne out by the following cases: Chicago Bank v. Kansas Bank, 136 U. S. 223–235, 10 Sup. Ct. 1013, 34 L. Ed. 341; Etheridge v. Sperry, 139 U. S. 266–277, 11 Sup. Ct. 565, 35 L. Ed. 171; Dooley v. Pease, 180 U. S. 126–128, 21 Sup. Ct. 329, 45 L. Ed. 457; Thompson v. Fairbanks, 196 U. S. 516–522, 25 Sup. Ct. 306, 49 L. Ed. 577; Humphrey v. Tatman, 198 U. S. 91–95, 25 Sup. Ct. 567, 49 L. Ed. 956.

[2] Therefore the first inquiry is as to what the courts of West Virginia have had to say in regard to deeds of this character. In the case of Claflin v. Foley, 22 W. Va. 434, the first syllabus is in the following language:

"A deed, conveying a stock of goods and merchandise and notes and accounts of a merchant to a trustee to secure the payment of notes not then due, which provides that said conveyance shall cover 'such goods and merchandise as may be added to said stock, from time to time, by the grantor and brought into the store in course of business or to take the place of such goods as may hereafter be sold,' but does not authorize to take possession or control of said goods until the grantor has made default in the payment of one or more of said notes and has been requested to do so by the holder or holders of such note or notes, is as against the unsecured creditors of the grantor fraudulent and void on its face, although it provides that the 'trustee, by himself or by his agent or attorney, shall at once take possession,' of the notes and accounts transferred by such deed and collect the same for the benefit of the trust creditors."

The learned judge who tried this case in the court below in disposing of the same filed a memorandum, a part of which is in the following language:

"The exact question involved here has been discussed and determined by me in Re Elletson Co. (D. C.) 174 Fed. 859. In that case, speaking of Judge Poffenbarger's very cautious and qualified expression, in Gilbert v. Peppers [65 W. Va. 355, 64 S. E. 361], that 'Bartles & Dillon v. Dodd [56 W. Va. 383, 49 S. E. 414] may possibly be sustained on principle, as the property, except a small portion thereof, was not consumable in its use, nor perishable, nor intended to be sold,' I say, at page 866 of 174 Fed.: 'I do not think the decision in Bartles & Dillon v. Dodd can possibly be maintained in principle for the reasons stated. On the contrary, I think it in direct conflict with the true principles established by very many older cases (such as Shattuck v. Knight, 25 W. Va. 590–600; Landeman v. Wilson, 29 W. Va. 702, 2 S. E. 203; Livesay, Ex'r, v. Beard, 22 W. Va. 585; Claflin v. Foley, 22 W. Va. 434–441; Gardner v. Johnston, 9 W. Va. 403) to which the ruling in Gilbert v. Peppers directly takes us back, as also with those directly established by this Gilbert Case itself.'"

The decision in Bartles & Dillon v. Dodd, 56 W. Va. 383, 49 S. E. 414, while not absolutely overruled by Gilbert v. Peppers, 65 W. Va. 355, 64 S. E. 361, is thereby much weakened in force, and the result is a restoration of the older doctrine, set out in Cochran v. Paris, 52 Va. 348, and quoted as follows in Gardner v. Johnston, 9 W. Va. 408, 409:

"The fact that a deed of trust embraces articles which must perish, or be consumed in the use, before a sale of them can be made according to the terms of the deed, is not one which, of itself, necessarily shows the deed to have been made with a fraudulent design. The amount in number or value of such articles may be so inconsiderable, as compared with the main subjects of the trusts, as to justify the conclusion that they were embraced, through inattention of the parties, to the inconsistency of providing a security

out of property which, from its nature, would necessarily perish before it could be made as means of satisfying the trust. Or the deed may embrace other property, to the improvement, support, or substance of which such perishable property is embraced in the deed, so far from being indicative of a fraudulent purpose, might rather serve to show an honest and provident design and an effort to make the main subjects of the trust a more certain and productive security."

It appears from an inventory made at the instance of the appellant, on the 7th day of November, 1908 (the date that this property was taken in charge by the trustee), that the contents of the pantry, wine-room, and the bar supplies were estimated to be worth $942.41. It is but fair to say that counsel for appellee insist that this property was not worth more than from $200 to $500. However, there is a covenant in the lease to keep this stock up to $2,500, and it may therefore be assumed that a considerable amount of the stock had been disposed of by the bankrupt before the trustee took possession of the same. It is apparent from the evidence in this case (as shown by the two agreements) that the agreement of the bankrupt to use his influence in obtaining a liquor license, while not controlling, should be taken into consideration in passing upon the question as to whether any considerable portion of the property conveyed was of a transitory nature. It undoubtedly shows that the lessee considered the barroom the most important feature in connection with the business in which he was about to engage.

In the case of Ritchie County Bank v. McFarland, supra, this court, in an opinion by Judge Waddill, said:

"We think it is equally well settled by the decisions of the Supreme Court of Appeals of West Virginia that, where property of the same class as last herein stated is conveyed under like conditions and treated in the same way, along with other property of a permanent nature, as here, and the transitory property forms, as it does in this case, a material part of what is conveyed, the deed, as respects both classes of property, is equally void. Gardner v. Johnston, 9 W. Va. 403; Claflin v. Foley, 22 W. Va. 441; Livesay v. Beard, 22 W. Va. 585; Shattuck v. Knight, 25 W. Va. 590–600; Landeman v. Wilson, 29 W. Va. 703, 2 S. E. 203."

In the case at bar it may be that the deed of trust is not void per se; but the evidence adduced before the referee shows that the parties intended, and that, in fact, the stock of consumable pantry and saloon supplies did constitute a considerable part of the property conveyed.

We are of opinion that the court below properly held the deed of trust void.

[3] The appellees, asserting in their brief illegality in the contract between Swager and Tompkins & Geary, ask that this court hold that Swager's claim as a common creditor should be rejected. The appellees have not taken a cross-appeal. Mere assertion of error in an appellee's brief does not give this court jurisdiction to review alleged error against an appellee. Canter v. Insurance Co., 3 Pet. 307, 317, 7 L. Ed. 688; Chittenden v. Brewster, 2 Wall. 191–196, 17 L. Ed. 839; The Maria Martin, 12 Wall. 31–40, 20 L. Ed. 251; The Stephen Morgan, 94 U. S. 599, 24 L. Ed. 266; Clark v. Killian, 103 U. S. 766, 769, 26 L. Ed. 607; Loudon v. Taxing District, 104 U. S. 771, 774, 26 L. Ed. 923; Farrar v. Churchill, 135 U. S. 609–612, 10 Sup. Ct. 771, 34 L.

Ed. 246; Cherokee Nation v. Blackfeather, 155 U. S. 218–221, 15 Sup. Ct. 63, 39 L. Ed. 126; Bolles v. Outing Company, 175 U. S. 263–268, 20 Sup. Ct. 94, 44 L. Ed. 156; Ency. of Pl. & Pr. 157, 514; Stand. Proc. 430.

In view of what we have stated, the ruling of the lower court is affirmed.

Affirmed.

CONNOR, District Judge (dissenting). Eliminating all irrelevant matter, the record, for the purpose of passing upon the assignments of error, presents this case: Truman Swager, prior to April 4, 1908, owned, and personally operated, a hotel and restaurant in the city of Clarksburg, W. Va. Desiring to retire from the business, he, on that day, entered into a contract with one Davis, evidenced by writings, whereby he agreed to sell the furniture of all kinds in, and being used for the purpose of operating, the hotel, for the sum of $5,000 and to execute to him a lease for the hotel building. The purchase price was to be paid in the following manner: $500 paid cash; $500 on June 1, 1908; and $1,000, 6, 12, 18, and 24 months each, after June 1, 1908, with interest from date. For these amounts Swager agreed to accept the promissory notes of the purchaser, payment whereof was to be secured by a deed of trust on all of the property purchased as well as on all the furniture, bar fixtures, appliances and stock of goods to be placed in said building by the purchaser, the bar fixtures and stock of goods was, at all times, to be of the value of at least $2,500, and kept insured for the benefit of the trustee. The parties, on the same day, and as a part of the said transaction, entered into a contract whereby the said Swager promised to use his influence to secure from the city council a license to said purchaser to operate a retail liquor store and saloon in said building. Upon failure to secure such license the contract of sale was to be null and void. License having been obtained, Davis executed a deed in trust to E. G. Smith to secure the balance of the purchase money in accordance with the terms of the contract. The property transferred by said deed is described as follows:

"All of the household and kitchen and dining room furniture, which is in, and has heretofore belonged to the Swager Hotel Building and which is now used as a part of the appliances, furniture and equipment of said hotel, including tables, chairs, sideboard, table linen, together with all the furniture and appliances, beds and bedding in the rooms on the second and third floors of what has heretofore been known as the Swager Hotel Building (as per Schedule No. 1 attached hereto) including all the furniture, fixtures and appliances in the bar, situated on the first floor of said building and all the stock of liquors, beers, wines, ales, and everything which are now in or may hereafter be placed in the said hotel building or business rooms of said building or which may be placed in any of the buildings on the premises."

After declaring the trust, relating to the security of the notes, is the following clause:

"The said trustee is to permit the said parties of the first part to remain in possession of and enjoy the use of the said property herein conveyed until such time as default be made in the payment of the said notes, or any one of them, when they, or either of them, become due and payable and, upon the failure for a period of thirty days, to pay any one of said notes

when it shall become due and payable, then all the notes remaining unpaid shall become due and payable notwithstanding the terms and conditions as appear upon the face of the notes themselves."

Power is given the trustee, upon such default, "when thereto requested by the said J. Truman Swager," to take possession of and sell said property, etc.

On June 10, 1908, Davis, in consideration of $1,500, transferred and assigned to Tompkins & Geary all of his right, title, and interest in the property purchased from Swager; they assuming the payment of the four notes of $1,000 each, executing, for the security thereof, a deed of trust to E. G. Smith containing the same provisions as the one executed by Davis. Swager executed a contract with the purchaser, in regard to obtaining retail liquor license, to the same effect as that made with Davis. The deed of trust was executed, pursuant to the terms, and in substitution of, the deed of Davis, bearing date June 1, 1908, but actually made, delivered, and proven several days thereafter. It was recorded August 13, 1908. That deed contained this additional clause:

"The parties of the first part being engaged in the retail liquor business have therefore the right to sell at retail and replace, from time to time, any of the stock of wines, beers, etc., hereinbefore set out or intended to be included in this conveyance."

On January 29, 1909, Tompkins & Geary were, upon the petition of sundry creditors, filed October, 1908, adjudged bankrupts. Swager offered to prove his debt, being for said notes and amount due on account of rent, against the estate of said bankrupts, as a preferred debt. The trustee in bankruptcy, Harvey F. Smith, filed objections thereto, assigning the reasons set forth in the record. The referee, without finding any specific facts, sustained the objection and permitted him to prove the debt as an unsecured claim. Upon a petition for review this ruling was affirmed by the District Judge. The case was brought to this court for review, etc. The decision of the learned judge below is based upon the opinion that the deed of trust from Tompkins & Geary to E. G. Smith, trustee, is fraudulent and void per se. In his opinion, in the record, he says:

"The exact question involved here has been discussed and determined by me in Re Elletson (D. C.) 174 Fed. 859."

A careful examination of the opinion in that case discloses that a deed in trust conveying personal property, a portion of which was consumable in the use, had been executed for the security of a debt. It further discloses facts, aliunde the deed, upon which the conclusion could, with abundant reason, be sustained, that it was, in fact, made with a fraudulent intent. The process of reasoning and reference to decisions of the Supreme Court of West Virginia indicates, I think, that the judge was of the opinion that the deed was fraudulent per se, and that, in addition thereto, he found conditions and facts which led him to the conclusion, sitting as trier of the fact, that the deed was fraudulent in fact. This court, upon petition for review, evidently treated the decision below as having been based upon a conclusion of law, by the court below. The question was presented and decided here

in Ritchie County Bank v. McFarland, 183 Fed. 715, 106 C. C. A. 153. After stating the facts, this court says:

"The learned judge of the District Court, in an able and elaborate opinion (174 Fed. 859), reviewed the facts and discussed the law applicable to the case. After careful consideration, we concur in and adopt the conclusions reached by him. In our view it is entirely clear that the decisions of the state of West Virginia, as announced in the recent case in the Supreme Court of Appeals of that state of Gilbert v. Peppers, 65 W. Va. 355, 64 S. E. 361, hold that a conveyance of a shifting stock of goods, or of other personal property of a transitory character, and which changes in the use and handling thereof, left in the possession of the grantor, who is allowed to control and dispose of the same at his will, is void per se and on its face, and hence can form no basis as security for payment of a debt. * * * We think it is equally well settled that, by the decisions of the Supreme Court of West Virginia, where property of the same class, as last herein stated, is conveyed under like conditions and treated in the same way, along with other property of a permanent nature, as here, and the transitory property forms, as it does in this case, a material part of what is conveyed, the deed, as respects both classes of property, is equally void."

I have been thus careful to set forth the language used by this court, because I wish to avoid being misunderstood in respect to it. I fully concur in the decision both below and in this court, because I think that the judge below found, as a fact, aliunde the deed, that it was made and used for the purpose of hindering or delaying creditors. The learned judge, concluding his well-considered opinion, referring to the decision in Bartles v. Dodd (to which I will hereinafter refer), says:

"In the Bartles Case the trust deed was only assailed as being fraudulent on its face. Here the trust deed is not only assailed for this reason, but also because it is fraudulent in fact, and, as I have indicated, I think the facts disclosed clearly show it to be so, made as it was to hinder and delay creditors from interfering with this property, while the company carried on business with it for years."

This language separates the case, as an authority, from that before us. Concurring fully with the conclusion reached, a careful examination of the decisions of the Supreme Court of Appeals of West Virginia prevents me from concurring in all that is said in the opinion filed by this court. In saying "that the exact question involved here has been discussed and determined by me in Re Elletson Co.," the learned judge evidently referred to the question of law—the facts were essentially different, as an examination of the opinions and records demonstrate. I, of course, concede that, in this court, we must ascertain whether the West Virginia court has made a controlling and authoritative deliverance upon the subject, and, if so, we must adopt and apply it to this case. The West Virginia decisions constitute the construction placed by that court upon the statute in force in that state to prevent transfers and conveyances made with intent to hinder, delay, or defraud creditors. The statute is essentially the same as that of 13 Eliz. c. 5, and is found in the codes of probably all of the American states. The decisions of the several courts, in respect to its construction in some respects, are not uniform. All concur, however, in holding that, before a deed can be brought under its condemnation, the attacking party must persuade the court that it

was made with the intent to hinder, delay, or defraud creditors. This may be regarded as settled. The line of cleavage is found in those decisions which hold that transfers of a certain class of property with retention of possession and right of disposition are fraudulent per se, and those which treat such transfers and deeds as presumptively fraudulent—leaving the ultimate fact to be determined, either by the court or the jury, according to the jurisdiction in which the question is tried. This case was argued, I think correctly, before us upon the theory that the court below held that the deed of trust from the bankrupts to E. G. Smith, trustee, was fraudulent per se; that is, it was fraudulent as matter of law.

While the opinion filed in this court contains language capable of being construed as an intimation to the contrary, I assume that the decision is based upon the opinion that the deed is per se fraudulent, and that this conclusion is based upon the construction placed upon decisions of the Supreme Court of Appeals of West Virginia. It is from the last conclusion that I respectfully dissent. It must be kept clearly in mind that, as said by Judge Dayton in his opinion in Re Elletson, supra, that the validity of the deed turns, not upon the validity of the debt, but upon the intent of the grantor—and as the invalidating elements named in the statute are in the disjunctive, the existence of either of them is sufficient to sustain the conclusion that the deed is invalid. If the intent of the maker be to appropriate his property to the payment of an honest debt, although in effectuating such intent his plan may, for a reasonable time, have the effect of hindering or delaying his creditors, the deed is valid. If, however, his intent be to provide for his own ease and benefit, to withdraw his property from the reach of his creditors, to use and enjoy it as his own, the scheme or plan is condemned by the statute because of the intent. This, I understand, to be the test. The intent may be ascertained from the terms and provisions of the deed—the character of the property conveyed, the right to retain possession, and the manner of using it, the time and terms upon which the creditor, or his trustee, may take it into possession, subject it to sale, etc., or the intent, when not apparent upon the face of the deed, may be ascertained by reference to evidence of facts and circumstances dehors the deed. In the first instance the court declares, as matter of law, that the language contained in the deed manifests so clearly and indisputably the intent of the grantor that it is incapable of any explanation; the provisions of the deed manifest the intent, hence the court applies the law and declares the deed fraudulent. As is aptly said by one of the judges, the deed is a felo de se. In the second instance, the chancellor sitting as a trier of the fact or the judge, in an action at law, with the aid of a jury, hears relevant evidence in regard to circumstances, conditions, conduct, and declarations of the parties, and ascertains, as a fact, the intent with which the deed was made. In either forum, or mode of trial, the question to be decided is one of fact—the difference between the cases is only as to mode of proof. It is always, primarily, for the court to decide upon which side of the line of separation the instant case falls. The rule by which this is done is well stated by

the Supreme Court of West Virginia in Landeman v. Wilson, 29 W. Va. 703, 2 S. E. 203, where it is said:

"Unless, upon the inspection of a deed claimed to be fraudulent upon its face, the court says that the intent of the grantor, in executing the deed, was to hinder, delay, or defraud his creditors, the court cannot hold the deed fraudulent upon its face."

This, I think, is the test uniformly applied by the courts. A deed is said to be fraudulent per se when the facts, appearing on the face thereof, necessarily imply the fraudulent intent and are incapable of any explanation to the contrary, in which case it is the duty of the court to declare it fraudulent. Has the court of West Virginia declared that a deed, to which the one before us must be assimilated in principle, is so manifestly fraudulent as to be incapable of any explanation showing that in truth and fact the intent of the maker was to make an honest appropriation of the property to the payment of the debt at maturity? It seems to be conceded, and a careful examination of the leading cases decided by that court discovers, that it has held:

"That if the property conveyed by the deed of trust is of such a character as must be consumed in the use, and, by the provision in the deed, it is not to be sold for a considerable time, and the grantor is to remain in possession of it until the sale, then such deed is per se fraudulent, for the obvious reason that the postponement of the sale, for a considerable time, and the retention of the possession of such property until the sale, could only have been inserted for a fraudulent purpose and with a view of enabling the grantor in such deed of trust to defeat its declared purpose, as a security for certain specified debts." Green, J., in Shattuck v. Knight, 25 W. Va. 597.

After stating the general principle, the learned justice puts this case:

"When a stock of goods, wares, and merchandise is conveyed in a deed of trust to secure debts, the property not to be sold for a considerable time, if there be any provisions in the deed which clearly indicate that the grantor, when he made it, intended to remain in possession of the property until the day of sale, such deed will be regarded as fraudulent per se precisely as it would have been had there been in it an express provision that the grantor should remain in possession of the goods until the day of sale. If such intention appear on the face of the deed, whether it be express or implied is entirely immaterial." Id.

This, I think, is in accordance with the weight of authority in this country, although a number of courts of eminent respectability hold that the conditions described in the opinion constitute a presumption of fraud, leaving the ultimate fact—the intent—to be found by the court or jury upon the entire evidence. It is generally held that, quoad present indebtedness, if the grantor is insolvent at the time of making the deed, the presumption is practically conclusive. So far as I have been able to investigate, the doctrine of Shattuck's Case was the settled law of West Virginia, where the property conveyed was a stock of goods and merchandise. It may be that, in some of the cases, not available to my investigation, it was extended to deeds conveying both consumable and nonconsumable property. In Claflin v. Foley, 22 W. Va. 434, a stock of merchandise was the subject-matter of the controversy. It seems that this was the settled law until Conaway v.

Stealey, 44 W. Va. 163, 28 S. E. 793, was decided. It is suggested that, in this case, the former decisions were, in some measure, departed from. I regret that I have not access to this case, but I note that Mr. Justice Brannon, in his concurring opinion in Horner-Gaylord Co. v. Fawcett, 50 W. Va. 487, 40 S. E. 564, 57 L. R. A. 869, referring to the Stealey Case, says:

"In that case the provision for the possession, replenishment, and sale of the stock was not. as it is in this case, on the face of the trust, but an oral agreement outside of the trust."

It would seem that the question, now under discussion, was not presented. Of course, when the fact was disclosed, the court, under Shattuck's Case, would hold the deed fraudulent. In Horner-Gaylord Co. v. Fawcett, supra, there was a departure from the former decisions. The question presented here does not invite a discussion of the reasons upon which that decision is based. There is no suggestion that the older decisions are overruled. The learned justice, writing for the court, in a carefully prepared opinion, points out the respects in which he distinguished the case from former decisions. As we shall see, that and the Stealey Case have been expressly overruled. The next case in order is Bartles v. Dodd, 56 W. Va. 383, 49 S. E. 414. There, a hotel equipment was sold and, to secure the purchase price, the purchaser executed a deed of trust transferring the property purchased, together with "any property that may be hereafter acquired to take the place of the property herein mentioned." The notes secured ran from 60 days to 4 months. Provision was made for their renewal, and that the grantors should retain possession until default, etc. Dent, J., says:

"It is insisted, because there was some perishable property included in the deed, that this shows it to be fraudulent per se. The plain object of the deed, while not permitting the debtor to defeat it, was to permit him to proceed with the hotel business and presumably to make the money to pay off his indebtedness. This is admitted in the allegations of the bill. In carrying on this business, it would be necessary for him to use up the eatables and drinkables on hand and continually to purchase others to supply the place of those used. Otherwise all the other property would be useless to him. To cover the things so used, it is provided in the deed that it shall extend over any property hereafter acquired to take the place of the property herein mentioned. The plain object of these provisions was not to hinder, delay, or defraud creditors, but was to keep the security good. The amounts thereof being small in comparison with the residue of the property, and the object of including it in the deed being apparent, does not render the deed fraudulent upon its face."

This language is sustained by the citation of a number of decisions of the Court of Appeals of Virginia. Other points are discussed, but the foregoing is the crux of the decision. The opinion concludes:

"To hold this deed fraudulent, we must believe, as stated by Judge Green in Shattuck v. Knight, 25 W. Va. 596, 'that the design of the grantor, clearly shown by these provisions, was when he executed the deed, to hinder other creditors and at the same time not to devote any of his property, then owned by him, and conveyed in the deed of trust, to the payment of the debts professedly secured by it, but to keep possession of it as he pleased and to dispose of the proceeds as he choose.'"

It will be noted that this opinion was written by Judge Dent for a unanimous court. He also wrote the opinion in the Fawcett Case, supra, to which Judge Brannon gave a cautious and guarded assent. The decision in the Dodd Case does not rest upon either the process of reasoning or the distinguishing features relied upon in the Fawcett Case. It is securely rested upon the Shattuck Case in so far as the facts are similar. The facts in the Dodd Case are strikingly similar to the case before us. They fall, naturally, into the same class, and I think should be decided by the application of the same principles. Has it been overruled? In Gilbert v. Peppers, 65 W. Va. 355, 64 S. E. 361, a stock of goods and merchandise was sold for $2,000 of which sum $200 was paid cash and for the balance 36 notes, running from 60 days to 4 months, were given. For their security, a deed of trust was executed transferring the same property and after-acquired goods. Without extending the recital of facts therein, I think the deed came clearly under the condemnation of Shattuck's Case and probably could have been saved by the decision in Fawcett's Case. The court, through Judge Poffenbarger, says:

"Until a comparatively recent date, this court held all deeds of trust on stocks of mercantile goods, allowing the debtor to remain in possession of the property and sell and dispose of the same, fraudulent and void per se" —citing Shattuck v. Knight, supra, and other decisions of the court.

After quoting from the opinion of Judge Green, the language quoted herein, other opinions, and Bump on Fraudulent Conveyances, the learned judge says:

"For a great many years, the doctrine of our cases cited has been adhered to by this court, but in Conaway v. Stealey the rule of the Iowa Supreme Court, as recognized in Etheridge v. Sperry, 139 U. S. 266 [11 Sup. Ct. 565, 35 L. Ed. 171], was adopted and a departure so made."

After pointing out why the case of Kreth v. Rogers, 101 N. C. 267, 7 S. E. 682, cited in Etheridge's Case, could not be treated as authority in West Virginia, he says:

"Conaway v. Stealey was followed in two later cases, Horner-Gaylord Co. v. Fawcett and Bartles v. Dodd. These decisions do not wholly repudiate the doctrine of the earlier cases."

After a discussion of the grounds upon which the Stealey and Fawcett Cases were decided, none of which I respectfully submit, was relied upon or suggested in the Dodd Case, the learned judge says:

"Much as we regret to disapprove and overrule decisions of this court, we are constrained by the weighty reasons of public policy which, centuries ago, impelled the passage of the statutes against fraudulent conveyances, to overrule Conaway v. Stealey and Horner-Gaylord Co. v. Fawcett."

But for the length of this opinion, I would quote, in full, the language of the judge, showing that the reasons which impelled the court to overrule the cases named do not apply to the Dodd Case. He concludes with these significant words:

"Bartles & Dillon v. Dodd may possibly be sustainable on principle, as the property, except a small portion thereof, was not consumable in its use, nor perishable nor intended to be sold."

Judge Brannon, concurring, explains his position in the Fawcett Case, but omits any intimation that he doubts the correctness of the Dodd Case in the decision of which he concurred.

I have, thus, I fear at unpardonable length, traced the current of decisions of the Supreme Court of Appeals of West Virginia upon the question with which we are confronted upon this record. A somewhat careful examination and frequent resort to the opinions of that court, while in another sphere of judicial work, has brought me to a profound respect for their well-considered conclusions, their exhaustive research, and great learning. Both inclination and duty impel me, in this case, to adopt the decision of that court. I fully appreciate the force of the reasoning and the wisdom of the policy upon which the Supreme Court of West Virginia rests these decisions. It is probable that several of the courts which treat such deeds as presumptively fraudulent are influenced by constitutional and statutory provisions narrowing the power of the courts to find conclusions of fact—compelling them to submit every issue of fact to a jury. This may explain the reason for the divergence of method of ascertaining the intent. However this may be, my difficulty in concurring with the opinion of the majority here does not arise out of a difference of opinion with the court of West Virginia, but a difference of opinion, with this court, in regard to what that court has decided. I am of the opinion that, although the decision in Bartles v. Dodd, while much weakened as an authority, is not overruled by the decision, or the opinion, in Gilbert v. Peppers, supra. I cannot foresee what that learned court may hereafter decide in regard to that case, but I do not think that I can be mistaken in holding that it has not yet overruled it. The learned judge, writing for a unanimous court, carefully distinguished between the two cases which were overruled and the one which was not. He further says that the Dodd Case may be sustained "on principle" because of the existence of the very facts and features found in this case. This, I submit, falls very far short of overruling the case. When we examine the facts in the Fawcett Case and Gilbert v. Peppers, and the process of reasoning adopted by the court, it appears to my mind that one of two conclusions is irresistible, either the decision in Bartles v. Dodd is the last controlling and authoritative deliverance of that court and should be applied here, or that there is no controlling and authoritative declaration of the law of that court which we are required to or can safely follow. In the condition last named, I assume that we should first look, for guidance, to the decisions of the Supreme Court of the United States, and, in default of finding it, we should carefully examine the decided cases of other state and federal courts, discussions of the most reliable text-writers and, with their aid, adopt that conclusion which is most consonant with sound policy and "the reason of the thing." While, necessarily, any decision of the Supreme Court of the United States would, to some extent, be controlled by the local law of the state from which the case comes, I think that we find in the language of Mr. Justice Brewer, in Etheridge v. Sperry, 139 U. S. at page 278, 11 Sup. Ct.

at page 569, 35 L. Ed. 171, a safe principle. After discussing the law, as held by the courts of Iowa, he says:

"If the question were an open, or a new one, unaffected by any settled law of the state, we incline to the opinion that the question is not one of law, so much as it is one of fact and good faith."

In this record it appears that oral evidence was taken by the referee. There was a sharp and decided conflict between several of the witnesses in regard to essential matters—the value of the nonconsumable property, the value of the wines and liquors on hand when the property passed into the possession of the trustee (it was shown that at the date of the deed there were none on hand), the reasons for not recording the deed promptly, the notice which the attacking creditors had of the situation—all of their debts were contracted subsequent to the date of the deed, etc., all of which were, I think, material to a correct decision of the question of the intent of the maker. For instance, the appellant insists that the schedule shows that the property transferred, including the lease, was worth $5,990.36 and of this only 6 per cent. was consumable, or property to be sold and replenished. This is controverted by appellee. My purpose in referring to the evidence is not to express an opinion in regard to it, but to point out the danger of doing injustice by holding the deed to be per se fraudulent. If, upon hearing and considering the evidence, the referee had found as a fact that the deed was made with a fraudulent intent, and the learned district judge had affirmed his finding, I should, in the absence of controlling reasons to the contrary, have concurred with his conclusion. The danger which, I think, confronts the court in holding that a deed conveying both consumable and nonconsumable property fraudulent per se, or of making the holding to depend upon the question whether the former constitutes a considerable or inconsiderable portion of the whole, is found in the cases to which our attention is called. The diligent counsel for appellant informs us that the record shows that in the Elletson Case it was 31.8 per cent., in the Peppers Case 32 per cent.—here 6 per cent. I cannot but think that the Supreme Court of West Virginia will, when finally settling the principle to control in classifying deeds of trust, hesitate to adopt a rule so uncertain, variable, and dependent upon the differing views of courts regarding what percentage of consumable property is material or immaterial, considerable or otherwise. This is a question in regard to which, there will be "many men of many minds." In dealing with both property rights and questions affecting the integrity of the citizen, courts should endeavor to prescribe, with as much certainty as possible, a "rule of action" for their guidance. I submit that it is but just to that learned court to think that it will "blaze" a plain pathway in which the citizen may walk with safety in respect to his honor and his property. I confess that I am partial to the ancient way of submitting such questions to the decision of a jury.

I have, at unusual length, set out my reasons for thinking that, following the decisions of the Supreme Court of West Virginia, or, if by reason of their unsettled condition, we must look elsewhere for guid-

ance, the deed from Tompkins & Geary to E. G. Smith, trustee, was not fraudulent per se. I think that the intent should have been found, after an examination of the testimony, of course taking into consideration the provisions of the deed. I concur in the opinion that other questions discussed in appellee's brief are not raised upon the record.

STATE OF MARYLAND, to Use of PRYOR et al., v. MILLER et al.

(Circuit Court of Appeals, Fourth Circuit. December 15, 1911.)

No. 1,022.

1. MUNICIPAL CORPORATIONS (§ 727*)—LIABILITY FOR TORTS—FAILURE TO PERFORM DUTIES IMPOSED BY STATUTE—"POWER"—"AUTHORITY."

Under the law of Maryland, as settled by decision, a legislative delegation of "power and authority" to a municipal corporation, to be exercised for the public benefit or protection, is not permissive merely, but imperative, and imposes a duty and obligation on the municipality for the nonexercise or negligent exercise of which, resulting in private injury, it is liable in damages.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1545; Dec. Dig. § 727.*

For other definitions, see Words and Phrases, vol. 1, pp. 646–648; vol. 6, pp. 5477, 5478; vol. 8, p. 7758.]

2. MUNICIPAL CORPORATIONS (§ 733*)—LIABILITY FOR TORTS—FAILURE TO PERFORM DUTIES IMPOSED BY STATUTE.

Act March 30, 1908 (Laws Md. 1908, c. 148) § 1, confers general powers on the city of Baltimore with respect to the Patapsco river, including the power to make such regulations as it may deem proper respecting wharves, bulkheads, piers, and piling, and the keeping of the same in repair so as to prevent injury to navigation or health, which powers the city assumed to exercise by the passage of an ordinance on April 10, 1909, vesting its harbor board with authority to grant permits for private wharves, etc., and to regulate and supervise their construction and repair. It required permittees to observe such regulations, under penalty, and to indemnify the city against liability for damages by reason of injuries to person or property resulting from negligence on the part of the permittee, and provided for the appointment of officers and agents for the enforcement of its provisions. The harbor board licensed a riparian owner on the river to construct piers in front of his property extending 600 feet into the river, and to connect the outer ends of the same by a bulkhead 700 feet long. In the construction of such work the owner drove rows of piles which for a distance had been cut off two feet below the surface of the water and left wholly unguarded and unmarked, and a motor boat filled with passengers properly navigating the river struck such submerged piles and was sunk; a number of the passengers being drowned, and others injured. The city had taken no percautions whatever to supervise the construction of the work or to see that it was done with due regard to the safety of those lawfully navigating the river. *Held*, that under the law of the state the city was liable in damages to the persons so sustaining injuries as the result of its failure to perform such duties which were imposed on it by the statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1547–1549; Dec. Dig. § 733.*]

3. ADMIRALTY (§ 18*)—TORTS—LIABILITY UNDER ADMIRALTY LAW—NEGLIGENT OBSTRUCTION OF NAVIGABLE STREAM.

A city vested by statute with authority to license, regulate, and supervise structures in a navigable river is liable under the admiralty law for

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

injuries to persons or vessels lawfully navigating the river caused by obstructions negligently created in the building of a structure which it authorized and which it was its duty to supervise.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 206–221; Dec. Dig. § 18.*]

Cross-Appeals from the District Court of the United States for the District of Maryland, at Baltimore.

Suit in admiralty by the State of Maryland, to the use of James V. Pryor and Annie M. Pryor, parents of Frank S. Pryor, deceased, James H. Pryor, and others, against Andrew Miller and Kunigunda Miller, the Mayor and City Council of Baltimore and the Board of County Commissioners of Baltimore County. Cross-appeals from a decree for libelants against respondents Miller only (180 Fed. 796). Reversed on libelants' appeal as to Mayor and City Council of Baltimore; otherwise affirmed.

H. N. Abercrombie and Arthur L. Jackson (Robert H. Smith, Raymond S. Williams, Jacob S. New, and Philip B. Watts, on the brief), for James V. Pryor and others.

John H. Richardson and George Washington Williams, for Andrew Miller and Kunigunda Miller.

S. H. Lauchheimer (Edgar Allan Poe, German H. H. Emory, and Charles A. Marshall, on the brief), for Mayor and City Council of Baltimore.

Arthur D. Foster (James J. Lindsay and John S. Biddison, on the brief), for Board of Com'rs of Baltimore County.

Before GOFF, Circuit Judge, and WADDILL, District Judge.

WADDILL, District Judge. This is an appeal and cross-appeal from a decree of the United States District Court for the District of Maryland, rendered on the 24th day of June, 1910. A brief summary only of the facts will be stated, relying upon the opinion of the learned judge of the lower court (180 Fed. 796) for a full statement and elaboration of the same.

Kunigunda Miller, the wife of Andrew Miller, one of the libelants here, owned a tract of some eight acres of land on the waters of the Patapsco river, near the city of Baltimore, at Willow Grove, Dundalk, Baltimore county, Md. Through her said husband, on the 6th day of June, 1906, she made application to the harbor board of the mayor and city council of the city of Baltimore, for a permit to build a bulkhead into the Patapsco river, which was duly granted; previous leave having been given on the 16th of March of the same year, by the same board, to build a platform pier within the inclosure of the bulkhead. This bulkhead extended out into the river from the northern and southern lines of said tract of land, approximately at right angles thereto, some 600 feet, and the purpose was to connect the offshore ends of these bulkheads with each other, a distance of some 700 odd feet, by the construction of another bulkhead, which would be substantially parallel to the shore line, called in the record the western bulkhead, the other two being the northern and southern bulkheads,

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

respectively, thus forming a sheltered lagoon or harbor, of some eight acres, the ultimate purpose being to fill in the lagoon, and make an addition of eight acres of land to the mainland, when filled in as was contemplated would be done in the future. Pursuant to this plan, by the summer of 1909, the south bulkhead was about completed, and work had been begun on the west bulkhead at its intersection with the south bulkhead, and four rows of piles had been driven northward for something over half the length of the western end. These piles had not been cut off on the 5th day of August, 1909, the date of the accident, and on that day all the piles forming the north bulkhead had been driven, for some 175 feet or thereabouts from the shore, they had been cut off, capped, and a platform placed over them; the next 200 feet or thereabouts had been cut off, and not capped on the day of the accident, and were from one foot to fifteen inches below the surface of the water, and from the end of this open space to the outshore end, a distance of about 200 feet, piles were still standing as they had been originally driven, and projected from two to six feet above the water; thus leaving the west end of the lagoon, from about the middle thereof to the northern end, unobstructed, and without any piles, and the northern line of the bulkhead commencing some 200 feet from its outshore end, submerged under the water for a distance of about 200 feet, leaving an open sheet of water, through which the launch, the accident to which is the subject of this litigation, endeavored to navigate, in ignorance of the submerged piles referred to. Nothing lay between this bulkhead construction and the channel of the Patapsco river, except an open expanse of navigable water, over which tugs, drawing from six to nine feet of water, habitually navigated in passing in and out of said lagoon. The premises of Miller had been fitted up as a pleasure park and resort, and were used as picnic grounds by Sunday school parties and others, the place being a short distance from Baltimore, and connected directly with the city street car system. On the day of the accident, a Sunday school picnic of the Waverly Baptist Sunday School, occupied the grounds, and one of the libelant's intestates, J. G. Pryor, came to the picnic grounds in a small gasoline motor boat, having entered the lagoon from its western end, that is, through the opening caused by the lack of completion of the western bulkhead, which was used for the purpose of affording water ingress. The launch was 27 feet long, and 6 feet 6 inches beam, drawing from 18 to 24 inches of water. Pryor observed other launches within the lagoon, and he invited the superintendent of the Sunday school and others to go with him for a short trip on the water. He took his launch through the opening of the west bulkhead, and returned the same way. He subsequently invited others, and, on his second and fatal trip, there were 18 persons, 11 adults and 7 children, the latter ranging from an infant, to boys and girls of about 15 years of age. The launch was not crowded; there was scarcely any wind, and the water was smooth; and upon starting Miller was on his wharf about to get in his own launch, and said nothing to Pryor, or, indeed, to any one, about the submerged piles. The course that Pryor desired to navigate on his second trip took him through the open space in the north

bulkhead, which appeared to be an opening straight out to the channel. His craft, as it seems other shipping without his knowledge had previously done, struck upon the submerged piles, causing the accident complained of; and as a result five persons, two adults and three children (one of whom was the engineer and brother of the owner of the launch), were drowned, and another adult seriously injured.

Original libels and intervening petitions were duly filed against Andrew Miller and his wife, the mayor and city council of Baltimore, a body corporate duly incorporated by the Legislature of Maryland, and the board of county commissioners of Baltimore county, in the state of Maryland, and upon appropriate pleadings and proofs being had and taken, the decree complained of was entered by the lower court. The decision of that court was that the cause of action was one properly cognizable in an admiralty court, that Miller and wife were liable to libelants for the damages sustained, and that the mayor and city council of Baltimore and the board of county commissioners of Baltimore county were not responsible therefor. From this decision, relieving the parties last named, the libelants and intervening petitioners appealed, and Miller and wife likewise appealed from the decree against them.

It is as to the correctness of the decision thus rendered by the lower court that we have to pass. The conclusion reached by us, for the reasons stated in an able and elaborate opinion filed by the learned judge of the lower court (180 Fed. 796, supra), finding the facts and giving his views on the law applicable thereto, is that the lower court was plainly right in holding that the cause of action was one properly cognizable within the admiralty and maritime jurisdiction of the courts of the United States; that Miller and wife were liable for the losses sustained; and that the county commissioners of Baltimore county were free from fault. We are unable, however, to concur with the lower court as to the nonliability of the mayor and city council of Baltimore. This latter question was fully considered by the lower court, which, after quoting from the case of Mayor & City Council of Baltimore v. Marriott, 9 Md. 174, 66 Am. Dec. 326, commented thereon, and on other cases there referred to, as follows:

"In that case the city was held liable to an individual who had slipped on the ice which had been allowed to accumulate on one of the city's sidewalks. There was a city ordinance which required the removal of snow and ice. The city had made no attempt to enforce it. The principle stated in Marriott's Case is still the recognized law in Maryland.

"A municipality which does not prevent boys from making a practice of coasting on its streets is liable for injuries occasioned by their sleds. Taylor v. Mayor of Cumberland, 64 Md. 68, 20 Atl. 1027, 54 Am. Rep. 759.

"When it allowed 'cows armed with dangerous horns and equipped with annoying bells' to wander in its streets, it was liable for injuries occasioned to a passer-by who was 'violently horned, tossed, thrown and trampled upon.' Cochrane v. Frostburg, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728, 48 Am. St. Rep. 479.

"It is liable to a foot passenger knocked down by a bicycle when it had permitted bicycle riders, in spite of a municipal ordinance to the contrary, to ride on the streets and sidewalks at an immoderate rate of speed. Hagerstown v. Klotz, 93 Md. 437, 49 Atl. 836, 54 L. R. A. 940, 86 Am. St. Rep. 437.

"The libelants assert that a submerged obstruction in navigable water is in itself a nuisance. They rely on Harmond v. Pearson, 1 Campbell, 515. In that case Lord Ellenborough said: 'It is a peremptory law of navigation that,

when any substance is sunk in a navigable river so as to create danger, a buoy should be placed over it for the safety of the public.' The same rule was laid down in Philadelphia, Wilmington & Baltimore R. R. Co. v. Philadelphia & Havre De Grace Steam Tow Boat Co., 23 How. 217, 16 L. Ed. 433.

"Their contention, therefore, may be briefly summed up as follows: The submerged pile was a nuisance. The city was given power to compel its removal. The city did not exercise reasonable diligence or any diligence whatever to cause the pile to be removed, and is liable.

"It will be noticed that all these Maryland cases are cases in which the city failed to keep its streets and highways free of nuisance. A similar rule has been applied to county roads and bridges. County Commissioners of Anne Arundel County v. Duckett, 20 Md. 468, 83 Am. Dec. 557.

"The language in which the principle is stated, it is true, is broad enough to render the city liable for things other than those which affect the use of its streets, but I do not find in any of the authorities cited, or with which I am familiar, that in point of fact this liability for the simple nonuse of powers given to it has in point of fact ever been extended beyond the class of cases above mentioned."

It will be observed from this extract from the lower court's opinion, and the cases there given, and others might be cited, that under the laws of the state of Maryland, its cities are liable for failure to keep their streets and highways free of nuisance, and the same is admitted to be true as to the public roads and bridges of the state, which latter liability is one at least that many of the states of the Union do not recognize. The court proceeds, however, upon the theory that the city is not liable for a nuisance arising from a submerged obstruction in the waters of the Patapsco river, because the river itself is not a highway in the sense of the Maryland decisions. Technically this may be true of rivers of the state generally, where there had been no legislation by the state conferring special power and authority upon the cities over their waters, or respecting which the cities themselves, pursuant to such delegation of power, had not exercised authority. Where such action has been taken, as in this case, in our judgment, a very different question is presented, and it is as to a case arising under such circumstances that we have to pass, as well as to determine the city's liability in the premises, in a court of admiralty. The General Assembly of the state of Maryland, by act of 30th of March, 1908 (chapter 148 of the Public General Laws) entitled "Harbors, Docks and Wharves," provided:

"Section 1. Be it enacted, * * * the mayor and city council of Baltimore shall have full power and authority to provide for the preservation of the navigation of the Patapsco river and tributaries, including the establishment of lines throughout the entire length of said Patapsco river and tributaries, beyond which lines no piers, bulkheads, wharves, pilings, structures, obstructions or extensions of any character may be built, erected, constructed, made or extended; to provide for the improving, cleaning and deepening of said river and tributaries, and the removal therefrom of anything detrimental to navigation or health; to provide for and regulate the stationing, anchoring and moving of vessels, or other water craft, and to prevent any material, refuse or matter of any kind from being thrown into, deposited in or placed where the same may fall or be washed into said river or tributaries; to make surveys or charts of the Patapsco river and tributaries, and to ascertain the depth and course of the channel of same, and if necessary affix buoys or water marks for facilitating and rendering more safe the navigation and maintenance of and to make such regulations as it may deem proper respecting wharves, bulkheads, piers and piling and the

keeping of the same in repair so as to prevent injury to navigation or health; to regulate the use of public wharves, docks, piers, bulkheads or pilings, and to lease or rent the same, and to impose and collect dockage from all vessels and other water craft lying at or using the same, and to collect wharfage and other charges upon all goods, wares, merchandise or other articles landed at, shipped from, stored on or passed over the same; to provide for the appointment of such officers and employés as may be necessary to execute the aforegoing powers, and to impose fines or penalties for a breach of any ordinance passed in conformity herewith, said fine not to exceed $200 for any one offense.

"Section 2. * * *"

Pursuant to this act, on the 10th day of April, 1909, an ordinance was duly passed by the city of Baltimore, the sections of which specially applicable to this case are as follows:

"Sec. 11. Wherever the same may be proper and necessary the harbor board shall cause public wharves or bulkheads to be built or repaired at any water front property of the city. The harbor board shall require all private wharves or bulkheads that are decayed or defective, or likely to be injurious to navigation or to health, to be rebuilt or repaired within a reasonable time to be prescribed in a written notice (not less than thirty days) to be served on agent, owner or occupier of such wharf or bulkhead, and the owner of any water front property on the Patapsco river or tributaries shall cause the same to be secured and protected in such manner as the harbor board may think proper and may direct, and if the owner is a minor, or cannot be found, the harbor board shall have such property secured and protected at the expense of the owner to be recovered by the mayor and city council in due course of law; any person who fails to comply with the requirements of this section shall pay a fine of ten dollars for every day of non-compliance."

"Sec. 18. All work under a permit issued by the harbor board shall be done in accordance with the rules and regulations of the department and in accordance with plans and specifications submitted by the permittee and wholly at the expense of the permittee. The permittee shall indemnify and save harmless the mayor and city council of Baltimore, its officers, agents and servants, against and from all damages, cost and expense which they may suffer, or to which they may be put by reason of injury to the person or property of another resulting from carelessness or negligence on the part of the permittee. The procedure under the permit issued by the harbor board shall be in strict compliance with all applicable laws and ordinances and the rules and regulations of the city departments established for the purpose of enforcing them; and the harbor board shall have the right to revoke a permit at any time."

"Sec. 31. No material, refuse or matter of any kind shall be thrown into, deposited in or placed where the same may fall or be washed into the Patapsco river, or any of its tributaries, without written permission from the harbor board, which is hereby authorized to employ supervisors to see that any material permitted to be deposited is placed where directed by said board, and the person applying for or receiving said permission shall pay for the services of said supervisors such rates as the harbor board may deem proper. Any person violating this section shall pay a fine of not more than two hundred dollars, and the harbor board and harbor masters are specially charged with the execution of this section."

It will thus be seen that as to the Patapsco river, the city of Baltimore not only had conferred upon it the power to provide for the preservation of the navigation of it and its tributaries, and the removal therefrom of anything detrimental to navigation or health, but to authorize the erection and maintenance of, and to make such regulations as it deemed proper, respecting wharves, bulkheads, piers, and piles, and the keeping of the same in repair, so as to prevent injury to navi-

gation or health; and the city was further given authority to "provide for the appointment of such officials and employés as may be necessary to execute the aforegoing powers, and to impose fines and penalties for the breach of any ordinances passed in conformity with the act."

[1] This state statute clearly defined the power and authority of the city of Baltimore over the waters in question, at the scene of the accident, and the ordinances pased in pursuance thereof show the authority exercised by the city under the delegation of the power from the state, leaving alone for the consideration of the court the determination of the liability of the city in the premises. The authorities of the state of Maryland regarding liability for injury arising from nuisance upon its public highways, caused by the neglect of cities, and holding the cities responsible therefor, are many in number, and clear and comprehensive in character. Mayor & City Council of Baltimore v. Marriott, 9 Md. 160, 174, 66 Am. Dec. 326; Taylor v. Cumberland, 64 Md. 68, 20 Atl. 1027, 54 Am. Rep. 759; Cochran v. Frostburg, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728, 48 Am. St. Rep. 479; Hagerstown v. Klotz, 93 Md. 437, 49 Atl. 836, 54 L. R. A. 940, 86 Am. St. Rep. 437; Havre De Grace v. Fletcher, 112 Md. 562, 570, 77 Atl. 114. From the language of the legislative act, there can be no less doubt of the duty imposed on the city than of the consequences of its failure to perform the same. The meaning of language similar to that used in the act was passed upon by the Supreme Court of Maryland, in the case of Baltimore v. Marriott, 9 Md. 160, 174, 66 Am. Dec. 326, in construing a provision of the then charter of the city. There the provision was to the effect that the city of Baltimore should have "full power and authority" to pass all laws and ordinances necessary to preserve the health of the city, and to prevent and remove nuisances, etc., and the court held that when the statute conferred power upon the corporation, to be exercised for the public good, the exercise of the power was not merely discretionary, but imperative, and that the words "power" and "authority" meant duty and obligation. This rule, construing the granting of power and authority by the Legislature to the cities, has been affirmed frequently by the Court of Appeals of Maryland, and as late as the year 1910, the Marriott Case, supra, was approved; the court saying:

"We are of the opinion that the effect of the provision in the statute just cited, was to place the corporation of Baltimore City in regard to their obligations to prevent and remove nuisances, upon the same footing which is held by individuals and private corporations." Havre de Grace v. Fletcher, 112 Md. 562, 570, 77 Atl. 114, 117.

[2] In this case, the city of Baltimore, expressly authorized the building out into the public navigable waters of the Patapsco river, from each of the northern and southern boundary lines on the shore line of respondent Miller's land, extending some 600 feet, bulkheads, piers, and other obstructions, and authorizing the connection of the outshore ends of these obstructions, by building a connecting stringer or bulkhead in said river, where its waters were constantly used by persons lawfully engaged in commerce, with vessels of six to nine feet draft, and took no precaution whatever, either to superintend the con-

struction of the work, or to see that those permitted to do it properly did the same, having regard to the safety of navigators thereon; and that, too, in face of the fact that the city had full power and authority to appoint the necessary officials and employés to provide for the supervision of such work, and to impose fines and penalties for failure to comply with its orders; and, moreover, its own ordinance contemplated the fullest protection to the city from damage growing out of the permission given by it in respect to the building or repair of wharves, bulkheads, piers, or piling in said river, the ordinance being:

"The permittee shall indemnify and save harmless the mayor and city council of Baltimore, its officers, agents and servants, against and from all damages, costs and expenses, which they may suffer, or to which they may be put, by reason of injury to the person or property of another, resulting from carelessness or neglect on the part of the permittee."

This action of the mayor and council clearly indicated their understanding as to the city's liability for actions such as the one at bar, and hence provided for indemnity of the city against suit or damage arising from the neglect of those given permission to obstruct the navigable waters under their control. The city chose to give the authorization to place the obstruction in the river, and took no step looking either to the manner in which the work was to be done, or to inspect, supervise, or in any respect look after the same, so far as its safety to mariners was concerned, or to indemnify itself against harm incident to the negligent construction of the same, and under such circumstances should not be allowed to escape responsibility for injury arising to others innocently and lawfully using such waters, caused by the city's omission, and the negligence of those permitted by it to place such hidden obstruction in a public waterway. Indeed, there can be but little reason why the city should be held less liable for injury from a nuisance of the character in question placed or allowed to remain in the waters of the Patapsco river, with its knowledge, or opportunity of knowledge, or by and with its authority and consent, than for one caused by a nuisance allowed upon a public highway or street of the city; and this is certainly true in a court of admiralty, where those lawfully using such waters have innocently sustained injuries from such neglect, however much it may appear that, as between the city and its permittee, the latter would be primarily liable.

The question of the nonliability of a municipal corporation for its acts of a legislative character, and which it exercises as a part of the sovereign power, and those private franchises which belong to it as a creature of the law, is one which has been much discussed in the authorities, and the same is stated in different ways; but we know of no decision that makes clearer what is the obligation for which the city is or is not liable, than that of the Court of Appeals of Maryland, in County Commissioners v. Duckett, 20 Md. 468, 478 (83 Am. Dec. 557); the court there saying:

"With regard to the liability of a public municipal corporation for the acts of its officers, the distinction is between the exercise of those legislative powers which are imposed for public purposes, and as a part of the government of the country, and those private franchises which belong to them as a creature of the law. Within the sphere of the former, it enjoys the exemption of the government."

In that case, the county was held liable for its failure to keep a public road in safe condition to travel over; the court laying down the criterion of liability as follows:

"The conditions necessary to constitute legal liability are a duty imposed by law, with the means and agents at their command to execute it, and capacity to sue and be sued imposed by the act of their creation."

The learned judge of the court below, in support of his views, cites the cases of Gullikson v. McDonald, 62 Minn. 278, 64 N. W. 812; Ogg v. Lansing, 35 Iowa, 498, 14 Am. Rep. 499; Boehm v. Baltimore, 61 Md. 265; Coonley v. Albany, 132 N. Y. 149, 30 N. E. 382; Goodrich v. Chicago, 20 Ill. 447; Winpenny v. Philadelphia, 65 Pa. 137; and Faust v. Cleveland, 121 Fed. 810, 58 C. C. A. 194. In the main, these cases are clearly distinguishable from the one at bar. The first involved the right of an individual to recover against the city for the defective condition of a station house, and hence within the doctrine of the city's police power; the second, the failure of the city to carry out a health ordinance, and damage arising from exposure to smallpox, likewise within the police power of the city; the third, for refusal to issue a permit in connection with the removal of matter dangerous to the health of the city; and, the fourth, Coonley v. City of Albany, 132 N. Y. 149, 30 N. E. 382, largely inapplicable here by reason of the difference between the New York and the Maryland law regarding liability for causes of action of the character in question. This latter case, however, is one of interest because of the fact that it grew out of an attempt to compel the city of Albany to remove a sunken boat in the Hudson river, and the court says:

"If the statute of this state had laid on Albany the command in the same terms (i. e., as in the Winpenny Case) as to navigable rivers, we should not hesitate to follow the decision in a case founded on neglect of performance resulting in injury."

The fifth case, Goodrich v. Chicago, 20 Ill. 457, one very similar to this, the court, without citing authorities to support its view, based its conclusions upon the fact that the Legislature did not intend to require the city to carry out the provision with respect to the Chicago river, because of the expense, difficulty, and extent of the work. In the sixth case, Winpenny v. Philadelphia, 65 Pa. 137, is found express authority for the views herein contained. The statute in that case placed the direct duty upon the city with regard to navigable waters, in language no clearer or more definite than used in this case; and the city was held liable. In this connection, it may be said that the rule as to liability for injuries arising from usage of defective public highways in Pennsylvania is the same as in Maryland, and hence gives to decisions from the courts of that state special weight. The seventh case, Faust v. Cleveland, will be referred to in connection with the rule in admiralty applicable to this class of cases.

[3] In what we have said thus far, we have had regard more particularly to the city's liability at law, for causes of action such as the one involved in this case. We will refer briefly now to the admiralty doctrine on the subject. Two cases from the Circuit Court of Appeals of the Sixth Circuit (Faust v. Cleveland, 121 Fed. 810, 58 C. C. A. 194,

and Great Lakes Towing Co. v. Cleveland, 176 Fed. 492, 100 C. C. A. 109) bearing upon the subject under consideration in admiralty were much relied upon in argument, the first named by the city of Baltimore, and the last named by the appellants. The first case, in our judgment, having regard to its peculiar facts and circumstances, and in the absence of a statute such as we have here, does not militate especially against the views contended for by the appellants herein; the Circuit Court of Appeals in the last case saying of that decision:

"In the case of Faust v. City of Cleveland, we had before us a case where the appellant had filed a libel in personam against the city to recover damages for an injury to a vessel navigating the same stream, which, it was alleged, it was the duty of the city to have removed. We dealt with the case as one involving the question whether the river was a 'highway' within the meaning of the statute above quoted. We held that it was not, and, without further inquiry, affirmed the judgment of the lower court, which was for the defendant. *But here the controlling fact is that the city was charged with the care, supervision, and control of the offending structure by statute.* * * * The city knew of these submerged timbers, for it put them there. And it should not have removed the piles, or suffered them to be removed, without giving warning to those navigating the river of the danger."

In the latter decision (176 Fed. 492, 100 C. C. A. 109) the views expressed strongly support the contention of appellants here that the city, under the circumstances of this case, is liable. The Supreme Court of the United States in Workman v. New York, 179 U. S. 552, at pages 557, 558, 21 Sup. Ct. 212, at page 214 (45 L. Ed. 314), has recently had under review this entire doctrine arising in cases in admiralty, and from which decision it would appear that the court holds that even the nonliability of a city by reason of the exercise of its governmental functions does not serve to relieve it from liability, where the cause of action is one maritime in character, and properly maintainable in an admiralty court; the court, through Mr. Justice White, saying:

"The proposition then which we must first consider may be thus stated: Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts and when the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular state or the course of decisions therein. And this, not because, by the rule prevailing in the state, the wrongdoer is not generally responsible and usually subject to process of courts of justice, but because in the commission of a particular act causing direct injury to a person or property it is considered, by the local decisions, that the wrongdoer is endowed with all the attributes of sovereignty, and therefore, as to injuries by it done to others in the assumed sovereign character, courts are unable to administer justice by affording redress for the wrong inflicted.

"The practical destruction of a uniform maritime law which must arise from this premise is made manifest when it is considered that, if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state, and one in another; one thing in one part of the United States, and a different thing in some other part. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions

rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. * * * (At page 559 of 179 U. S., at page 214 of 21 Sup. Ct. [45 L. Ed. 314]). The disappearance of all symmetry in the maritime law and the law on the other subjects referred to, which would thus arise, would, however, not be the only evil springing from the application of the principle relied on, since the maritime law which would survive would have embedded in it a denial of justice. This must be the inevitable consequence of admitting the proposition which assumes that the maritime law disregards the rights of individuals to be protected in their persons and property from wrongful injury, by recognizing that those who are amenable to the jurisdiction of courts of admiralty are nevertheless endowed with a supposed governmental attribute by which they can inflict injury upon the person or property of another, and yet escape all responsibility therefor. It cannot be doubted that the greater part, if not the whole, of the maritime commerce of the country is either initiated or terminated in ports where municipal corporations exist. All the vessels, whether domestic or foreign, in which this vast commerce is carried on, under the rule referred to, could be subjected to injury and wrong without power to obtain redress, since every municipality would be hedged about with the attributes of supreme sovereignty." Workman v. New York, 179 U. S. 552, supra, and especially pages 557, 558 and 559, 21 Sup. Ct. 212, at page 214, 45 L. Ed. 314.

This case, however, does not require us especially to enter upon a discussion of that question, or to go to the extent that the Supreme Court did in the Workman Case, since here we have clearly a case of injury arising not from the exercise of the city's governmental functions, but because of default in one of its private obligations incurred as a creature of the law, and moreover, one for which, as before stated, liability would exist at law, and hence in a court of admiralty, where less harsh and stringent rules should prevail, certainly responsibility cannot be escaped.

It follows, from what has been said, that the decree of the lower court, in so far as it holds the cross-appellants, Miller and wife, liable, and relieves the county commissioners of Baltimore county from responsibility, should be affirmed, and that so far as it relieves the city of Baltimore from liability, it should be reversed, with costs to the appellants in this court against said Miller and wife, and the city of Baltimore, and with costs to the county commissioners of Baltimore county against the appellants and cross-appellants.

The case will be remanded, with directions to the court below to proceed further therein, as indicated by the views herein set forth.

COOK v. ROBINSON (FAIRBANKS BANKING CO., Garnishee; H. P. PARKIN, Intervener).†

(Circuit Court of Appeals, Ninth Circuit. March 18, 1912.)

No. 2,013.

I. BANKRUPTCY (§ 198*)—LIENS—VACATION—STATUTES.

Bankruptcy Act July 1, 1898, c. 541, § 67c, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), provides that a lien created or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment on

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

† Rehearing denied May 22, 1912.

mesne process or a judgment by confession, which was begun against a person within four months before the filing of the bankruptcy petition, shall be dissolved by the adjudication if the lien was obtained and permitted while the defendant was insolvent, and its existence or enforcement will work a preference, or the parties to be benefited thereby had reasonable cause to believe that defendant was insolvent and in contemplation of bankruptcy, or that the lien was sought and permitted in fraud of the provisions of the act; but by subdivision "f" all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months before bankruptcy are made void in case he is adjudged a bankrupt, etc. *Held*, that such subdivisions are repugnant to each other, and that subdivision "f" is controlling.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 289, 296–316; Dec. Dig. § 198.*]

2. BANKRUPTCY (§ 100*)—ADJUDICATION—PARTIES—EFFECT.

Creditors of a bankrupt are parties to the proceedings to have him so adjudged, and are precluded by the adjudication in so far at least as it determines the debtor's insolvency, and that he has committed an act of bankruptcy within four months prior to the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141–144; Dec. Dig. § 100.*]

3. BANKRUPTCY (§ 100*)—LIENS—VACATION.

Bankruptcy Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), provides that all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy shall pass freed therefrom to the trustee unless the court shall order that the lien be preserved for the benefit of the estate. *Held*, that where an attachment was levied on the property of a bankrupt within the four months' period, such attachment being rendered void by reason of the subsequent adjudication, the insolvency of the bankrupt at the time the attachment was levied was not material, in defense of the trustee's right to intervene and recover the attached property; such issue having been conclusively determined by the adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141–144; Dec. Dig. § 100.*]

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

Action by Henry Cook against Charles J. Robinson and the Fairbanks Banking Company, garnishee, in which H. P. Parkin, trustee in bankruptcy of the defendant Robinson, intervened. From an order vacating an attachment, plaintiff brings error. Affirmed.

On July 18, 1910, plaintiff in error, the plaintiff below, instituted an action against Robinson, one of the defendants in error, to recover upon two promissory notes aggregating $10,000; one having been given September 20, 1909, and the other November 12, 1909. On the same day a writ of attachment issued, and the same was on July 18th, July 19th, and August 4th of the same year levied upon different properties of Robinson. Judgment of default was entered against Robinson in the action October 26, 1910. On November 5, 1910, H. B. Parkin, trustee in bankruptcy for Robinson, one of the other defendants in error, was allowed to intervene in the action, and on the same day filed his complaint in intervention therein. The complaint sets forth, in brief, that on August 27, 1910, an involuntary petition in bankruptcy was filed against Robinson; that on September 16, 1910, he was duly adjudged a bankrupt; that thereafter by order of the court the

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

cause was referred to W. H. Adams, referee in bankruptcy; that at a regular meeting of the creditors of the bankrupt the intervener was on October 18, 1910, duly appointed trustee of the bankrupt's estate, qualified as such, and entered upon the discharge of his duties; that plaintiff on July 18, 1910, and within four months prior to the filing of the petition in bankruptcy, caused an attachment to be issued and levied upon the property of the bankrupt; that plaintiff now holds such property under such attachment; and that at the time of the levies of attachment and subsequent thereto the defendant Robinson was insolvent and unable to pay his debts, by reason whereof the attachment is null and void. The prayer is for a dissolution of the attachment and an order directing the marshal to turn over the property held under the levy to the trustee. The answer simply denies all the allegations of the complaint excepting such as pertain to the issuance of the writ of attachment and its levy upon the property of Robinson. Under the issues thus formulated a trial was had before a jury, resulting in a verdict and judgment favorable to the intervener and against plaintiff. Further facts necessary to a determination of the controversy are stated in the opinion.

Stevens, Roth & Dignan, Metson, Drew & Mackenzie, and Horatio Alling, for plaintiff in error.

McGowan & Clark, Albert Fink, and Thomas R. White, for defendants in error.

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

WOLVERTON, District Judge (after stating the facts as above). The referee in bankruptcy was called in behalf of the trustee and permitted over objections to testify respecting and to give in evidence a "list of debts proved" against the bankrupt's estate. Attending the list is a statement by the referee that:

"The following is a list of creditors who have proved their debts at the first meeting and subsequently."

It simply contains the names of the claimants with the amounts set opposite, and was filed in the District Court January 16, 1911. There is nothing stated in connection with the claims to show the date when they accrued. The aggregate of the list is $14,487.96. To be added to these are the claims of the plaintiff amounting to $10,950, which, according to the showing in that way, make a sum total of indebtedness of the bankrupt of $25,437.96. The claimants themselves or witnesses cognizant of the fact gave evidence respecting all these claims except seven, which aggregate $7,103.61. This sum, deducted from the total claims shown by the list with Cook's claim added, leaves a margin of $18,334.20, and constituted a factor in determining the true aggregate amount of the liabilities of the bankrupt. It is questioned that the list was ever admitted in evidence; but the record shows that it was, and it was finally marked as an exhibit. See Record, p. 336. Now, it is objected that the testimony of Adams respecting the claims contained in the list was by nature hearsay, and therefore incompetent to prove that the liabilities of Robinson existed at a date antecedent to the date of filing such claims, and that the list, Exhibit 10, was itself incompetent to establish the existence of such claims. This constitutes the basis for the first assignment of error.

The second assignment relates to the introduction and admission in evidence over objection of intervener's Exhibit 9, being the inventory and appraisement of the property of Robinson filed by the appraisers November 9, 1910, because it does not tend to prove the fair valuation of Robinson's property on July 18 and August 4, 1910, the date of the levies of the writ of attachment.

The third pertains to the admission over objection of intervener's Exhibit No. 7, being a schedule containing a list of properties and creditors filed by the bankrupt October 18, 1910, for the like reason that it does not tend to prove either the amount of his liabilities or the fair valuation of his property on said July 18 and August 4, 1910, and for the further reason that the schedule constitutes a self-serving declaration.

These assignments, among others, are confidently relied upon as showing cause for reversal of the judgment of the District Court. We have concluded, however, after a very careful study of the record and consideration of the real controversy involved, that they are rendered wholly irrelevant and immaterial by reason of the order or judgment adjudicating Robinson a bankrupt. This judgment of adjudication is preclusive of all these questions. This although the petition of intervention was framed upon the theory that it was essential to show that the bankrupt was insolvent at the date upon which the levies of attachment were made, and although the cause was tried upon that theory.

The plaintiff in error is himself a creditor of Robinson, and it was by reason of that relationship that he was enabled to obtain an attachment against the bankrupt's property. It is provided by the Bankruptcy Act that the bankrupt or any creditor may appear and plead to the petition (for involuntary bankruptcy) within five days after the return day, or within such further time as the court may allow. If neither the bankrupt nor any of his creditors shall so appear and controvert the facts alleged in the petition, then the judge is empowered and directed to determine as soon as may be the issues presented by the pleadings, unless for the question of insolvency or any act of bankruptcy alleged in the petition a jury is demanded. If on the last day within which pleadings may be filed none are filed, the judge is authorized on the next day to make the adjudication. Section 18, subds. "a," "b," "c," and "d," and section 19, subd. "a," of the Bankruptcy Act. So far as the record shows, the adjudication was regularly made, and no question has been interposed to the jurisdiction of the District Court to pronounce it.

Five acts of bankruptcy are prescribed by the statute. The third consists in having suffered or permitted while insolvent any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected thereby vacated or discharged such preference; and the fifth in having admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground. A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Section 3, subds. "a" and "b."

[1] As it is matter for consideration, we further call attention in this relation to certain clauses of the act respecting liens. By section 67, subd. "c," it is provided that:

"A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act."

And by subdivision "f":

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate."

With these statutes in view, let us examine the petition filed for having Robinson adjudicated a bankrupt. The amended petition was filed September 10, 1910; the original having been filed August 27th previous. The adjudication was made September 16, 1910. Among other things, it sets out that Robinson is insolvent and unable to pay his debts; that within four months prior to the filing of the petition Robinson committed an act of bankruptcy, consisting in the institution by Cook of the action to recover for an indebtedness of $10,000 and interest owing by Robinson to Cook, and the levy of the attachment on July 18, 1910, and August 4, 1910, upon the property of Robinson, and the securing of an injunction by Cook against Robinson restraining the latter from disposing of any of his property, it being alleged in connection therewith that, unless Robinson is adjudicated a bankrupt, Cook will secure a preference over and above all the other creditors whose claims are equal in rank and ahead of those creditors having preferred claims, some of the claims of the latter class being set out.

Then it is further alleged that Robinson had admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground, a copy of which admission accompanies the petition. With relation to this petition it might possibly be objected that the first alleged act of bankruptcy is not well pleaded; in other words, that the facts stated do not constitute an act of bankruptcy as contemplated by the statute, in that it is not shown that a or any sale was made of the property, or that Robinson failed within five days of such sale to vacate or discharge the preference. It is alleged, however, that Robinson is unable to pay his debts. But if it be that the petition is deficient in stating a cause in respect to

the third act of bankruptcy, there can be no question that an act of bankruptcy on the part of Robinson by admitting in writing his inability to pay his debts, etc., has been well pleaded. So that the petition presents the two cardinal issues: Robinson's insolvency, and the commission of an act of bankruptcy. Upon consideration of these he was adjudged a bankrupt. It has been held, under a construction of the Bankruptcy Act by the Supreme Court, that where it is sought to have the debtor adjudged a bankrupt for having made a general assignment for the benefit of his creditors, it was not essential that it be either alleged or proved that the bankrupt was insolvent. West Company v. Lea, 174 U. S. 509, 19 Sup. Ct. 836, 43 L. Ed. 1098. The same deduction may perhaps be predicated of the fifth act of bankruptcy because it is not required by the statute that the debtor shall be insolvent at the time of making his admission in writing of his inability to pay his debts, etc. But, however this may be, the allegation of Robinson's insolvency was essential in view of the attachments pending against his property. It must be further premised that the controversy inaugurated under the present action is wholly collateral to the proceeding in which Robinson was adjudged a bankrupt.

[2] Now, the creditors of the bankrupt became parties to the proceeding to have him so adjudged and are precluded by the order of adjudication in so far at least as the adjudication determines the insolvency of the debtor, and that he has committed an act of bankruptcy within four months of the filing of the petition. In Bear v. Chase, 99 Fed. 920, 924, 40 C. C. A. 182, 186, a case bearing near analogy upon the facts to the case at bar, the Circuit Court of Appeals for the Fourth Circuit expressly held that:

"Upon the adjudication of the bankrupt, all creditors became parties to the bankruptcy proceedings by operation of law, and particularly these creditors by whose acts the bankruptcy was caused."

Here, as there, the person running the attachment is a creditor of the bankrupt, and it was he who through the attachment precipitated the proceeding in bankruptcy. So in Hackney v. Hargreaves Bros., 13 Am. Bankr. Rep. 164, 170, 68 Neb. 624, 99 N. W. 675, which was a contest between a trustee in bankruptcy and one sought to be charged as a creditor having received unlawful preference, the court gave a like rendering of the law, as follows:

"The defendants in the action are not third parties in the sense that they are in no wise connected with the bankruptcy proceedings, because, for the purpose of these controversies, and in determining their liability, they are sought to be charged as creditors of the bankrupt having received unlawful preferences, and for such purposes were necessarily parties to the bankruptcy proceedings."

Being parties to the bankruptcy proceeding, it must follow that the creditors are precluded by the adjudication upon such issues as must necessarily be determined in order to pass judgment; otherwise there would be no end to controversy as to these matters, as every creditor would claim the right to be heard by independent suit.

As was said in Re American Brewing Co., 112 Fed. 752–758, 50 C. C. A. 517, 523:

"If it were necessary, in order to bind creditors by a judgment in bankruptcy, that they should appear and answer, as they always have a right to do, then an adjudication could be prevented simply by creditors abstaining from appearing in the proceedings. But it is well settled that the proceedings are in a large sense in rem, and are binding whether the bankrupt or creditors appear or not."

And it has been held that the adjudication in bankruptcy, until avoided by direct proceeding, is as binding and conclusive upon the bankrupt and the creditors as much so as a judgment inter partes on due hearing in a court of competent jurisdiction. In re Hecox, 164 Fed. 823-825, 90 C. C. A. 627. See, also, In re First National Bank (C. C. A. 8th Ct.) 152 Fed. 64–70, 81 C. C. A. 260, 11 Ann. Cas. 355.

In the case at bar, as we have seen, two of the essentials to be determined in the course of the adjudication were the insolvency of the debtor, and the admission in writing of his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground, and this within four months previous to the filing of the petition. So that the plaintiff in error is precluded by the adjudication to question the insolvency of Robinson at the time of the filing of the petition in bankruptcy, and it does not affect the case that Robinson may not have been insolvent at the time the attachments of Cook were levied. This for the reason that by subdivision "f" of section 67 all attachments levied against a person insolvent at any time within four months prior to the filing of the petition in bankruptcy are deemed null and void, in case the adjudication in bankruptcy is made. The attachment is annulled by force of the adjudication, and the trustee becomes entitled to the property free of the lien or incumbrance thereof.

Subdivision "c" of section 67 declares, in effect, that a lien acquired by attachment shall be dissolved by the adjudication if it appears that such lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference; but it has been determined that subdivision "c" is repugnant to the provisions of subdivision "f" on the same subject, and that the latter provisions should prevail. It was so held in Re Richards by the Circuit Court of Appeals of the Seventh Circuit, 96 Fed. 935, 37 C. C. A. 634. The court there, speaking through Jenkens, C. J., says:

"These two subdivisions, 'c' and 'f,' in our judgment, are plainly antagonistic and irreconcilable. The former saves a lien obtained through legal proceedings begun within four months unless it was obtained and permitted while the debtor was insolvent, or the creditor had reasonable cause to believe such insolvency, or the lien was sought and permitted in fraud of the provisions of the act. The question of the pecuniary condition of the debtor and knowledge upon the part of the creditor are influential in determining the validity of the lien so obtained. But subdivision 'f' is broader in its scope, and avoids all liens obtained through legal proceedings within the time stated against a person who is insolvent, within the meaning of the subdivision, irrespective of knowledge on the part of the creditor of the fact of insolvency, and irrespective of the question whether the obtaining of

the lien was in any way suffered and permitted by the debtor. It avoids all liens obtained through legal proceedings against a person who is insolvent within four months before the filing of the petition."

It is then held that subdivision "f" must control. The history of the legislation is gone into and deemed confirmatory of the conclusion reached. The same construction was given to these subdivisions in Bear v. Chase, supra. Speaking of subdivision "f," section 67, the court says:

"Not only does this section make null and void the levy of the attachments under the circumstances of this case, but it expressly provides that the property affected by the levy shall be wholly discharged and released from the same, and that it shall pass to the trustee as a part of the bankrupt's estate, unless the court, upon due notice, shall order that the right under such lien be preserved for the benefit of such estate. This section is broad and comprehensive in its terms, and too clear to admit of serious controversy. Under it no preference can be acquired by the levy of attachments within four months of the filing of a petition in bankruptcy."

See, also, In re Kenney (D. C.) 97 Fed. 554, 557.

[3] Cook's attachment therefore having been rendered null and void by reason of the adjudication in bankruptcy, it was of no further potency to affect or incumber the property of the bankrupt, and it follows that the inquiry as to the insolvency of the bankrupt at the time the attachment was levied was wholly irrelevant and immaterial. It could in no way affect the inefficacy of the attachment so rendered by the adjudication. So also were the list of claims proved, the inventory and appraisement and the schedules containing the list of properties and creditors of Robinson wholly immaterial and irrelevant for the purpose of showing the insolvency at any time, as the adjudication precluded further inquiry upon the subject, and the admission thereof in evidence could not in any way affect the plaintiff in error to his injury; he being also precluded by the adjudication to further question the insolvency of Robinson at any time within four months previous to such adjudication.

The cases relied upon by the plaintiff in error as authority that the creditors are not parties to the proceeding in bankruptcy and are not precluded by the adjudication are not to the purpose. Cullinane v. State Bank of Waverley, 12 Am. Bankr. Rep. 776, 123 Iowa, 340, 98 N. W. 887, was a case by the trustee to recover an alleged preference obtained by chattel mortgage. The mortgaged property had been sold and the proceeds thereof applied upon the indebtedness of the bankrupt, and the mortgage. By subsequent collections the indebtedness was fully discharged. In re Chappell (D. C.) 113 Fed. 545, was a case of like nature to recover certain partial payments alleged to have been made by way of preference. As it pertained to those preferences, the parties defendant could not be considered parties to the bankruptcy proceedings, and of course would not be bound by the adjudication. But as it is said in Bear v. Chase, supra:

"These attaching creditors do not occupy the relation of third persons in possession of, or adverse claimants dealing with, the property of the bankrupt."

The remaining three assignments of error consist: First, in the alleged erroneous theory adopted by the court respecting the fair valuation of the property; second, remarks of the judge alleged to be prejudicial to the plaintiff in error; and, third, certain alleged miscellaneous and unclassified errors in the admission and rejection of evidence and in the giving and refusing instructions. Like the three assignments just considered, these are likewise rendered immaterial by the adjudication in bankruptcy. In fact, under the conditions prevailing, all that was necessary to the dissolution of the attachment was the mere suggestion on the part of the trustee that the adjudication was had and that the attachment was levied within four months of the adjudication.

These considerations lead to an affirmance of the judgment, and it is so ordered.

FOLGER v. PUTNAM et al.

In re FOLGER.

(Circuit Court of Appeals, Ninth Circuit. March 18, 1912.)

No. 1,998.

1. BANKRUPTCY (§§ 58, 59*)—PREFERENCE—WHAT CONSTITUTES—ACT OF BANKRUPTCY.

Bankruptcy Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), relates to preferred creditors, and provides that a person shall be deemed to have given a preference if, being insolvent, he has within four months before the filing of the petition, or after the filing and before adjudication, suffered a judgment to be entered against him in favor of any person, or made a transfer of his property, and the effect of the enforcement of any such judgment or transfer would be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors in the same class. *Held*, that such definition of a "preference" confines its sufferance or acquirement to two classes of transactions, viz., a judgment obtained within four months before the filing of the petition in bankruptcy and before adjudication, and a transfer made by the bankrupt within the same period of time, contradistinguishing the preference by a transfer from that of procuring or suffering a judgment to be entered, etc.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 72–79, 81, 82; Dec. Dig. §§ 58, 59.*]

2. BANKRUPTCY (§ 198*)—LIENS—DISSOLUTION—STATUTES.

Bankruptcy Act July 1, 1898, c. 541, § 67c, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), declares that all liens obtained by suit at law or in equity, including attachment on mesne process or a judgment by confession begun within four months before the filing of the petition in bankruptcy, shall be dissolved by the adjudication, if it appear that the lien was obtained or permitted while the debtor was insolvent, or that its existence or enforcement will work a preference. *Held*, that such clause recognizes a preference obtained through an attachment acquired on mesne process pursuant to a suit or proceeding at law or in equity, providing the attachment shall have been obtained while the debtor was insolvent, and its existence and enforcement will operate as a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 289, 296–316; Dec. Dig. § 198.*]

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

3. BANKRUPTCY (§ 198*)—STATUTES—CONSTRUCTION.

Bankruptcy Act July 1, 1898, c. 541, § 67c, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), saves to a creditor a lien obtained through legal proceedings begun within four months unless obtained while the debtor was insolvent, or the creditor had reasonable cause to believe such insolvency, or the lien was sought and permitted in fraud of the provisions of the act, while subdivision "f" avoids all liens obtained through legal proceedings within the four months' period against a person who is insolvent, irrespective of the creditor's knowledge of insolvency, and of the question whether the obtaining of the lien was in any way suffered or permitted by the debtor. *Held* that while subdivisions "c" and "f" are antagonistic and irreconcilable, and subdivision "f" was controlling, the two subdivisions must be read together in construing the act, and hence a preference may not only consist in the bankrupt's procuring or suffering a judgment to be entered against him or making a transfer of his property within four months of the filing of the bankruptcy proceedings, but also by the creation of a lien by attachment within the four months' period, the existence or enforcement of which will work a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 289, 296–316; Dec. Dig. § 198.*]

4. BANKRUPTCY (§ 59*)—ACT OF BANKRUPTCY—ATTACHMENT.

Bankruptcy Act July 1, 1898, c. 541, § 3a, subd. 3, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), provides that an act of bankruptcy shall consist in the bankrupt having suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged the same. *Held*, that since under section 1, subd. 25, the word "transfer" includes every mode of disposing of or parting with property, or the possession thereof, either absolutely or conditionally as a payment, pledge, mortgage, gift, or security, where a bankrupt, while insolvent, failed to discharge an attachment five days before the expiration of the four months' period, after which it would have become an irrevocable incumbrance on the property attached and operate as a preference to the attaching creditor, the bankrupt thereby committed an act of bankruptcy and was subject to adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 81, 82; Dec. Dig. § 59.*]

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of California, in Bankruptcy.

In the matter of bankruptcy proceedings of J. A. Folger. Petition for revision of a judgment overruling a demurrer of Kate C. Putnam, as administratrix of the estate of Fred C. Putnam, deceased, and others, praying that petitioner be adjudged a bankrupt. Affirmed.

This is a petition to this court for a revision of the judgment of the District Court overruling a demurrer to a petition in bankruptcy praying that the petitioner herein, J. A. Folger, be adjudged a bankrupt. The petition for the adjudication was filed November 2, 1910, and sets forth, among other things:

"That within four months next preceding the filing of this petition said J. A. Folger committed an act of bankruptcy, in that he suffered and permitted, while insolvent, a creditor, one Charles C. Moore, to obtain a preference through legal proceedings, and did not, within five days before the final disposition of the property affected by said preference, or at all, vacate or discharge the same.

"That on the 2d day of July, 1910, one Charles C. Moore commenced an action in the superior court of the state of California, in and for the city and county of San Francisco, against said J. A. Folger, to recover the sum

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

of $21,443.75, together with accrued interest thereon, which action ever since has been and is now pending in said court, and has never been dismissed or determined adversely to the plaintiff herein. That said action was brought by said Charles C. Moore for the purpose of obtaining from J. A. Folger contribution of the amount due as a joint indorser of a promissory note, made, executed, and delivered by the Ocean Shore Railway Company, to the Mercantile Trust Company of San Francisco for the sum of $120,000 payable at the said city and county of San Francisco, on June 27, 1910, and indorsed by said Charles C. Moore and J. A. Folger. That said Ocean Shore Railway Company failed and neglected to pay said note, and that said Charles C. Moore was required to and did pay the sum of $84,975 on account thereof. That said action is brought to enforce a just and valid indebtedness due from said J. A. Folger, and that he has no good legal or equitable defense thereto.

"That on said 2d day of July, 1910, said Charles C. Moore caused the clerk of said court in which said action was brought to issue a writ of attachment in said action, and said clerk duly issued the same in the sum of $21,443.75, which writ was thereupon duly delivered to the sheriff of said city and county of San Francisco, who thereupon duly levied the same upon property there and then belonging to said J. A. Folger, and consisting of all stock owned by him in the Ocean Shore Railway Company. That thereafter alias writs of attachment were duly issued in said action and duly levied by said sheriff on property there and then belonging to said J. A. Folger and consisting of shares of stock in the Folger Estate Company, a corporation, and shares of stock in the J. A. Folger & Co., a corporation, and on money, credits, goods, effects, debts, and property due from said J. A. Folger & Co. a corporation, to said J. A. Folger. That said property was of the value of upwards of $50,000.

"That the attachments so levied have never been released, determined, or vacated, or discharged, but that they ever since have and do now constitute subsisting liens upon the property of said J. A. Folger, and that on November 3, 1910, said liens will become a preference not to be released or avoided by bankruptcy proceedings, and that said attached property will become and be finally disposed of and sequestrated by said Charles C. Moore, and that your petitioners and the general creditors of said J. A. Folger will be deprived of said property and of the value thereof."

W. W. Kaufman (Walter D. Mansfield, of counsel), for petitioner.
L. S. Melsted and Edwin H. Williams, for respondents.

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

WOLVERTON, District Judge (after stating the facts as above). Several grounds of demurrer are assigned, but the sole question presented for our determination is whether the petition for adjudication charges an act of bankruptcy as having been committed by Folger under section 3a, subdivision 3, of the Bankruptcy Act.

It will be noted from the petition for adjudication that the attachment was issued and levied upon Folger's property July 2, 1910, and that on November 3d four months would have run from the date of the levy.

Now it is contended that, if four months from the time of the levy were permitted to elapse without a vacation or discharge of such attachment, the lien thereof would become irrevocable in bankruptcy, and thus the attaching creditor would have obtained a preference over other creditors, a thing that the act was intended to obviate. Hence that the averments of the petition show that Folger had committed

the third act of bankruptcy because he had failed to vacate or discharge the attachment within five days before final disposition of the property. The contention includes another, namely, that a failure to so release the attachment, the four months being permitted to elapse, would amount to a final disposition of the property, because it is said the attachment would thus become irrevocable under the Bankruptcy Act.

The contention thus made and a solution of the problem presented requires a construction of subdivision 3, section 3a, and to do which it must be read in connection with four other clauses of the Bankruptcy Act. These are subdivision 25, section 1a, and sections 60a, and 67c and f. Subdivision 25 gives meaning to the word "transfer," which signifies "the sale and every other and different mode of disposing of or parting with property or the possession of property absolutely or conditionally as a payment, pledge, mortgage, gift or security."

[1] Section 60a relates to preferred creditors and defines when a person shall be deemed to have given a preference. It is when being insolvent he has within four months before the filing of the petition in bankruptcy, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of any such judgment or transfer would be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors in the same class. This definition of a "preference" confines its sufferance or acquirement to two classes of transactions, namely, a judgment obtained within four months before the time of the filing of the petition in bankruptcy and before adjudication, and a transfer made by the bankrupt within the same period of time. It will be noted, also, that by the classification it contradistinguishes the preference by transfer from that by procuring or suffering a judgment to be entered. There is here a complete absence of all mention of an attachment in any form or stage as constituting a preference.

[2] Section 67c declares that all liens obtained by suit in law or in equity, including an attachment upon mesne process or a judgment by confession begun within four months before the filing of the petition in bankruptcy, shall be dissolved by the adjudication if it appear that said lien was obtained or permitted while the debtor was insolvent, and that its existence and enforcement will work a preference. This clause, it would seem, recognizes a preference obtainable through an attachment, acquired upon mesne process pursuant to a suit or proceeding at law or in equity, the condition being that the attachment shall have been made while the debtor was insolvent, and its existence and enforcement will so operate; that is, as a preference.

[3] Section 67f provides that all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of the petition in bankruptcy, shall be null and void in case he is adjudged a bankrupt, and that the property affected thereby shall be wholly

discharged and released from the same. It has been held and determined that subdivision "c" is repugnant to the provisions of subdivision "f," on the same subject, and that the latter provisions are controlling. In re Richards, 96 Fed. 933, 935, 37 C. C. A. 634; Bear v. Chase, 99 Fed. 920, 40 C. C. A. 182. We quote from the opinion in the former case:

"These two subdivisions, 'c' and 'f,' in our judgment, are plainly antagonistic and irreconcilable. The former saves a lien obtained through legal proceedings begun within four months unless it was obtained and permitted while the debtor was insolvent, or the creditor had reasonable cause to believe such insolvency, or the lien was sought and permitted in fraud of the provisions of the act. The question of the pecuniary condition of the debtor and knowledge upon the part of the creditor are influential in determining the validity of the lien so obtained. But subdivision 'f' is broader in its scope, and avoids all liens obtained through legal proceedings within the time stated against a person who is insolvent, within the meaning of the subdivision, irrespective of knowledge on the part of the creditor of the fact of insolvency, and irrespective of the question whether the obtaining of the lien was in any way suffered and permitted by the debtor. It avoids all liens obtained through legal proceedings against a person who is insolvent within four months before the filing of the petition."

See, also, Cook v. Robinson et al., 194 Fed. 785, 114 C. C. A. —, No. 2,013, just decided.

Notwithstanding the repugnancy of subdivision "c" to subdivision "f," and that the provisions of the latter are controlling, those of the former still remain for the purpose of interpretation, as the intendment of the act must be gathered from a reading of all its provisions as enacted in pari materia. So reading the provisions as they relate to a preference, we find that a preference may not only consist in the bankrupt's procuring or suffering a judgment to be entered against him or making a transfer of his property within four months of the filing of the petition in bankruptcy, but also in the creation of a lien by way of attachment, or the confession of a judgment within four months of the filing of the petition, the existence and enforcement of which will work a preference.

[4] Now, the third act of bankruptcy, as will be noted from a reading of the statute, consists of two elements, namely: (1) Having suffered or permitted while insolvent any creditor to obtain a preference through legal proceedings; and (2) not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged the same, that is, the preference. The mere suffering or permitting while insolvent a creditor to obtain a preference alone does not constitute the act of bankruptcy, but the debtor must have failed at least five days before a sale of the property or final disposition thereof to have vacated or discharged such preference. It must be further observed that the preference here alluded to is one to be obtained through legal proceeding, not one by transfer. Preference by transfer constitutes the second act of bankruptcy.

It appears to be plain what is meant by the term "sale," but it is not so clear as it respects the words "final disposition." Judge Ray of the District Court for the Northern District of New York has

given to them a much broader signification than appertains to the word "sale." He says, in Re Tupper (D. C.) 163 Fed. 766, 770, that:

"Congress had in mind, when it enacted this law, the fact that there are different ways or modes of disposing of property, of enforcing executions, judgments, and liens, and it referred to the ordinary method of disposition by way of sale, and then used the words 'or final disposition' to cover every other method of passing the control and dominion of the property from the debtor, insolvent person, to another or to others, either absolutely or as security to the preferred creditor to the exclusion of his other creditors."

In that case a judgment was obtained against the bankrupt November 8, 1907, and being docketed became a lien upon his real property. The judgment so remained until March 7, 1908, when a petition was filed to have the judgment debtor adjudged a bankrupt; it being alleged that the same constituted an illegal and unlawful preference in bankruptcy. There had been no execution or order of sale issued, nor was any sale advertised or made. The judgment was within a day, however, of becoming an irrevocable lien under the bankruptcy act, and if not vacated or discharged by the bankrupt would at the expiration of the day have bound the property of his estate indissolubly.

"Here, but for the bankruptcy proceedings," the learned judge further says, "the land or its proceeds will go to the judgment creditor if the judgment debtor does not pay it. But he is insolvent, as the petition alleges, and the demurrer concedes, and cannot discharge the lien without applying his other property, if any, to the payment of this preference, or borrowing the money. It was possible and easy for Tupper to vacate or discharge the preference obtained by the docketing of this judgment. All she had to do, being insolvent, was to file a voluntary petition in bankruptcy and the judgment would fall under sections 67c and 67f and 60b."

So that it was in effect determined that the failure of the bankrupt to vacate or discharge a judgment within five days of the time it would become a fixed lien upon his property, irrevocable under the Bankruptcy Act, was tantamount to a final disposition under the judgment and constituted an act of bankruptcy under subdivision 3, § 3a.

An expression of the Supreme Court contained in the opinion rendered in Wilson v. Nelson, 183 U. S. 191, 198, 22 Sup. Ct. 74, 77 (46 L. Ed. 147), would seem to indicate that the court thought it incumbent upon the bankrupt to make a voluntary assignment in bankruptcy, if he is unable to discharge the lien of the judgment in any other way. The court says:

"And the debtor did not, within five days before the sale of the property on execution, vacate or discharge such preference, or file a petition in bankruptcy. By failing to do so, he confessed that he was hopelessly insolvent and consented to the preference that he failed to vacate."

On the other hand, it has been held by Judge Dodge, in a succinct and able opinion in Re Crafts-Riordon Shoe Co. (D. C.) 185 Fed. 931, that an attachment and sale of the attached property within four months of the levy, the sale being made on the ground that the property could not be kept without great and disproportionate expense, and the lien not having been discharged by the debtor, did not constitute an act of bankruptcy under subdivision 3, section 3a. In this

case the action was instituted and the attachment had on May 28, 1909, and the petition in bankruptcy was filed July 3, 1909. The property was sold June 29, 1909; but, as said by the court, the sale was not one affecting the "final disposition of the property," the purpose being only to preserve the property to abide the judgment, if one was had, and to be applied on the execution to issue in due course. The case did not, therefore, present the exigency of an attachment about to become irrevocable under the bankruptcy act within the period of five days.

Further, it has been held by the Circuit Court of Appeals, First Circuit (Parmenter Manufacturing Co. v. Stoever et al., 97 Fed. 330, 38 C. C. A. 200), that under subdivision 3, § 3a, the act of bankruptcy consists in the failure to vacate the execution five days before the sale or other disposition of the property seized on execution, and the four months' period runs from that date. Says the court:

"This was clearly the true act of bankruptcy within the contemplation of the statute."

In this case an attachment was had July 5, 1898, judgment was entered by default September 21, 1898, an execution issued and the attached property seized under it on October 15th, and the property was sold October 27, 1898. The petition in bankruptcy was filed February 1, 1899, more than four months after the attachment was levied, but within four months of the time the property was seized under the execution. The court further observed at the close of the opinion that:

"In order to prevent any misapprehension, we will add that the question whether or not the attaching creditor acquired a valid lien as against these proceedings in bankruptcy is not in issue on this appeal."

To advance a step further, Lowell, District Judge, announced the doctrine in the case of In re Blair (D. C.) 108 Fed. 529, that:

"An attachment on mesne process under the statutes of Massachusetts which creates a lien, under the decisions of the courts, enforceable, however, only by obtaining judgment and issuing execution thereon within a limited time, is not discharged, under Bankruptcy Act 1898, § 67f, by the filing of a petition in bankruptcy against the defendant more than four months after such attachment was levied, although the judgment was not obtained until within the four months; nor are the judgment and execution issued thereon rendered void by such section, since they do not affect with a lien the property attached, but only enforce the lien already existing, and which, having attached more than four months before the filing of the petition, is, by necessary implication, preserved by the act."

The quotation is from the headnote.

This case has the approval of the Supreme Court in Metcalf v. Barker, 187 U. S. 165, at page 174, 23 Sup. Ct. 67, at page 71 (47 L. Ed. 122). That court says:

"In our opinion the conclusion to be drawn from this language (of section 67f) is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months, the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an other-

wise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so, the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial."

Thus it will be seen that the interpretation given the act by Judge Lowell and the Supreme Court renders it possible for an attachment lien creditor to obtain an irrevocable preference under the act, unless it be that the debtor is required to vacate or discharge such a preference as well as one obtained through judgment and execution or order of sale at least five days before sale or final disposition of the property, final disposition signifying the operation of the law, which renders the lien irrevocable and unalterably incumbers the property with it. Such cannot be the intendment of an act which has for its special purpose the securing to creditors of a bankrupt, an insolvent person, a just and equal distribution of his estate among them according to their respective claims. If so the act would defeat itself; otherwise the purposes of the act are adequately subserved.

We hold, therefore, that it is incumbent upon an insolvent person to discharge or vacate a lien secured by an attachment upon his property at least five days before a period of four months expires following the date of the levy of such attachment, and if he fails therein he commits the third act of bankruptcy. It may be and has been suggested that this will sometimes force a person into bankruptcy, when the attachment is acquired upon an invalid or spurious claim, or one not provable against the bankrupt's estate; but it seems to us better that this contingency should obtain than that the very statute itself should be defeated in its fundamental purpose. Of course, unless the person against whom the attachment is secured is insolvent, the conclusion reached cannot apply.

The view of the court in Parmenter Manufacturing Co. v. Stoever, supra, would seem to be opposed to this conclusion; but the exact question here determined was not a subject of controversy there.

These considerations lead to an affirmance of the judgment of the District Court, and it is so ordered, with costs to the respondents.

SALMEN BRICK & LUMBER CO., Limited, v. DONALD & TAYLOR.

DONALD & TAYLOR v. SALMEN BRICK & LUMBER CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. February 13, 1912. Rehearing Denied March 12, 1912.)

No. 2,224.

SHIPPING (§ 54*)—CHARTER—INJURY TO VESSEL—LIABILITY OF CHARTERER.

Respondent was charterer of a steamship under a time charter which required the owner to provide the winches and winchmen for loading and discharging and the ropes, falls, etc., "necessary to handle ordinary cargo up to three tons in weight." While the vessel was being loaded by stevedores employed by respondent and acting as its agents through their negligence and improper use of the appliances the wire runner leading

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

into a forward hatch became jammed, and when the winchmen, in obedience to their orders, started the winch, the foremast which supported the derrick was broken off by the strain. The forestay, which led forward from said mast over the forward hatches, and which interfered with the loading, had been removed by the master, as he testified, by direction of the stevedores. *Held*, that conceding that the mast would not have broken if the stay had been in place, and that its removal was negligence on the part of the master, such negligence was not a proximate cause of the injury and did not relieve respondent from full liability therefor; it being shown by a preponderance of the evidence that the mast without such support was of ample strength to withstand the strain put upon it by a load several times greater than the three tons impliedly stipulated for in the charter and had previously been so used with safety.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219–221; Dec. Dig. § 54.*]

Maxey, District Judge, dissenting.

Appeal and Cross-Appeal from the District Court of the United States for the Eastern District of Louisiana.

Suit in admiralty by Donald & Taylor, owners of the steamship Santona, against the Salmen Brick & Lumber Company, Limited. Decree for libelants for half damages, and both parties appeal. Reversed on libelants' appeal, and decree for full damages against respondent.

Donald & Taylor, libelants below, owners of the steamship Santona, on May, 1907, chartered her under a time charter to the Salmen Brick & Lumber Company, respondent below and appellant in this court.

Among other things, the charter party provides:

"4. That the charterers shall pay for the use and hire of the said vessel (£1,000) one thousand pounds, British sterling, per calendar month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire, to continue until her delivery, with clean holds to the owners (unless lost) at a United States Gulf port."

"22. That the owners are to provide ropes, falls, slings and blocks, necessary to handle ordinary cargo up to three tons (of 2,240 lbs. each) in weight, also lanterns for night work.

"23. Steamer to work night and day if required by charterers, and all steam winches to be at charterers' disposal during loading and discharging, and steamer to provide men to work same both day and night as required. Charterers agree to pay for all night work, at the current local rate."

After the vessel was delivered to the charterers, and while being loaded by the stevedores of the charterers at Gulfport for a voyage to Panama, and on the twelfth day of loading, all the hatches being in use, the ship's foremast fell down, necessitating the rebuilding of the same and resulting in delay in the use of the ship. The owners protested the next day and after notice repaired the foremast at their own expense, and then on demand to the charterers for the cost of the same and pay for the time the ship was delayed, which was refused, filed their libel against the Salmen Brick & Lumber Company, therein alleging the charter party and the delivery of the ship thereunder, and

"Third. That said steamship having been delivered as aforesaid, said company proceeded to have placed on board, through representatives selected and paid by said company and acting for it, a cargo of round pine piling. That in the course of said loading and by the direction of said representatives of said company, the forestay of said vessel, although good, sound, and proper in all respects, was removed. That said representatives of said company, thereafter on August 20, 1907, caused and directed the wire runner leading from winch No. 2 through a pulley on the foremast to be led into hold No. 2, from the starboard side, under two deck beams and over the angle bars

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

leading fore and aft, and thence to port side and there attached to two pilings, so as to jam said runner in such a manner as to render it impossible to move the same; and said representative of said company caused and directed the winchman at said No. 2 winch (who was so placed that it was impossible for him to see the work of stowing, or the lead of the wire as aforesaid) to apply steam to the winch and to continue the application of steam, thereby placing an unusual and improper and extraordinary strain upon said mast (in spite of being warned of the evidence of strain thereon), until finally said mast broke near the deck of the vessel and fell. Libelant avers that said acts of said representatives of said company were negligent, careless, and improper, and were done for and on behalf of said company.

"Fourth. That the damages to said foremast and to the ship caused by its fall as aforesaid were repaired at the proper and reasonable cost of $1,375, which was paid by the master for the account of the libelant, and libelant was put by said breakage to the further expense of $125.25 for surveyor's fees and expenses in connection therewith, and $50 for Lloyd's agent for inspection and report and $15 notary fees for said surveys and reports and statements in connection with said breakage, making a total of $1,565.25, necessarily paid by libelant on account of said breakage and justly due and owing by said company to libelant with interest at 5 per cent. per annum until paid. Libelant avers that said chartering company declined to have said repairs made, and the same were accordingly made by libelant in order to minimize damages, and were made as promptly and speedily as was possible, and when said loading was completed said ship proceeded on her voyage."

Respondents answered, denying the libel, except as otherwise admitted, and alleged:

"Second. Answering the second article of the libel, respondent avers that the said article is true in part only. It is true that the said steamer was placed at Gulfport, Miss., for the loading of cargo by respondent, but at the time she was so placed to receive cargo, she was not tight, staunch and strong, to the knowledge of libelants and of the master, officers, and crew of said vessel, nor was she fitted for the service required by said charter party, nor was she properly equipped, nor was she manned with a full complement of competent officers, engineers, seamen, and firemen for a vessel of her tonnage, nor was the placing of said vessel at Gulfport, Miss., done in accordance with the duties of libelants under said charter, nor did libelants fulfill all their duties under said charter with respect to maintenance during the continuation of said charter party, all to the knowledge of libelants and of the master and crew of said vessel. The truth is that at the time said vessel was by libelants placed at Gulfport, Miss., the foremast of said vessel was cracked, its construction was weak, and it was not of sufficient strength and stability for the uses and purposes for which it was originally designed and to which it was necessary to put it in the loading of the cargo in the manner contemplated under the charter.

"Third. That the allegations of the third article of the libel are denied, excepting as herein specially admitted. It is true that respondent proceeded to have placed on board, through a representative selected by it and acting for it, a cargo of round piling, and respondent is informed by said representative, and so believes and avers, that all of said work was done in a skillful and proper manner, and that neither the said representative nor any one acting for him or for respondent requested that the stay or support for the foremast of said vessel be removed; but that such removal was improper and done solely upon the volition of the master and officers of said vessel, and not otherwise. That the forestay of said mast was removed by the master, officers, and crew of said ship, when they well knew that this stay and support was absolutely necessary to prevent the coming down of said foremast. Respondent is further informed, and so believes and avers, that an employé of the aforesaid stevedore, representing the respondent company, even called the attention of one of the mates of said ship to the cracked and unsafe condition of the foremast, and was responded to in a rude manner by said officer. That the master of said vessel well knew the defective condition of said mast, but neglected to compel the mate of said vessel to put the aforesaid stay in a position to stay or support said foremast, although he had on more that one occasion directed the mate to do so."

"Seventh. The allegations of the seventh article of the libel are denied. The truth is that because of the aforesaid defective condition of the foremast of said vessel, and because of the neglect of the master and other officers and crew of said vessel to properly stay and support the said mast, causing the said mast to fall down through lack of proper support, respondent was occasioned serious losses, resulting from the falling of said mast and the neglect of the master of said vessel to thereafter provide temporary means for the loading of said vessel. The damages so sustained by this respondent in costs, charges, expenses, and penalties aggregate a sum upwards of $1,446.30, and for the recovery of said sum, respondent herein assumes the position of cross-libelant, and sets out at large and in detail all of said losses and damages in a cross-libel which it hereby expressly reserves the right to file in this cause against the libelants, Donald & Taylor. That respondent has well and truly performed all its obligations in the premises."

And thereupon filed a cross-libel praying for damages for delay and for certain expenses incurred on account of the breaking of the mast.

Thereafter the cross-libel was duly answered, and a supplemental bill filed, and a supplemental cross-libel filed, mainly relating to damages claimed, leaving the issues, however, substantially as charged in the libel and answer.

Evidence was taken and on hearing April, 1910, the court held:

"Libelants allege that the stevedores, respondent's employés, while loading the ship, caused the wire runner leading from winch No. 2 to the end of a derrick to be negligently and improperly led into the hold from the starboard side, then under two deck beams and over the angle bars leading fore and aft, and thence to the port side of the hold, where it was attached to two piles; that this lead was improper and caused the runner to jam; that they then directed the winchman at winch No. 2 to start the winch, and thereby an unusual and improper strain was placed on the mast and it was broken off. Respondents have answered and deny this state of facts, and also set up the contributory negligence of the officers of the ship in removing the forestay from the said mast. They have also filed a cross-libel for damages occasioned them by the delay incident to the repairs. The pleadings are voluminous, and the record exhibits a mass of conflicting and contradictory testimony. I have carefully read and considered all of it, and lack of time and space prevents my commenting upon it more fully.

"But two facts are conceded by both sides: First, that the mast did come down; and, second, that the forestay was not fastened when the mast fell.

"It seems to me that the preponderance of evidence is clearly with the libelants, as to the manner in which the wire runner was led. Common sense should have told any person, with sufficient intelligence to be the foreman of a gang of laborers, that a wire rope led in the manner indicated above would jam, and it was certainly negligence to so handle it. The mast had been undoubtedly weakened by the removal of the forestay and also by the fact that several holes had been improperly drilled in its plates, for the purpose of fastening on the goose neck. Nevertheless, it was sufficiently strong to conduct the loading in the manner in which it was being done, had this unusual strain not been put upon it. The forestay was removed by the officers of the vessel, and that was negligence. This forestay was a wire rope 4¼ inches in circumference. The runner was a wire rope 2¼ inches in circumference. Conceding the former to have been of iron and the latter of steel, still the breaking strain of the stay was at least double that of the runner. It is evident that had the forestay been allowed to remain in place, or had it been transferred to the forward bitts, even though the wire runner had been led in such a manner as to jam, the mast would not have fallen, the result most probably would have been that the winch would have stopped, or, at most, the wire runner would have snapped.

"There is considerable conflict of testimony and contention between counsel as to whose agent the winchman was, and also as to whether the officers of the ship caused the forestay to be removed at the request of the stevedores, to facilitate the loading, or whether they did it of their own volition, to prevent its being chafed. I do not consider either of these questions material. If the winchman ran the winch improperly, he received his orders from the stevedores, who were undoubtedly the employés of respondents. It is certain

the forestay was cast entirely loose and allowed to hang down beside the mast. The officers of the ship ought to have known better than to permit this condition no matter who requested them to allow it.

"I must conclude that the negligence was equal on both sides, and, therefore, the damages should be divided."

And thereupon entered a decree dividing the damages and costs.

From this decree both parties appeal to this court.

John D. Grace and Gustave Lemle, for Salmen Brick & Lumber Co., Limited.

George Denegre, J. P. Blair, and Victor Leovy, for Donald & Taylor.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). From an examination of the evidence, in the light of the argument and briefs of counsel, we concur with the judge of the District Court in holding that the fall of the foremast aboard the Santona was caused through the negligence of the charterers' agents in misusing the appliances of the ship in the manner indicated by the judge's opinion; but we do not find that the negligence of the shipowners proximately, if at all, concurred in or contributed to the falling of the foremast so as to render them responsible for the damage resulting.

Under the charter party and the evidence, the winchman was an employé furnished by the owners of the ship to run the winch under the direction and orders of the charterers and their agents. The evidence does not show that the winchman in and about the falling of the mast was incompetent, disobeyed orders of charterers' agents, or, in any wise except by obeying orders, contributed to the falling of the same. There is nothing, therefore, in the winchman's conduct to adversely affect the shipowners.

The photographs and the evidence of witnesses in the case show that the Santona was a vessel with a foremast and a mainmast; that directly forward of the masts and directly aft were hatches, leading to the hold; and at each hatch double derricks were rigged with proper slings and pulleys for the purpose of hoisting goods into and out of the hold. The derricks were supported in each case by the mast. On the foremast running directly forward was a forestay, which served the purpose of supporting the mast from pressure from forward and was mainly useful to carry the foresail; but there was no backstay supporting the mast from any pressure applied from aft. The inference is strong that the forestay was not intended to support the foremast in using derricks. The forestay was directly over the forehatches, and in case of hoisting any cargo from the side of the ship was so low as to be in the way of the full swing of the derrick, making it necessary for full action that either the stay should be removed or that an extra man should be employed to dip the derrick (or the goods being raised) under the stay if goods were to be lowered through the further side of the hatch into the hold.

There is nothing in the evidence to show that the owners of the ship had any interest in removing the forestay during the loading.

The case does show that it was to the interest of the charterers, and that it would facilitate their business and tend to quicken dispatch to have the stay removed. The evidence is undisputed that on a prior voyage, loading at this same place and at the destination in unloading, the stay was removed at the request of the charterers' agents, and we think that in this case the weight of evidence shows that at the time of the falling of the mast the stay had been removed at the request of the charterers' agents. In the charter party was a provision that the owners were to provide ropes, falls, slings, and blocks necessary to handle ordinary cargo up to three tons, which seems to carry with it as a corollary that the charterers were not to use heavier weights on the derricks in loading the ship than three tons.

Considering that the forestay was not intended in the construction of the ship to support the mast when derricks were used in the loading of the ship through the fore hatches, that all the hatches were in use at the time, that it was to the interest of the charterers that the stay should be removed when the hatches forward of the mast were in use, that under the preponderance of the evidence the stay was removed at the request of the charterers' agents, and that there was an implied guaranty that the mast should not be used in carrying on the derrick a greater weight than three tons, we are clear that the removal of the forestay, while derricks were used in connection with the foremast, was not negligence on the part of the shipowners.

The shipowners contracted that at the time of delivery under the charter party the Santona was seaworthy and to be so maintained; and the respondent alleges that the foremast "was cracked, its construction was weak, and it was not of sufficient strength and stability for the purpose for which it was originally designed and to which it was necessary to put it in the loading of the cargo in the manner contemplated in the charter."

There is no sufficient evidence that the mast, which was of plate metal of about three-eighths inch thickness, was cracked. There was one witness produced by the respondent who testified that he heard a crack while the mast was in use shortly before breaking. To prove that the mast was not of sufficient strength, etc., reliance is placed on the actual break under the use made by the charterers' agents, and that at the particular place of breaking there was a series or row of rivets in a line fifteen-sixteenths of an inch in diameter at various spaces in the circumference of the mast where the upper and lower section of the same were riveted together, and where rivets were also put in to fasten the goose necks attaching the derricks to the mast. Respondents' evidence shows that in the half section forming the forward part of the mast, and at the place where the upper and lower sections were riveted together, there were 14 rivet holes, fifteen-sixteenths of an inch in diameter in a line and at various distances from each other; and the opinion is given that this was faulty construction, because it unnecessarily weakened the mast, and that the rivets should not have been placed in a line, but in at least two rows, or, as one witness called it, "staggered," and that no rivet holes should have been spaced nearer at the very least than 3½ inches from center to

center. These witnesses appear to lose sight of the fact that the rivets fastening together the upper and lower sections of the mast must be placed where the lap is, and that the rivets fastening on the goose necks must be placed where the derricks are to be located on the mast. The section offered in the exhibit, sent up to this court by the respondents and alleged to be similar to the metal plate of the forward part of the mast where it was riveted, shows that out of a circumference of 33 inches, 13⅛ inches are taken up with 14 rivet holes at various distances apart, from 1⅛ inch to 4 inches from center to center, in one place two very close together about 3/16 inch and in another three with distance of 7/16 inch from hole to hole.

The evidence of libelants' expert as to the fact is as follows:

"The thickness of the plate at the point of fracture was ⅜ of an inch. The forward half of that circumference was weakened by 13 rivet holes of 15/16 of an inch diameter. It left an area of fractured plate in the forward half of the mast of 7½ square inches of area. That 7½ inches of area, allowing 20 tons per square inch as the average tensile strength of steel, the mast would break with a strain of about 150 tons."

The same witness also testified that the mast was of ordinary construction for vessels of that type, and further as follows:

"Q. Is it a defect in the mast of any kind to have the rivet holes around it in that way? A. No.

"Q. Is it customary in all steamer masts? A. It is customary, yes. Where these holes were, there was a certain amount of re-enforcement equal to the diameter of the holes and loss of material through the rivet holes, by the application of steel pads that made the steps of the derrick.

"Q. You mean the derrick platform? A. The pads—goose necks. The goose necks were riveted on to the mast by means of these holes. That was the object of putting these holes in—to secure the goose necks for the derricks to step into. And these heavy steel castings being riveted on to the mast, exerted a compensation to the mast.

"Q. And it was just above these rivets where the break occurred, just in line with them, was it? A. Just in line with the holes at the top of these pads."

There is some opinion evidence in the record as to the deterioration of a steel mast from using, shaking, seepage, and rust; but it is not very clear nor of convincing effect in this case, where it is shown that the Santona was comparatively a new ship, being at the time of the falling of the foremast not over two years old; and that the foremast fell only through the misuse of appliances.

On consideration of the entire evidence relating thereto, we find that the foremast, at the time in question, was seaworthy within the terms of the charter party.

There is a consensus of opinion, and it is even sworn to, that the foremast would not and could not have fallen through any pressure applied through the winch and derricks if it had been supported by the forestay; and learned proctors for respondent have been urgent in pressing this as showing negligence on the part of the shipowners. The fact may be conceded and, in addition, that the master removed the stay from the foremast on his own motion; and yet, when we consider that the mast unsupported was sufficient for all the rightful purposes of the charterers' agents, as shown by the loading and unloading on the former voyage and the loading commenced and carried on

for 12 days for the second voyage, and that the charterers' agents were fully cognizant of the use of the mast unsupported by the forestay, and that the mast only fell when the charterers' agents without warrant and against the implied stipulations of the twenty-second article of the charter party misused and misapplied the winch and derricks, and thus furnished the real proximate and determinative cause (the causa causans) of the fall of the mast, we are clear the respondents can take nothing from the fact that the foremast would not have fallen if the forestay had been in place. The respondent can be heard to say that the shipowners could have built and supported with stays a mast that with all our misuse and negligence could not have been broken.

These conclusions lead to the reversal of the decree appealed from and the rendition of a decree in favor of the libelants Donald & Taylor and against the respondent Salmen Brick & Lumber Company for the full amount of the proved damages, which were, as shown by the commissioner's report, not disputed as to details, as follows:

For repairs of mast	$1,375 00	
Surveyor's fees, etc	190 25	
Hire of ship from August 20, 1907, to September 6, 1907, at £1,000 per month	2,832 07	
Additional hire withheld and for small breakage	1,207 49	
Making a total of		$5,604 81
Less deductions agreed upon		418 14
Total damages		$5,186 67

—and interest at 5 per cent. should be allowed on such amount from judicial demand, and for all costs.

And it is so ordered and decreed.

MAXEY, District Judge (dissenting). Under the facts of the case at bar there was negligence on the part of the employés of the charterer and also on the part of the officers of the ship. It is evident to the writer, upon a careful analysis of the testimony, that, but for the concurring negligence of the officers of the ship, the accident would not have happened. Under such circumstances, the damages should be divided. The trial court so held, and in such ruling there was no error. In the judgment of the writer the decree dividing the damages was right and should be affirmed. See The Max Morris, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586; Morris & Cummings Dredging Co. v. Nelson (C. C.) 134 Fed. 161; The Musselcrag (D. C.) 125 Fed. 786.

WINFREY v. MISSOURI, K. & T. RY. CO.†

(Circuit Court of Appeals, Eighth Circuit. March 4, 1912.)

No. 3,482.

1. CARRIERS (§ 305*)—INJURY TO PASSENGERS—NEGLIGENCE—PROXIMATE CAUSE.

Where an intoxicated passenger alighted from a north-bound train at his destination, and then entered on the track where he remained when he was struck by a south-bound train about 20 minutes later, the negligence of the trainmen on the north-bound train in failing to see that he was safely removed from the train at his destination was not the proximate cause of his death, and, in the absence of evidence of failure of the trainmen on the south-bound train to give the statutory signals and keep a proper lookout, there could be no recovery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1132, 1136–1139, 1245–1246; Dec. Dig. § 305.*]

2. NEGLIGENCE (§ 141*)—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

An instruction in an action for the death of a passenger struck by a train after he had alighted, which correctly explains the meaning of contributory negligence, and which states that, if the death of decedent resulted "in any degree" from such contributory negligence, there can be no recovery provided such negligence contributed proximately to the injury, correctly charges on contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382–399; Dec. Dig. § 141.*]

3. NEGLIGENCE (§ 80*)—CONTRIBUTORY NEGLIGENCE—STATUTORY MODIFICATION.

The rule that any negligence of a plaintiff directly contributing to his injury complained of precludes a recovery, however great the negligence of defendant may have been, has not been modified by Comp. Laws Okl. 1909, §§ 1149, 2938, 2940, making every one responsible for an injury occasioned another by his want of ordinary care, except so far as the latter has, by want of ordinary care, brought the injury on himself, and declaring that the degrees of diligence and of negligence are slight, ordinary, and gross.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 84; Dec. Dig. § 80.*]

4. APPEAL AND ERROR (§ 273*)—INSTRUCTIONS—EXCEPTIONS—REVIEW.

The rule that an exception to a charge must call the judge's attention to specific phases claimed to be erroneous, so that he may correct them if he desires to do so before the jury retires, must be applied practically with a view of facilitating review, and where in an attempt to take an exception a general reference to a topic discussed in a charge is made, and the topic constitutes a definite part of the charge clearly distinguishable from and not involved in other parts, the exception is sufficient to require review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1620–1630, 1764; Dec. Dig. § 273;* Trial, Cent. Dig. §§ 256, 257, 689, 690, 694–696, 965.]

5. APPEAL AND ERROR (§ 273*)—INSTRUCTIONS—EXCEPTIONS—REVIEW.

Where a large part of the charge in an action for the death of an intoxicated passenger consists of a consideration of the subject of decedent's voluntarily putting himself in a condition of intoxication or danger, and the question is variously commented on in view of some particular phase of the testimony bearing on it, an exception "to the proposition of deceased voluntarily putting himself in a condition of in-

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

† Rehearing denied May 13, 1912.

toxication * * * or danger as not being warranted by the evidence" is too general, and will not be considered on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1620–1630, 1764; Dec. Dig. § 273;* Trial, Cent. Dig. §§ 256, 257, 689, 690, 694–696, 965.]

6. CARRIERS (§ 281*)—INTOXICATED PASSENGERS—CARE REQUIRED.

Where a passenger is so intoxicated as to be physically unable to care for himself, the trainmen, knowing of his condition, must bestow such care on him as is reasonably necessary for his safety; but, where a passenger is not in such a state of intoxication as renders him unable to care for himself, or where the trainmen do not know of his intoxicated condition, no special care for his safety is required.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1093–1097; Dec. Dig. § 281.*]

7. APPEAL AND ERROR (§ 882*)—INVITED ERROR—RIGHT TO COMPLAIN.

Where an action for the negligent death of a passenger was tried on the theory that decedent's contributory negligence would defeat a recovery, and no suggestion was made that the theory was inapplicable to any phase of the case, any error in giving an instruction on contributory negligence because of submission of the issue of last clear chance was invited or acquiesced in, and was not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591–3610; Dec. Dig. § 882.*]

8. CARRIERS (§ 348*)—PASSENGERS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

An instruction in an action for the death of an intoxicated passenger alighting at his destination from a north-bound train, and entering the track where he remained when struck by a south-bound train about 20 minutes later, which deals with the subject of the carrier's liability for injury to a drunken passenger known by trainmen to be in a dangerous position, and helpless, and which states that the carrier is liable if it fail to exercise reasonable care to prevent injury, and which declares that a man cannot voluntarily place himself in a condition whereby he loses such control of himself as a man of ordinary prudence in the possession of his faculties will exercise, thereby contributing to an injury to himself and then require of one ignorant of his condition recompense therefor, is sufficiently favorable to plaintiff on the issue of voluntary drunkenness.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1403–1407; Dec. Dig. § 348.*]

9. NEGLIGENCE (§ 88*)—PERSONS UNDER DISABILITY—INTOXICATION.

One voluntarily intoxicated must exercise the degree of care in avoiding danger, as is exacted from a sober person of ordinary prudence under like circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 119, 120; Dec. Dig. § 88.*]

10. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY CHARGE GIVEN.

It is not error to refuse a requested charge fully covered in the charge given, so far as it is correct and applicable to the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

11. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

The error in permitting a witness for the successful party to testify that a witness of the defeated party was addicted to the use of morphine, without first laying a foundation for impeachment of the witness

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

by having his attention called to it while testifying, was harmless, where the defeated party could not recover under the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140–4145, 4151, 4158–4160; Dec. Dig. § 1048.*]

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

Action by Lizzie Winfrey against the Missouri, Kansas & Texas Railway Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

This was an action by Lizzie Winfrey, widow of William Winfrey, for damages occasioned to her by the death of her husband caused by the negligence of defendant Railway Company. The petition charges that the defendant received the deceased into one of its cars at Vinita, Okl., to be carried as a passenger to Blue Jacket, a station about 12 miles north of Vinita, knowing he was so intoxicated as to be incapable of adequately caring for himself; that, on arrival of the train at Blue Jacket, the agents of defendant, still knowing his condition of intoxication, failed to exercise the care and precaution required of them in advising him of the arrival of the train and assisting him to alight; that as a result he, when the train had started up after a brief stop at Blue Jacket, fell off the platform of the car, and in some way got upon the track after the train had passed, and was run over and killed by a south-bound train passing Blue Jacket over the same track about 20 minutes later. It is also alleged that the agents of the Railway Company in charge of the south-bound train negligently failed to maintain a proper lookout or to stop their train in time to avoid killing Winfrey. The defense was a denial of the alleged negligence and a plea of contributory negligence. On these issues the cause was tried, and resulted in a verdict and judgment for the defendant, from which the plaintiff prosecutes error. The evidence tended to show that Winfrey was with the knowledge of defendant's agents received aboard the train in an intoxicated condition, and continued drinking with two or three companions all the way from Vinita to Blue Jacket.

As to the degree of intoxication, whether it was so great as rendered him unable to properly care for himself, the witnesses differed materially. There was evidence tending to show that, as the train stopped at Blue Jacket, Winfrey and two of his companions arose from their seats, went out of the car upon the station platform in the usual way. On the other hand, there was evidence tending to show that Winfrey did not alight with his companions, but remained on the platform of the car until after the train started, and then fell or was jostled off that platform through a vestibule door which is said to have been left open. The evidence conclusively established that whether the deceased walked off the train with the other passengers or fell, as a result of his intoxication, he in some manner got upon the track, and within about 20 minutes was run over and killed by the south-bound train. There was no substantial evidence that the agents in charge of the south-bound train failed to give the usual signals of its approach to Blue Jacket or failed to maintain a proper lookout.

Upon this and other such evidence the case was submitted to the jury, and a verdict was rendered in favor of the defendant.

W. H. Kornegay, for plaintiff in error.

Clifford L. Jackson, W. R. Allen, and M. D. Green, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge (after stating the facts as above). The main theory of plaintiff's case as disclosed by the pleadings was that

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

defendant's agents in charge of the north-bound train knew of Winfrey's intoxicated and incapacitated condition, and did not exercise that degree of care required of them to remove him, or see that he was safely removed from the train, at his destination at Blue Jacket; and as a result that the train started while he was in a perilous position, and so known by defendant's agents, and caused him to fall or be precipitated upon the track, and that he was so injured by the fall or so paralyzed by his intoxication that he could not escape before the south-bound train overran him.

Another theory disclosed by the pleadings was that defendant's agents in charge of the south-bound train were guilty of actionable negligence, in that they so failed to keep a proper lookout, and so negligently operated their train as to occasion the injury and death of Winfrey.

The court charged the jury among other things as follows:

"If you find from the evidence that the deceased, William Winfrey, did not remain upon the train until after it started to leave the station of Blue Jacket, but left the train at Blue Jacket with the other passengers leaving the train at that point, and, instead of falling from the train, came upon the track in some other way, then your verdict should be for the defendant. * * * If the servants of the company whose duty it is to receive passengers on the trains accept one as a passenger who from drunkenness is unable to care for and look after himself, when such condition is known to them, then the railroad company owes him the duty to exercise with regard to such passenger such care as may be reasonably necessary for his safety, * * * [and] must bestow upon him any special care and attention beyond that given to the ordinary passenger, which reasonable prudence and care demand for his safety. * * * If its servants in charge of the passengers on such train, knowing the facts, fail to give such care and attention, and injury results as an immediate consequence of such failure, then the company is guilty of negligence. * * * If an intoxicated person * * * negligently places himself in a dangerous position, and his danger, by reason thereof, is known to the servants of the defendant in charge of the train, whose duty it is to take care of passengers, it then becomes their duty, notwithstanding his intoxication and its having caused him to become in a dangerous position, to use reasonable and ordinary care—that is, such care as a reasonably prudent person would use under the circumstances—to prevent injuring him. If his dangerous position is discovered, the fact that his negligence has placed him there would not warrant the defendant in not exercising with regard to him that care which it would exercise with regard to any other person, whom it was aware was in a similarly dangerous position. * * * As one of the defenses to this action, the defendant pleads contributory negligence. The plaintiff in this case cannot recover if the want of care or caution on the part of the deceased contributed proximately to his injury; but in such case the deceased would be guilty of what the law terms contributory negligence. * * * If from a preponderance of all the evidence offered by both the plaintiff and the defendant you find that the injury resulted in any degree from the plaintiff's contributory negligence, then your verdict should be for the defendant. * * * In considering the question of contributory negligence of the deceased, I charge you that a man cannot voluntarily place himself in a condition whereby he loses such control of his brain or muscle as a man of ordinary prudence and caution in the full possession of his faculties would exercise, and thereby contribute to an injury to himself, and then require of one ignorant of his condition recompense therefor. The law of contributory negligence imposes upon one who has voluntarily disabled himself by reason of intoxication the same degree of care and prudence which is required of a sober person. If the voluntary intoxication of a person leads him to place himself in an exposed position, or prevents the full use of his faculties, so that injury results there-

from, and but for such intoxication the injury would not have resulted, then such injured person is guilty of contributory negligence. The mere fact, however, that a person at the time he may receive an injury is intoxicated is not of itself evidence of contributory negligence, but is a circumstance to be considered, and it is for the jury to determine whether it in fact contributed to his injury."

Counsel for plaintiff took exceptions to the charge in these words:

"I * * * except to * * * that portion of your honor's charge withdrawing from the jury the question of the negligence of the defendant in the event it should be ascertained that the deceased got off the train at Blue Jacket."

"I desire * * * to except to that portion of your honor's charge upon the subject of contributory negligence, which instructs the jury that, if the injury resulted *in any degree* from the deceased's contributory negligence, this should be considered by the jury as cutting the plaintiff off from a right of recovery.

"I desire to except specially to that portion of your honor's charge upon the proposition of the plaintiff's voluntarily putting himself in the condition of intoxication, * * * [and of his] voluntarily placing himself in a position of danger, * * * as not being warranted * * * by the evidence."

I "desire also to except to that portion of your honor's charge which, by itself and uncoupled with the part which came later, told the jury that the same degree of care and prudence is required of a drunken man as of a sober man, for the reason that the same ignores the * * * helpless condition of a drunken man."

"I also desire your honor to instruct the jury that drunkenness itself is not contributory negligence, * * * [and] that drunkenness itself is not sufficient evidence of contributory negligence."

[1] We think there was no error in holding as a matter of law that if the deceased did not remain upon the train after it started to leave the station at Blue Jacket, but left it as other passengers did at that place, plaintiff could not recover. If those were the facts, the first and main specification of negligence could not have been the proximate cause of Winfrey being run over and killed by the south-bound train. These being the facts, his death was not the natural and probable consequence of the alleged negligence of the agents in charge of the north-bound train, but some other and intermediate efficient cause must have produced it (Milwaukee, etc., Ry. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256), and, as there was no evidence that the usual or statutory signals were not given or the proper outlook maintained as the south-bound train approached the station, the instruction was clearly right on any phase of the case.

[2] The next assignment of error is founded on the exception to the charge that, if the injury resulted *in any degree* from the deceased's contributory negligence, plaintiff could not recover. On this subject the court, after explaining what was meant by contributory negligence, charged not only that, if the injury to deceased resulted *in any degree* from any such contributory negligence, there could be no recovery, but that such negligence must have contributed proximately to his injury. We discover no error in this charge. It is in accord with the established doctrine of this court as announced in Pyle v. Clark, 25 C. C. A. 190, 79 Fed. 744, and Gilbert v. Burlington, C. R. & N. Ry. Co., 128 Fed. 529, 533, 63 C. C. A. 27, 31, and cases there cited, which declare the general rule that any negligence by a plaintiff

in a case directly contributing to his injury, precludes recovery by him however great the negligence of the defendant may have been.

[3] It is claimed, however, that this rule has been modified by the statute in Oklahoma, and attention is called to section 1149 of the Compiled Laws of that state (1909), which reads as follows:

"Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except, so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself."

And also to sections 2938 and 2940 of the same compilation, which declare that there are three degrees of diligence and three degrees of negligence, namely, slight, ordinary, and great or gross. It is claimed that these three sections have modified the rule governing contributory negligence already referred to. But we do not so interpret them. If the Legislature had intended to modify that well-established rule, it could, and doubtless would, have used language clearly appropriate and efficacious to that end. Moreover, these statutes were originally enacted in 1890, and since then many cases involving the question of contributory negligence have arisen and been decided by the Supreme Court of the state or former Territory of Oklahoma, and notwithstanding the existence of these statutes the rigid rule of nonliability in case of any contributory negligence has been adhered to. Blevins v. A., T. & S. F. Co., 3 Okl. 512, 524, 41 Pac. 92; Pittman v. City of El Reno, 4 Okl. 638, 646, 46 Pac. 495; Severy v. C., R. I. & P. Ry. Co., 6 Okl. 153, 161, 50 Pac. 162. In the last-cited case the Supreme Court, referring to the general rule laid down on this subject by the Supreme Court of the United States in the case of Railroad Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542, said:

"The rule thus laid down is a salutary one. * * * It is true that, where the doctrine of comparative negligence prevails, juries are permitted to measure the fault of each party contributing to the injury, and award damages against the party whose contribution to the cause of the injury appears the greater. But this is not the law in this territory."

[4, 5] The next exception to the charge is in the language of counsel as follows:

"To the proposition of deceased's voluntarily putting himself in a condition of intoxication * * * [or] danger, as not being warranted by the evidence."

One of the important purposes of exceptions to a charge is to call a trial judge's attention to specific phases, claimed to be erroneous, so that he may reconsider and correct them if he desires to do so before the jury retires. This general rule must, however, be applied practically with a view of facilitating rather than impeding review. Accordingly, if in an attempt to take an exception a general reference to a topic discussed in a charge is made, and if that topic constitutes a succinct and definite portion of the charge clearly distinguishable from and not involved in other portions, it would satisfy all rational requirements. But does the exception just quoted satisfy this demand? A large part of the charge consists of a consideration of the

general question referred to in the exception, and the question is variously commented upon in view of some particular phase of the testimony bearing upon it. In such circumstances we are unable to pass on an assignment founded on such an exception. We cannot do so without reviewing the entire charge in the light of all the evidence. This under well-recognized principles of practice we cannot do.

[6] We have, nevertheless, given careful attention to the charge as a whole, and discover that the court repeatedly told the jury in effect that if Winfrey was so intoxicated as to be physically unable to care for himself, and if this condition was known by defendant's agents in charge of the train, they were bound to bestow such care upon him as was reasonably necessary for his safety, and that if Winfrey was not in such a state of intoxication as rendered him unable to care for himself, or if the agents of the company did not know of his intoxicated condition, no such special care was required of him. This is the well-understood general rule governing such cases, and certainly the plaintiff could not have been prejudiced by its announcement and application to her case.

[7] The next assignment of error relates to contributory negligence broadly considered. Before taking it up, we may, in view of some observations in the brief of plaintiff in error, properly concede that if Winfrey was so intoxicated as to be unable to care for himself on the train, and if defendant's agents knew that he was in imminent danger or peril resulting from his condition of intoxication, the duty to exercise reasonable care and take proper precaution for his safety devolved upon the defendant, notwithstanding any contributory neglignce on his part. Price v. St. L., I. M. & S. Ry. Co., 75 Ark. 479, 88 S. W. 575, 112 Am. St. Rep. 79. This is a recognition of the law laid down in what are commonly known as the "last-clear chance" cases, which was invoked in plaintiff's petition so far as one phase of the negligence relied upon is concerned. The trial court recognized this law and instructed the jury accordingly. It told them, as already pointed out:

"If his dangerous position *is discovered*, the fact that his negligence has placed him there would not warrant the defendant in not exercising with regard to him that care which it would exercise with regard to any other person, whom it was aware was in a similarly dangerous position."

On the hypothesis just referred to and in the view we take of other phases of plaintiff's complaint, it is probably true that no issue of contributory negligence should have been submitted to the jury, but plaintiff's counsel asked no instruction to that end, and, so far as we can discover from the record, made no such point during the trial, but, on the contrary, requested instructions conditioning plaintiff's right of recovery upon Winfrey's having exercised ordinary care for his own protection. The case having been trial on the theory that Winfrey's contributory negligence would defeat plaintiff's recovery, and no suggestion having been made that that theory was inapplicable to any one or more phases of the case, we cannot hold that the

mere instruction of the jury on that subject, independent of what was said in the instruction, was erroneous. If it was in fact erroneous, it was an error invited or acquiesced in, and, therefore not reviewable.

The Supreme Court in Tweed's Case, 16 Wall. 504, 516, 21 L. Ed. 389, said:

"Courts are not inclined to grant a new trial merely on account of ambiguity in the charge of the court to the jury, where it appears that the complaining party made no effort at the trial to have the point explained."

[8] It remains, therefore, to consider the assignment of error taken to the court's charge as made concerning contributory negligence, and especially to that particular part of it which told the jury that the same degree of care and prudence is required of a drunken man as of a sober man, without in the same connection telling them to consider the helpless condition of a drunken man.

By referring to the charge as a whole on this subject, it will be seen that the court first dealt with the subject of defendant's liability for injury to a drunken passenger known by its agents to be in a dangerous position and helpless, in which the jury were told, in effect, that defendant would be liable notwithstanding the intoxication of the passenger if it failed to exercise toward him reasonable and ordinary care to prevent his injury. This fairly stated the law on the prominent phase of the case, and then, as if the minor phases of the case required instruction on the subject of contributory negligence, the court after properly defining it told the jury as follows:

"In considering the question of contributory negligence of the deceased, I charge you that a man cannot voluntarily place himself in a condition whereby he loses such control of his brain or muscles as a man of ordinary prudence and caution in the full possession of his faculties would exercise, and thereby contribute to an injury to himself, and then require of one ignorant of his condition recompense therefor."

And then amplified and explained the proposition as hereinbefore stated.

The court studiously limited the application of its charge on this subject of contributory negligence to those "ignorant of the condition" of the drunken man. In other words, it obviously undertook to advise the jury what the law was, not respecting those who knew Winfrey's perilous plight concerning which it had already fully charged the jury, but respecting those who were ignorant of his plight, manifestly referring to the agents of the south-bound train who were charged with negligent conduct in operating their train which actually ran over and killed Winfrey. Treating this matter, therefore, as an independent subject of inquiry, based, not on the last clear chance theory which had already been considered, but upon the primary negligence of the agents of the south-bound train, we discover no error in the charge of the court in this particular. It was fully as favorable to the plaintiff as the facts and pleadings of the case warranted.

[9] A drunken man must be held to the consequences of that condition. Otherwise a premium is put upon misbehavior. If he, by

voluntarily rendering himself unable to care for himself, can invite injury and recover from another ignorant of his condition therefor, notwithstanding his own direct contribution to the cause of it, the sober and careful man is put to a disadvantage in such cases. This seems and is unreasonable.

Hutchinson, in his work on Carriers (volume 3, par. 1230), announces this rule:

"Intoxication does not per se constitute contributory negligence, but is a matter to be taken into consideration as bearing on the question whether the passenger has, by his own conduct, brought the injury upon himself. The law exacts from one who is voluntarily intoxicated the same degree of care and caution in voiding an exposure of his person to danger as it exacts from a sober person of ordinary prudence under like circumstances."

Beach, in his work on Contributory Negligence, par. 391, says:

"Drunkenness will never excuse one for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances. Men must be content, especially when they are trespassers, to enjoy the pleasures of intoxication cum periculis."

In Trumbull v. Erickson, 38 C. C. A. 536, 97 Fed. 891, 893, Judge Caldwell, speaking for this court, said:

"The authorities are uniform that the mere fact that a person, when injured, was intoxicated, is not in itself evidence of contributory negligence, but that it is a circumstance to be considered in determining whether his intoxication contributed to his injury. If it did, he cannot recover. If it did not, it will not excuse the defendant's negligence."

To the same effect are Keeshan v. E. A. & S. Trac. Co., 229 Ill. 533, 82 N. E. 360, and Vizacchero v. Rhode Island Co., 26 R. I. 392, 59 Atl. 105, 69 L. R. A. 188.

[10] Other assignments of error relate to the refusal of the trial court to give certain instructions to the jury which were asked by plaintiff's counsel. These requested instructions have all been carefully considered in connection with what was said to the jury in the main charge, and we fail to find in them any correct principle of law applicable to the case under the pleadings and proof which was not fully covered in the charge. There was therefore no error in refusing to give them in the language requested.

[11] An exception was taken to permitting a witness for defendant to testify that one of the plaintiff's witnesses was addicted to the use of morphine. Whether this fact could have been proven as an independent fact by way of impeachment of plaintiff's witness without having called his attention to it while on the stand may be questioned, but it is obvious that this possible deviation from correct practice was without prejudice to plaintiff's rights under the pleadings and proof as made.

Finding no prejudicial error in the proceedings below the judgment is therefore affirmed.

BROAD RIVER LUMBER CO. v. MIDDLEBY et al.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1912.)

No. 1,038.

1. LOGS AND LOGGING (§ 2*)—"TIMBER."
Generally the word "timber," as used in a contract selling standing timber, unless modified or controlled by other expressions, in the contract means such trees as are fit to be used in buildings or similar construction; that is, trees of a size fit to be used in the construction of dwellings or ships; trees too small to be used for these purposes, not, strictly speaking, being considered as timber, although their products are utilizable for the construction of interior work in dwellings, or for the manufacture of tools and other appliances.
[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 1–5; Dec. Dig. § 2.*
For other definitions, see Words and Phrases, vol. 8, pp. 6972, 6973 7816.]

2. LOGS AND LOGGING (§ 2*)—"MERCHANTABLE TIMBER."
The term "merchantable timber," within a contract to sell land warranted to contain 100,000,000 feet of "merchantable timber," while not limited to timber that could be reduced to board measure and manufactured into lumber at a profit, is limited to timber capable of being measured in board feet when sawed or cut for the purpose of utilization.
[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 1–5; Dec. Dig. § 2.*
For other definitions, see Words and Phrases, vol. 5, pp. 4489–4490.]

3. EVIDENCE (§ 591*)—CONCLUSIVENESS.
On an issue as to the quantity of timber on land, defendant's own testimony binds him.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2440–2443; Dec. Dig. § 591.*]

Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Greensboro.

Bill by the Broad River Lumber Company against Katherine Middleby and others. From a decree dismissing the bill, complainant appeals. Modified.

E. J. Justice (Justice & Broadhurst, on the brief), for appellant.

William P. Bynum and R. C. Strudwick (J. J. McCarthy, on the brief), for appellees.

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

SMITH, District Judge. On the 17th of December, 1906, J. Middleby, Jr., and Katherine Middleby, his wife, executed a deed of conveyance to the Broad River Lumber Company of several parcels of land in the counties of Rutherford, Cleveland, Burke, and McDowell, in the state of North Carolina, which several tracts were warranted in the conveyance to contain not less than 20,000 acres. The conveyance also included a certain amount of personal property, viz., mules, oxen, wagons, carts, traction engines, with three sawmills, machinery,

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

engine, and boilers, and everything belonging thereto. The deed of conveyance further contained this covenant:

"It is further understood and agreed between the parties to this deed that the said parties of the first part warrants and guarantees that there shall be not less than one hundred million feet of merchantable standing timber on the land hereinbefore described. If there should be less than one hundred million feet of such merchantable timber, then the parties of the first part bind themselves, their heirs and assigns to pay to the said party of the second part, its successors or assigns, the sum of $2.00 per thousand feet for such deficiency. Or if there shall be an excess of one hundred million feet of standing merchantable timber on the said lands, then the said party of the second part hereby binds itself, its successors and assigns to pay to the said parties of the first part, their heirs or assigns the sum of $2.00 per thousand feet for such excess."

The purchase price of all the property mentioned in the deed of conveyance was $150,000, of which $10,000 was paid in cash, and the balance was represented by notes for the aggregate of $140,000, which was secured by a mortgage which was executed on the same day as the deed of conveyance. The proceeding before the court was initiated by a bill of complaint in equity alleging that the land conveyed contained much less than 100,000,000 feet of merchantable standing timber, in fact contained, as alleged in the bill of complaint, only 64,000,000 feet, and the complainants therefore claimed that they were entitled to a credit of $2 per thousand feet upon the deficiency, or a credit of $72,000 upon the notes given for the credit portion of the purchase money. The proceedings having been completed by answer and replication, on the 6th of October, 1907, a consent decree was entered requiring the complainants to pay all the credit portion of the purchase money secured by the mortgage, including the note maturing February 1, 1908, with interest, leaving still unpaid $75,000 of the principal of the notes as secured by the mortgage. The consent decree further provided that the case should remain upon the docket as a cause in equity in order to determine the amount of merchantable standing timber on the land at the time of the sale, to wit, October 1, 1906, and it was referred to a master to take the testimony and report his findings of fact and conclusions of law to the court. The consent decree further provided that, if there should be found a deficit under 100,000,000 feet, then judgment was to be entered against the defendant for such deficit at the rate of $2 per thousand feet, and be credited on the amount unpaid of the purchase money. If the deficit should be greater than the balance of the purchase money unpaid, then it should be applied to the payment of the balance of the purchase money unpaid, and whatever amount of the judgment was in excess of the purchase money unpaid should be entered as a judgment against the defendant, and, if there should be found to be an excess over 100,000,000 feet of timber on the said land, the defendant Middleby was to have judgment against the lumber company for the amount of such excess.

The effect of this consent decree was to put an end to all other questions in the cause and leave open simply the determination of the question as to the amount of merchantable standing timber on the land at the time of the sale, to wit, October 1, 1906. For any

deficit under 100,000,000 feet the plaintiff was to have judgment against the defendant at the rate of $2 per thousand feet. For any excess over 100,000,000 feet the defendant was to have judgment against the lumber company for the amount of such excess at the same rate. In effect, therefore, the only question for determination was the amount of merchantable standing timber on the land on October 1, 1906. The master to whom it was referred to take testimony and report found that the definition of merchantable standing timber as contained in the covenant of warranty set out in the deed of conveyance meant saleable standing timber and did not include any standing timber so defective or so inaccessibly located, all the lands being considered together, as to render it unprofitable to handle the standing timber measured in board feet, and that estimated under this definition there was a deficiency of 53,000,000 feet of merchantable standing timber. On exceptions to the finding of the special master the case was heard by the trial judge below, who overruled the master on this point and held that the term was sufficiently broad and comprehensive to include all timber as it stands in the forest, which can be manufactured into articles of trade or value recognized on the market when placed there, whether the timber be suitable to be manufactured into boards or turned into railroad sills, telegraph poles, or the smaller products from standing timber, more particularly the hard woods, such as rims, spokes, handles, spools, bobbins, and shuttles, and that the proper construction of the contract required that all timber standing on the land which had a value as such if placed upon the market should have been estimated as it stood in the forest, and that the timber contemplated by the contract should not have been confined to such only as could be reduced to board measure and manufactured into lumber at a profit. The trial judge therefore overruled the master, and held that the complainant had failed by the testimony to show that there was any deficiency in the amount of merchantable standing timber, included under his definition of the terms, at the date of sale upon the lands under 100,000,000 feet, and dismissed the bill of complaint. Upon appeal from this decree below the case now comes before this court.

[1, 2] The single question for construction in the case is what is the meaning of "merchantable standing timber" as embraced in the covenant of warranty in the deed of conveyance. When the proper timber to be included in that definition is determined, the only question of fact is what amount of timber included in that definition has been shown to be upon the land. The court finds that as a general rule the word timber, unless modified or controlled by other expressions in the contract, means as a rule such trees as are fit to be used in buildings or similar construction; that is, trees of such a size as are fit to be used in the construction, either of dwellings or ships. Trees of a size too small to be used for these purposes are not strictly speaking considered as timber, although their products are utilizable for the construction of interior work in dwellings, or for the manufacture of tools and other appliances. The determination, however, of what is meant by merchantable standing timber in the present

contract is also to be taken in connection with the fact that the amount of this merchantable standing timber is under the terms of the contract to be ascertained in feet, and therefore it is a guide to the determination of what timber is meant if we can determine what measurement is meant by the word "feet" in this contract. It is admitted it does not mean cubic feet; so, also, it does not mean lineal feet, as that would include mere poles which may be of very small diameter, and not of a kind fitted for the purposes of construction. The parties themselves seem to have given a construction which evidences what is the meaning of the word "feet" in this contract. In the answer of the defendant Middleby, he sets out that the original contract of sale was made with D. A. Ritchie and B. E. Cogbill (afterwards officers and incorporators of the complainant), who had an estimate made with a view to the purchase of the property, and on June 1, 1906, entered into a contract with the defendant Middleby for the purchase of the lands and timber; that the contract so made by the defendant Middleby with Ritchie and Cogbill was taken over by the complainant the Broad River Lumber Company, which company was incorporated for the purpose of taking over the contract, and a copy of the contract is attached to the answer of the defendant Middleby as a part of his answer, and the defendant alleges that the estimate of the amount of timber on the land made for Ritchie and Cogbill was known to and relied upon by the complainant. This contract with Ritchie and Cogbill, which is annexed to the answer of the defendant Middleby, provides for a sale of the property (the lands to contain not less than 20,000 acres) for $150,000, to be partly represented by notes; that the first note should be paid when 5,000,000 feet of lumber should have been cut from the premises; and that the second note should become due when 5,000,000 feet additional should have been cut.

The contract also provides that the several sawmills on the premises should be operated by Middleby after June 4, 1906, for the benefit of the purchasers until they could take control, but that all lumber already sawed or sawed prior to 4th of June, 1906, should belong to Middleby. It thus appears that this preliminary contract contemplated the payment of the purchase price of $150,000 accordingly as so many feet of lumber should have been cut; that is to say "sawed" from the premises, which would show that the word "feet" as embraced in this contract meant feet as calculated upon timber that can be sawed or cut for purposes of lumber, and as estimated by what is commonly known as feet in board measure. The preponderance of the testimony also of the witnesses adduced, especially that of Dr. C. A. Schenck, an expert witness put up by the defendant Middleby, was to the effect that the word "feet," when applied in expressing the number of merchantable standing timber, meant such timber that would be measured in feet by a sawmill man. This from the testimony would mean board measurement. If the word "feet" as used in this contract be one of technical character, to establish the meaning of which the evidence of persons skilled in the vocabulary of the particular business is admissible, the testimony is that the word "feet"

as used in this contract would mean board feet, or timber that can be measured in board feet when sawed in lumber. This would appear to be exactly the same meaning as intended by the parties as expressed in writing by the contracts made at the time. The court holds, therefore, that the court below was right in overruling the master on the point that in the present contract the words "merchantable standing timber" embraced only timber that could be reduced to board measure and manufactured in lumber at a profit, but erred in extending the construction of those words in the contract to include any timber in excess of such timber as was capable of being measured in board feet when sawed or cut for the purposes of utilization. The exact amount of such timber does not appear to have been put in evidence by the complainant, and the testimony put in the evidence by the complainant appears to be deficient in not proving with sufficient exactitude the amount of timber that would be embraced in this definition as settled by this court, but there is in evidence as put in evidence by the defendant himself testimony to show that the quantity of timber upon the lands in question which would be embraced within this definition would be 78,826,676 feet which aggregate is arrived at by taking the 75,624,198 feet shown by Exhibit A in the transcript and adding thereto the 3,202,478 in cross-ties, making the total as above set forth.

[3] Inasmuch as this is the defendant's own testimony, it should be binding upon him as to the amount of timber within the definition fixed by this court, and, as the complainant failed to show exactly the amount within the definition, the court is of the opinion that it would be better at this stage of the cause to give a final decree based upon the evidence before it. This would leave a deficiency under the 100,000,000 feet guaranteed of 21,173,324 feet, for which deficit, estimated at the rate of $2 per thousand, amounting to the sum of $42,346.64, the complainant is entitled to judgment against the defendant to be credited upon the unpaid notes secured by the mortgage. The credit to be made upon the notes as of their date, so as to reduce the principal of the notes when given by the amount credited.

The decree of the court below, therefore, must be modified so as to accord with this conclusion.

BURCHETT et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 26, 1912.)

No. 1,000.

1. CRIMINAL LAW (§ 1129*)—ADDITIONAL ASSIGNMENTS OF ERROR—RIGHT TO CONSIDERATION.

The Circuit Court of Appeals will not consider additional assignments of error which the court below permitted counsel to lodge in the clerk's office, but which the court refused to permit to be filed; motion for permission having been made more than five weeks after the writ of error was allowed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954–2964; Dec. Dig. § 1129.*]

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

2. CRIMINAL LAW (§ 1129*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.
Under Circuit Court of Appeals Rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii), requiring assignments of error to specify the errors relied on, an assignment that the court erred in impaneling and swearing the jury is insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954–2964; Dec. Dig. § 1129.*]

3. CRIMINAL LAW (§ 1129*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.
An assignment that the court erred in admitting testimony of specified witnesses as to offer of bribes and other means besides threats, as set forth in the bill of exceptions, as the same was not alleged in the indictment, is insufficient, under Circuit Court of Appeals Rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii), for failing to quote the full substance of the evidence admitted, so as to indicate the object of the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954–2964; Dec. Dig. § 1129.*]

4. CRIMINAL LAW (§ 1129*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.
An assignment that the court erred in its instructions given for the prosecution as set forth in the bill of exceptions is insufficient for not setting out the instructions in totidem verbis, as required by Circuit Court of Appeals Rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954–2964; Dec. Dig. § 1129.*]

5. CRIMINAL LAW (§ 1086*)—APPEAL AND ERROR—REVIEW—EXCEPTIONS NOT PRESERVED BELOW.
The Circuit Court of Appeals cannot review instructions given for the prosecution where the record does not show that the ruling complained of was excepted to at the time when made a part of the record by a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736–2769, 2772, 2794; Dec. Dig. § 1086.*]

6. CRIMINAL LAW (§ 1031*)—APPEAL AND ERROR—OBJECTIONS NOT RAISED BELOW.
An objection to irregularities in summoning, impaneling, or organizing the grand jury cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2622, 2626, 2631; Dec. Dig. § 1031.*]

7. INDICTMENT AND INFORMATION (§ 133*)—IRREGULARITIES—OBJECTIONS—TIME FOR MAKING.
Objections to irregularities in summoning, impaneling, or organizing a grand jury must be called to the trial court's attention by a plea in abatement or motion to quash before a plea of not guilty.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 454–468; Dec. Dig. § 133.*]

8. CRIMINAL LAW (§ 1086*)—RECORDS—REQUISITES.
The record in a criminal case should show that the grand jury which returned the indictment was duly sworn.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736–2769, 2772, 2794; Dec. Dig. § 1086.*]

9. CRIMINAL LAW (§ 1088*)—OATHS—ADMINISTRATION—PROOF—SUFFICIENCY.
That the grand jury which returned the indictment was duly sworn is sufficiently shown by a recital in a record that the grand jury was "impaneled" and by a recital in the caption of the indictment that the grand jurors were impaneled, sworn, and charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2746–2751, 2757, 2766, 2782–2802, 2899; Dec. Dig. § 1088.*]

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

10. INDICTMENT AND INFORMATION (§ 21*)—CAPTION—EFFECT.
While the caption of an indictment is no part of the accusation, it is a part of the record, and may be considered to ascertain the court to which the jury was summoned, in which it was charged, when the indictment was returned, and whether or not the grand jurors were sworn.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 92–97; Dec. Dig. § 21.*]

In Error to the District Court of the United States for the Western District of Virginia, at Big Stone Gap.

George Burchett and others were convicted of conspiring to prevent a witness from attending and testifying, and they bring error. Affirmed.

S. H. Sutherland and Roland E. Chase (Smith & McCorkle, Sutherland & Sutherland, and Chase & Daugherty, on the briefs), for plaintiffs in error.

Barnes Gillespie, U. S. Atty. (Thomas J. Muncy, Asst. U. S. Atty., on the briefs).

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

GOFF, Circuit Judge. The plaintiffs in error, George Burchett, Columbus Colley, Jim Sykes, and Logan Salyers, were convicted in the court below on an indictment charging violations of sections 5399, 5404, and 5406 of the Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 3656, 3657). They were found guilty of unlawfully conspiring together to prevent, and of preventing by force, threats, and intimidation, a witness from attending and testifying in the court below.

[1] The verdict was returned on the 10th day of August, 1910, and the sentence of the court was imposed on that day. The writ of error was allowed on August 15, 1910, on which day the assignments of error had been duly filed. On the 24th day of September, 1910, the plaintiffs in error moved the court below for permission to file additional assignments of error. This request was refused, but the court permitted counsel to lodge the same in the clerk's office, from which, at the request of the plaintiffs in error, such additional assignments were certified to this court, and it is now contended by counsel for said plaintiffs in error that the same are part of the record. As a matter of course we are compelled to decline to consider them. This question has been heretofore considered and decided by this and other courts, and is no longer open for discussion. U. S. v. Goodrich, 4 C. C. A. 160, 54 Fed. 21; U. S. v. Fletcher, 8 C. C. A. 453, 60 Fed. 53; Mutual Life Ins. Co. v. Conoley, 63 Fed. 180, 11 C. C. A. 116; Lloyd v. Chapman, 93 Fed. 599, 35 C. C. A. 474.

[2-5] The assignments of error as filed in the court below do not "set out separately and particularly each error asserted and intended to be urged," as is required by rule 11 of this court (150 Fed. xxvii, 79 C. C. A. xxvii), which reads as follows:

"The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of er-

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

rors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

We are unable from the alleged assignments of error filed when the writ of error was allowed to determine from the various causes mentioned in them what the errors are of which the plaintiffs in error complain.

A reference to a few of said assignments will illustrate the difficulty we are laboring under, and demonstrate, not only the necessity of, but the importance of, adhering to the requirements of the rule referred to. One of the assignments reads as follows: "The court erred in impaneling and swearing the jury." We are entirely unable to comprehend what was intended by this assignment. Surely it was not error to impanel and swear the jury. If it was intended to convey the idea that irregularities were committed or that essential formalities were dispensed with, its grave defects become apparent, and the object of the rule is brought plainly in view.

Another assignment is as follows:

"The court erred in admitting the testimony of Bruce Compton as to offers of bribes and other means besides threats, as set forth in the bill of exceptions, as the same was not alleged in the indictment."

The full substance of the evidence admitted should have been quoted as required by the rule, so as to indicate the object of the testimony, and to show the reason of, the propriety for or the error in the ruling of the court. It is manifestly unjust to the trial court to permit such general assignments as are here indicated, under which points not mentioned during the trial, may in this court when presented by learned counsel with the aid of other facts and other assignments based on other bills of exceptions, be made to present a situation entirely different from the one existing when the court below ruled on the question then before it.

Again we quote another assignment of error:

"The court erred in its instructions to the jury, in the two instructions given for the government, which are set forth in the bill of exceptions as such exceptions."

Not only does this assignment ignore that portion of the rule which requires that the instructions given alleged to be error should be set out in todidem verbis, but we find that the record shows that no exception was taken by counsel for plaintiffs in error to the action of the court below in giving said instructions. It is fundamental that no alleged error in law can be reviewed in an appellate court of the United States, when the record does not show that the ruling of the court complained of was excepted to at the time, and made part of

the record by a bill of exceptions. The record of this case discloses that no exceptions were taken to the action of the court in giving the instructions now complained of, and therefore no bill of exceptions relating thereto could have been tendered to and signed by the court. An exception is intended, not only to challenge the correctness of the instruction given by the court, so that when his attention is called specially to the matter he may change his ruling, but also in case he should decline so to do, that a foundation may have been provided for a review in an appellate court.

Without particularly referring to the other assignments of error, we dispose of them generally when we say that they all entirely ignore the requirements of the rules of this court. The fact being that there is scarcely a semblance of their observance in any of the alleged assignments. We have heretofore repeatedly called attention to the importance of these rules, and to the necessity of the proceedings in this court being conducted in strict conformity therewith. We are impelled to the conclusion that it is our duty to disregard all of the assignments of error that we find in the record.

[6, 7] Because of the unusual circumstances with which this writ of error is entangled, and mindful of the fact that the liberty as well as the property of the plaintiffs in error are involved in its determination, we deemed it consistent with the due administration of justice —as provided for in our rules—to request and permit counsel to advise us fully concerning the points relied upon by them to demonstrate error in the proceedings during the progress of this case in the court below, relating to the following questions: Does it appear from the record that the grand jury which found the indictment on which the plaintiffs in error were convicted had been duly sworn before it returned the same? If not so sworn, did the plaintiffs in error waive such omission by not pleading the same in abatement, and by pleading to the merits?

It is now well established that no objection relating to irregularities in summoning, impaneling, and organizing a grand jury can be raised for the first time in an appellate court. Such objections must be called to the attention of the trial court by a plea in abatement or a motion to quash before a plea of not guilty is filed. Such matters will not be considered after verdict on a motion for a new trial, or in arrest of judgment, for the accused admits the validity of the indictment when he pleads to the merits. If there is no legal accusation against him, he should show that to the court in the manner we have indicated, otherwise he has waived such defects, if in fact they existed.

[8, 9] We think that the record should show that the grand jury was duly sworn, and we are impelled to the conclusion that such essential fact is shown by the orders of and the proceedings in the court below relating to this case. The record sets forth that at a regular term of the District Court for the Western District of Virginia, held at Big Stone Gap, on Monday, January 24, 1910, a grand jury of inquest for the body of said district was impaneled, the names of the foreman and of the other members thereof being given, that such

jury retired to consider of their indictments, and that in due time the indictment now under consideration was presented in open court by such jury. The word "impaneled," as used in the earlier days of criminal procedure, had a different signification to that which it is now intended to convey. In the old English practice a jury was said to be impaneled when the officer summoning the members thereof had entered their names in the "panel" which he attached to the venire before returning the same to the court from which it issued. It appears that in some jurisdictions the old meaning still adheres, and that "impaneling" does not include the swearing of the jury. We also find that in a large number of well-considered cases in many of the states of this country the contrary is held. It will we think aid materially in determining the meaning of that word as it was used in the court below to consider it specially in connection with the other words found in the orders and recitals of that court relating to this indictment. Clearly it was not used in this case—(the substance of the order we have heretofore given)—in the sense that was generally given it in the days of Lord Coke, when the sheriff returned the venire. It appears from the order that a foreman had been selected, and his name must have been taken from the list theretofore drawn and returned as provided by law, evidently in pursuance of the requirements of section 809 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 627). It was after the return of the panel, and subsequent to the selection of a foreman, that the grand jury was "impaneled." What could that word have been used for, save only to indicate the usual formalities, including the requirements of the statutes, and the proper discharge of all their duties relating to that jury, by the court and its officers?

[10] In addition to this, we find that the record discloses in the caption of the indictment that the grand jurors returning it "were impaneled, sworn, and charged." The caption is not a part of the accusation returned by the grand jury, but it is a part of the record, and may be considered for the purpose of ascertaining the court to which the jury was summoned, in which it was charged, when the indictment was returned, and whether or not the grand jury was sworn. 1 Bish. New Crim. Pro. §§ 661, 667; 22 Cyc. 228, 239; Robinson v. Commonwealth, 88 Va. 900, 14 S. E. 627; 10 Enc. P. & P. 430; U. S. v. Bornemann (C. C.) 35 Fed. 824; State v. Gilbert, 13 Vt. 647; Noles v. State, 24 Ala. 672; Duncan v. People, 1 Scan. (Ill.) 456; Melton v. State, 3 Humph. (Tenn.) 389.

Finding, as we thus do, that the record discloses that the grand jury was duly sworn, it becomes unnecessary for us to further consider the question of waiver about which we heard argument. To an unusual degree have we indulged the plaintiffs in error. We have given due consideration to the arguments of the able counsel representing them in this court, have analyzed and applied the numerous authorities they have cited, the result being that we find no error in the judgment complained of. They were charged with offenses of a serious nature; they intended to impede and corrupt the administration of justice; to shield criminals and prevent their punishment. After a

fair trial they were convicted by a jury of their country, and were sentenced by an able and conscientious judge who, familiar with all the details of the trial, was forced to overrule the motions by which they hoped to escape the punishment that their conduct invited, that the law imposed, and that fits the crimes of which they are guilty.

Affirmed.

CARLISLE v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1912.)

No. 1,041.

1. CRIMINAL LAW (§ 1050*)—APPEAL—NECESSITY OF EXCEPTIONS—INDICTMENT—MOTION TO QUASH.

   Denial of a motion to quash an indictment cannot be reviewed, in the absence of an exception noted to the ruling at the time it was made.

   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2656, 2658, 2660; Dec. Dig. § 1050.*]

2. CRIMINAL LAW (§ 1149*)—INDICTMENT—MOTION TO QUASH—REVIEW.

   A motion to quash an indictment is addressed to the discretion of the court, and the denial thereof will not be reviewed in the appellate court, except where there has been such failure to properly exercise judicial discretion as to cause real injustice.

   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3039–3043, 3058; Dec. Dig. § 1149.*]

3. CRIMINAL LAW (§ 322*)—RETURN—PRESUMPTION.

   Where an indictment has been regularly returned into open court, it will be presumed that the grand jury and other officials properly discharged their respective duties with reference thereto.

   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 728; Dec. Dig. § 322.*]

4. CRIMINAL LAW (§ 721*)—TRIAL—ARGUMENT OF COUNSEL.

   The rule that a district attorney shall not refer in his argument to defendant's failure to testify in his own behalf does not prevent argument amounting only to a claim that the government had made out a prima facie case, which had not been contradicted.

   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. § 721.*

   Comments of counsel and instructions on failure of accused to testify, see note to McKnight v. United States, 54 C. C. A. 373.]

5. CRIMINAL LAW (§ 1055*)—TRIAL—APPEAL—EXCEPTIONS AT TRIAL.

   Alleged improper argument by the district attorney to the jury cannot be reviewed, where no exception was taken to a ruling of the trial judge on the objections interposed at the time the argument was made.

   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2666, 2667; Dec. Dig. § 1055.*]

6. CRIMINAL LAW (§ 728*)—APPEAL—NEW TRIAL.

   An assignment of error, based on the refusal of the trial judge to grant a new trial because of alleged improper argument by the district attorney, first suggested after the rendition of the verdict, will not be sustained in the appellate court.

   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689–1691; Dec. Dig. § 728.*]

In Error to the District Court of the United States for the District of South Carolina.

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

Milton A. Carlisle was convicted of violating the National Banking Act, and he brings error. Affirmed.

Fred. H. Dominick and Cole L. Blease, for plaintiff in error.
Ernest F. Cochran, U. S. Atty.

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

GOFF, Circuit Judge. The plaintiff in error was convicted in the court below on an indictment containing 162 counts, charging violations of sections 5208 and 5209, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3497). The first count charges that he, as president of the National Bank of Newberry, in the district of South Carolina, misapplied certain money of that bank by means of a check drawn by him on his general account as a depositor. The counts from 2 to 73, inclusive, are founded on other checks of his, drawn on the same account, payable to other parties, of various dates and amounts. Counts 74 to 93, inclusive, charge similar misapplication by means of checks drawn by him on said bank, on a different account, payable to a number of payees, of various dates and amounts. Counts 94 to 146, inclusive, are based on checks drawn by the plaintiff in error as president and treasurer of the Cold Point Granite Company, and paid by the bank. Counts 147 to 151, inclusive, charge him with misapplying the funds of the bank by means of certain notes and checks specially described in said counts. Counts 152, 153, and 154 relate to certain drafts of the Cold Point Granite Company, drawn on separate drawees, charged as being worthless, paid by the bank, whereby its money was misapplied. Counts 155 to 160, inclusive, charge the defendant below with misapplying various sums of money, by turning the same over to said Cold Point Granite Company, under the guise of loans by means of worthless notes, and by collecting various sums of money from different parties which was misapplied. Counts 161 and 162 are based on section 5208, as amended by Act July 12, 1882 (22 Stat. 166), in which he is charged, as president of said bank, with certifying checks drawn by a depositor, when the amounts of such checks were not to the credit of such party on the books of the bank.

The defendant below was convicted on five counts of said indictment, viz., 152, 153, 154, 159, and 160, and was sentenced by the trial judge to be imprisoned in the United States Penitentiary at Atlanta, Ga., for the term of five years.

[1] When the case was called for trial in the court below, the attorneys for the plaintiff in error moved the court to quash the indictment on the following grounds:

"On account of the numerous counts contained therein, that being that the indictment was handed the grand jury on October 21, 1909, and was returned by them on the same day marked 'True Bill,' the indictment containing 162 distinct and separate counts, composing 342 closely typewritten pages, and that consequently it was a physical impossibility for the jury to have read this indictment or to have taken sufficient testimony upon each of the separate counts to have intelligently formed a basis for the return of a true bill.

"Furthermore, because it is burdensome beyond question and hardly possible for any petit jury to take this indictment and take the testimony that

will be necessary, the verbal testimony and the written testimony that will be necessary, and to distinguish at one time between these different counts, and to form an intelligent opinion upon which the defendant should be convicted, and upon which he should be acquitted, and therefore the natural prejudice will lean against the defendant for the jury to write either a sweeping charge one way or the other, without a proper and intelligent consideration of the different counts in this indictment, and

"Furthermore, because the defendant in this court, or in any other court, with an indictment like that presented against him, it is hardly possible for him to prepare his defense in such a way as to present to a jury the testimony necessary to explain all of these counts, and that therefore it is burdensome, and it is an unnecessary hardship, and almost reaches the point of torture, to hand out an indictment of that kind against any man, and compel him to come into a court of justice and attempt to make answer before a jury. We take the position that this indictment should have been separated, and that this man should have been indicted only in one indictment, under such transactions as connect him with the different allegations thereof."

In reply to this motion, and argument of counsel thereon, the court below remarked:

"It does not seem to me that there is sufficient legal ground to quash the indictment, and the motion is denied."

Really that is all that it is necessary to say on this motion. The court in a few words properly disposed of the question presented for its consideration, and to this ruling it is well to here notice that no exception was taken. As we understand the record, all the points now presented to this court by the plaintiff in error were raised by him either on the motion to quash or the motion for a new trial, and we are unable to find that any exception was noted at the time to the ruling of the court. The object of an exception is to challenge the correctness of the court's ruling, and to permit the trial judge, when his attention has been specially called to the alleged error, to correct his disposition of the matter, should he deem it proper so to do, and in case he does not do so to provide a method for review in the appellate court. Such an exception is absolutely indispensable under the practice in the courts of the United States.

[2] A motion to quash an indictment is addressed to the discretion of the court, and will not be reviewed in an appellate court, save only in cases where there has been such failure to properly exercise the judicial discretion as to cause real injustice. In the case we now consider we are unable to conceive how the court below could have decided other than it did. The questions involved were not new, but had in fact been disposed of by repeated decisions of the courts, among others, Pointer v. United States, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; Ingraham v. United States, 155 U. S. 434, 15 Sup. Ct. 148, 39 L. Ed. 213; Gardes v. United States, 87 Fed. 172, 30 C. C. A. 596; Morse v. United States, 174 Fed. 539, 541, 98 C. C. A. 321, 20 Ann. Cas. 938.

[3] The indictment had been regularly returned in open court, and the presumption is that the grand jury, the court officials, and the court properly discharged their respective duties. Nothing to the contrary appears; the only suggestion of impropriety being found in the brief and argument of counsel.

[4] The contention of counsel for the plaintiff in error that the argument of the district attorney to the jury can be construed as a reference to the failure of the defendant below to testify in his own behalf is not supported by the facts as they appear in the record. In substance, the words complained of amounted to the claim that the government had made out a prima facie case, which had not been contradicted. The rule that the prosecution shall not comment on the failure of the accused to testify should not prevent an argument that the evidence of the government is uncontradicted or unexplained.

[5] In addition to this, it is well understood that, before such remarks can be considered in an appellate court, they must be brought to its attention by an exception taken to the ruling of the trial judge on an objection interposed at the time the argument was made. No such suggestion was made, nor was the attention of the court called to the matter. If the remarks of the district attorney were objectionable, defendant's counsel should have called the attention of the court to them, with the request that it interpose and caution the jury to disregard them.

[6] An assignment of error, based on the refusal of a trial judge to grant a new trial because of a complaint of this character, first suggested after the rendition of a verdict, will not be sustained in an appellate court. Crumpton v. United States, 138 U. S. 361, 11 Sup. Ct. 355, 34 L. Ed. 958; Chadwick v. United States, 141 Fed. 225, 246, 72 C. C. A. 343; Higgins v. United States, 185 Fed. 710, 108 C. C. A. 48.

Because of the fact that the liberty of the plaintiff in error was involved, we, as we were authorized under our rule to do, permitted and asked counsel to present fully the points relied upon by the plaintiff in error to show error in the rulings of the court below; the result being an absolute failure to justify the contentions presented to this court. There is no merit in any of the assignments of error. It is well that, under all the circumstances surrounding this case, the record is found to be without a flaw, that no error appears in it. The plaintiff in error was given a fair, patient, and impartial trial, was protected by all the formalities of the law, and was by a jury of his country found guilty of the offenses with which he was charged. It would be a travesty on justice, in the light of the record we have before us, to reverse the judgment of the court below.

Affirmed.

In re HURST.

WASHINGTON et al. v. TEARNEY et al.

(Circuit Court of Appeals, Fourth Circuit. March 14, 1912.)

No. 1,068.

BANKRUPTCY (§ 157*)—FRAUDULENT CONVEYANCES—PARTICIPATION IN PROCEEDS—RECOVERY OF DIVIDENDS.

A bankrupt, being indebted to the county in the amount of $15,000 for defalcation as sheriff, obtained a loan of the amount from decedent, his father-in-law, to settle the defalcation, and on December 4, 1896, as

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

part of the same transaction, executed conveyances of certain real estate to decedent as security for the debt. These were not recorded, but were found among decedent's papers after his death in 1902, after which they were recorded by the executors, September 12th, 11 days prior to the grantor's adjudication as a bankrupt. The executors filed a claim for the indebtedness which was proved and allowed, after which the bankrupt's trustee instituted suit in a state court to set aside the conveyances for the benefit of "all" the bankrupt's creditors, and, being successful, the property was sold and the proceeds distributed; dividends being paid therefrom to the executor. *Held* that, the trustees having sued to set aside the conveyances for the benefit of all creditors, they could not thereafter claim that the dividends paid to the executors should be repaid because the land had been conveyed in fraud of creditors, participated in by the decedent in withholding the conveyances from record.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 237, 238; Dec. Dig. § 157.*]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Martinsburg, in Bankruptcy.

In the matter of bankruptcy proceedings of J. Garland Hurst. On petition of J. F. Tearney and another, the surviving executors of Edward Tearney, deceased, to revise the decision of a referee requiring repayment of dividends received by them on a claim in proceedings instituted by S. W. Washington and another, surviving trustees of the bankrupt. From a decree reversing the ruling of the referee (188 Fed. 707), the trustees appeal. Affirmed.

James M. Mason, Jr., for appellants.

Forrest W. Brown and R. T. Barton, for appellees.

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

ROSE, District Judge. The appellants are the surviving trustees in bankruptcy of J. Garland Hurst. They will be called the trustees. He the bankrupt.

The appellees are the executors of Edward Tearney. They will be styled the executors. The deceased the creditor.

Prior to December 4, 1896, the bankrupt owed the creditor a large sum of money. Moreover, at that time the creditor was indorser or surety for the bankrupt. As such he was subsequently called upon to make good sums that the bankrupt should have paid but did not.

At the time of the filing of the petition in bankruptcy, the amount due from the bankrupt to the executors on account of this indebtedness contracted before December 4, 1896, or for which the creditor at that time had become liable, was $18,166.22. No part of this sum was in any wise connected with the transactions that took place on the last-mentioned day. At some prior time the bankrupt had been sheriff of Jefferson county, W. Va. As such he had become indebted to the state in the sum of $15,000. He had been elected to the Legislature. He could not take his seat until he paid the state what he owed it. The creditor was his father-in-law. He asked the latter to let him have the needed $15,000. The request was granted. The money was paid

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

to or for him. On December 4, 1896, as a part of the same transaction, he executed two deeds, one for a farm of 157 acres; the other for his dwelling house in Harpers Ferry. The consideration named in the conveyance of the farm was $8,000; in that of the house $6,000.

The creditor lived until March, 1902. He never recorded either of the deeds. The bankrupt remained in possession of both the farm and the residence. To the public he appeared to be still their owner. After the creditor's death, the executors found the deeds among his papers. The bankrupt asked that they should not be recorded until he had opportunity to put his business affairs into better shape. In compliance with this request the executors withheld them from record until September 12, 1902. Eleven days later the bankrupt was adjudicated on his own petition.

The executors promptly filed in the bankruptcy proceedings their claim for $18,166.22, the amount of the indebtedness which was altogether apart from the dealings with the farm and house. This claim was properly proved. It was allowed. No question has ever been made that it was both provable and allowable.

On the 10th of March, 1903, the bankrupt court directed the trustees to file a bill in the state court to avoid the two deeds in question and "to recover the property thereby conveyed for the benefit of the creditors of the bankrupt estate." The trustees filed such a bill in the circuit court for Jefferson county. They made the executors and the heirs of the creditor defendants. They alleged, among other things, that:

"The debts proved in bankruptcy against the said J. Garland Hurst, entitled to participate in the distribution of the estate amount, with interest (*to*) September 23, 1902, to the sum of $55,930.42, and the trustees report filed in said bankruptcy proceeding show that the assets, other than these pieces of property, will not pay as much as 10 per centum, and *all* of the said creditors have a right to have said two deeds set aside as to their debts, as being fraudulent as to creditors." (The italics are ours.)

This sum of $55,930.42 included the claim of $18,166.22 filed by the executors, as well as the sum of $2,000 more which was claimed for the rent of the house and farm. This latter sum was subsequently disallowed in Re Hurst, 23 Am. Bankr. Rep. 554.

The circuit court for Jefferson county dismissed the bill on final hearing. Its decree was on appeal reversed by the Supreme Court of Appeals of the state. Moore v. Tearney, 62 W. Va. 72, 57 S. E. 263.

The opinion directed that the lower court should decree the sale of the property for the benefit of the plaintiffs as trustees in bankruptcy. The mandate adjudged that the deeds "be and the same are hereby held void and set aside as to the rights of the plaintiff trustees." The property was thereupon sold. Its net proceeds were paid over to the trustees. Those proceeds were divided among the creditors by two distribution accounts stated by the trustees. Without objection dividends were allowed and paid to the executors on their claim for $18,166.22. These two dividends amounted to $4,188.46.

On the 6th of June, 1909, the trustees began this proceeding. By their petition then filed they asked that the executors be required to repay the dividends so paid them. This action was not taken until

more than six years after the same trustees had asked the state court to set aside the fraudulent deeds in order that the property included by them might be distributed among *all* the creditors, including among such creditors the executors as to their claim of $18,166.22. The referee ordered the executors to repay the dividends. On petition for review, the learned judge below in a careful opinion reversed the ruling of the referee. He dismissed the petition of the trustees. They appealed to this court.

They say that their petition should have been granted, even if the proceeds of the sale of the farm and residence constituted general assets of the bankrupt estate in the hands of the trustees. They argue that a court of bankruptcy is a court of equity and will therefore postpone the claim of the executors to those of the creditors who were not parties to the fraud. They urge that the creditor's fraudulent conduct in withholding the deeds from record gave a fictitious credit to the bankrupt. Had they been recorded, the latter would not have been able to contract the $35,000 of debts, which at the time of his bankruptcy he owed to others than the executors.

A court of bankruptcy is undeniably in many senses a court of equity. It is guided by equitable principles in the administration of its relief. It will not enforce a fraudulent transaction. It will not aid any one to profit by his own wrong. It will usually, if not always, refuse to help one to recover property which he has let pass out of his hands with intent to defraud. The executors are not now making any claim with reference to the $15,000 which the creditor paid to or for the bankrupt at the time of the delivery of the fraudulent deeds and as a part of the same transaction. If they were, the principles invoked by the trustees might well be applicable. That question is, however, not before us. We express no opinion upon it.

To the extent that a court of bankruptcy is a court of equity it cannot be a criminal court. Except where specially authorized by statute, it may not punish men for an offense by decreeing the forfeiture of rights which have no connection with the wrong of which they have been guilty. Keppel v. Tiffin Savings Bank, 197 U. S. 363, 25 Sup. Ct. 443, 49 L. Ed. 790.

Courts of equity abhor forfeitures. They have neither the will nor the power to take from a man who has committed a fraud property which he has honestly acquired and which he has not in any way made use in furtherance of the wrong he has done. One who has suffered by his fraudulent conduct may compel him to make good the damage he has done. Such redress may be sought by appropriate proceedings in a court of law or equity, and a judgment or decree there obtained may be, as a matter of course, enforced against any of the assets of the defendant. The circumstances under which a court of bankruptcy could administer such relief would be rare, if they could exist at all. It may be called on in some cases to distinguish between prior and subsequent creditors and to determine which of the latter, if any, had actual or constructive notice of some transaction. We know of no jurisdiction it has to inquire how many of the bankrupt's other creditors became such in a whole or in part because of the failure of

the creditor to record his deeds. It may not ordinarily require him to make partial restitution to such as it may find were so induced to trust the bankrupt by applying to the purposes of such restitution property of his which was in no wise concerned in any of the fraudulent transactions.

The trustees say that, however this may be they are still entitled to recover. They contend that under the bankrupt law these deeds of house and farm were not void as to the trustees. If they were not, they assert that the assets recovered by the trustees were recovered in the right of those creditors only who could have avoided those deeds in the state court had not bankruptcy intervened. In that event they say that the assets so recovered must be distributed among the creditors in the way in which the state court would distribute them. In their view the facts of this case bring it within the rule laid down by this court in Simmons v. Greer, 174 Fed. 654, 98 C. C. A. 408, and not within that applied by the Supreme Court in Miller v. New Orleans Fertilizer Co., 211 U. S. 496, 29 Sup. Ct. 176, 53 L. Ed. 300. They apparently overlook the difference between the effects of fraud in fact, as in this case, and a mere failure to file a mortgage otherwise valid against the world as in Simmons v. Greer, supra. The Supreme Court calls attention to this distinction in Security Warehousing Co. v. Hand, 206 U. S. 427, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789. The argument, of course, assumes that the trustees had no power in their own right to avoid the deeds in question. They point out that section 67e of the Bankrupt Law (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]) declares void only those fraudulent conveyances which were made subsequent to the passage of the bankrupt act and within four months prior to the filing of the petition for adjudication. These deeds were executed December 4, 1896. It was more than 18 months before the bankrupt act became a law. It was 5 years and 10 months before the petition in bankruptcy was filed in this case.

In the view we take, it is unnecessary for us to consider whether as against the trustees these deeds can be said to have been made on December 4, 1896, and not on September 12, 1902, at which latter date they were for the first time recorded or in any wise acted upon. Nor are we concerned to inquire whether the provisions of section 70a, by which the trustee is vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt to property transferred by the bankrupt in fraud of his creditors, did not make the house and farm assets of the bankrupt estate so soon as a court of competent jurisdiction had judicially decreed that such property had been transferred by the bankrupt in fraud of his creditors.

Without going into such questions, we are, for the purposes of this case and *for those purposes only, content to assume without in any wise deciding*:

(1) That the trustees are right in asserting that their bill was filed under the provisions of section 70e and under those provisions alone.

(2) That against seasonable objection no bill would have been sustained in the state court unless it had been filed in the right of those creditors only entitled under the state law to attack the conveyance.

(3) That the trustees are right in asserting that the property recovered by them upon such a bill would have to be distributed by them among the creditors against whom the state court declared the conveyance to be void, and among those creditors alone.

We shall not follow the learned and zealous counsel for the trustees in his analysis of the statutes and decisions of West Virginia on the subject of fraudulent conveyances. It is unimportant to determine how we would have construed and applied those statutes and decisions to the facts of the record submitted to the Supreme Court of Appeals of West Virginia. We do not go into any of these questions, because the trustees themselves asked the state court to declare these deeds void as to them as representing *all* of the creditors, including the executors. The highest court of the state did what they asked it to do. It does not lie in their mouths now to say that in so doing it erred. The property in this case must be distributed equally and ratably among those creditors whose claims have been proved and allowed. The court below was right in dismissing the petition of the trustees.

Affirmed.

CENTRAL WISCONSIN TRUST CO. v. BARTER et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1912.)

No. 1,802.

STATUTES (§§ 72, 80*)—STOCKHOLDERS—ADDITIONAL LIABILITY—ARTICLES OF INCORPORATION—AMENDMENT.

St. Wis. 1898, § 1771, authorizes organization of corporations for a number of enumerated purposes, and then adds, "or for any lawful business or purpose whatever, whether similar to the purposes herein mentioned or not," except banking and certain other specified purposes. Section 1772 declares generally what the articles of incorporation shall contain, relating entirely to corporate functions, and then provides that they may contain such other provisions, not inconsistent with law, as the incorporators deem proper to be therein inserted for the interest of the corporation or for the accomplishment of the purposes thereof, including the duration of its existence. Const. art. 4, § 31, prohibits the enactment of special or private laws for enumerated purposes, including the granting of corporate powers or privileges, except to cities; and section 32 requires the enactment of general laws for the transaction of any business thus prohibited by section 31, and requires that such laws shall be uniform in their operation throughout the state. *Held*, that where a corporation, organized for pecuniary profit, adopted articles imposing no additional stockholders' liability, section 1772 could not be construed to authorize the corporation by an amendment of its articles to make the common stockholders liable for a 100 per cent. assessment, since so to construe the section would be to render it in violation of the constitutional provision requiring uniformity of corporate powers and privileges.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 73, 74, 75, 86–89; Dec. Dig. §§ 72, 80.*]

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

Suit in equity by Harold Harris against the Northern Blue Grass Land Company. On petition for an order directing a receiver of de-

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

fendant to issue an assessment on the holders of defendant's common stock, to pay into court the par value of the stock held by them. From an order denying such application and dismissing the petition (185 Fed. 192), the Central Wisconsin Trust Company, as receiver of defendant corporation, appeals. Affirmed.

The appellant, Central Wisconsin Trust Company, is receiver of the Northern Blue Grass Land Company, an insolvent Wisconsin corporation, appointed by the Circuit Court under a bill filed therein against that corporation, in an interlocutory decree; and this appeal is from an order of such court dismissing upon the merits the receiver's petition for "an assessment of one hundred per cent. upon all of the common stock of said defendant corporation." Under citation to show cause why such assessment should not be ordered, the appellees appeared as stockholders, and motion was made on their behalf "to dismiss said petition," resulting in the order appealed from, on final hearing thereof. Harris v. Northern Blue Grass Land Co. (C. C.) 185 Fed. 192.

The petition avers that the corporation was organized in July, 1906, under the laws of Wisconsin, with a capital stock of $500,000, whereof "more than fifty per cent." was subscribed and "more than twenty per cent." was paid in, before the corporation "entered upon any business operation"; that there was now "outstanding and issued" stock thereof "of the face value of $344,666.67"; that claims of creditors have been filed amounting to $404,006.40 and about $70,000 of additional claims are to be filed; that claims in excess of $150,000 are held by other creditors, not filed because such creditors prefer "to hold the securities which are in their possession as collateral security"; that the assets of the corporation "consist almost wholly of equities in certain securities or property pledged" for its obligations, and the value of its equities therein does not exceed $75,000; that the valid indebtedness exceeds the assets "not less than $250,000." It further avers that the stockholders of the corporation adopted amendments to the articles of incorporation in 1908, at a meeting thereof duly called, at which all of the stock "was duly and regularly represented," and that one of such amendments—thereafter duly filed as required by law—provides:

"Art. 2. The capital stock of said corporation shall be $500,000, divided into 5,000 shares of $100 each. Of said capital stock 500 shares amounting to $50,000 shall be preferred stock and 4,500 shares amounting to $450,000 shall be common stock. The preferred and the common stock shall be issued from time to time as may be determined by the board of directors, and in such proportion as such board shall deem best.

"The holders of said preferred stock shall be entitled to receive from the surplus of net profits of said company for each fiscal year a dividend at the rate of seven per cent. per annum, payable annually before any dividend shall be set apart and paid to the holders of the common stock of said company for such year, it being the intention that the common stock shall receive dividends at the same rate after such dividend on preferred stock has been paid, after which all funds set aside for dividends are to be divided equally between the two classes.

"The common stock of said company, though paid for in full, shall be assessable to the extent of one hundred per cent. thereof and each stockholder of the common stock of said company shall be personally liable to the amount of stock held or owned by him for all the debts, obligations and liabilities of said company, and such assessments and liabilities of said common stockholders shall be enforced to such extent and in such manner and at such times as the board of directors of said company shall deem fit and proper."

The petition further avers that the stock ledger of the corporation shows the names and addresses of holders of its common stock, "together with the date of issuance of the stock to such persons" and the number of shares held by each, as exhibited in a list annexed to the petition; and all certificates there noted bear date subsequent to the date of the above amendment, except one instance of 100 shares. A number of these stockholders are specified in the petition as insolvent, and it is averred that an assessment of

100 per cent. is necessary to meet the liabilities of the corporation and expenses of administration.

S. T. Swansen, for appellant.

McNeil V. Seymour and L. K. Luse, for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). This appeal from an order dismissing the appellant's petition for an assessment against the stockholders of an insolvent corporation presents a novel plan for charging such personal liability for corporate indebtedness, under the Wisconsin statute providing for incorporation for general business purposes, notwithstanding the fact that the stock is "paid for in full." The contention is, in substance, that such double liability may be imposed, within the general terms of the statute, (a) either by provision in the original articles of incorporation, or (b) by subsequent amendment adopted by stockholders of the corporation; and that such liability was created in the case at bar, by an amendment so adopted nearly two years after the corporation was organized and engaged in business, and more than eighteen months prior to the filing of the present bill. It is not averred in the petition when or in what manner the corporate indebtedness arose—greatly in excess both of its property assets and of the entire issue of common stock—nor whether it arose before or after the present holders of common stock became owners thereof, so that no question of personal liability is presented, by contract or otherwise, unless the above-mentioned amendment creates such liability, per se, against every purchaser and holder of the stock. Thus narrowed, without plain statutory authority therefor, it is unquestionable that provision in the articles to that end by the alleged amendment cannot be upheld.

The several provisions of the Wisconsin statute, applicable to the incorporation in question (sections 1772 and 1774, c. 86, Wis. Stat. 1898) are completely set forth in the opinion of Judge Sanborn, as filed below and reported under the title of Harris v. Northern Blue Grass Land Co. (C. C.) 185 Fed. 192, and reference thereto is sufficient for the purposes of this opinion, with the remark that section 1774 authorizes amendment of the articles, "by a vote of at least the owners of two-thirds of all the stock then outstanding," to "provide anything which might have been originally provided in such articles." An amendment of the Constitution of Wisconsin (adopted in 1871), in section 31, art. 4, prohibits the enactment of "special or private laws" for various enumerated purposes, including, "7. For granting corporate powers or privileges, except to cities"—municipalities being included thereunder by a subsequent amendment—and in section 32 requires the enactment of general laws "for the transaction of any business" thus prohibited by section 31, and that "such laws shall be uniform in their operation throughout the state." So, no special charter "powers or privileges" are authorized, for incorporations under the above-mentioned general laws and their general provisions must be interpreted in conformity with this constitutional requirement, if otherwise uncertain.

The purposes for which these general corporations may be organized are stated in section 1771—with the business of banking and other special purposes provided for in other sections and chapters excepted therefrom—and it is not contended that any provision applicable to the incorporation in question authorizes, in express terms, assessment of stockholders or charge of personal liability, for general indebtedness of the corporation, as attempted by the amendment referred to. Section 1772 prescribes the subject-matter of the articles for incorporation, concluding as follows:

"7. Such other provisions or articles, if any, not inconsistent with law, as they may deem proper to be therein inserted for the interests of such corporation or the accomplishment of the purposes thereof, including, if desired, the duration of its existence."

And these general terms are relied upon for support of the amendment to the articles. Two other statutory provisions are cited in the argument as recognitions that such personal liability "is not contrary to public policy": (1) Section 1769, providing that stockholders shall be liable for certain debts to corporate employés; and (2) section 2024, providing double liability thereof in banking and trust corporations. But both are plainly marked exceptions from the general rule, lending no force to the contention.

The nonliability of stockholders for the debts of the corporation except to make good unpaid subscriptions for their shares, is the established rule, both at common law and in the American states; and the attempted departure therefrom, in the instant case, cannot be upheld without "provisions of positive law" for its support. Gray v. Coffin, 9 Cush. (Mass.) 192, 199; 3 Thomp. Con. on Law of Corp. § 2925; Cook on Stock & Corp. Law, § 242.

Interpretation of the above-mentioned provision to that end is not only without sanction under any Wisconsin decision cited, but would, as we believe, depart from the uniformity of corporate "powers and privileges" intended by the statute, within the constitutional requirement, and thus be unauthorized.

We are of opinion, therefore, that the provisions of the statute were rightly construed by the trial court, and that the alleged amendment affords no ground for an assessment against the appellees, as sought under the petition. The order of the Circuit Court, accordingly, is affirmed.

WILSON v. HIBBERT.

(Circuit Court of Appeals, Third Circuit. April 8, 1912.)

No. 1,574.

1. MASTER AND SERVANT (§ 330*)—INJURIES TO SERVANT—PROXIMATE CAUSE.
Evidence *held* to warrant a finding that the proximate cause of an injury to plaintiff, while working in a building in process of construction by defendant as general contractor, was the undermining of a pier by an independent plumbing contractor, whose work was under defend-

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

ant's supervision, and defendant's permitting the pier to remain so undermined until the trench was filled and the wall softened by rainwater.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270–1272; Dec. Dig. § 330;* Negligence, Cent. Dig. § 240.]

2. MASTER AND SERVANT (§ 318*)—NEGLIGENCE—INDEPENDENT CONTRACTOR—INJURIES—GENERAL CONTRACTOR'S LIABILITY.

Where defendant, the general contractor for the construction of certain buildings, sublet the mason work, carpenter work, and plumbing to independent contractors, but reserved to himself and exercised the right to supervise the work, he was liable for injuries sustained by a servant of the carpenter contractor by the collapse of a brick pier, resulting from the negligent undermining of the pier by the plumbing contractor, and could not escape such liability on the ground that the latter was an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 318.*

Negligence of independent contractor see note to Atlantic Transport Co. v. Coneys, 28 C. C. A. 392.]

3. MASTER AND SERVANT (§ 322*)—DANGEROUS PREMISES—DUTY TO PROTECT.

Where a brick pier, constructed in the erection of a building, had been accepted by the general contractor, it was his duty to protect the same from being so undermined as to threaten the safety of the employés of other contracts working on or about it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1263; Dec. Dig. § 322.*]

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

Action by Charles M. Hibbert against E. Allen Wilson. Judgment for plaintiff, and defendant brings error. Affirmed.

G. Von Phul Jones, for plaintiff in error.

John J. McDevitt, Jr., for defendant in error.

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

GRAY, Circuit Judge. Wilson, the plaintiff in error, an architect by profession, entered into a written contract with one Brown, the owner of a lot of land in the city of Philadelphia, by which it was agreed that he should build for the said Brown upon said lot 26 houses. The contract was a complete and entire building contract, the houses to be delivered when finished, according to the specifications drawn up by Wilson and accompanying the contract. For performance on his part Wilson was to receive a lump sum, payable in certain instalments as the work progressed. By a special stipulation, the owner was relieved from any responsibility for loss or damage which might happen during the course of the work of construction, or for any material or other things furnished or supplied by the contractor. There was also the usual stipulation in which the contractor covenanted to save from and keep harmless the owner from the filing of mechanics' liens by himself or any sub-contractors. It was further agreed that the said contractor, Wilson, should not "sublet any part of the general contract to construct said operation." Under this contract, the defendant entered into possession of the premises, for the purpose

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

of the building operation, and entered into three sub-contracts—one for the mason work, one for the carpenter work and another for the plumbing work. These contracts covered the entire work to which they related, all of them being in the same form, written upon the same blanks. In each of them, as in the plumbing contract, with which we are here concerned, the sub-contractor agreed with the defendant that, as to so much of the work as was sub-contracted for, he would take his place and do everything about and concerning the same as provided in the contract between the defendant and the owner, Brown. It was also stipulated that he should be considered as an independent contractor in respect to that part of the work which he had undertaken to perform, and that he alone should be answerable for any loss or damage caused by his own sub-contractor's agents or employés.

During the progress of the work thus provided for, a brick wall on a stone foundation had been built, with a certain pier therein, by the sub-contracting mason. Afterwards the plumbing contractor, in making excavation for the reception of soil pipes, dug a trench under the said brick pier and allowed the same to remain open and to fill with water from the rains that were then prevalent. While the pier was in this undermined condition, Hibberd, the plaintiff below, while working in the second story and pounding on the jamb of a door against the said pier, was suddenly precipitated from the place where he was working to the ground below, by reason of the falling of said pier, and suffered the injuries complained of. The suit in the court below was in consequence brought against the defendant, Wilson, the general contractor, to recover damages suffered by plaintiff by reason of the falling of said pier.

The statement of claim alleges that plaintiff was, at the time of the accident, employed by the sub-contracting carpenter and that the defendant was the builder of the property in question; that while so employed, defendant neglected to properly construct and maintain certain walls and foundations and to provide proper methods for "providing against the elements," and neglected to require the filling in of various excavations and permitted the plumbing contractor or others to excavate at or about the foundations of the wall in a careless, negligent and dangerous manner, and allowed them to permit such excavations to remain in such condition as to become dangerous.

It appears from the evidence (and there is no dispute about the material facts in the case) that the plumber, under his sub-contract, was required to do his own excavating; that the trench dug for the soil pipe was improperly made to extend under the brick pier in question, and the expert testimony clearly shows that it would have been convenient, as well as proper, to have placed the pipe in another trench already open which did not so undermine the pier. It also appears that the undermining trench, in which the soil pipe was laid, was not covered over, but was allowed to remain open, and that the rains filled it with water. It is also in evidence that the brick pier itself, after it had fallen, appeared to be a mass of soft material, indicating that the mortar had not entirely hardened when the trench was dug.

[1] That this undermining of the pier was the causa causans of

the accident, is not seriously questioned by the plaintiff in error. Indeed, the defense relied upon is chiefly, if not entirely, the relation of the sub-contracting plumber to the general contractor, the defendant. It is contended that the plumber, being an independent contractor, was responsible for the location and digging of the undermining trench, and therefore that he alone was liable for the damage that occurred by reason of the negligence in so locating the same. It is disclosed by the evidence that the contracting carpenter, one Lannagan, was also employed by the defendant as his general superintendent of the whole building operation, and Lannagan himself testifies that he had supervision over practically all the work for Wilson, the defendant; that a watchman was there employed by Wilson; that a telephone was there in Wilson's name, and that Wilson inspected the work at the end of each week, and then would allow the vouchers for the amount of work done. Lannagan also testifies that, in Wilson's absence, he, Lannagan, would give any directions required as to the doing of any of the work, whether by plumbers, carpenters or stone masons. Lannagan also testifies that the particular pier that fell was up as high as it was to be built, and had been built for approximately four weeks. Some reference was also made at the argument, although there was little or no evidence in regard to the matter, that the statement of claim charged improper construction, in that the pier collapsed by reason of a certain steel girder or girders, carrying a portion of the upper floor of one of said buildings, not having been properly supported and imbedded. There is no testimony, however, nor was it insisted at the trial, that this alleged defect in the structure caused the falling of the pier. The real cause of the accident, so far as disclosed by the testimony, was the conjoint undermining by the trench of a wall softened by the rains. There was evidence tending to show that the wall had been completed, and as a completed structure was in the possession and control of the defendant, and, as charged in the statement of claim, that he permitted it to be undermined by the negligent placing of the trench beneath it.

[2] The doctrine by which the owner of premises out of possession may be exempt from liability for the negligence of an independent contractor engaged in a building operation on such premises, cannot apply to the case in hand. On the other hand, the legal situation has some analogy to one where, under the same circumstances, the occupier or owner in possession is held liable. The defendant, as general contractor, necessarily had possession and control of the premises, and though he made what are called independent contracts for certain portions of the work to be done, he could not relieve himself from liability for a dangerous situation, which, though created by the so-called independent contractor, he passively or actively permits to exist.

[3] There was, moreover, evidence to go to the jury tending to show that this wall had been completed and accepted by the defendant, and if this were so, whatever were the duties or liabilities of the sub-contractor, it was the defendant's paramount right and duty to protect this wall from being so undermined as to threaten the safety

of those working on and about it. The case was fairly submitted to the jury by the learned judge of the court below and we think the defendant's motion for judgment notwithstanding the verdict, was properly overruled. The assignment of error in that regard, which is the only assignment contained in the record, must therefore be disallowed, and the judgment below affirmed.

LEWIS et al. v. HOLMES et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1912.)

No. 1,794.

1. EQUITY (§ 454*)—BILL OF REVIEW—RIGHT TO FILE—LEAVE OF COURT.
The right to file a bill of review for alleged errors apparent on the face of the record is an absolute right recognized in equity, for which leave of court is not required.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1110; Dec. Dig. § 454.*]

2. EQUITY (§ 464*)—BILL OF REVIEW—ERRORS APPARENT OF RECORD—DISMISSAL.
A bill of review for errors apparent on the face of the record is not subject to dismissal on motion because of the pendency of a prior bill to review the same records and proceedings, because of insufficiency of averments, because newly discovered evidence was not alleged, because it was filed without leave of court, because there were no specified assignments of error, or because it did not appear that defendant's rights would be conserved by the further prosecution of the suit or that they would be injured or prejudiced by the dismissal, or that complainants' rights would be conserved by the further prosecution of the suit or injured by the dismissal.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1129–1140; Dec. Dig. § 464.*]

3. APPEAL AND ERROR (§ 373*)—EQUITY—FINAL ORDER OR DECREE—ALLOWANCE—EXCESSIVE BOND.
Appeal from a final order or decree in equity being a matter of right to be allowed by the court when sought as of course, without other conditions than the filing of the usual bond for costs, it was error to make allowance of an appeal from an order dismissing a bill of review, conditional on the filing of a bond with sufficient sureties in the sum of $1,100,000.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2001–2004; Dec. Dig. § 373.*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Bill by John A. Lewis and another, as executors of the will of John A. Dowie, deceased, against William B. Holmes and others. From an order dismissing the bill and striking the same from the files, complainants appeal. Reversed and remanded, with directions.

The appellants filed in the Circuit Court a bill of review, for alleged errors apparent on the face of the record, under a prior bill of complaint filed therein by the appellee Holmes against their testator and other parties named, and another bill filed by their testator against Wilbur Glenn Voliva and other defendants named, together with certain bankruptcy proceedings

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

against the testator, involved therewith—all consolidated, heard, and decided together, under stipulations by the parties—and involving (as alleged) all parties named defendants in the bill of review. On motion of the appellee Wilbur Glenn Voliva, the court ordered that such bill of review be stricken from the files, and that the cause be dismissed, and this appeal is from the order or decree accordingly, reading as follows: "This cause coming on this day to be heard upon the entry of a special appearance and motion of the solicitor for Wilbur Glenn Voliva, one of the defendants to this cause, to strike the bill of complaint in this cause from the files and dismiss said cause, and said motion coming now on to be heard, and it appearing to the court that due notice of the time and place of said motion has been given to the solicitors representing the complainants in this cause, and said motion coming on for argument of counsel for the respective parties complainant and said defendant, and the court having heard tthe argument of counsel for and against said motion, the attention of the court in said argument, having been among other things directed to certain records and proceedings of this court in the cause entitled John A. Lewis, Executor and Trustee, etc.. et al., v. William B. Holmes et al., Gen. No. 25,409, and the court having inspected the bill of complaint filed in this cause as well as the complaint filed in this court by the same complainants Gen. No. 25,409, being fully advised in the premises, finds that the complainants in this cause heretofore on April 10, 1909, in the same character as executors and trustees under the last will and testament of John Alexander Dowie, deceased, exhibited their bill of complaint in this court, Gen. No. 25,409, to review the orders and decrees of this court entered in the suit of William B. Holmes v. John Alexander Dowie et al., upon certain specified errors of law apparent upon the record in said proceedings of Holmes v. Dowie et al., and that said bill of review in said cause, Gen. No. 25,409, so instituted by said complainants, is still pending in this court and undisposed of.

"The court further finds from an inspection of the bill of complaint so filed by said complainants in this cause that said complaint is a bill exhibited by said complainants to review the record and proceedings of this court had in said suit of William B. Holmes v. John Alexander Dowie et al., being the same record and proceedings also sought to be reviewed by said complainants by their bill exhibited in Gen. No. 25,409, on April 10, 1909, and which is now pending and undisposed of.

"And the court further finds from an inspection of the bill of complaint in this cause that the complainants John A. Lewis and Fielding H. Wilhite, as executors and trustees under the last will and testament of John Alexander Dowie, deceased, have not in and by their bill of complaint made or stated such a state of facts as discloses upon the record in this cause that said complainants or either of them, have or hold any such a right or title to, or interest in, the subject-matter of the suit of William B. Holmes v. John Alexander Dowie et al. as entitle them, or either of them, to file or maintain a bill of review to review the record and proceedings in said suit of Holmes v. Dowie et al.

"And the court further finds from an inspection of the complaint filed in this cause that the said bill of complaint is not verified, and does not conform with or to the established practice as a bill of review for newly discovered evidence, and contains no averments setting out or alleging any newly discovered evidence, and was filed and exhibited in this court by said complainants without having first had and obtained the leave of this court so to do, in accordance with the practice in such case made and provided.

"And the court further finds that the bill of complaint in this cause fails to conform with the practice of this court as a bill of review for errors of law apparent, in that there are no specified assignments of error in said bill of complaint contained wherein or whereby it is alleged or claimed by said complainants any error of law apparent has intervened upon the said record and proceedings of Holmes v. Dowie et al., to the damage or injury of said complainants or either of them.

"And the court further finds that it nowhere appears from any of the averments contained in the bill of complaint in this cause that the rights of any of the defendants to this suit would be conserved by the further prose-

cution of this suit, or that the rights of any of the defendants to this suit would be in any manner or to any extent injured or prejudiced upon the dismissal of this suit, and that the motion of said defendant should be granted and sustained.

"It is therefore ordered, adjudged, and decreed that the motion of the defendant Wilbur Glenn Voliva to strike the bill of complaint in this cause from the files and to dismiss said cause be, and the same is hereby, granted, allowed, and sustained; and it is further ordered, adjudged, and decreed that the bill of complaint exhibited in this cause be, and the same is, hereby stricken from the files of this cause, and this cause be and the same is hereby dismissed.

"To the entry of which order and decree striking the bill of complaint from the files in this cause and dismissing this suit the complainants by their counsel object and except, and pray an appeal from said order and decree to the United States Circuit Court of Appeals in and for the Seventh Judicial Circuit, which said appeal be, and the same is hereby, granted and allowed by the court, upon condition that complainants file their appeal bond, conditioned as by law provided with good and sufficient sureties to be approved by this court, in the sum of one million one hundred thousand ($1,100,000) dollars within 30 days from the date of the entry of this decree, and that complainants be, and they are also, granted 30 days from the entry of this decree in which to prepare, present for approval, and file their certificate of evidence in this cause."

William F. Burns, for appellants.

Eli B. Felsenthal, for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The appellants' bill, which was "stricken from the files" and dismissed by the order or decree of the Circuit Court, is unquestionably framed as a bill of review for alleged errors apparent on the face of the record therein set forth. It is deemed sufficient to mention that the voluminous averments purport to state, in substance, the pleadings and proceedings of record, under a bill of complaint theretofore filed in such court by the appellee Holmes against John Alexander Dowie (appellants' testator) and other parties named, together with another bill in equity filed by their testator against the appellee Voliva; that both causes were (in effect) consolidated for hearing; that various proceedings and orders ensued, as set forth; and that the final order or decree therein alleged for review as set forth was made and recorded July 14, 1910. The bill of review was filed January 14, 1911, after the expiration of the term of such decree and within the time allowed by law for appeal from the alleged final order.

[1] The right to file such bill for review of errors apparent on the face of the record is well recognized in equity, as a right of course, for which leave of court is not required. Whiting v. United States Bank, 13 Pet. 6, 11, 10 L. Ed. 33; 3 Notes U. S. Rep. 781; Ricker v. Powell, 100 U. S. 104, 109, 25 L. Ed. 527; Story's Eq. Pleadings (10th Ed.) § 403, et seq.; 2 Daniel Ch. Pl. & Pr. (6th Am. Ed.) § 5, c. 34; 2 Foster's Fed. Pr. § 354. Being "in the nature of a writ of error" (Story's Eq. Pl. supra), this bill involves "a strict legal right," and does "not in any manner depend on the discretion of the court," thus distinguishing it from a bill of review for newly discovered matter, resting on favor (Ricker v. Powell, supra), as well defined in Cope-

land v. Bruning (C. C.) 104 Fed. 169. The question is not presented, whether a bill of review may be summarily dismissed, on motion, without plea or demurrer, where its averments disclose, either premature filing or laches; nor is the order predicated on such ground. Findings are recited in the order, in substance, (a) of the pendency of a prior bill, filed by the appellants in 1909, wherein review is sought of "the same records and proceedings" whereof review is sought by the present bill; (b) that the averments of the present bill are insufficient for the purposes of review; (c) that newly discovered evidence is not alleged; (d) that the bill was filed without leave of court; (e) that there are "no specified assignments of error"; and (f) that it does not appear that rights of the defendants "would be conserved by the further prosecution of this suit," nor that they would be "injured or prejudiced upon the dismissal." We believe neither of these propositions lends support to the motion or order thereupon.

[2] The bill of review, as filed by the appellants, was entertainable alike with other bills for equitable relief, filed by a complainant, entitled to invoke the federal jurisdiction. Hearing thereupon in conformity with the rules of equity procedure is equally the right of either complainant. Neither bill is subject to summary dismissal upon motion for one or all of the above-mentioned causes. Sufficiency of the averments for the relief sought must be tested under demurrer or other proper pleading; and the pendency of a prior suit, for like cause, constitutes no bar to a new bill—even were it assumed that the prior bill of review described in the order could be commensurate with the present bill for review of the subsequent (alleged) decree—although such suits may be subject to equitable regulation, for hearing or otherwise.

The above-mentioned propositions, therefore, of insufficiency of the averments for the purposes of review, are in no sense involved for decision under this appeal, and we have not considered and intimate no opinion upon the sufficiency or insufficiency of the bill for such purposes, as variously discussed in the briefs. Irrespective of any question whether the bill appears to be with or without merit, we are of opinion that the order erroneously denies such hearing thereunder as the rules of equity require.

[3] Furthermore, the concluding provision of the order reads for allowance of the appeal therefrom, subject to the condition that an appeal bond be filed, with sufficient sureties "in the sum of one million one hundred thousand dollars." This requirement is neither reasonable in the amount named for the bond, nor authorized under the statute, as no supersedeas is mentioned or involved therein. Appeal from a final order or decree in equity is matter of right, to be allowed by the trial court when sought, as of course, without other conditions than the filing of the usual bond for costs of the appeal.

The order of the Circuit Court is reversed, accordingly, with direction to reinstate the appellants' bill, and proceed thereupon in conformity with the rules of equity.

In re HOGAN.

HOGAN v. FAUERBACH BREWING CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1912.)

No. 1,827.

BANKRUPTCY (§ 143*)—PROPERTY OF BANKRUPT—INSURANCE POLICY—EXPECTANCY.

A bankrupt's mother at the time of adjudication held a policy of insurance on her life payable to certain designated persons as beneficiaries, but providing that the insured, with the consent of the company, might change the beneficiary at any time, provided the policy had not been assigned by filing with the insurer a written request duly acknowledged and accompanied by the policy for indorsement. During her life the insured directed that the beneficiary should be changed so that the sum should be payable equally to the bankrupt and his sister, children of the insured, subject to further change as provided in the contract. Insured having died subsequent to the bankrupt's adjudication, there was paid to him his share of the proceeds of the policy under such indorsement. *Held* that, by the terms of the policy authorizing change of beneficiary, the bankrupt did not have a vested interest in the insurance during the insured's life which he could by any means have transferred or which might have been levied on and sold under judicial process against him, as provided in Bankr. Act. (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) § 70a, and hence the proceeds so paid to him were not recoverable by his trustee in bankruptcy, nor subject to administration in such proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213–217, 223, 224; Dec. Dig. § 143.*]

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

In the matter of bankruptcy proceedings against William D. Hogan. Original petition to revise an order in bankruptcy requiring the bankrupt to transfer to his trustee (186 Fed. 537) the proceeds of certain notes obtained by him since adjudication. Petition granted, and order reversed.

The bankrupt, William D. Hogan, petitions for review and revision of an order (in bankruptcy) of the District Court for the Western District of Wisconsin which requires him to transfer to the trustee in bankruptcy $1,220.44, acquired by the bankrupt since the adjudication of bankruptcy. This amount was derived as one of the beneficiaries under a policy of insurance upon the life of his mother, Susan S. Hogan, written by the Northwestern National Life Insurance Company, at the "home office of the company in the city of Madison, Wis.," issued to such mother, December 14, 1900, pursuant to application made by her.

The policy is for $4,000, "to be paid to the beneficiary of the assured last designated on the back of this policy, if living, otherwise to the legal representatives or assigns of the insured," in consideration of the payment of bimonthly premiums during the continuance of the policy; and provides that failure to pay any premium when due "will thereupon terminate this contract and insurance and forfeit all payments made to the company." It further provides: "This policy is issued with the express understanding that the insured may, with the consent of the company, change the beneficiary at any time, provided it has not been assigned, by filing with the company a written request duly acknowledged and accompanied by this policy, such change to take effect upon its endorsement hereon by the company."

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

The following are the indorsements, entitled "Beneficiary Subject to Change":

"The sum insured under this policy is payable to Sadie J. Hogan, daughter, $1,500.00 and remainder to Matthew and William Hogan, sons of the insured equally as beneficiary, subject to change as provided in this contract.

"Madison, Wis., Feb. 15.

"Upon the written request of the insured made this day, the sum insured by this policy is hereby changed from Sadie J. Hogan $1500 and remainder to William and Matthew as beneficiary and instead is made payable to Sadie J., Matthew and William Hogan, equally, children of the insured, as beneficiary, subject to change hereafter as provided in this contract. [Signed.]"

The adjudication of bankruptcy (voluntary) upon petition of the bankrupt was made June 18, 1909. The insured, Mrs. Hogan died June 22, 1909, and in due course the bankrupt received the above-mentioned share of insurance. Upon hearing of an application by Fauerbach Brewing Company, creditor in bankruptcy, to require the bankrupt to pay over the proceeds, the referee denied such relief as unauthorized. The District Court, on review thereof, reversed the referee's ruling as to the law applicable to the facts, all undisputed, and ordered transfer of the proceeds to the trustee in bankruptcy. In re Hogan (D. C.) 186 Fed. 537.

S. T. Swansen, for petitioner.

C. F. Lamb, for respondent.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). Under proceedings in bankruptcy, the order of the District Court requires the bankrupt to pay over to the trustee the amount derived as a beneficiary named in a policy of insurance on the life of his mother through the death of the insured subsequent to his adjudication as a bankrupt. The terms of the policy and all material facts are undisputed—including as well the fact that the policy was procured by and issued to the mother alone and that she paid all the premiums as they accrued—and the order rests on the proposition, in substance, stated in the opinion of the district judge that the interest of the beneficiary in the policy, during the life of the insured, is a vested property right under the Wisconsin law, subject only to be divested by exercise on the part of the insured of her right to change the beneficiary or surrender the policy. Thus the petition for review of the order distinctly presents a reviewable question of law, namely, whether the bankrupt had a property right in the insurance, at "the date he was adjudged a bankrupt," either under the general law or the law of Wisconsin, which justifies such order.

The terms of the policy are unmistakable in their provision "that the insured may, with the consent of the company, change the beneficiary at any time, provided it has not been assigned"; and it is unquestioned that such provision was authorized (if not required) under the Wisconsin statutes applicable thereto. With the contract rights so established in the insured, the general doctrine (for which counsel contends in support of the order) as to the rights of a beneficiary under other contract terms and circumstances we believe to be inapplicable to the present issue. The doctrine referred to is thus stated in Washington Central Bank v. Hume, 128 U. S. 195, 206, 9 Sup. Ct. 41, 44 (32 L. Ed. 370): That in the general form of life insurance the

"policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance by any act of his, by deed or by will, to transfer to any other person the interest of the person named." Numerous decisions of like import, in various state reports, are cited in the argument of counsel as supporting this order (see 3 Am. & Eng. Encyc. Law [2d Ed.] 981–1001; 25 Cyc. 764–778; Union Cent. Life Ins. Co. v. Buxer, 62 Ohio St. 385, 57 N. E. 66, 49 L. R. A. 737, etc.), but review of such citations is not deemed needful, for the reason above stated, that they rest either on other forms of policy, or on various conditions not applicable to the case at bar. Moreover, it may well be noted, not only that want of harmony appears in the general line of authorities thereupon, but that the Wisconsin Supreme Court has uniformly upheld a different rule (commencing with Clark v. Durand, 12 Wis. 223), in favor of the right of the insured, under the general form of policy, either to assign the policy or change the beneficiary, except as restrained by statute in certain cases.

Whatever may be the rule, therefore, in reference to the interest and rights of one named unqualifiedly as the beneficiary under a life insurance policy, we are of opinion that such rule is not applicable to the express terms of the present policy, providing that the insured may "change the beneficiary at any time," and that interpretation thereof must rest on the principles of contract law unaffected by special rules in respect of insurance policies which may appear in various jurisdictions, other than the place of the present contract. In the absence of restraint imposed by rule or statute governing the contract, the above stated terms of insurance were plainly open to arrangement between the contracting parties, and are conclusive of rights thereunder. So, if the question presented is one of general law, we are advised of no rule thereof which would establish in the bankrupt, through the fact alone that he had been named, for the time being, as an intended beneficiary, a property right in the contract during the life and volition of the insured (mother), within the meaning of section 70a of the Bankruptcy Act.

The mother was at the date of the bankruptcy adjudication vested with complete property rights in the policy, having possession and control of the policy, together with the unqualified right to dispose of the entire benefits of such insurance, with no obligation in evidence, legal or equitable, to vest any share otherwise, either in the bankrupt or in his estate in bankruptcy. Thus the utmost effect of the existing indorsement naming the bankrupt as one beneficiary, under the general rule applicable to contracts, would be an inchoate benefit, a mere expectancy in his favor, without vested interest or property right during the life of the insured. Hopkins v. Northwestern Life Assur. Co., 99 Fed. 199, 202, 40 C. C. A. 1; Masonic Mut. Benefit Soc. v. Burkhart, 110 Ind. 189, 192, 10 N. E. 79, 11 N. E. 449; Martin v. Stubbings, 126 Ill. 387, 404, 405, 18 N. E. 657, 9 Am. St. Rep. 620; Union Mut. Ass'n v. Montgomery, 70 Mich. 587, 594, 38 N. W. 588, 14 Am. St. Rep. 519; Woodmen Acc. Ass'n v. Hamilton, 70 Neb. 30, 97 N. W. 1017; 2 May on

Ins. (3d Ed.) § 399 M. Resting entirely on the will of the insured during her lifetime, the expectancy of possible benefits under the policy has neither substantial present value, nor other element of property, which the bankrupt could then "by any means have transferred, or which might have been levied upon and sold under judicial process against him," defined in section 70a as property vesting in the trustee of the estate of a bankrupt by operation of law. In the case of an analogous expectancy—In re Wetmore, 108 Fed. 520, 523, 47 C. C. A. 477—the Circuit Court of Appeals of the Third Circuit so ruled, and the opinion is pertinent and instructive. It arose in bankruptcy, under a claim of expectancy in the bankrupt at the date of adjudication, through a provision standing in his favor, in a will made by his mother who was then living. The provision in question purported to exercise a power of appointment vested in the mother, under will of the deceased father, over the residue of a fund created for use of the mother, with power to appoint or dispose thereof by will or otherwise. As well remarked in the opinion, the test of property right in the bankrupt under the statute is not whether he "might for a valuable consideration" prior to bankruptcy "by executory contract have barred or precluded himself from enjoying, or have become bound to permit others to have the exclusive benefit of the fund," but whether "the bankrupt had some title to it at the date of the adjudication," and that no such title arose during the lifetime of the mother.

In reference to another contention advanced by counsel in support of the order—that "a possibility coupled with an interest passes to the trustee" in bankruptcy—for which Williams v. Heard, 140 U. S. 529, 535, 11 Sup. Ct. 885, 35 L. Ed. 550, is cited as decisive, we do not understand the citation to militate in any sense against the foregoing definition of property right which must appear in the bankrupt to vest in the trustee. The case arose in bankruptcy, under the Act of March 2, 1867, c. 176, 14 Stat. 517, and involved the question whether claims for war premiums awarded in favor of the bankrupts long after the bankruptcy adjudication out of the Geneva arbitration award, pursuant to subsequent act of Congress, constituted property of the bankrupts amenable to the bankruptcy proceedings. As there ruled: The claims for indemnity arose when the losses were incurred during the war, and thus became property in the sense of the law prior to bankruptcy; so the claims were not created by the subsequent act of Congress, although thereby provided with means for their prosecution and collection. The distinctions there pointed out are in line with our understanding of the general rule.

The question remains, however, whether the Wisconsin authorities prescribe a different rule of property right applicable to this Wisconsin contract, under which the order of the District Court may be sustainable. For the doctrine there assumed of "vested interest of the beneficiary" under the policy terms, the opinion cites Foster v. Gile, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217; Rawson v. Milwaukee Mut. Life Ins. Co., 115 Wis. 641, 92 N. W. 378; Slocum v. Northwestern Nat. Life Ins. Co., 135 Wis. 288, 115 N. W. 796, 14 L. R. A. (N. S.)

1110, 128 Am. St. Rep. 1028; Meggett v. Northwestern Mut. L. Ins. Co., 138 Wis. 636, 120 N. W. 392.

In Foster v. Gile, the opinion premises that the rule of the earlier cases (Clark v. Durand, 12 Wis. 223, and Kerman v. Howard, 23 Wis. 108) "must be adhered to by this court," namely, that the insured who procures the policy of insurance and pays the premiums "may dispose of it, by will or otherwise, to the exclusion of the beneficiary named in the policy." The policy in question was in the general form, procured by the father, as the insured, and made payable to his two sons (named therein) in equal shares, "their guardians, executors, administrators or assigns." Both sons died before the death of the father, and the father had made no disposition of the insurance when his death occurred. The issue was whether legal right to the insurance passed to the administrator of the father's estate or to the estates of the sons, under the above stated terms thereof, and the decision below in favor of the administrator of the sons' estates was affirmed. It is stated in the (majority) opinion, however, that making the policy thus payable "is so far in the nature of an executed voluntary settlement that it vests in the persons to whom the insurance money is payable an actual subsisting interest in the policy, but not the absolute, unconditional ownership, and of the moneys therein agreed to be paid." The minority opinions concur in the result, but not in the above statement of a reason therefor; and it may well be noted in connection therewith that in a subsequent case—Given v. Wisconsin O. F. M. Life Ins. Co., 71 Wis. 547, 550, 37 N. W. 817—the court speaks unanimously, through the writer of the majority opinion in Foster v. Gile, that the Foster decision rested "on the sole ground" that the insurance was made payable, not only to the beneficiaries, "but to 'their guardians, executors, administrators or assigns.'"

In Rawson v. Milwaukee, etc., the policy of insurance is described as "a benefit certificate issued by a fraternal order," providing for its surrender by the insured, "without consent of the beneficiary," to "receive a new certificate"; and the sole question discussed in the opinion was, whether evidence was admissible, as against the beneficiary, of subsequent statements by the insured, to third parties, in derogation of his representations of good health in the application for insurance. Exclusion thereof was upheld, and the opinion states that the beneficiary in such certificate "has so far vested interest therein that the prior declarations of the assured are not" thus admissible. On the other hand, Slocum v. Northwestern Nat. L. Ins. Co. arose under a policy issued by the same company (and in like form) involved in the present suit. The company had increased the rate of premiums and for alleged default of the insured therein had declared the insurance rescinded. Thereupon the "beneficiaries last designated on the back of the policy" sued the company to recover damages for such rescission, as unauthorized, alleging that both insured and beneficiaries were ready and able to pay the premiums due under the policy, but were not willing to pay the increase thereof exacted by the company. As the insured was then living, the complaint of the alleged beneficiaries was demurred to, and the appeal was from an order overruling the

demurrer. For reversal of such order, the opinion states, as the settled rule in Wisconsin, that beneficiaries were without interest to recover damages for the alleged breach; that, although their rights are referred to as "vested" (in the Rawson case and other citations), they are in their nature "a mere expectancy, which is subject to be defeated by the act of the insured, and hence cannot be absolute and indefeasible until the death of the insured," and that they are too uncertain and "hypothetical to be made the ground for damages for breach of the contract." Meggett v. Northwestern Mut. Life Ins. Co. merely upholds the validity of an assignment of a policy (in the ordinary form) by the beneficiary named therein, "with the consent of the insured."

We are not concerned with the question whether the above mentioned cases, together or severally, harmonize entirely—either in their ultimate ruling, or in mention of the interest of a beneficiary as "vested" in any sense—with the rule of the leading case of Clark v. Durand, supra, reaffirmed in a long line of successive cases; nor whether the mention of such interest as "vested" was mere obiter, as counsel for petitioner contends. It is deemed sufficient that throughout the Wisconsin cases no authority appears—apart from statutory restrictions, not applicable to the present case—to disturb the absolute property right vested in the insured, under the terms of the instant policy, to dispose of its benefits. Such right is expressly conceded and reaffirmed in each of the foregoing group of citations. So, with the interest of the beneficiary thus settled, as dependent on the option of the insured during his lifetime, these mentions thereof as "a vested interest subject to be divested" at the will of the insured, are without force, in either view of their bearing in the adjudication, to confer or impose property right in such expectancy, within the purview of the Bankruptcy Act.

We are of opinion, therefore, that the order of the District Court is unauthorized, and it is reversed, accordingly, with direction to dismiss the petition of Fauerbach Brewing Company, and release the insurance proceeds.

GUARDIAN FIRE INS. CO., OF PENNSYLVANIA, v. CENTRAL GLASS CO., Limited.

CENTRAL GLASS CO., Limited, v. GUARDIAN FIRE INS. CO., OF PENNSYLVANIA.

(Circuit Court of Appeals, Fifth Circuit. February 20, 1912. Rehearing Denied March 12, 1912.)

Nos. 2,218, 2,258.

1. APPEAL AND ERROR (§ 701*)—REVIEW—INSTRUCTIONS.

A particular portion of the charge of the court cannot be reviewed in an appellate court, where the bill of exceptions fails to show whether or not there was an issue or state of facts to which it was applicable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2933–2935; Dec. Dig. § 701.*]

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

2. APPEAL AND ERROR (§ 975*)—TRIAL (§ 303*)—REVIEW—MATTERS OF DISCRETION.

Permitting the separation of the jury before verdict in a federal court is a matter wholly within the discretion of the court, and error cannot be predicated on it, unless based on misconduct adversely affecting a fair trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3844; Dec. Dig. § 975;* Trial, Cent. Dig. § 724; Dec. Dig. § 303.*]

3. INTEREST (§ 21*)—VERDICT—ALLOWANCE OF INTEREST.

Under Civ. Code La. art. 1938, and Code Proc. La. art. 554, interest may properly be allowed on the amount of a verdict, where it contains no provision therefor.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 42; Dec. Dig. § 21.*]

4. INSURANCE (§ 602*)—ACTION ON POLICY—STATUTORY PENALTIES.

Act La. No. 168 of 1908, providing for the allowance of 12 per cent. damages and attorney's fees against insurance companies on recovery against them, where they failed to pay a policy within a stated time has no application to actions on policies issued prior to its passage.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1498; Dec. Dig. § 602.*]

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

Action at law by the Central Glass Company, Limited, against the Guardian Fire Insurance Company, of Pennsylvania. Judgment for plaintiff, and both parties bring error. Affirmed.

Donelson Caffery, Lamar C. Quintero, Philip S. Gidiere, and J. C. Hollingsworth, for plaintiff in error.

Henry L. Lazarus and Eldon S. Lazarus, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

In No. 2,218.

PARDEE, Circuit Judge. The first assignment of error, relating to the exclusion of the evidence of Joseph G. Weckerling, is not well taken: (1) Because the bill of exceptions does not show that the ratio between the cost of labor and the cost of material, either in said Weckerling's business or normally in such line of business, was material to any issue in the case. (2) The ruling of the court excluding the evidence of witness' individual experience in relation to ratio of labor to material in carrying on the glass business for his own account was correct.

The second assignment of error, complaining of the refusal of the trial judge to permit Mr. St. Paul to testify to what Mr. Marcuse, former president and bookkeeper, testified, in a previous case in a state court, as to what the books of the Central Glass Company showed as profits of 1907, is not well taken, because the bill of exceptions does not show that such matter was either relevant or material to any issue in the case.

[1] The third assignment of error complains of a certain portion of the charge of the court; but the bill of exception shows no issue or state of facts for us to judge whether the matter complained of was

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

relevant or material, or in any wise bore on any of the issues in the case. If we look into the pleadings, and find an issue as to whether the plaintiff presented and kept complete and itemized inventories as provided for in the contract, and that the claim is made that an entry of "Salvage glass, $2,500," is not a sufficient itemizing under the contract for such a quantity of broken glass and then assume, as counsel do, that there was evidence showing or tending to show that the inventory presented by the plaintiff contained the gross item of "Salvage glass, $2,500," and that the same was made up of glass which could have been classified and itemized with more particularity, and thus furnish a better idea of the quantity and value of the glass included under the item, still we find no reversible error, if error at all, in the definition the trial judge in his charge gave of the words "a complete, itemized inventory," as used in the iron safe clause in the policy in suit.

[2] The fourth assignment of error relates to the separation of the jury before verdict, which was a matter wholly within the control of the court below, and upon which no error can be predicated, unless based upon misconduct adversely affecting a fair trial. As we read the bill of exceptions, there was no unauthorized separation of the jury.

[3] It was not error to allow interest on the judgment from the date of verdict and judgment. C. C. La. art. 1938; C. P. La. art. 554.

In No. 2,258.

The claim for statutory interest of 5 per cent. from judicial demand was correctly refused by the court below.

[4] Act No. 168 of 1908 was not intended to have, and cannot have, any retroactive effect, and therefore cannot be applied in this case, where the policy sued on was issued prior to the passage of said act.

The judgment of the Circuit Court is affirmed, with costs, on both writs of error.

B. J. WOLF & SONS v. ROYAL INS. CO., LIMITED, OF LIVERPOOL.

(Circuit Court of Appeals, Fifth Circuit. February 20, 1912.)

Nos. 2,209, 2,220, 2,222, 2,223, 2,225, 2,226, 2,230, 2,259–2,264.

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

Actions by B. J. Wolf & Sons against the Royal Insurance Company, Limited, of Liverpool (No. 2,209), by the Northern Assurance Company, of London, England, against the Central Glass Company, Limited (No. 2,220), by the Hartford Fire Insurance Company, of Hartford, Conn., against the Central Glass Company, Limited (No. 2,222), by the Michigan Commercial Insurance Company, of Lansing, Mich., against the Central Glass Company, Limited (No. 2,223), by the Dixie Fire Insurance Company, of Greensboro, N. C., against the Central Glass Company, Limited (No. 2,225), by the Detroit Fire & Marine Insurance Company, of Detroit, Mich., against the Central

Glass Company, Limited (No. 2,226), by the Shawnee Fire Insurance Company, of Topeka, Kan., against the Central Glass Company, Limited (No. 2,230), by the Central Glass Company, Limited, against the Shawnee Fire Insurance Company (No. 2,259), by the Central Glass Company, Limited, against the Detroit Fire & Marine Insurance Company (No. 2,260), by the Central Glass Company, Limited, against the Hartford Fire Insurance Company, of Hartford (No. 2,261), by the Central Glass Company, Limited, against the Michigan Commercial Insurance Company (No. 2,262), by the Central Glass Company, Limited, against the Dixie Fire Insurance Company (No. 2,263), by the Central Glass Company, Limited, against the Northern Assurance Company (No. 2,264). Judgment for defendants, and plaintiffs bring error. Affirmed.

No. 2,209:

Henry L. Lazarus and Eldon S. Lazarus, for plaintiff in error.

Donelson Caffery, Lamar C. Quintero, and Philip S. Gidiere, for defendant in error.

No. 2,220:

Donelson Caffery, Lamar C. Quintero, Philip S. Gidiere, and J. C. Hollingsworth, for plaintiff in error.

Henry L. Lazarus and Eldon S. Lazarus, for defendant in error.

No. 2,222:

J. C. Hollingsworth, for plaintiff in error.

Henry L. Lazarus and Eldon S. Lazarus, for defendant in error.

No. 2,223:

J. C. Hollingsworth, for plaintiff in error.

Henry L. Lazarus and Eldon S. Lazarus, for defendant in error.

No. 2,225:

J. C. Hollingsworth, for plaintiff in error.

Henry L. Lazarus and Eldon S. Lazarus, for defendant in error.

No. 2,226:

J. C. Hollingsworth, for plaintiff in error.

Henry L. Lazarus and Eldon S. Lazarus, for defendant in error.

No. 2,230:

J. C. Hollingsworth, for plaintiff in error.

Henry L. Lazarus and Eldon S. Lazarus, for defendant in error.

No. 2,259:

Henry L. Lazarus and Eldon S. Lazarus, for plaintiff in error.

J. C. Hollingsworth, for defendant in error.

No. 2,260:

Henry L. Lazarus and Eldon S. Lazarus, for plaintiff in error.

J. C. Hollingsworth, for defendant in error.

No. 2,261:

Henry L. Lazarus and Eldon S. Lazarus, for plaintiff in error.

J. C. Hollingsworth, Donelson Caffery, Lamar C. Quintero, and Philip S. Gidiere, for defendant in error.

No. 2,262:

Henry L. Lazarus and Eldon S. Lazarus, for plaintiff in error.

J. C. Hollingsworth, Donelson Caffery, Lamar C. Quintero, and Philip S. Gidiere, for defendant in error.

No. 2,263:

Henry L. Lazarus and Eldon S. Lazarus, for plaintiff in error.

J. C. Hollingsworth, for defendant in error.

No. 2,264:

Henry L. Lazarus and Eldon S. Lazarus, for plaintiff in error.

J. C. Hollingsworth, Donelson Caffery, Lamar C. Quintero, and Philip S. Gidiere, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. Under agreement between the parties that the judgments in the above entitled and numbered cases should follow that in Guardian Fire Ins. Co. v. Central Glass Co., 194 Fed. 851, No. 2,218 and No. 2,258, just decided, the judgments of the Circuit Court are affirmed, with costs.

BROWN, Collector of Internal Revenue, et al. v. FOSTER et al.

(Circuit Court of Appeals, Fourth Circuit. February 14, 1912.)

No. 1,042.

INTERNAL REVENUE (§ 24*)—COMMISSIONER OF INTERNAL REVENUE—DISCRETION—BONDS.

Exercise by the Commissioner of Internal Revenue of his discretion under Rev. St. § 3293 (U. S. Comp. St. 1901, p. 2133), to require a new warehousing bond, should not be disturbed by the courts, where the principal obligor departed from the country, the liquor had been seized for violation of the revenue laws and was declared forfeited and then released to a person other than the original distiller, and the surety on the original bonds notified the Commissioner that it was no longer bound.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 68–71; Dec. Dig. § 24.*]

Pritchard, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Greensboro.

Bill by D. C. Foster and another against George H. Brown, Collector of Internal Revenue, and another. Judgment for plaintiffs, and defendants appeal. Reversed.

A. E. Holton, U. S. Atty. (A. L. Coble, Asst. U. S. Atty., on the brief), for appellant Brown.

George S. Bradshaw (C. E. McLean, on the brief), for appellant United States Fidelity & Guaranty Co.

William P. Bynum and R. C. Strudwick, for appellees.

Before PRITCHARD, Circuit Judge, and McDOWELL and SMITH, District Judges.

SMITH, District Judge. In the year 1905, and up to January 1, 1906, one Dart C. Foster, a distiller in the Western district of North Carolina, gave bonds under section 3292, U. S. Rev. Stats. (U. S.

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

Comp. St. 1901, p. 2132), with penalties in the aggregate of $41,400 to the United States for the payment of the taxes due upon certain whisky to be paid within eight years from and after the entry of the whisky in the bonded warehouse, i. e., until the year 1913. His surety upon the bond was the United States Fidelity & Guaranty Company, and the premium on the bonds to the surety company appears to have been paid in full. Thereafter Foster transferred all his interest in the whisky to the complainant N. Glen Williams, and departed from the country, and became a citizen of and was, at the time of the action by the Commissioner of Internal Revenue hereinafter mentioned, residing in the Republic of Mexico. In April, 1910, the whisky referred to was, after due legal proceedings, adjudged forfeited to the United States for alleged violations of the internal revenue law, and judgment was rendered for the value of the same in excess of the taxes due the government of the United States, and thereafter the whisky was restored or released to the owner, N. Glen Williams, upon his executing to the United States a bond for the value of the whisky in excess of the tax. The surety on the warehousing bonds then gave notice to the Commissioner of Internal Revenue that it would contest any claim that its liability as surety on the bond continued after such forfeiture and release, and in view of the complication that had arisen in the case, especially the seizure and release and the notice from the surety, the commissioner concluded that a new bond should be given under the provisions of section 3293 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2133), and the complainant N. Glen Williams having failed to give a new bond when required so to do, the Commissioner proceeded to collect the tax by distraint, and advertised the whisky for sale. The proceeding in this case was brought to enjoin the sale as threatened to be made by the Commissioner. The trial judge below held that the United States had entered into a contract with the distiller, by which the latter was given eight years in which to pay the internal revenue tax on the distilled spirits in the warehouse, and that in reliance upon that contract the distiller had paid the premium for the whole eight years to the indemnity company. The court further held that under the provisions of section 3293 a new bond should be required in case of death, insolvency, or removal of either of the sureties, and could be required in any other contingency affecting its validity or impairing its efficiency, at the discretion of the Commissioner of Internal Revenue; but that inasmuch as there was no death, insolvency, or removal of the surety herein, the Commissioner could only require a new bond in a contingency affecting its validity or impairing its efficiency, and that nothing appeared in this case which either affected the validity or impaired the efficiency of the bond, and that the discretion given to the Commissioner of Internal Revenue was not one that he could exercise in a case in which the court should hold as a judicial matter that a contingency had not arisen affecting the validity, or impairing the efficiency of the bond.

The principal question here is whether this power lodged in the Commissioner of Internal Revenue was one which so far rests in his

discretion as that the court could review his action in a case in which it is not alleged or proven that any ulterior purpose existed, or there has been any improper abuse of the discretion lodged in him. The deposit of the spirits in the warehouse and the extension of the time for the payment of taxes is solely for the benefit of the distiller, and to enable him to give bond for the payment of the tax instead of paying the tax at once. U. S. v. Witten, 143 U. S. 76, 12 Sup. Ct. 372, 36 L. Ed. 81. Except for this privilege given to him, the government could call upon him to pay the tax at once. In the opinion of this court the facts in this case are not sufficient to allow the court to interfere with the discretion lodged in the Commissioner of Internal Revenue. Where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts unless he has exceeded his authority, or this court should be of opinion that his action was clearly wrong. Whether such decision is right or wrong, is not the question. "Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction." Bates & Guild Company v. Payne, 194 U. S. 106, 109, 24 Sup. Ct. 595, 597 (48 L. Ed. 894). In that case the Supreme Court ruled as follows:

"The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

In Public Clearing House v. Coyne, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092, the court held, in referring to the case of School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, that it was within the power of Congress to intrust the Postmaster General with the power to seize and detain letters upon evidence satisfactory to himself, and that his action will not be reviewed by the court in doubtful cases, and, again (194 U. S. 515, 24 Sup. Ct. 796, 48 L. Ed. 1092), also referring to the McAnnulty Case:

"That the party injured has a right to invoke the judicial power of the government, whenever his property rights have been invaded by the exercise of such power, was settled by this court in Noble v. Union River Logging Railroad, 147 U. S. 165 [13 Sup. Ct. 271, 37 L. Ed. 123], as well as in the McAnnulty Case. But, as already indicated, it would practically arrest the executive arm of the government if the heads of departments were required to obtain the sanction of the courts upon the multifarious questions arising in their departments before action were taken in any matter which might involve the temporary disposition of private property."

In the case at bar, not only the principal obligor of the bond departed from the jurisdiction and became a citizen of a foreign country, but the liquor in question had been seized by the government upon an information for an infraction of the internal revenue laws; had been actually adjudged forfeited, and then released to a different party than

the original distiller, and the surety on the bonds had notified the Commissioner that it was no longer bound on his bond. In view of these complications, the Commissioner of Internal Revenue, in the exercise of the discretion vested in him by the terms of the statute, required a new bond, and it does not appear to this court that the exercise of his discretion was so palpably wrong, and such an invasion of the property rights of the complainant, as to require an interference by a court with the action of the Commissioner of Internal Revenue. Whilst an ultimate recourse to the judiciary may be reserved in all cases where the action of the officer is an invasion of property rights and is in excess of his authority, or palpably and clearly erroneous, or an abuse of the discretion lodged in him, yet the case at bar does not come within these categories.

It follows from this conclusion that the judge below erred in sustaining the bill upon the facts found, and that his judgment must be reversed.

Reversed.

PRITCHARD, Circuit Judge, dissents.

CHODKOWSKI v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1912.)

No. 1,762.

1. BANKRUPTCY (§ 495*)—CONCEALMENT OF ASSETS—CRIMINAL LIABILITY—BURDEN OF PROOF.

In a prosecution of a bankrupt for concealment of assets, the burden was on the government to establish defendant's guilt beyond a reasonable doubt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 912; Dec. Dig. § 495.*]

2. BANKRUPTCY (§ 496*)—INSTRUCTIONS—REASONABLE DOUBT.

In a prosecution of a bankrupt for concealment of assets, in that he failed to disclose an alleged interest in certain real property which he had conveyed to another, he was entitled to an instruction that, if the jury found from the evidence that the bankrupt had conveyed to the grantee the property in question by warranty deed, the law presumes that in so doing he acted legally and in good faith, and that the jury should give him the benefit of such presumption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 913; Dec. Dig. § 496.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Hylary Chodkowski was convicted of concealing assets from his trustee in bankruptcy, and he brings error. Reversed and remanded, with directions.

Plaintiff in error was indicted upon two counts: (1) For unlawfully, knowingly, willfully, and fraudulently concealing from his trustee in bankruptcy certain of his property, consisting of real estate, in violation of section 29b of the Bankruptcy Act; and (2) for unlawfully, knowingly, willfully, and

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

fraudulently concealing from his said trustee certain property, which consisted of a legal and equitable interest in certain real estate, etc. He pleaded "not guilty," and was placed upon trial before a jury. Such further action was had upon the trial that at the close of the evidence the court gave to the jury the following instructions:

"It was the duty of the bankrupt, Chodkowski, the defendant in this case, to give to Garmire, as his trustee in bankruptcy, a disclosure of his (the defendant's) property, as, under the bankruptcy law, it was the defendant's duty to do in accordance with that provision requiring that when a citizen applies to the bankruptcy court, sets on foot—sets in motion—the bankruptcy court, with a view to securing protection from his creditors, in order that he may start life anew, freed from the burden that otherwise would be imposed upon him, it is his duty, as the law points out and provides, to disclose to the court, in response to the demand of the trustee for his property, a full statement of what he has. The law requires that. So that really we have here a dispute about one proposition, as I take it. That proposition is involved in the charge that, when Garmire made his demand on Chodkowski, Chodkowski kept still about this real estate; that it was his duty, as the indictment charges, to speak about the real estate to Garmire, as it was his duty under the bankruptcy law to speak if he owned the property; that if he had retained, and had at the time the demand was made, an equitable interest in the property, that is to say, a beneficial interest in the property, in that event, under the law, it was his duty to speak and tell Garmire about it. It is for the jury in this case to decide, and answer the question by your verdict, whether or not this transaction between Chodkowski and Wojnowski, the grantee in the deed introduced and shown to have been executed by Chodkowski to Wojnowski, was a real, bona fide, good faith transaction. And that is what this dispute is.

"You will consider all the evidence, to determine whether or not the conveyance was merely colorable, or whether it was a good faith transaction, ending his interest in the property and control over it. Of course, if in the fall of 1909 Chodkowski was in a position to convey this same property to any of these creditors, these men who testified that Chodkowski offered to convey it to them at that time, that is evidence for you to consider in determining whether or not he had divested himself of the property in the April before. Your function is to arrive at the truth of the situation as to whether Chodkowski sold the property to Wojnowski, ending his connection with and dominion over the property. If you find he did, he is entitled to a verdict of not guilty. If, on the contrary, you find that transaction was colorable, and merely to becloud the situation, and in determining that, as I said before, have regard to all the evidence on it, as to this man's contact with the property, his exercise of dominion over the property, his enjoyment of revenue from the property, or his enjoyment of the property itself, the statement made after the date of the deed to Wojnowski and the other witnesses, if you believe the statement to have been made as to his willingness then to convey to them, with all the other evidence in the case, and by your verdict answer whether or not, after his adjudication in bankruptcy, and at the time Garmire made his demand upon the defendant for his property, the defendant at that time had an interest in this particular piece of real estate contended for by the United States in this prosecution. If he had, your verdict must be 'guilty.' If he did not, your verdict must be 'not guilty.'"

To each of which plaintiff in error excepted. Plaintiff in error also then and there requested the court to give certain other instructions, which are duly set out in clause No. 11 of the assignment of errors hereafter quoted. Each of such requests was refused by the court. In due course, the jury brought in a verdict of guilty as charged in the indictment. Motions for new trial and arrest of judgment were made and overruled, and defendant was sentenced to serve a term of six months in the House of Correction for Chicago. Plaintiff in error thereupon, and on June 22, 1910, filed his petition for a writ of error to this court, asking that the same be made a supersedeas, and that he be enlarged on bail pending said writ, which motions were granted, whereby the cause is now before the court for review.

Clause 11 of the assignment of errors above referred to, reads as follows, viz.: "11. Then and there, and before the cause was submitted to the jury, the defendant requested the court to give each of the following instructions to the jury, but the court refused severally to give each of said instructions as requested, to which refusal the defendant then and there severally excepted, each of which instructions so requested and so refused is as follows: '(1) The court instructs the jury that they are not permitted to suspicion or guess that the defendant owned an interest in the real estate subsequent to the date of his deed, and then to use such suspicion or guess against the defendant; but the law places upon the prosecution the burden of proving that the defendant did own such interest, and if the evidence in the case fails to satisfy the jury beyond a reasonable doubt that the defendant did own such interest, then it is the duty of the jury to find the defendant not guilty. (Refused.) (2) The court instructs the jury that whether the real estate was worth more than $6,000 is not in issue in the case, nor is it in issue whether the defendant received the full value of the property. (Refused.) (3) The court instructs the jury that if they find from the evidence that Hylary Chodkowski and Kamilia Chodkowski, his wife, by their warranty deed conveyed to John Wojnowski lots 40 and 41, etc., known and described as No. 136 107th street, in the city of Chicago, then the law presumes that when he did so he acted legally and in good faith, and, further, the law requires the jury to give the defendant the benefit of this presumption when they consider of their verdict. (Refused.) (4) The court instructs the jury that, if they find from the evidence that since the filing of the bankruptcy proceedings the defendant has not owned an interest in the property known and described as No. 136 107th street, in the city of Chicago, then it is the duty of the jury to find the defendant not guilty. And the court further instructs the jury that, if they entertain from the evidence a reasonable doubt whether the defendant since the beginning of the bankruptcy proceedings owned said real estate or a legal and equitable interest in said property, then it is the duty of the jury to find the defendant not guilty. (Refused.) (5) The court instructs the jury that whether the defendant and his wife are enjoying the use of the premises known and described as No. 136 107th street, in the city of Chicago, is not in issue in the case, and the jury are not to use the mere enjoyment and use of the premises against the defendant. (Refused.)' "

S. William Polkey, for plaintiff in error.

James H. Wilkerson and Elwood G. Godman, for the United States.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] Clauses 1, 3, and 4 of the instructions tendered by the defendant below, as numbered by us in the statement of facts herein, deal only with the questions of reasonable doubt and burden of proof. They state the law correctly, and the jury should have been so instructed. The burden of proof was on the government to establish the guilt of plaintiff in error beyond a reasonable doubt. These propositions are too well settled to require citation of authorities.

[2] Plaintiff in error was entitled to have the jury instructed that, if they found from the evidence that Chodkowski and wife conveyed to Wojnowski the lots in question by warranty deed, then the law presumes that in so doing appellant acted legally and in good faith, and required that the jury should give him the benefit of that presumption. American Hoist & Derrick Co. v. Hall, 208 Ill. 601, 70 N. E. 581; Schroeder v. Walsh, 120 Ill. 403, 11 N. E. 70. The refusal of the court to so instruct the jury constituted reversible error.

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

DEVINE v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1912.)

No. 1,835.

1. COURTS (§ 406*)—CIRCUIT COURT OF APPEALS—REVIEW—WEIGHT OF EVIDENCE.
The Circuit Court of Appeals, in an action at law for alleged wrongful death, will not review the weight of evidence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1103; Dec. Dig. § 406.*]

2. APPEAL AND ERROR (§ 237*)—QUESTIONS REVIEWABLE—ACTION NECESSARY TO PRESENT ERROR.
Alleged misconduct of defendant's counsel in addressing the jury cannot be reviewed, in the absence of a request for action by the trial court, in addition to exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1386–1388; Dec. Dig. § 237.*]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by John F. Devine, as administrator of the estate of Peter Argiriou, against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Emery S. Walker, for plaintiff in error.

O. W. Dynes, for defendant in error.

Before BAKER and SEAMAN, Circuit Judges, and ANDERSON, District Judge.

ANDERSON, District Judge. The plaintiff in error brought his action against the defendant in error for negligently causing the death of one Peter Argiriou. The declaration was in five counts, and in each count it was averred that the accident happened by reason of a collision between one of the trains of the defendant and a hand car upon which the defendant was riding. In each count the negligence complained of related to the management and operation of the train. To this declaration the defendant joined issue by a plea of not guilty. The cause was tried by a jury, a verdict rendered for the defendant, and judgment upon the verdict. Plaintiff in error has filed 25 assignments of error, but in his brief mentions and relies upon 6 only.

[1] The first is that the verdict of the jury is contrary to and against the weight of the evidence. It is too well settled to require the citation of authorities that this court in this kind of a case will not weigh the evidence.

The second, third, fourth, and fifth assignments relied upon relate to the rulings of the court upon the introduction of the evidence. The questions sought to be raised by these assignments are either without substance or are not properly presented. These questions, whether of substance, or as involving practice only, are neither novel nor of sufficient importance to warrant further comment.

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

[2] The sixth assignment is:

"Counsel for the defendant made improper and prejudicial remarks in addressing the jury."

No good purpose would be served by setting out the remarks complained of. We do not decide whether they were proper or improper. The bill of exceptions recites, after setting out the remarks:

"To which remarks counsel for plaintiff then and there duly excepted."

Plaintiff's counsel did not move or request the court to take any action with regard to such remarks and then except to the court's action. There was no action or ruling of the court invoked by plaintiff in error, and he cannot assign as error of the court the remarks of opposing counsel.

We find no available error in the record.

Judgment affirmed.

ÆTNA LIFE INS. CO., OF HARTFORD, CONN., v. OUTLAW.

(Circuit Court of Appeals, Fourth Circuit. February 14, 1912.)

No. 1,056.

INSURANCE (§ 669*)—LIFE POLICIES—STATEMENTS BY INSURED—EFFECT.

In an action on a life policy, which provided that statements by insured should be deemed representations, and not warranties, in the absence of fraud, it was not error to instruct that, in the absence of fraud, no false statement as to an immaterial matter, or not constituting an inducement of the contract, would be a defense, and that representations through mistake would not avoid the policy, unless made with a fraudulent purpose; insurer not being entitled to an instruction that a misstatement or misrepresentation in a material matter would avoid the policy, although such misstatement may have been honestly made.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1771–1784; Dec. Dig. § 669.*]

McDowell, District Judge, dissenting.

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

Action by Benjamin Lucas Outlaw against the Ætna Life Insurance Company, of Hartford, Conn. Judgment for plaintiff, and defendant brings error. Affirmed.

W. G. Belser (Melton & Belser, on the brief), for plaintiff in error.

Robert Macfarlan and P. A. Willcox (Macfarlan & Thornwell and Willcox & Willcox, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and McDOWELL and SMITH, District Judges.

SMITH, District Judge. This is a suit upon an insurance policy upon the life of Daniel Angus Outlaw, which was assigned to the defendant in error. The policy was for $5,000, dated July 8, 1908, and was assigned to the defendant in error on the 13th of July, 1908. The insured, Daniel Angus Outlaw, died December 1, 1908, and suit was

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

thereupon brought by his assignee in the court of common pleas for the county of Darlington for the state of South Carolina to recover the amount of the policy, which action was removed to the Circuit Court of the United States for the District of South Carolina. The policy of insurance contained a provision as follows:

"All statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties, and no such statement shall avoid the policy or be used in defense to a claim under it, unless it is contained in the written application for this policy and copied hereon."

The defense of the Ætna Life Insurance Company to the policy is based upon certain alleged misstatements, viz., that the defendant stated that he was in his 58th year, whereas he was in fact more than 60 years of age; that he stated that he had made one application, which had been rejected by the Mutual Benefit Society, whereas he had also made another application, which had been rejected by another company; that he had made a statement that he had not within the last seven years had any disease or severe sickness, whereas he had within seven years suffered from disease or severe sickness; that he stated that he had never been intemperate in the use of either malt or spirituous liquors, whereas he had been so intemperate. Evidence on these controverted allegations was offered by both sides, and the case went to the jury, which found a verdict for the defendant in error.

Under the assignments of error the question in this court turns upon the trial judge's charge with regard to the effect of the statements of the insured. The trial judge charged:

"That under the terms of the policy upon which this suit is based, all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; therefore, in the absence of fraud, no false statement in reference to an immaterial matter, and no false statement which did not induce the company to enter into the contract, and in which the insured participated with a fraudulent intent, can be relied upon by the insurer as a defense."

And again:

"That representations which may be the result of mistake or otherwise on the part of the applicant, even if proved to be mistakes or misrepresentations, unless made with a fraudulent purpose, would not avoid the policy."

The contention of the plaintiff in error is that the trial judge should have charged the jury explicitly that a misstatement or misrepresentation in a material matter would avoid the policy, although such misstatement may have been honestly made in a sincere belief that it was correct, and without any fraudulent intent. The correctness of the charge as made depends upon what is the true definition of a representation under the terms of the policy, and what is the difference between a warranty and a representation. The distinction between a warranty and a representation in an application for an insurance policy has by a number of decisions been stated to be that, if the statements are warranted, they must be true in every particular, whether material or immaterial; whereas, if the statements are representations, incorrectness in an immaterial matter will not avoid the policy, although,

if incorrect in a material matter, the policy will be avoided. Under these decisions, if the misstatement be a material one, the policy would be avoided, whether the statement was a warranty or a representation, and the honesty, good faith, and sincerity of the applicant would not affect the question. Those circumstances would be considered only if the statement was a representation and immaterial. The fraud or fraudulent intent of the applicant would in either case be for consideration only in the case of a representation on an immaterial point.

This distinction is not a satisfactory one logically, especially where, as in the present case, the clause in the policy itself makes fraud a distinguishing element. It says:

"All statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties."

If the misstatements were material, under the construction claimed by the plaintiff in error, the policy would be avoided, and in such case the only effect of the use of the word "fraud" in this clause would be to avoid the policy in case of fraud for immaterial statements, notwithstanding that, without this clause, under the general rule of law, fraud could be relied on as a defense. Such construction would seem to deprive the clause of effect.

It was decided by the Circuit Court of Appeals of the Eighth Circuit, in the case of Rice v. Fidelity & Deposit Company of Maryland, 103 Fed. 427, 43 C. C. A. 270, that:

"In insurance a representation is a statement by the applicant to the insurer regarding a fact material to the proposed insurance; and it must be not only false, but fraudulent, to defeat the policy. A warranty, in the law of insurance, is a binding agreement that the facts stated by the applicant are true. It is a part of the contract, a condition precedent to a recovery upon it, and its falsity in any particular is fatal to an action upon the policy."

Accepting this as the definition of a representation, it follows that, in order for a representation, under the terms of this policy, to serve as a defense, it must have been knowingly false, and therefore fraudulent. Unless so knowingly false and fraudulent, it could not be availed of by the insurance company as a defense. Tested by this principle, or giving the clause in the policy its due effect, the charge of the trial judge was not erroneous under the case presented, and the judgment below must be accordingly affirmed.

Affirmed.

McDOWELL, District Judge, dissents.

LARSEN v. NEAL et al.

(Circuit Court of Appeals, First Circuit. March 8, 1912.)

No. 947.

SALES (§ 363*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

Where a buyer of a patent for $10,000, of which $50 was paid at the time of the agreement of sale and $1,950 after title passed, gave a mortgage with the usual condition that it should be void provided he paid $8,000 due under the sale on or before a designated date, without dis-

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

closing whether any note was taken for that amount, and where the question whether the mortgage constituted the entire agreement is in controversy, in an action by the seller on an alleged personal obligation of the buyer beyond the condition of the mortgage, the court should not direct a verdict against the plaintiff, if, on the most favorable view of any theory advanced by him, a doubtful question of fact is disclosed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1064; Dec. Dig. § 363.*]

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

Action by Gustav Adolph Larsen against Frank W. Neal and another. There was a judgment for defendants, and plaintiff brings error. Reversed.

Wade Keyes (Montague & Keyes, on the brief), for plaintiff in error.

Addison C. Burnham (Blodgett, Jones & Burnham, on the brief), for defendants in error.

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

ALDRICH, District Judge. This writ of error relates to a situation in which Gustav Adolph Larsen, the owner of a United States patent for a device known as an otter trawl, something which is used for catching fish from steam vessels, claims to have sold it for $10,000 to the defendants. There are no questions of deceit or of failure of consideration.

Gustav Adolph Larsen lived in the kingdom of Norway, and gave T. H. Nilson & Son authority to proceed to the United States and dispose of the patent, but named as the minimum price the sum of $10,000. There was certain correspondence and negotiation between these agents and Capt. J. W. Collins, then chairman of the Fish and Game Commission of Massachusetts, who sought as broker to negotiate a sale to these defendants.

What appears in the record does not seem to be sufficient to justify an attempt to establish the ultimate right between the parties. The defendants did not put in any evidence, because a verdict was directed for the defendants upon the sole theory, so far as we can ascertain from the record, that the plaintiff did not make out any case. Enough does appear to show that there was some talk as to how much the purchasers of the patent should pay down, and it was finally agreed that $50 should be paid concurrently with the agreement of sale, and $1,950 after the title had passed.

The pleadings, and the testimony, indicate that the purchase price was $10,000, $50 and $1,950 to be paid down, and the balance of $8,000 was to be paid on or before May 1, 1907.

Though there was apparently no disagreement as to the amount of the purchase money of $10,000, and as to the amount remaining due after the two small sums were paid, the parties went to a firm of lawyers to have the papers drawn up, and, among other things

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

done, a mortgage was executed from John R. Neal and Frank W. Neal, the purchasers, with the usual mortgage condition that the mortgage is to be void provided they pay the sum of $8,000, the balance due under the original sale, on or before May 1, 1907; but, so far as appears in the mortgage, no note or notes were taken for that amount.

It would have been very useful if the particular grounds upon which the verdict was ordered had appeared through a rescript or upon the briefs, but nothing of that kind does appear; but the circumstances of the case and the briefs indicate that the verdict was ordered upon the sole ground that the mortgage expressed no personal debt or obligation on the part of the mortgagors. This doubtless was upon the theory that, there being no note or notes, no personal obligation was entered into beyond the condition that the mortgage might be foreclosed upon default of payment of the balance secured.

Our conclusion is that the question is one of so much doubt that a court should not undertake to establish the ultimate right one way or the other upon a partial hearing; and this is so because an entirely different aspect might be placed upon the question of the real intention of the parties, if the defendants had been required to answer what the plaintiff put before the jury. It is because of such uncertainty, and because the purpose always is to determine questions of ultimate right upon such proceedings as will best show the whole material situation, that the rule is now firmly established, and generally recognized, that no case will be ruled against the plaintiff, on demurrer, if, upon the most favorable view of any theory advanced by the plaintiff, a doubtful question can be seen. The case of Kansas v. Colorado, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838, is a good explanation of the rules of caution which guide courts in this respect. While the two situations are not precisely the same, the principle involved is the same, and the reasons for caution are strongly analogous.

While we do not make any ruling upon the ultimate questions of right, and while we do not assume to determine any questions in regard to the admissibility of evidence, we do think it extremely doubtful whether a mortgage like this should be held to so far operate as a reduction of the entire agreement to writing as to exclude parol evidence of the actual facts relating to the sale and the actual indebtedness, and for these reasons:

It is ordered that the judgment of the Circuit Court be vacated, and that further proceedings be had not inconsistent with this opinion, and that the plaintiff in error recover costs in this court.

UNITED STATES LIGHT & HEATING CO. v. J. B. M. ELECTRIC CO. et al.

(Circuit Court of Appeals, Second Circuit. January 29, 1912.)

No. 140.

CORPORATIONS (§ 426*)—ASSIGNMENT BY PRESIDENT—RATIFICATION.

Three persons owned all of the stock of a corporation, and composed the board of directors. One who was the president in the name of the

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

corporation executed an assignment of an application for a patent which had been made by him, and had been assigned to the corporation, and of which the assignee claimed to be the owner. One of the other directors was present and signed as a witness, and the other had knowledge of it soon after, but no notice was given to the assignee of any dissent, although the parties had further business transactions together, during which there was a settlement and mutual receipts, and releases of all claims and demands were given. *Held*, that such conduct amounted to a ratification of the assignment by the corporation, and that it could not thereafter make a valid assignment of the application to another.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702–1704, 1707, 1708, 1710–1716; Dec. Dig. § 426.*]

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

Suit in equity by the United States Light & Heating Company against the J. B. M. Electric Company and others. Decree for complainant (189 Fed. 382), and defendants appeal. Modified and affirmed.

Alan D. Kenyon and W. H. Kenyon, for appellants.

K. H. Addington, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is a bill in equity praying for the reformation of an assignment of an application dated September 30, 1907, No. 404,271, for letters patent, executed by the J. B. M. Electric Company inadvertently under the name of the "J. B. M. Company," and also that a subsequent assignment thereof by the same company to the Gould Coupler Company be canceled as a cloud upon the complainant's title, and that the revocation by the inventor of his power of attorney accompanying the said application be annulled.

The defendant filed a cross-bill, praying that the aforesaid assignment, as well as an assignment of the same date, No. 404,272, be declared void and canceled of record, or that the complainant be ordered to reassign the same. The introduction of an entirely new matter not mentioned in the original bill was improper, and we shall therefore not consider the rights of the parties with reference to application No. 404,272. It is to be noted that the cross-bill alleges no fraud or duress, but only charges that the assignment was executed by the president of the J. B. M. Company without consideration and without authority.

The present parties are assignees, with no greater rights than their assignors, and we shall hereafter speak of the assignors. The complainant's assignor, the Bliss Electric Car Lighting Company, was engaged in the manufacture of devices for electric lighting, and John W. Jepson, Alexander McGarry, and George R. Berger were associated together as partners in the invention and promotion of devices for electrical distribution. January 8, 1907, these parties entered into an agreement, whereby Jepson and his associates assigned to the Bliss Company four applications for patents, Nos. 312,223, 276,276,

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

314,531, and 288,055, and the Bliss Company agreed to manufacture, sell, and pay royalties upon devices under the same. The agreement provided as to future inventions:

"Tenth. It is understood and agreed that said party of the second part shall have the right to manufacture, use, sell and rent any and all improvements that said parties of the first part may make, either jointly or severally, upon the aforesaid inventions, and also the right to manufacture, use, sell or rent any apparatus devised by said parties of the first part, either jointly or severally, which may be in any way applicable to systems embodying any features of the aforesaid inventions, or which may in any way fall within the scope of the patents that may be obtained for the aforesaid inventions; provided, however, that such inventions, improvements or apparatus shall be made, sold, leased licensed or rented only in equipments or apparatus embodying in whole or in part the inventions in the aforesaid applications and patents on which royalty is payable under this agreement and nothing in this agreement shall be construed to prevent the parties of the first part from granting rights or licenses to others for improvements or further inventions not embraced within or covered by the aforesaid applications or patents which have been assigned to the party of the second part."

The subject of cancellation of the contract was regulated in article 20 as follows:

"Twentieth. It is understood and agreed that in the event that this agreement be cancelled or terminated under any of the provisions thereof, then the party of the second part shall reassign to the parties of the first part the patent or patents and application or applications for letters patent covering the equipment or apparatus affected by said cancellation or termination; and in the event that this agreement be not renewed at the expiration of the term of five years herein provided, then the party of the second part shall reassign to the parties of the first part all the applications and letters patent for the aforesaid inventions or improvements made thereon by the parties of the first part, either jointly or severally; and the party of the second part agrees to make, execute and deliver to said parties of the first part any and all deeds, writings or instruments of assignment necessary or required to vest in and secure to said parties of the first part the full and complete title, rights and interests in and to said inventions and improvements in accordance with the provisions of this clause."

January 31, 1907, Jepson and his associates assigned their common interests to a corporation they had organized under the name of the J. B. M. Electric Company.

The Bliss Company constructed a car lighting device under one or more of these applications in accordance with what is known as the "booster" system. Upon exhibition at an electrical convention held at Atlantic City in June, 1907, it proved a conspicuous failure. Thereupon all parties to the contract agreed that future efforts should be spent upon application 312,223. Just here arises the vital issue of fact. The witnesses of the Bliss Company say that it thereupon furnished to Jepson an invention theretofore made by Bliss of an automatic reed regulator under an agreement that all work in improving it was to be done by Jepson and his associates for the sole benefit of the company, and not under the contract of January 8, 1907. On the other hand, Jepson and his witnesses say that all work done upon it was to be done under the contract and covered by the contract as an improvement upon application 312,223. Either account might be true, and there is much in the record to sustain each, but in disposing of the dispute we shall rely upon a few facts that seem to us controlling.

Jepson's work did result in improvements which were covered by an application in his name for letters patent No. 404,271. March 28, 1908, the parties to the contract of January 8, 1907, in accordance with article 20 thereof, canceled that agreement. The Bliss Company reassigned to Jepson and his associates the applications mentioned in it, and delivered copies of the same, together with the drawings, for which Jepson and his associates receipted April 3, 1908.

Nothing whatever was said about application No. 404,271. If this application had been still in the name of Jepson, the inventor, this omission would be no ground for comment. But in point of fact he had on the day of its date, September 30, 1907, assigned it to the J. B. M. Electric Company, and as president of that company (though the word "Electric" was left out of its name in the actual execution) assigned it to the Bliss Company. Evidently it should have been reassigned if it was covered by the agreement of January 8, 1907, as the defendant contends.

July 30, 1908, the J. B. M. Company assigned applications Nos. 312,223, 276,276, 314,531, letters patent No. 878,305, which had issued upon application No. 288,055, all of which had been assigned to the Bliss Company under the contract of January 8, 1907, together with application No. 419,993 and "any others the numbers of which may have been omitted in this agreement" to the Gould Coupler Company, the defendant and cross-complainant, without making any mention of application 404,271.

December 4, 1908, the J. B. M. Company executed an assignment of No. 404,271 specifically to the Gould Company, which recited that it was owned by it July 30, 1908, and was therefore covered by the assignment of that date.

Upon the foregoing statement it would seem to be perfectly clear that the complainant is entitled to a decree and that the cross-bill should be dismissed. But the defendant, while not standing upon the inventor's obvious inadvertence in signing the assignment dated September 30, 1907, in the name of the J. B. M. Company, instead of the J. B. M. Electric Company, says that this assignment was without consideration, and that Jepson as president of the company had no authority to execute it.

If the assignment were without consideration, equity would not lend its aid to enforce it. The assignment recited a consideration of $1 in hand paid and other good and valuable consideration, the receipt of which was acknowledged. The witnesses for the Bliss Company testify that Jepson and Berger were paid for the work they did on the Bliss regulator, and that it was delivered to them upon the express agreement that whatever they accomplished in connection with it should be for the sole benefit of the Bliss Company. This was quite consideration enough if the testimony is true. And we are convinced that it is true because the assignment of the absolute title to the Bliss Company instead of its having a mere shop right under article 10 of the agreement of January 8, 1907, and the fact that the parties did not in the cancellation agreement of March 28th, mention the assignment, nor make nor require any reassignment thereof, are wholly in-

consistent with their understanding that the assignment was made under the contract of January 8, 1907.

We come now to the question of the authority of Jepson to execute the assignment as president of the J. B. M. Company. It is true that the power of a president of a corporation to dispose of its property as president is very limited, and that this assignment was not made in pursuance of any resolution of the board of directors. But this corporation was owned by the three individuals Jepson, Berger, and McGarry in equal shares. They constituted the board of directors. Jepson and Berger were both present when the assignment was made. Although various objections were raised by them, Jepson executed it as president and Berger signed as a witness.

As against McGarry, the assignment might have been held inoperative, but he was informed of it as early as October, 1907. Yet, though the complainant in its correspondence was urging that the assignment should be corrected by re-execution in the name of the J. B. M. Electric Company, that company did not reply to the Bliss Company's letters until February 3, 1908, when it wrote as follows:

"I beg to acknowledge the receipt of your favor of Dec. 18, 1907, and those of Jan. 9 and 18/08, and trust you will pardon me for not having answered before this date.

"In replying will say that I have fully noted the discrepancy referred to in yours of Dec. 18, which, of course can easily be corrected.

"But this is not the only defect, as there is I believe a more serious discrepancy, which I came across and have been trying to straighten out for some time. I have no doubt but that everything will be all right and the proper assignment made and in accordance with our agreement.

"We expect to have a meeting of the J. B. M. Electric Co. in the near future and the matter finally disposed of.

"As president of the J. B. M. Electric Co. I can assure you that we are willing to make all the necessary assignments as provided for in our agreement.

"You can expect to hear from me in the near future with reference to the subject in question, and trust that entire matter will be straightened out."

In the meantime, on January 16, 1908, the board of directors had resolved not to execute the corrected assignment nor to ratify the assignment already made. No notice of disaffirmance, however, was ever given to the Bliss Company. On March 28, 1908, the original contract was canceled by the parties to it, and on July 30, 1908, and December 4, 1908, as we have seen, the J. B. M. Company assigned the same applications to the Gould Coupler Company, and on November 27, 1908, the defendant Jepson, the inventor, revoked the power of attorney he had given to the attorney for the Bliss Company to act for him in the Patent Office.

We are of opinion that the J. B. M. Company ratified the assignment executed by Jepson and witnessed by Berger. The cancellation agreement of March 28th is a further ground for sustaining the decree. It extinguished the agreement of January 8, 1907, and any rights that either party had under the same. It recited:

"Whereas, the parties hereto do now desire to terminate, cancel and annul first-mentioned agreement and the rights given and granted thereby; and the said second party has reassigned, transferred and conveyed to the said first parties by separate instrument of even date herewith, the entire right in and to the said inventions, applications and letters patent.

"Now therefore, for and in consideration of the execution and delivery of said reassignment, transfer and conveyance of said inventions, applications and letters patent, and of the payment of the second party to the first parties of the sum of one thousand five hundred dollars ($1,500), the receipt whereof is hereby acknowledged, and of the cancellation and termination of the said first-mentioned agreement, the said first and second parties, for themselves, their and each of their legal representatives and assigns, do hereby mutually release and discharge each other from any and all claims of every kind and nature under said first-mentioned agreement, and mutually acknowledge each to the other full satisfaction thereof, and the parties hereto, for themselves, their legal representatives and assigns, do hereby agree and declare that said first-mentioned agreement is hereby terminated, cancelled and annulled and that all rights and privileges given and granted thereby and all claims thereunder which either party now has or may or shall hereafter have are satisfied and terminated."

The form of the decree in reciting findings of fact and evidence is not in accordance with the practice of this circuit. So much of the first 27 pages as contains this matter should be stricken out, as well as so much of the ordering part as declares the complainant to be the owner of application No. 404,272. See Delaware, Lackawanna & Western R. R. Co. v. City of Syracuse, 165 Fed. 631, 92 C. C. A. 41.

As thus modified, the decree is affirmed, with costs.

CHARLES BOLDT CO. v. NIVISON-WEISKOPF CO.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1912.)

No. 2,165.

1. PATENTS (§ 28*)—DESIGNS—REQUISITES TO VALIDITY.

The exercise of the inventive faculty, as well as originality and beauty, are all essential to the patentability of a design.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 33; Dec. Dig. § 28.*]

2. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—DEMURRER FOR INVALIDITY OF PATENT.

The question of want of novelty and invention as disclosed by the specification of a patent may be raised by demurrer by a defendant charged with its infringement, and in a clear case, where, taking into consideration the common and general knowledge with respect to the art, the court can say that the want of novelty and invention is so palpable that it is impossible that evidence could show the fact to be otherwise, the bill may be dismissed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507–540; Dec. Dig. § 310.*

Pleading in infringement suits—demurrer for want of novelty and invention, see note to Caldwell v. Powell, 19 C. C. A. 595.]

3. PATENTS (§§ 45, 49*)—NOVELTY—EVIDENCE.

Extensive or general use of a patented article is evidence of its utility, but is not conclusive in that respect and much less of its patentable novelty.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 51–53, 59–62; Dec. Dig. §§ 45, 49.*

Utility, extent of use, and commercial success as evidence of invention, see note to Doig v. Morgan Mach. Co., 59 C. C. A. 620.]

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

4. PATENTS (§ 328*)—VALIDITY—DESIGN FOR BOTTLE.
The Boldt design patent, No. 39,921, for a design for a bottle, is void on its face for lack of patentable novelty and invention.

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

Suit in equity by the Charles Boldt Company against the Nivison-Weiskopf Company. Decree for defendant, and complainant appeals. Affirmed.

Littleford, James, Frost & Foster (Walter F. Murray and Francis B. James, of counsel), for appellant.

Lewis M. Hosea and Walter A. Knight (Hosea & Knight, on the brief), for appellee.

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

SATER, District Judge. On April 20, 1909, the complainant obtained a patent, No. 39,921, for a design for bottles, claimed to be new, original, and ornamental. He sued the defendant for infringement. The patent was held invalid on demurrer, as not involving the exercise of inventive genius, and the bill was dismissed. The case is here to secure a reversal of the Circuit Court.

His claim is for the ornamental design for a bottle shown by the two figures appearing in his patent. The description and claim are sufficient. The purport of the description is that what the drawings represent as a whole is the invention, and it is that which is claimed when applied to bottles. Dobson v. Dornan, 118 U. S. 10, 14, 6 Sup. Ct. 946, 30 L. Ed. 63.

At the top of the neck is a lip, from the base of which the neck descends vertically until the enlargement of the interior of the bottle causes an outward curvature. When a diameter is reached which is slightly more than one-third of that of the main body of the bottle, the outer surface makes a brief vertical descent, causing an offset or collar-like effect, from the base of which an outward half-globular like expansion occurs until the full diameter of the cylindrical portion of the body is attained. The residue of the walls are perpendicular. Complainant's counsel describes the neck as terminating in a circular base or collar and as having the appearance of resting or bearing upon a flattened hemisphere, thus suggesting symmetry and strength. The bottle is an entirety and is devoid of all added ornamentation. The claim made in argument that the diameter of its cylindrical portion equals the height of the same portion is not borne out by an examination of the figure shown in the patent or by the sample exhibited for the court's inspection. The height exceeds the diameter

[1] This court, in Soehner v. Favorite Stove & Range Co., 84 Fed. 182, 28 C. C. A. 317, and Westinghouse v. Triumph Electric Co., 97 Fed. 99, 38 C. C. A. 65, assented to the doctrine that both novelty and the exercise of the inventive faculties are essential to the patentability of a design. The insistence, however, is that designs, excepting such as exhibit merely the imitative faculty or obtain a mechanical result

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

and are therefore wanting in patentability, are patentable, if they are new and pleasing and increase the salability of the articles to which they respectively relate. A classification of decisions is attempted to show that this theory has prevailed excepting from about 1893 to 1900. During the excepted period the reported cases confessedly exact substantially as high an order of inventive genius for design patents as is required in mechanical patents. Numerous cases are cited, some of which tend to sustain complainant's theory. Others adopt the view that, in addition to novelty, pleasing effect, and increased salability, invention is prerequisite to patentability. Whatever confusion may have existed in the judicial minds of the lower courts as to the degree of invention essential to a valid design patent, Smith v. Whitman Saddle Co., 148 U. S. 674, 679, 13 Sup. Ct. 768, 770, 37 L. Ed. 606, forever put at rest all controversy on that subject by declaring that:

"The law applicable to design patents does not materially differ from that in cases of mechanical patents, and all the regulations and provisions which apply to the obtaining or protection of patents for inventions or discoveries * * * shall apply to patents for designs. * * * To entitle a party to the benefit of the act, in either case, there must be originality, and the exercise of the inventive faculty. In the one, there must be novelty and utility; in the other, originality and beauty. Mere mechanical skill is insufficient. There must be something akin to genius—an effort of the brain as well as the hand. The adaptation of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in their new role, is not invention."

[2] The issuance of a patent gives rise to the presumption that it involves both novelty and invention. The dismissal of the bill denied to the complainant the right to produce evidence to support that presumption. The question of want of novelty and invention, as disclosed by the specifications of a patent, may be raised, however, by demurrer by a defendant who is charged with infringing the alleged invention (Richards v. Chase Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991; Risdon Iron & Locomotive Works v. Medart, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899; American Fibre-Chamois Co. v. Buckskin-Fibre Co. [C. C. A. 6] 72 Fed. 508, 18 C. C. A. 662), and in a clear case a court may dismiss the bill to establish the patent and enforce a remedy for its infringement (Milner Seating Co. v. Yesbera [C. C. A. 6] 111 Fed. 386, 49 C. C. A. 397; Northwood v. Dalzell, Gilmore & Leighton Co. [C. C. A. 6] 100 Fed. 98, 40 C. C. A. 295), and thus save the parties the expense and delay incident to litigation (Strom v. Weir [C. C. A. 6] 83 Fed. 170, 27 C. C. A. 502). Indeed, if the court can see that a patent is void on its face for want of invention, it need not look beyond it and may sua sponte adjudge it invalid, whether the defense of nonpatentability is made or not. Slawson v. Grand Street, etc., R. R. Co., 107 U. S. 649, 2 Sup. Ct. 663, 27 L. Ed. 576; Brown v. Piper, 91 U. S. 44, 23 L. Ed. 200. But to justify sustaining a demurrer to an infringement bill, adopting the language of Judge Taft, speaking for this court in American Fibre-Chamois Co. v. Buckskin-Fibre Co.:

"The court must be able, from the statements on the face of the patent, and from the common and general knowledge already referred to, to say that

the want of novelty and invention is so palpable that it is impossible that evidence of any kind could show the fact to be otherwise. Hence it must follow that, if the court has any doubt whatever with reference to the novelty or invention of that which is patented, it must overrule the demurrer, and give the complainant an opportunity, by proof, to support and justify the action of the patent office. This is the view which has been taken by the Supreme Court, and the most experienced patent judges upon the circuit."

To the same effect, see Milner Seating Co. v. Yesbera.

In considering a demurrer to a bill, such as the one before us, the court may take judicial notice of whatever is generally known within the limits of its jurisdiction, of facts of common and general knowledge tending to show that the device, process, or design patented is old or wanting in invention, and, if its memory is at fault, it may refresh the same by resorting to any means for that purpose deemed safe and proper to ascertain what facts were of common and general knowledge and had been published at the time the application for the patent was made. Brown v. Piper; American Fibre-Chamois Co. v. Buckskin Fibre Co.; Northwood v. Dalzell, Gilmore & Leighton Co.

[3] The demurrer admits the well-pleaded averments of the bill, and therefore admits that complainant's bottle has gone into extensive use. It is earnestly argued that its salability creates a presumption of patentable novelty. Extensive or general use of the bottle is evidence of its utility, but it is not conclusive evidence in that respect, much less of its patentable novelty. Where there is no invention, the extent of the use is not a matter of moment. McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; Adams v. Bellaire Stamping Co., 141 U. S. 539, 12 Sup. Ct. 66, 35 L. Ed. 849; Drake Castle Pressed Steel Lug Co. v. Brownell & Co. (C. C. A. 6) 123 Fed. 86, 89, 90, 59 C. C. A. 216.

[4] The bottle shown in the patent is the old and familiar cylindrical bottle with a rounded top and a centrally rising neck with a collar-like base. Bottles of the same design, differing only in size and especially used for holding perfumeries, may be seen in many well-appointed drug stores of considerable size, and were so used long prior to the issuing of the patent. Other such bottles have not one only, but two or three, of the collar-like neck bases. Bottles with a cylindrical body, mounted by a hemispherical or oblate spheroidal surface bearing a neck with an offset base, like that shown in the patent, are seen in works on chemistry which issued from 40 to 50 years ago. Necks, like that shown in complainant's drawing, terminating in circular bases or collars of the same character as that delineated in the patent, appear in architecture, columns, balusters, bottles and vases of ancient times, and are seen in the electrical fixtures which, long prior to the date of the patent, were placed in the court room in which this case was heard, as well as in a wide range of other familiar articles of daily use. The complainant's bottles vary in size, but are intended to hold a considerable quantity of liquid. To obviate the danger of breakage, the patentee adopted the obvious and ancient method of thickening the walls and enlarging the base of the neck, thus distributing the stress of weight outwardly over a larger surface toward the outer vertical surface of the bottle. He did only

what had been done before and what would naturally and spontaneously occur to any mechanic or operator ordinarily skilled in the art of bottle making. His design lacks both patentable novelty and invention, and is clearly void.

The judgment of the court below is affirmed.

WESTEN MFG. CO. et al. v. HARTFORD et al.

(Circuit Court of Appeals, Third Circuit. February 17, 1912.)

No. 1,553.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SHOCK ABSORBER.

The Truffault reissue patent, No. 12,437 (original No. 695,508), for a frictional retarding means for spring-supported vehicles, is not invalid for laches in applying for the reissue, because of the broadening of the claims, nor for anticipation, 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 Edward V. Hartford, George H. Hartford, and the Hartford Suspension Company against the Westen Manufacturing Company and Christian H. Westen. Decree for complainants (172 Fed. 676), and defendants appeal. Affirmed.

Conrad A. Dieterich (Samuel O. Edmonds and Robert H. McCarter, of counsel), for appellants.

Clifford E. Dunn and Charles C. Linthicum, for appellees.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge. The appeal in this case is from the decree of the court below in a suit brought for infringement of United States reissue letters patent No. 12,437, granted January 16, 1906, to Edward V. Hartford and George H. Hartford, upon the invention of J. M. M. Truffault, for frictional retarding means for spring vehicles. The decree declared the letters patent valid and infringed by defendant and ordered the usual accounting for damages and profits.

The patent is a reissue of original letters patent, No. 695,508, granted March 18, 1902. Its subject matter is thus stated in the specifications, which are identical in the original and reissue patents:

"This invention relates to the class of vehicles in general wherein springs are employed to relieve jolting and vibration, and particularly motor cars and cycles of the various well known kinds. * * *

"The object of the present invention is to overcome or materially modify these shocks and vibrations by combining with the spring supporting devices certain frictional devices between the moving parts or between the running-gear and the spring-supported parts, whereby said frictional devices serve as brakes to retard the too-rapid vibration or movement of the parts."

The defenses set up by the answer are, that the claims of the reissue patent are invalid, because of laches in applying for the reissue, and

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

because the reissue was not authorized by any statute in such case made and provided, by reason of the unlawful broadening of the claims of said reissue. Also, that the claims of the said reissue patent are invalid, because of anticipation in prior patents and in public use, and by reason of lack of invention, in view of the prior art.

The patent in suit has been the subject of much litigation, and we have at least two adjudications prior to the one here appealed from, in which all the matters here in controversy have been fully passed upon. Suit on the reissue letters patent was brought in the Circuit Court for the Southern District of New York, and upon final hearing in November, 1907, Platt, District Judge, in a short opinion deals with the challenged validity of the reissue and says:

"I cannot avoid the conclusion that, by narrowing the number of means he broadens the scope of his invention. He has not, therefore, reissued for the same invention."

On this ground, the bill of complaint was dismissed, with costs. Hartford et al. v. Hollander (C. C.) 158 Fed. 103.

An appeal from this decree brought the case for review before the Circuit Court of Appeals for the Second Circuit (163 F. 948, 90 C. C. A. 308), and the court, discussing at length the sole ground upon which the bill was dismissed below, to wit, the decreed invalidity of the reissue, adjudged the same to be valid, and assuming the validity of the patent, infringement was found and the decree of the court below was reversed.

In October, 1908, in a suit between the same complainants and Joseph Harris, trustee in bankruptcy of the Diezemann Shock Absorber Company, bankrupt, on a rule made by Judge Lacombe requiring the defendant trustee to show cause why an injunction should not issue against him, according to the prayer of the bill, and why the infringing devices in defendant's possession and control should not be destroyed, counsel were heard on behalf of both the complainant and defendant, and after due consideration an injunction was ordered against the defendant, and further, all of the said infringing devices in his custody or under his control were ordered to be destroyed by him in the presence of complainant's counsel. (See Record, pp. 12, 13.)

Afterwards, suit was brought in the Circuit Court for the Southern District of New York, by the same plaintiffs against one Moore (181 Fed. 132), the bill of complaint alleging infringement by the defendant and praying for an injunction, etc. The same issues were raised by the answer as to the validity of the reissue patent—anticipation and lack of invention—as are here raised, and after final hearing in June, 1910, the court (Hand, J.) delivered its opinion, sustaining the validity of the reissue patent on the opinion of the Circuit Court of Appeals, in Hartford et al. v. Hollander, above referred to, and after a full discussion of the other defenses, entered a decree holding the patent valid and infringed.

After careful consideration, not only of the oral arguments of the able counsel on both sides, but of their voluminous briefs, we think the learned judge of the court below was right in his conclusion, and

that the decree as to the validity of the patent and infringement by the defendant should be affirmed.

It is true that the learned judge in his memorandum said that he doubted that the patented device showed invention, but added that his doubt was not of such an abiding or convincing character as to justify him in deciding otherwise, and that he was therefore constrained by the prior adjudications that had expressly adjudicated the validity of the patent. The learned judge, however, has no difficulty in finding the defendant guilty of infringement. A careful consideration of the expert testimony and the exhibited drawings of the defendants' mechanism compels us to agree with the court below, that they embodied the same idea of means as found in the complainants' device, in absorbing the shock created by the greater movement of the body of the car toward and from the springs, and particularly as to the rebound when the greater obstruction to the movement of the automobile is encountered. We also agree that the fact that in defendants' device there is presented both a lesser and a greater area of friction surface, while in complainants' there is but one, corresponding to the greater of defendants, and that in the lesser up and down movements of the car, only the lesser friction device of the defendants is employed, is no answer to the charge of infringement, when its greater friction device is used in the greater movements of the car. Undoubtedly, as the learned judge says:

"If the defendants' device had been a part of the prior art, the complainants' would have been clearly anticipated thereby."

We think, however, the reasoning of the Circuit Court of Appeals in the case referred to is quite conclusive as to the validity of the reissue of the patent in suit, and precludes the necessity of further discussion on that point by this court. We think also that the opinion of the Circuit Court for the Southern District of New York, delivered by Judge Hand, in the case of Hartford et al. v. Moore, supra, clearly and satisfactorily discusses and disposes of every important question raised in the present suit, touching the validity of the patent, whether depending on its relation to the prior art or upon the patentable invention that may be involved therein. After the filing of this opinion, an application was made and granted for a rehearing, on the ground of certain prior uses discovered by the defendant embodied in the Columbia bicycle and the Victor bicycle, in which friction joints were alleged to have been used, which embodied and anticipated the essential feature of the complainants' device. After rehearing, Judge Hand refused to disturb the decree already made and accompanied his refusal by an opinion, in which he exhaustively discussed these alleged prior uses. The learned judge finds that these rotary frictional joints disclose nothing that was characteristic of the patent in suit, and "consisted only of a specific use, or rather misuse, of the machines which themselves contain no suggestion of the patent." The reasoning of both the original opinion and the opinion on the rehearing are so complete and satisfactory that we have determined not to incumber the reports by attempting to add another and independent opinion to those to which we have referred. As we have said, they completely

and satisfactorily to this court cover the questions involved in this appeal. Adopting, therefore, the reasoning and conclusions reached by the courts referred to, in both cases, we affirm the decree of the court below.

STEIGER et al. v. WAITE GRASS CARPET CO.

(District Court, E. D. Wisconsin. February 21, 1912.)

No. 156.

1. PATENTS (§ 167*)—SCOPE—DEVICES WITHIN PRINCIPLE OF INVENTION.

A patentee, who describes and illustrates what he deems the best embodiment of his invention, is not confined to such form, but is entitled to any other form which is within the principle of operation of his invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FEEDING DEVICE FOR GRASS TWINE MACHINE.

The Jerrems patents, No. 745,625 and No. 824,871, for feeding mechanism for grass twine machines, having as elements opposing blades, both having serrated edges and one a vibratory motion, while valid and meritorious and showing a considerable advance in the art, cannot be construed to cover a device for handling the grass stems by what is called the rotary system, which was in the prior art. As so construed, *held* not infringed by a device having a rotary member instead of the reciprocating blade of the patent and the opposing blade without serration.

In Equity. Suit by Emil H. Steiger and Thomas W. Jerrems against the Waite Grass Carpet Company. On final hearing. Decree for defendant.

Williamson & Merchant (Jas. F. Williamson, of counsel), for complainants.

Samuel W. Banning (Thomas A. Banning and Walker Banning, of counsel), for defendant.

SANBORN, District Judge. Suit on letters patent No. 745,625, applied for January 15, 1903, and No. 824,871, applied for September 21, 1905, for feeding mechanism for grass twine machines, issued to complainant Jerrems. Two claims only are in issue, being the first claim of each patent, as follows:

"1. A feeding device for a machine of the character described, comprising opposing blades or bars having co-operating serrated edges, and means for vibrating one or more of said blades or bars to produce the feeding action, substantially as decribed."

"1. In a feed device of the character described, the combination with opposing blades or bars having co-operating serrated edges, of means for vibrating one or more of the said blades to produce a feeding action, and a vibratory agitating arm arranged to act upon the grass blades in the vicinity of the point where the said blades make their entrance between the said serrations of said blades or bars, substantially as described."

The difference between the two claims consists in the additional element of the vibratory agitating arm mentioned in the second claim.

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

Defendant pleads noninfringement and anticipation by the prior art.

Both patents were granted by the Patent Office without objection by the first official action, and without the citation of any reference to the prior art. It also appears in proof that the agitating arm of the second patent was put on to the first operative machine made under the two patents.

The operation of the feeding device of the first patent is thus described in the patent specification:

"The principal feature of my invention resides in the grass-feeding device for feeding, in an even order of succession, the long wiry grass stems to the twisting devices or to other devices which are to receive them. This grass-feeding device involves co-operating blades or bars having serrated edges—that is, teeth or similar projections which co-operate to feed the grass stems one or more at a time—one or more of said feed bars or blades having a vibrating movement to produce the feeding action.

"The character a indicates three vertically disposed feed blades or bars having serrated inner edges a^1 and beveled inner edges a^2 above the said serrations. At one side two of the feed blades a are located parallel to each other, but spaced apart laterally, while the one co-operating blade on the other side is so located that it works in a plane passing between the co-operating blades on the other side, as best shown in Figs. 10 and 12. The co-operating beveled surfaces a^2 form an upwardly diverging crotch, which leads downward to the serrated edges of the feed blades and is adapted to receive the butt ends of the bunch of long grass blades, as best shown in Figs. 2 and 9, wherein the character z indicates such grass blades. The said feed blades a are guided for true vertical movement by slot-and-pin engagements a^3.

"Under the rapid but very short reciprocating motions of the co-operating feed blades or bars a, their serrated edges a^1 will work downward the butt ends of the grass blades or stems in an even order of succession, to wit, one or more for each reciprocation, but always approximately the same number for each reciprocation—and will drop the same where their ends will stand in position to pass between the co-operating feed rollers a^{11}. By the feed rollers said grass stems will be fed endwise into the corresponding receiving ends of the guide spouts c^9, and as they are drawn through these feed spouts they will be loosely twisted together under the actions of the primary twisters."

And the improved device of the second patent is thus described by the patentee:

"It will be noted that the construction and arrangement of parts are such that the toothed free end of the agitating arm 12 will move downward while the single blade on the corresponding side is being moved upward and while the two blades on the opposite side are being moved downward. This agitating arm therefore stirs up the grass blades at the bottom of the gathering crotch and prevents clogging of the grass blades at this point, and, furthermore, positively forces downward certain of the grass blades, so that they will be positively caught by the teeth of the single blade. The grass blades are thus positively started on their way downward between the serrations of the opposing blades and will be moved downward in a regular order of succession under the alternate reciprocations of the opposing blades."

Defendant's counsel give their idea of the Jerrems conception, which is repeated here for greater clearness:

"The first Jerrems patent in suit relates to a machine for feeding wisps of grass or straw from a bunch or mass in the hopper in an even order of succession. The wisps thus fed or started downward form a procession of overlapping lengths of material which are advanced by suitable means to a twisting mechanism, which serves to lash them together into a double-stranded

twine. We may confine our attention particularly to the devices for feeding forward the lengths of grass or straw and starting this procession, since the present suit concerns itself but slightly with the remaining portions of the machine. Such devices consist of a set of blades or bars having their edges *in parallelism* and very close together, and having downwardly extending teeth or serrations formed on the edges. As shown, a set consists of a pair of blades or bars which oppose a single blade or bar, with its edge intermediate the edges of the bars composing the pair. Those oppositely disposed members are mounted to have a *reverse reciprocation.* That is, the single blade or bar moves upwardly as the opposing bar moves downwardly, and vice versa. The degree of movement is sufficient to cause the teeth of one of the opposing members to move past the teeth of the other opposing member, with the result that grass or straw which is caught between the teeth will be fed or flexed downwardly by a step by step movement.

"The mass of material lies immediately above and between the diverging upper edges of the blades or bars, with the result that there will be an alternate selection and deflection of the blades of grass, first by the single bar and then by the opposing pair of bars. The grass will be caught and pulled down or segregated from the mass in this alternate manner, and thereafter it will be carried progressively downward, first by the action of one of the blades or bars, and then by the action of the others.

"Mr. See fully describes the construction and mode of operation of this Jerrems feeding mechanism on page 191 of the Record and following. After describing the structure of the device, he said (paragraphs 56 and 57):

" 'The lower portion of the blades, the portions below the crotch, have their contiguous edges provided with saw-teeth or serrations, as seen on a larger scale in Fig. 11. These teeth are formed in ripsaw fashion and present themselves downward. If the right-hand reciprocating blade goes up and the blade of grass, or possibly two blades, gets in under the top tooth, the blade of grass will be carried downward as the reciprocating blade descends, down about a sixteenth of an inch. When the metallic blade rises again, the sloping back of the tooth pushes the blade of grass over into a tooth of the left-hand member, which not only keeps the blade of grass from rising, but pushes it down as the left-hand blade descends. The blade of grass will therefore be moved downward about a sixteenth of an inch, at each descent of each metallic blade, and eventually the blade of grass will have seesawed its way down through and out from between the toothed bars; the grass blade, in its descent, being in the bite of a downwardly presenting tooth of one bar and then shifting over into the bite of a downwardly presenting tooth on the other bar, and so on in zigzag order downward. While this first blade of grass is moving downward, step by step, it is being followed by other blades of grass withdrawn in succession from the mass, so that it may be reasonably assumed that as the toothed blades are performing their reciprocating work all of the teeth contain grass; a flat, thin stream of blades of grass thus moving downward in step by step order. As the blades of grass drop from the lower ends of the toothed edges, they are carried away in overlapping order to the other portions of the twine making machine, which twist up the stranded grass, twisting two strands simultaneously and simultaneously twisting the two strands together to form a cabled twine.

" 'In the example illustrated, both of the toothed bars are given their reciprocating motions. If one of the bars was stationary, the blades of grass would be carried down in the same manner, going step by step from one tooth in one bar to the next tooth in the other bar; but the rate of feeding capacity would only be half as much as in the case of both bars being reciprocated. The patent appears to contemplate the employment of both bars or blades as reciprocating agents, or, alternatively, the employment of one stationary toothed blade and one reciprocating toothed blade.'

"Evidently the term 'agitating arm' can have no meaning or significance, unless we study the specification to learn what is agitated and how the agitation is effected. It is clear that the term 'agitating arm' is not intended to refer to a packing device which acts with substantial uniformity upon a large portion of the unorganized mass of grass in the hopper. It does not serve to *force* the grass downward by a packing movement, but merely serves

to take hold of a few of the blades in immediate proximity to the crotch, in order to carry these particular blades of grass into the bite of the serrated feeding bars.

"The characteristic feature of this agitating arm is that it acts upon small quantities of grass. It is an instrument or device peculiarly designed to act in conjunction with a special kind of feeding mechanism; that is, with co-operating serrated blades or bars having an alternate reciprocation. It is a 'mechanical packer' in a broad or generic sense, in that it assists in carrying down the mass to the point where definite and permanent segregation of successive units is effected; but it also assists in a very pronounced way in definitely effecting this selection, since it acts on only a few of the blades at a time and not on the mass as a whole, so that it, in truth and in fact, combines the functions of a selector with the functions of a packer. Neither the bar 28 nor the bar 29 of defendant's machine does this."

Complainant's expert describes the invention as follows:

"While the Jerrems patent thus shows a complete machine for automatically producing his particular twine, claim 1 of his patent relates exclusively to the means by which the successive stalks or stems of grass are selected out from a mass and delivered in the required order of succession to the secondary feeding devices, which, as shown in that patent, consist of a pair of feeding rolls. These means for successfully selecting and feeding forward to the secondary feeding rolls the stalks or stems of grass that are to enter into the formation of this twine consist of a plurality of members, which are disposed on opposite sides of the line of travel of the stalks or stems of grass through the machine, with their opposed co-operating edges, provided with serrations or teeth. The forms of these members, under the recitation of claim 1 of the patent, may be modified in various ways to suit them to the particular location or machine in which they are to be employed. In the specific form of the invention, which has been selected for the purpose of illustration of its principle, however, these members are constructed in the form of flat plates, called in the patent 'blades' or 'bars,' with their opposed co-operating serrated or toothed edges made straight, and three of these members are employed.

"As thus constructed, these blades or bars are arranged to move vertically, with two of their number arranged a short distance apart in parallel relationship to each other, and disposed on one side of the line of travel of the grass through the machine, in which position they are connected so as to move together, while the other or third member is arranged on the opposite side of this line, in a vertical plane passing between the two members of the former or first-mentioned side.

"With the blades or bars arranged as thus explained, a relative or vibrating movement is imparted to them by appropriate means. The particular form of these operative means, under the recitation of the first claim, is unessential; it only being required thereunder that they be sufficient to impart to them the requisite relative or vibrating movement. In the specific form of the invention shown in the drawings of the patent, however, it consists of a shaft, which is mounted in suitable bearings formed in the framework of the machine, and is provided with oppositely arranged cranks, which are respectively connected to the plates or bars on the opposite side of the line of travel of the grass through the machine by suitable connecting arms, whereby as the one, on the one side of that line, is moving in one direction, those on the opposite side thereof are moving in the other direction, and vice versa.

"With the parts arranged and organized as thus explained, the stalks or stems of grass, when deposited in the crotch at the upper end of the blades or bars, will extend inward across them to the proper distance, which, in practice, is generally limited by an abutment, supported from the framework or other part of the machine; and the operation of the blades or bars upon the stalks or stems will tend to move them in a direction transverse of their length along and between the opposed and co-operating serrated or toothed edges to the place of discharge, where their butt ends are delivered to appropriate secondary feeding devices, which, in the form of the invention shown in the drawing, consists of a pair of feeding rollers, located slightly in the

rear of the blades or bars, and rotated from any appropriate part of the machine.

"Under the recitation of the first claim, no restriction is imposed upon the construction of these blades or bars, beyond the fact that they may be arranged in opposition and have co-operating serrated edges. It is not required by this recitation that the portions forming the 'crotch' for receiving and holding the stocks or stems of grass be made an integral part of them. On the contrary, under it, the part forming such crotch or receptacle may be separate therefrom; and, under it, it is not required that the co-operating, serrated edges have any particular linear form, and they may be either straight or curved or any other form that will adapt them to any particular location, or to any particular form of grass twine making machine that is provided with means for moving the stalks or stems longitudinally of their lengths after they have been deflected laterally or transversely of their length to carry their ends into engagement with the means employed for moving them longitudinally.

"By the term 'blades or bars,' I understand, from what is shown in the drawings of the Jerrems patent, is meant devices that are made in plate or bar form.

"The same is also true respecting the means made use of for vibrating one or more of said blades or bars to produce the feeding action. Under the recitation contained in the claim, no limitation is imposed upon the construction of the means for producing this result; it only being required under it that the means be of such a character as will efficiently vibrate one or more of said blades or bars to produce the feeding action. Beyond this, there is no requirement as to their construction in the recitation, and any of the ordinary or well-known forms of motion transmitting devices, that are capable of imparting this vibrating movement to one or more of said blades or bars, to produce the feeding action, may be employed.

"From the movements imparted to the blades or bars, as shown in the drawings of the patent, I understand is meant by the term 'vibrating' any back and forth movement of one blade or bar, relatively to another, or others, or of all the bars back and forth relatively to each other or one another.

"In other words, I understand from the file wrapper and contents of this patent, 'Complainants' Exhibit 32,' that the patentee, Jerrems, was the first to produce a feeding mechanism or grass twine making machine, which operated to select and separate out, from a mass, stalks or stems of grass, and bend or deflect them transversely of their length, into engagement with devices that are adapted to move them longitudinally, by the relative movement of one or more of a plurality of serrated or toothed edges with respect to the other, or each other."

The practical form of the patented feeding devices is quite different from the form shown and described. The reciprocating motion is omitted, the two blades on one side made stationary, and the opposing blade vibrated toward and away from the others. To aid in getting the grass down to the point where it may be caught and a small portion selected, by the notches on the vibrating blade, the agitator of the second patent is employed. Then the notched portion of the vibrating bar is made semicircular convex, and the notched portion of the opposing blades semicircular concave; the edges of the three being so near each other as to handle the grass with great rapidity and efficiency. When a wisp of grass is caught in one of the notches of the vibrating convex blade, it is moved downward a step by the approaching vibration, and held in position by the opposite notches of the concave edges of the stationary blades while the retreating vibration occurs. A second downward movement rapidly succeeds the first, another wisp is caught and carried downward, while the first wisp is carried downward a second step. Thus, by a succession of quick forward and backward

movements, proper amounts of grass are fed down into engagement with the twine-forming mechanism. This form of machine comes within the general terms of the claims, having opposing blades or bars with serrated edges, and means for vibrating one of the blades to produce the feeding action.

Defendant's alleged infringing machine substitutes the notched rotary disk of the prior art for the vibrating semicircular convex blade and omits serrated edges on the opposing blade, using one instead of two. It employs the agitating arm to get the grass down to the notched disk, and an additional element consisting of a vibrating packing arm opposite the agitator with teeth as large as those on a gang saw for the purpose of forcing the grass down so it may be caught by the notches of the rotary disk and carried into the secondary rolls.

The two important functions in grass twine feeders of the type under consideration are (1) the supply feeder or grass holder, and (2) the selecting feeder. The patent supply feeder, or device for getting the grass down to the place of selection, is quite different from defendant's. Treating the agitator of the patent device as the equivalent of defendant's agitator, there is nothing in the patent drawing to suggest the toothed arm of defendant's. This addition, however, would not of itself prevent infringement. Defendant may be therefore properly regarded as an infringer so far as the first step or supply feed is concerned. The use of an additional element, by way of improvement, in no manner affects the question of infringement, because, as to this first step, defendant uses all that complainant does, and uses it in the same way.

As to the second step, made by the selecting feeder, if complainants are to be properly confined to the one form of selector shown in the drawings, there is a radical difference between the two, so great that defendant could not fairly or reasonably be held to infringe. The illustrated selecting mechanism of the patent selects the small bunches of grass just below the throat of the supply feeder or holder by purely reciprocating motions of the notched blades. In this form of the patented device the wisps of grass are selected by the notched blades, and moved down, step by step, by reciprocations of the notched blades. Defendant uses a different system, consisting of a notched rotary disk opposed by a concave member with a smooth edge. But in its practical form the patent device takes a somewhat different mode of operation. One of the blades is widened at the lower end; one edge taking the form of the segment of a circle with notches. This is made to vibrate back and forth in the arc of a circle, while the opposite blade is made with a concave edge with notches to hold the grass during the backward motion of the vibration. In defendant's device a notched disk rotates against the smooth edge of the opposing member. If therefore the patentee is confined to his illustrated form, there is no infringement.

[1] But the patentee is not so confined. He expressly says that the machine is capable of "a large range of modification within the scope" of the invention.

"An inventor must describe what he conceives to be the best mode, but he is not confined to that. If this were not so, most patents would be of little

worth. 'The principle of the invention is a unit, and invariable; the modes of its embodiment in the concrete invention may be numerous, and in appearance very different from each other.'" The Paper Bag Case, 210 U. S. 405, 418, 28 Sup. Ct. 748, 52 L. Ed. 1122, 1128.

So the real question is whether defendant's selecting rotary notched disk in co-operation with the concave smooth edge of the upright plate bar is within the principle of operation of the patent, as well as within the first claim.

[2] Turning to the claim, and to complainants' present form of device, we find that the requisite elements are: (1) Opposing blades or bars; (2) having co-operating serrated edges; (3) means for vibrating one or more of the blades or bars to produce the feeding action. Then, looking at defendant's machine, it is at once seen that the second and third elements are wanting. There are not only no serrated edges in both of the opposing blades or bars, but no vibration. The rotary notched disk is one of the opposing blades, under fairly liberal construction; but the co-operating edge of the opposite blade is smooth, not serrated. And in addition the third element, a vibratory member is also absent. Rotation is substituted for vibration. By this change in the mode of operation, the notching or serration of the opposing blade is rendered unnecessary.

This, however, only leads to another question, which is whether the invention is broad enough to include defendant's changed construction as equivalent; in other words, whether the position of the patent is such as to entitle it to a range of equivalents broad enough to include defendant's changed form.

Lowry was the pioneer in the art of making grass twine, but his machine operates on principles totally distinct from that of Jerrems. By Lowry's selecting means small wisps of grass are caught by fingers operating longtitudinally to the grass stems, and thus fed forward into the secondary mechanism. Jerrems' operation is transverse to the position of the stems, selecting and measuring the wisps of grass by lateral deflection, and the process is quite different, as well as much more simple. No other inventor came into this particular field between Lowry and Jerrems, thus making a wide gap between them so far as the special art of feeding apparatus for grass twine machines is concerned, since Monahan and Kieren do not anticipate Jerrems, as shown in the opinion filed herewith.

There are, however, a number of patents earlier than those in suit which operate upon principles similar to defendant's machine, using what is called in the testimony the rotary system. In this class are the Howe patent, No. 430,650; Bazerque, No. 485,146; Tejada, No. 584,655; Ellis, No. 701,183; Behel, No. 93,165; and Stephens & Carter, No. 369,479. These are machines for making cigarettes, grain binding, straw handling, and flax handling. The only one of these which is pleaded in the answer is the Howe patent for a band twister. All of them were designed to work on the rotary plan. Not one of them anticipates Jerrems, nor would they anticipate defendant if its machine was patented, nor Wessel, whose construction defendant adopted, with some change. But they are all in arts closely related, and justify de-

fendant in the position that it adopted a system of handling grass stems well known to the art prior to Jerrems, being the rotary system referred to. Its machine does what had often been done before Jerrems entered the field. It would therefore seem to follow that, as defendant's selecting device leaves out two elements of the Jerrems patents, opposing blades both having serrated edges and vibratory motion, it cannot be held to infringe in view of the considerable number of patents earlier than Jerrems which show substantially the rotary system which it adopted.

The Jerrems patents are meritorious, and a considerable step in advance; but, if construed to cover the rotary system of selection, they are so narrowed by what had gone before that the use of such system cannot be infringement.

The bill should be dismissed, with costs.

OSHKOSH GRASS MATTING CO. v. WAITE GRASS CARPET CO.

(Circuit Court, E. D. Wisconsin. February 21, 1912.)

No. 148.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—GRASS TWINE MACHINES.

The Monahan and Kieren patents, No. 688,789 and No. 785,070, for grass twine machines, disclose invention, being a step in advance of prior machines in the line of cheapness, simplicity, and speed, but are for improvements only, and of narrow scope. As so construed, *held* not infringed.

In Equity. Suit by the Oshkosh Grass Matting Company against the Waite Grass Carpet Company. On final hearing. Decree for defendant.

A. L. Morsell, for complainant.

Samuel W. Banning (Thomas A. Banning and Walker Banning, of counsel), for defendant.

SANBORN, District Judge. Suit for infringement of two patents, issued to Monahan and Kieren, now owned by complainant, respectively dated December 10, 1901, and March 14, 1905, and numbered 688,789 and 785,070, on machines for making grass twine for matting and rugs. The case of Steiger v. Waite Grass Carpet Co., 194 Fed. 878, decided herewith, relates to feeding devices for grass twine machines, by which the grass is brought into the machines in proper order and amount. The machines here involved take the grass so delivered and make it into twine.

The conception of the patentees was to construct a machine to make a "straight" twine, in place of twisted, as produced by the earlier Lowry machines. In order that the straight twine may be soft and pliable, it is necessary to crush the grass skin during the passage through the machine. This crushing process was done by the twisting in the Lowry devices. The patentees also sought to largely

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

increase product by higher speed, and diminish the initial expense by a simpler machine, as well as by making more twine per hour. All these objects were finally accomplished. Their commercial machine is much less expensive to build, and it makes twine at a high rate of speed. No practical machine was built under the first patent; but in 1901 a machine was produced, embodying the conceptions of parts of both patents, but omitting several of their elements. The inventors were striving for a simpler and more efficient device, which they were finally able to produce, making straight grass twine lashed together by winding, after the epidermis had been crushed.

Lowry was the pioneer in the art, and his machine is the most extensively used; the company now making twine by his process having built up an enormous business. When the third Monahan and Kieren machine appeared, infringement suits were brought by the owner of the Lowry patents, in which it was decided that the Monahan and Kieren machine did not infringe. American Grass Twine Co. v. Choate, 159 Fed. 140, 86 C. C. A. 330; Id., 159 Fed. 429, 86 C. C. A. 409. In the second opinion Judge Baker said that the inventive genius of Lowry was displayed, if at all, in modifying, combining, and adapting old elements to work successfully upon the materials used. "'There is room for such an adapter to have only a specific patent for his particular form of adaptation, and he is not privileged to exclude others from gleaning in the same general field.' * * * Considering Lowry and the patentees of appellees' feeder 'as alike having improved on the prior art, the question is whether the specific improvements of the one actionably invade the domain of the other. The presumption from the grant of the letters patent is that there was a substantial difference between the inventions." While this language was used with respect to the initial feeding mechanism, yet it applies generally to the whole of the devices then considered. It is evident that the Lowry invention deprives the patent constructions in question of any great breadth or scope.

For the purpose of procuring material for making mats and rugs, the object of a grass twine machine is to rapidly make twine of uniform size out of wire grass, by selecting a proper amount from a mass, moving forward or advancing it, bringing it together, crushing its skin to make it more pliable or soft, and winding it with thread. The important elements involved in this case are selection, forward movement, condensation or bringing together, and compression or abrasion of the cuticle. The commercial machines of both parties each possess all these elements, operating by different means and in a different way. The claims sued on do not, however, cover the element of selection per se, because defendant's selecting device does not advance the material used, although complainant's does. The claims of the first patent here in question are:

"23. In a machine for making twine, the combination of means for forcing the material forward, means for bringing the lengths of the material close together, compression-means adapted to compress the material, after the lengths of said material are brought close together, and means, after the material is compressed, for wrapping the twine therearound.

"24. In a machine for making twine, the combination of means for forcing

the material forwardly, a funnel into which the material is received, compression-rolls adapted to receive the material therebetween, after said material leaves the funnel, and means, after the material is compressed for wrapping a twine therearound."

Ten claims of the second patent are involved, three of which follow:

"9. In a material-feeding device the combination of a frame constructed for the travel therethrough of the material to be acted upon, a rotable roll journaled in the frame, a series of revoluble devices co-operating with the roll, each revoluble device provided with a concentrically-curved edge, the said devices being so set that the material is always acted upon by one or more of the curved concentric edges, whereby said material is pressed against the roll and moved along the frame of the machine."

"17. In a material-feeding device the combination of a frame constructed for the travel therethrough of the lengths of material to be operated upon, a pair of draw-rolls arranged in line with the travel of the material and transverse of the lengths thereof, and roller means for starting or forcing the ends of successive lengths of the material between the draw-rolls, whereby said rolls serve to grasp and draw a portion of the lengths of the material."

"24. In a material-feeding device, the combination of a frame constructed for the travel therethrough of the material to be operated upon, mechanism for moving the material along the frame, one member of said mechanism being movable and adapted to act at different longitudinal portions thereof successively on the material fed into the machine, and the other member thereof having an opposing surface co-operating, and adapted, in connection with the successively-acting portions of the other member, to start the movement of the material along the frame of the machine, and a pair of draw-rolls arranged in line with the travel of the material and transverse of the lengths thereof, and adapted to receive therebetween the lengths of material moved by the material-moving mechanism, and thereby draw said lengths of material therebetween."

The compression means claimed in the first patent are necessarily friction means, in order to crush the cuticle of the grass and make it soft and pliable. Undriven rolls for this purpose are shown. In the commercial machine these rolls are wanting, and the mouth of a funnel substituted. The funnel is located at an angle to the line of draft, so that the material is drawn around this angle and the grass skin scraped off. No friction means are used by defendant, but in going through the three sets of rolls the cuticle is rubbed off, and the same result reached as in complainant's operating machine. As the grass comes to the machine the stems are covered with a hard cuticle, which makes them brittle, and, if not crushed or scraped off, renders the twine stiff and brittle. In the Lowry machine the crushing was accomplished by the twisting process, while in complainant's machine this is done by scraping the stems, just before wrapping, through the funnel nose, which is the same size as the completed twine. Defendant accomplishes this by its second pair of draw-rolls, operating before the stream of grass is finally brought together in the funnel.

Coming, now, to a comparison of the complainant's and defendant's machines it is found that the first selects and pushes forward the grass by a series of revoluble devices working longitudinally of the grass stems, while the second employs the notched disk described in the Steiger Case, which only selects, and which rotates at right an-

gles to the grass stems. This particular means of "forcing the grass forward," counted on in claim 23, is wanting in defendant's selector. To perform this same function of advancing the grass complainant's machine employs, not only its feeding device, but tail and draw-rolls and a pair of driven smooth rolls immediately next to their selector. Defendant, on the other hand, uses three pairs of draw-rolls. As to the condensing operation, complainant's spreads out the grass in a thin, wide layer, advances it through the first pair of rolls partly through the pull of the tail end draw-rolls, and then brings it together in the funnel nose by the contracting walls of the funnel, partly by gravity and partly by the draw-rolls. In defendant's machine this compacting process is almost wholly absent, for the reason that its feeding disk delivers the stems in line with the completed twine, so that only a little bringing together is necessary. This is done, not by gravity or draw-rolls at the end of the machine, but by threads on the second pair of rolls and a horizontally disposed funnel. The third step mentioned in claims 23 and 24, that of compression or crushing of the cuticle, is done in complainant's process, as already explained, by pulling the stems across the funnel nose after they have been compacted and left the funnel, while in defendant's machine this crushing process is effected by the second pair of rolls, before the grass reaches the funnel and before any condensation of the stream occurs.

Not only is it evident that the patents in suit are not entitled to a very broad construction, in view of the decisions of our own Court of Appeals in the cases referred to, but there are many machines in the prior art which employ the principle of advancing straw, wool, excelsior, flax, hemp, etc., by means of power driven rolls. In view of this situation, while I find the Monahan and Kieren patents covered a step in advance, in the line of simplicity, cheapness, and speed, yet I think defendant employs different means and a different mode of operation; such means and mode being sufficiently distinct to negative infringement, giving the patents as liberal a construction as they ought to have.

The patents should be sustained, but held not infringed.

Decree for defendant, with costs.

WESTINGHOUSE ELECTRIC & MFG. CO. v. SUTTER et al.

(Circuit Court, W. D. Pennsylvania. February 21, 1912.)

No. 3.

1. PATENTS (§ 327*)—SUIT FOR INFRINGEMENT—EFFECT OF PRIOR DECISIONS.

Where a court is in doubt as to the correctness of its own views upon the question of the validity of a patent which has been adjudicated in other circuits, the rule of comity applies, and it should follow the prior decisions.

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

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

2. PATENTS (§ 328*)—INFRINGEMENT—ELECTRICAL TRANSFORMER.
The Stanley patent, No. 469,809, for a system of electrical distribution, construed, and *held* not infringed.

In Equity. Suit by the Westinghouse Electric & Manufacturing Company against Frederick C. Sutter and others, trading as the Pittsburgh Transformer Company. On final hearing. Decree for defendants.

Gifford & Bull, for Westinghouse Electric & Mfg. Co.

Clifton V. Edwards and S. S. & C. B. Mehard, for the Pittsburgh Transformer Co.

ORR, District Judge. This patent case is before the court upon final hearing. Since the bill was filed the patent has expired. Therefore no relief is sought except compensation for infringement. Before granting relief, the court must be fully satisfied that the patent was valid, and that the defendant infringed. No other questions have been raised.

The patent was issued to William Stanley, Jr., by the United States on March 1, 1892, was numbered 469,809, and was for a "system of electrical distribution." It relates to alternating current transformers or converters. A transformer having no moving part is structurally very simple. It consists of an iron core, about which are wound two separate unconnected coils of wire; one connected with the dynamo called the "primary coil," the other connected with the lamps called the "secondary coil." Its utility is in its power to transform an electric current of high tension to one of such low degree as to be reasonably safe for domestic use. The transformer was old in the art at the date of the Stanley patent. To make it self-regulating had been the aim of inventors for some time prior to that date. What they hoped to produce was a transformer which would cause a fixed amount of light in each used lamp connected with the secondary wire, no matter how many lamps thus connected were in use. Dimness in the lamps as more were lighted was then the undesirable feature of the existing transformers. It is insisted by the complainant that Stanley made the discovery that the trouble was due to an improper length of wire on the primary core. In his patent Stanley says:

"This should be of such length that reacting self-inductively upon its own magnetic circuit the average counter-potential so produced approximately equals the potential applied to the primary circuit. When so constructed, an ammeter will practically show no current when the secondary circuit is open. To obtain these results in practice I use the following method: I first choose the percentage of efficiency to be obtained. Then having selected a type of magnetic current affording as great magnetic conductivity as possible, I apply such a length of primary conductor that acting self-inductively upon its core the difference of the counter-potential and applied potential multiplied by the current in the converter shall equal the predetermined loss of energy inevitable in conversion and vary the length of primary wire until the desired results are obtained."

The claims of the patent in issue are as follows:

"1. In a system of electrical distribution, and in combination, an alternating current dynamo and converters electrically connected with the main-line

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

conductors in multiple arc and organized to transform the current in the main conductors into currents of less potential and greater quantity in the secondaries, each converter made with a primary coil containing such length of wire exposed to magneto-electric induction that when operated by the dynamo with which it is to be used with its secondary current open the electrical pressure and counter-pressure in its primary circuit shall be equal with incandescent lamps or other translating devices in the secondary circuits, substantially as and for the purposes set forth."

"3. In a system of electrical distribution and in combination, an alternating current-dynamo and converters organized to transform the current generated by the dynamo into currents of less potential and greater quantity at or near the points of consumption electrically connected with the main-line conductors in multiple arc and having their primary circuits constantly closed, each converter adapted to the dynamo operating the system by making its primary coil of such length that when supplied with its full proportionate share of the entire normal electro-motive force of the machine, its secondary circuit being open, the electrical pressure and counter-pressure in its primary circuit shall be approximately equal with translating devices in the secondary circuits of the converters to be cut out of the circuit when not in use without the introduction of any resistance in the place of them, substantially as and for the purposes set forth."

In each of the claims the most important element is such length of wire in the primary coil, etc. Those courts which have sustained the patent have held that its essential feature is the disclosure of the length of the primary wire. They have all assumed or found that a definite length of primary wire was necessary in order that a transformer should produce the desired result.

In Westinghouse Electric & Mfg. Co. v. Saranac Lake Electric Light Co. (C. C.) 108 Fed. 221, page 226, Judge Coxe says:

"He discovered that he could remedy existing evils by regulating the length of the wire on the primary coil of the transformer. The patent tells those skilled in the art, how to accomplish this result. To the uninitiated, Stanley's rule seems indefinite and obscure, but electricians have no difficulty in understanding it. He determines the correct length of the primary coil," etc.

In the same case (113 Fed. 884, page 886, 51 C. C. A. 514, at page 516), Judge Lacombe, speaking for the Court of Appeals for the Second Circuit, said:

"Stanley suggested that the difficulty was due to an improper length of wire on the primary, and among much else he states precisely, specifically, and exactly what that length should be. The amount of wire for a given character of current supply cannot be stated in feet and inches, because it is, to some extent, dependent upon other things, such as the quality of iron employed in the core, the quality of copper used in the coils, the shape of the transformer, and the way the coils are applied. The Stanley patent, recognizing these variable elements, gives a rule applicable to all conditions."

While these excerpts from the opinions in that case would indicate that Stanley's invention lay in "a certain length of primary winding," it was thought by some that the opinions found the real essence of the invention to be the Stanley rule for arriving at such length. This was the view of Judge Colt in the First Circuit in Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co. (C. C.) 117 Fed. 309. Therefore he refused an injunction because it was conceded that the defendant's apparatus was not made by the Stanley rule. Subsequently, in the Second Circuit it was from time to time specially emphasized that the essence of the invention was the length of primary coil. In

Westinghouse Electric & Mfg. Co. v. Montgomery Elec. L. & P. Co. (C. C.) 131 Fed. 86, Judge Coxe says:

"The essence of the invention is the length of the wire on the primary coil and not the instrument or method by which that length is determined."

In the same case, 153 Fed. 890, 82 C. C. A. 636, the Court of Appeals of that circuit, by Judge Townsend held that claims 1 and 3 of the patent cover combinations in which the length of the primary wire is the same substantially as would result from following the Stanley rule.

[1] In the case at bar it was insisted by the plaintiff that this court was bound by the construction given to the patent by the courts of the Second Circuit, and expert evidence was introduced to explain certain language in some of the opinions. If the phenomena of electricity and its laws had ceased to be in dispute at the date of the patent, if the art was not obscure to those most intimate with it, there would be great force in the position that this court for reasons of comity should adopt the conclusions reached elsewhere. It may well be doubted that any court to-day would reach the same conclusions under the evidence offered in the case. However, because the patent has expired, and an injunction is not sought and because the fact of infringement is not found, the question of the validity of the patent need not enter into this case, but may rest as determined by the courts of the Second Circuit. Indeed, comity is applicable because this court doubts the soundness of its own views of the question of validity. Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856.

Before considering defendant's transformer in the light of the patent, the relations of the parties to this action may be considered. The defendants are the largest independent competitors of the plaintiff in the manufacture of transformers, and have their plant in the city of Pittsburgh about 15 miles from the plant of the plaintiff, which is in the borough of East Pittsburgh. In 1902 plaintiff gave defendant notice of the infringement. In 1908 the bill was filed. On the day the bill was filed a representative of plaintiff visited the electric lighting plant of the Borough of Pitcairn, not far from plaintiff's works, and found in use 11 transformers made by the defendant and 6 made by plaintiff. That plaintiff should have delayed suit so long in the face of such competition indicates that plaintiff had some doubt of defendant's infringement. It is true that a plaintiff's delay is often excused where litigation is in progress in another forum. But the prosecution of suits against users of infringing apparatus, not made by the defendant in the case at bar, in other jurisdictions, coupled with a neglect to sue the largest independent competing manufacturer whose plant and activities are near those of the plaintiff, is a circumstance from which the inference may be drawn that infringement by defendant could not have been shown without difficulty.

[2] The evidence introduced by both sides is great in bulk, most of it being expert testimony of a technical and scientific nature. Hypothetical questions are answered by experts of perhaps equal qualifications in very different ways. Repeated study of the propositions

urged on the part of the plaintiff has failed to convince the court that they have sufficient merit to justify a finding for plaintiff. It is clearly shown that the transformers of defendant are self-regulating, and that in this respect they are like the transformers held to have infringed in the other litigation. That similarity of result may be produced by apparatus of different kinds is a matter of such frequent observation that a mere statement thereof without illustration is sufficient.

It was not made to appear satisfactorily that defendants use the Stanley rule in the construction of their transformers. Many pages of testimony are introduced as to whether in defendants' primary wire there was any difference between the applied potential and the counter potential. Of course, if the difference be o, then the product of such difference and the current as contemplated by the Stanley rule will be o also. Experiments were made by plaintiff's experts and as well by defendants' experts, and were confidently relied upon as settling the question. The former were not made by the use of different lengths of primary wire, but were made by the use of a uniform length of wire, and by repeatedly changed and increased voltage. The latter were made with varied lengths of primary wire and by uniform applied voltage. The former observed a difference between the counter and applied potentials, while the latter did not. The evidence in respect to the latter is more satisfactory, and, when considered with the offer of the defendants to repeat their experiments in the presence of representatives of plaintiff and their declination of such offer, should be considered as convincing. The results of their tests show that with a primary potential of 2,200 volts the counter potential was also 2,200 volts, whether there were 760 or 1,800 turns of primary wire or some intermediate number, and that self-regulation did not cease at any number of turns. The conclusion seems to follow that defendants' transformer is self-regulating without respect to the number of turns of primary wire. If defendants' length of primary wire be not ascertained by the Stanley rule, or be not such as would be arrived at by the use of the rule, then under the decisions above cited infringement cannot be found. Judge Lacombe, in Westinghouse, etc., Co. v. Orange County Gas & Elec. Co. (C. C.) 119 Fed. 365, refused a motion for a preliminary injunction because:

"It cannot be held that the length of wire in primary coil is substantially the same as it would be if such length were determined by the Stanley rule. If it be not substantially the same, we seem to have the very exception suggested in the opinion of the Court of Appeals—'some other length covered by the language of the claim, but not of the rule and infringement is not shown.'"

There are two general types of transformers, called the "core type" and the "shell type." In the former the coils mainly surround the iron, in the latter the iron mainly surrounds the coils. Defendants' transformer is of the former type. All transformers which were the subject of former litigation with respect to the Stanley patent, so far as appears, were of the latter type. The plaintiff has not satisfied the court that there may not be a different magnetic relation between coils and core in the one from that in the other, or a difference

between the electrical or magnetic conditions in each. Hypothesis without test does not answer.

This case is one where the absence of actual fact proof is not met by expert speculations. The plaintiff has not sustained the burden which rests upon it. Its evidence of infringement by defendants is not sufficient.

Its bill must be dismissed, with costs to the defendants. Let a decree be drawn.

NATIONAL ELECTRIC SIGNALING CO. v. TELEFUNKEN WIRELESS TELEGRAPH CO. et al.

(District Court, S. D. New York. March 18, 1912.)

1. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—JURISDICTION—ALLEGATIONS OF BILL.

A bill for infringement of a patent against a corporation of another state *held* to sufficiently allege that defendant committed acts of infringement and had a regular and established place of business within the district, to give the court jurisdiction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*

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

2. PATENTS (§ 291*)—SUIT FOR INFRINGEMENT—SERVICE ON NONRESIDENT CORPORATION.

The provision of Act March 3, 1897, c. 395, 29 Stat. 695 (U. S. Comp. St. 1901, p. 589), that where a suit for infringement of a patent is brought in a district of which defendant is not an inhabitant, but in which such defendant has a regular and established place of business service, "may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought," is permissive only, and where the defendant is a corporation, and a regular officer, upon whom service may be made generally, is found in the district, service may be made upon him.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 291.*

Service of process on foreign corporations, see notes to Eldred v. American Palace-Car Co. of New Jersey, 45 C. C. A. 3; Cella Commission Co. v. Bohlinger, 78 C. C. A. 473.]

In Equity. Suit by the National Electric Signaling Company against the Telefunken Wireless Telegraph Company and others. On demurrer to bill, and motions to set aside service and to vacate suspension of injunction. Demurrer and motions overruled.

See, also, 193 Fed. 424.

F. W. H. Clay, for complainant.

Hector T. Fenton, for defendants.

LACOMBE, C. J. Three proceedings in the action were argued at the same time and may be disposed of together.

[1] 1. The corporation defendant is a citizen of Pennsylvania, and in order to maintain suit for infringement against it in this district it must have committed acts of infringement here and have a regular and established place of business in this district.

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

The corporation defendant demurs to the bill on the ground that it does not set forth facts showing that this court has jurisdiction to entertain a suit against it for infringement.

Leaving out immaterial words, the amended bill avers that defendant is a corporation organized under the laws of Pennsylvania, and is a citizen of the state of Pennsylvania, and has a regular and established place of business in the Southern district of New York; also that defendants (the other two defendants are individuals) have jointly used, and after notice, without license and in violation of complainant's right, continue and threaten to continue jointly to use, within this district, apparatus the same as in the letters patent claimed, etc. I am at a loss to see why the averments of the bill are not sufficient.

[2] 2. The marshal served the subpœna upon the defendant corporation "by exhibiting to Alfred J. Ostheimer, as secretary and treasurer of said company, at 227 Fourth avenue, the within original, and at the same time leaving with him a true copy thereof."

A motion is made to set aside this service, because it was not made by service upon the agent or agents engaged in conducting the business of the corporation in this district. Reference is had to the Jurisdiction Act of March 3, 1897. That act provides that when a corporation, not an inhabitant of a particular district, shall have committed acts of infringement and have a regular and established place of business in such district, service *may* be made upon the agent or agents engaged in conducting such business in the district. This language is permissive merely, and I see no reason why it should be construed as imperative. If the regular officers of a corporation, upon whom service may generally be made, are found here, where the company has a regular and established place of business, there is no necessity for a substituted service on some local agent.

3. When the order was made suspending the injunction, it was provided that:

"Unless the appeal is perfected, record and briefs printed, and appellant ready to argue same at the opening of March session of Circuit Court of Appeals, this suspension will be vacated, or the amount of the security increased."

There has been some delay, but the record has now been printed, and the appeal will be moved on the calendar to-day. The present motion to vacate suspension is therefore denied, with leave to renew, should the appeal not be heard at the April session because of any delay or fault of appellant.

UNITED STATES v. McHIE et al.

(District Court, N. D. Illinois, E. D. March 28, 1912.)

1. GAMING (§ 60*)—CONDUCT OF OFFICERS—ILLEGAL ACTS.

In a raid by special agents of the United States and state police officers on certain offices, in which it was alleged a bucket shop was being operated in violation of Cr. Code, § 215 (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1909, p. 1455]), without a search warrant, such officers had no authority to "hold up" the occupants with a revolver,

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

cut the telegraph wires, and seize the instruments, books, and records of the operators of the business.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 117; Dec. Dig. § 60.*]

2. SEARCHES AND SEIZURES (§ 3*)—WARRANT.

A warrant authorizing a search and seizure of personal property for alleged violation of law may be issued from the clerk's office on a bench warrant after direction by the judge on a verified petition.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.*]

3. SEARCHES AND SEIZURES (§ 3*)—ARREST—WARRANT.

Where an arrest of persons alleged to be engaged in operating a bucket shop was made without a warrant because of the absence of a marshal or deputy, seizures of personal property made at the same time were therefore unlawful.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.*]

4. SEARCHES AND SEIZURES (§ 5*)—RECOVERY OF PROPERTY—PETITION.

Where property was wrongfully seized by federal officers, and was held under claim of judicial process and therefore beyond the reach of a writ of replevin, the owner was entitled to recover the same by petition addressed to the court in which the seizure proceedings were had.

[Ed. Note.—For other cases, see Searches and Seizures, Dec. Dig. § 5.*]

5. SEARCHES AND SEIZURES (§ 7*)—CONSTITUTIONAL LAW (§ 252*)—EQUAL PROTECTION OF LAWS—"PERSON."

Since a corporation is a person within the federal Constitution guaranteeing to all persons equal protection of the laws, corporations are also within the protection of the fourth, fifth, and fourteenth amendments of such Constitution.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. § 7;* Constitutional Law, Cent. Dig. §§ 728–731; Dec. Dig. § 252.*

For other definitions, see Words and Phrases, vol. 6, pp. 5322–5335; vol. 8, p. 7752.]

6. PROCESS (§ 141*)—RETURN—TRAVERSE.

Though a marshal's return is conclusive between the parties until set aside, and may not be traversed in a collateral proceeding, it is not conclusive as against strangers to the writ.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 189–192; Dec. Dig. § 141.*]

Proceedings by the United States of America against Sidmon McHie and others. On petition of the Capital Investment Company for the return of certain personal property seized by federal officers in a raid on an alleged bucket shop operated by the Capital Investment Company. Granted.

James H. Wilkerson, U. S. Dist. Atty., and Robert W. Childs and John F. Voight, Assts. U. S. Atty.

Francis Adams, Jacob J. Kern, Joseph B. David, Hugh Ryan, and John A. Brown, for defendants and Capital Inv. Co.

SANBORN, District Judge. It appears that in December, 1910, petitioner was engaged in Chicago in running an alleged bucket shop, claimed by the officers of the government to be in violation of section 215 of the Criminal Code, relating to the use of the mail in car-

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

rying out a scheme to defraud. Petitioner was not indicted as a defendant. On the 15th of December, 1910, George M. Scarborough, special agent of the department of justice, made a complaint before Mark A. Foote, United States commissioner, in respect to the existence of a scheme to defraud, whereupon a warrant was issued by the commissioner for the arrest of Sidmon McHie and 17 other persons. The only name appearing upon the warrant was that of McHie, but it appears that the names of the other 17 persons were typewritten on two slips of paper, both of which were pasted upon the warrant after the words "Sidmon McHie." Shortly afterwards these slips disappeared, and have not since been found, so that the warrant appears to have been issued only against McHie. The complaint filed with the commissioner contains the names of all the defendants, 45 in number, and it appears that 7 warrants were issued, 6 in addition to the one above described. On the same day Scarborough, Charles F. De Woody, another special agent, and some other assistants, together with about 20 policemen of the city of Chicago, went to the offices of the Capital Investment Company for the purpose of arresting the defendants and seizing the property of the company on the theory that it was being used in the perpetration of a felony. No marshal or deputy marshal was present, nor any person authorized to serve a warrant or make a seizure. At the time of the raid Sidmon McHie was in New York, but some of the officers of the corporation and its clerks and employés were present, about 18 in number, some of them being made defendants.

[1] The Capital Investment Company was doing business in a number of cities in different states, having branch offices connected by private telegraph wires, and, as the special agents desired to raid all of the offices simultaneously, they conceived it to be necessary to cut the telegraph wires in the main office, and seize the telegraph instruments. It appears from the affidavits on the part of the petitioner that, when the arrests and seizure were made De Woody, Scarborough, 10 special government agents, and 25 policemen came to the office of the company, and Scarborough advanced to the center of the room, and drew a large revolver, waving it towards the employés, and calling out loudly, "Throw up your hands, and keep them up, or some of you will get plugged. This place is in the hands of the United States government, and you are all under arrest." De Woody and Scarborough deny that the revolver was a large one, but admit its use.

De Woody testifies that the company had a number of different offices, and that it was the plan of the department to simultaneously arrest the managers of the different offices. Being connected by private telegraph wires, it was desired to put the private wire system out of commission, and, at the time Scarborough drew the revolver, he said, "Take your hands off those keys," which all the operators did, and that thereafter no revolver was flourished by any one in said offices, nor was any officer or employé of the company addressed by any officer except in ordinary conversational tones. All the property of the Investment Company was seized and taken to the government

building in Chicago, including some property which was not in use in their business. Afterwards defendants were allowed access to the rooms containing the books, papers, documents, and other property seized, with the right of inspection and taking copies.

It further appears from the affidavit of Walter Wainwright, deputy marshal, that about 3 o'clock p. m. December 15, 1910, he was requested to make a return upon the warrant above described against McHie and others, and was informed that 12 or 13 men had been arrested upon the warrant. Wainwright had just returned from a trip out of the city to Joliet, Ill., upon official business. He objected to making the return because he was not present and did not make any arrest, but after conferences with the district attorney and De Woody he made the ordinary return showing the arrest of certain of the defendants under the warrant. He testifies that he was not present at the time of the raid, being at Joliet as above stated. The papers show various other facts in relation to the disappearance of the typewritten slips attached to the warrant. Defendants claim that no such slips were attached, while the commissioner and his clerk and other witnesses state positively that the slips were typewritten and pasted upon the warrant, as there was not room on the blank to write all the names. It does not appear that the typewritten slips were seen by any one after the arrest.

Various other irregular acts by the special agents appear, such as the arrest without warrant of a stenographer in the commissioner's office, and, having him put under bond, "just to show him how it was done." He was not made a defendant in the original complaint before the commissioner, nor was any indictment found against him.

It would be exceedingly difficult under any circumstances to sustain the wholesale seizure and destruction of property shown in this case. The officers of the government, deriving their authority from the department of justice, acted in a most unjust and unnecessarily lawless manner. Under no circumstances had they any power to cut telegraph wires or break open a safe or vault. Nothing but a special order showing such a seizure as made it necessary to destroy property could have authorized it. They did not even insure the presence of a marshal, although making an entirely extravagant and wholly unnecessary show of force through policemen, special agents, and the use of the revolver. Such unauthorized raids are most deplorable in exciting the keenest sense of outrage and injustice in their victims, and are utterly opposed to the policy of the government. Even in such desperate cases as counterfeiting, the rules of the Secretary of the Treasury expressly deprecate arrests without warrant, and prohibit searches and seizures without a search warrant, except in cases of arrest. Secret Service Rules, arts. 3, 9. Seizure under subpœna duces tecum so broad as to be invalid as too general under Hale v. Henkel, 201 U. S. 44, 26 Sup. Ct. 370, 50 L. Ed. 652, is a mild proceeding compared with an arbitrary and illegitimate proceeding like this. The absolute necessity of constitutional restraint on official power is certainly shown to a demonstration by this record.

[2] The suggestion that no federal statute authorizes a commis-

sioner's warrant for the seizure of property used in the abuse of the mails is without force since the constitutional provisions referred to are self-executing. It is common practice to file a verified petition for searches and seizures, upon which a bench warrant issues from the clerk's office, after direction by the judge.

[3] The arrest having been made without warrant because of the absence of a marshal or deputy, the seizures were unlawful on this ground. The leading and satisfactory case of Dillon v. O'Brien, 16 Cox Crim. Cas. 245 (Irish, Exchequer Div.), and U. S. v. Mills (C. C.) 185 Fed. 318, are therefore inapplicable. The Irish case contains the best discussion extant upon the right of the state upon arrest under a criminal warrant to seize the instruments of crime found in the possession or control of the person arrested.

It is, however, sought to justify the seizure on the ground that the persons arrested were found actually in the perpetration of a crime, and could be arrested without warrant, under the Illinois statute; and thus, the arrest being lawful, the seizure was also valid under the Dillon and Mills Cases. It is sufficient to say, in answer to this position, that the seizure was unreasonable, no matter what technical power may have been behind it. Moreover, it would be a most surprising extension of the law of arrest without warrant to justify the seizure of peaceable persons, sitting quietly in their offices, on the ground that they were carrying on some business made criminal by some statute, or had formerly committed such an offense. On this theory all the officers, agents, and servants of the American Tobacco Company, for example, would have been subject to arrest without warrant by any one, officer or layman, because they were prosecuting an unlawful combination. Such a doctrine has no foundation, either in reason or necessity, and is utterly opposed to the fourth amendment to the Constitution.

[4] It is further objected on the part of the government that the Capital Investment Company has no standing in this case, no right to petition the court for the restoration of its property so unlawfully seized. As to this point, it is enough to say that the property was seized under the claim of judicial process, and thus brought under the control of the court. It appears to be placed beyond the reach of a writ of replevin, or any other effective independent or plenary remedy. The courts are always open to petitions of this kind, and the jurisdiction has been often exercised without question.

[5] That corporations are within the fourth, fifth, and fourteenth amendments to the Constitution was intimated in Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652. This inevitably follows from the multitude of decisions of the Supreme Court holding that a corporation is a person under the provision giving equal protection of the law. Smyth v. Ames, 169 U. S. 466, 578, 18 Sup. Ct. 418, 42 L. Ed. 819.

[6] It is urged that the marshal's return, although utterly false, cannot be traversed in a collateral proceeding, under Brown v. Kennedy, 15 Wall. 591, 21 L. Ed. 193. This application is made in the same proceeding. No doubt the marshal's return is conclusive be-

tween the parties, until set aside, but this rule does not conclude strangers. Even the judgment would not have such effect. Rigney v. De Graw (C. C.) 100 Fed. 213.

An order will be entered directing the surrender of the property to petitioner.

THE AMERICAN.

THE LIZZIE CRAWFORD.

(District Court, E. D. Pennsylvania. February 13, 1912.)

No. 11.

COLLISION (§ 95*)—TOWS MEETING—MUTUAL FAULTS.

Two meeting tugs, each with a tow alongside, both *held* in fault for a collision in Delaware river about dusk, where, although each was to the starboard of the other when only 700 feet apart, one gave and the other assented to a signal to pass port to port. and in attempting to execute such dangerous maneuver the collision occurred.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*

With or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

In Admiralty. Suit for collision against the tug American, in which the tug Lizzie Crawford was also joined. Decree against both tugs.

John Hampton Barnes, for libelant.
Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. On November 10, 1910, the tug Lizzie Crawford, under charter to the Pennsylvania Railroad Company, was towing a car float from Greenwich up the Delaware river, bound for the Atlas pier on the New Jersey side. The float—205 feet long and 35 feet wide—was lashed to the tug's port side, and projected beyond its bow. How far does not appear; but, as the tug was not large and was lashed aft of the float's amidships, the projection was probably considerable. The tug American, which is also small, was coming down the river from Vine street towing a loaded mud scow (whose dimensions were not proved) that was lashed upon her port side and projected beyond the bow about 75 feet. The tide was flood, the wind light from the southwest, and the hour about 5:30 in the afternoon. It was dusk, but not dark, and there was no difficulty in seeing objects at least as far as any distance referred to by the witnesses. Proper lights were in place and burning upon both tugs, and the float was also lighted, although the scow was not. But neither lights nor lookouts play the most important part in this inquiry and they need not be dwelt upon.

In my opinion both vessels were at fault. The testimony is in direct conflict, and it has been necessary to decide which account is more probable. The decision has been influenced to some extent by the conviction that the American's principal defense is unfounded. She avers that her attention was first engaged by another tug that was nearer to her than the Crawford, and that while she was trying to avoid this

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

immediate danger the Crawford approached without sufficient warning and improperly attempted to cross her bow. I am satisfied that this averment is not correct. No other tug was in the neighborhood, and the American's testimony is in some degree discredited. What happened, I think, was this: The Crawford had nearly reached the pier for which she was bound, and was preparing to round to starboard in order to make the mooring. At this point, over an interval of about 700 feet, each tug was aware of the other's presence. Each was showing its green light to the other, and it seems clear that in such a position and at such a distance there was danger in attempting to pass port to port. The proper maneuver would have been to keep their respective courses and pass starboard to starboard, and this could have been done in safety. But the Crawford was apparently unwilling to make the detour that would be necessary if she should pass starboard to starboard before rounding toward the pier, and signaled with one blast. This was an error, and the American was not bound to accept the proposal, especially as she could only move very slowly against the flood tide. But she made a similar error by agreeing to the signal and answering with one blast. Thereupon both vessels ported, and the attempt, dangerous as it was, nearly succeeded. As they approached, however, it became highly probable that they would come together. Danger signals were blown, and the American reversed; but the collision could not be wholly avoided, the float and the scow collided, the port corner of the latter's bow striking the port side of the float about 10 feet from the stern, and the damage complained of was done.

The Crawford's fault was in giving the wrong signal, offering to pass on the wrong side, and in attempting to carry out a dangerous maneuver. The American was at fault in accepting an obviously improper proposal, and in taking part in the effort to carry it out. The damages and costs should be divided, and a decree to that effect may be entered.

THE BUFFALO.
THE CHAUTAUQUA.

(District Court, E. D. New York. March 9, 1912.)

SALVAGE (§ 31*)—NATURE OF SERVICE—AMOUNT OF COMPENSATION.

A salvage award of $50 made to one of two licensed boatmen, who volunteered to take a tug owned by a railroad company, from which the master was absent, and move a ferryboat, also owned by the same company, and laid up for Sunday, from the vicinity of a fire in an oil building in the railroad yards alongside a slip, from which the burning oil had spread over the water and a pier, creating more or less danger to shipping in the nearby slips.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 75–77; Dec. Dig. § 31.*

Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

In Admiralty. Suit by Louis Hazzard and another against the steam tug Buffalo and steam ferryboat Chautauqua; Erie Railroad Company, claimant. Decree for libelants.

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

Foley & Martin, for libelant Hazzard.
Herbert Green, for claimants.

CHATFIELD, District Judge. The libelant Hazzard, who was a licensed and experienced boatman, with one Breen, also a licensed master, volunteered to use the tug Buffalo, which had been put in readiness by one Raymond, an engineer of the Erie Railroad, to remove the ferryboat Chautauqua from the possible danger zone, at a fire occurring Sunday noon, in the Erie Railroad yards at Weehawken, on February 5, 1911.

The testimony shows that the fire was in a one-story building filled with barrels of oil. Some of the oil at first ran down into the slip in front of the house, where the barrels were stored, and burned there. The fire was of considerable extent; the blaze and smoke being carried out into the river. A number of barges and lighters, three other tugs of the Erie Railroad, and some boats of the Jersey Central and the Delaware, Lackawanna & Western were lying in the slip where the Chautauqua was moored, and were taken out of the slip by the Delaware, Lackawanna & Western and the Jersey Central tugs after the ferryboat had been taken out. The ferryboat was in commission, laid up for Sunday, and having her boiler tubes cleaned. Her value is in excess of $50,000. Nothing was burned except the house containing the oil and the pier immediately next to it, with some slight damage to a boat moored at the other side of that pier. The exact position of the Chautauqua was two slips to the south, over 200 feet away.

The case presents unusual features, in that the salvage service was rendered by a boat belonging to the railroad company which owned the Chautauqua. This tug was used by the volunteers, with the consent of Raymond, who evidently anticipated that she might be needed for the service. The captain of the Buffalo did not return until the work had been accomplished. The element of risk to the property of the salvor is not present. The element of danger to life, aside from the remote possibility of explosion, is not shown. The removal of the boats was evidently a matter of good judgment, although finally the action of the fireboats and the lines of hose from the various tugs succeeded in confining the fire to its original situation. In other words, if the ferryboat and the tugs had remained where they were moored, and nothing had occurred other than did occur after they were removed, they probably would have escaped injury. Nevertheless, the action on the part of the Buffalo and of her crew was such a service as would be recognized as a salvage service by an independent tug.

I should consider that, if a full crew had been on board, for services of an hour or an hour and a half in duration, not more than $150 would be allowed to the crew for such a matter. There being but two men concerned, it is necessary to consider what each man did. It is evident that the libelant Hazzard joined in the responsibility, advised the action which has been characterized as good judgment at the time, and was entitled equally with Breen to whatever could be allowed for the services. It also appears that the engineer Raymond had been prompt and efficient in getting his boat ready, and that, if he were in a position where he could make a legal claim against the railroad, his

claim should be recognized. If promotion can be claimed for salvage work, he seems to have earned consideration.

The salvage service has to be confined to the ferryboat, even though the tug also was moved, for the employment of somebody by Raymond to help run the tugboat would be nothing more than ordinary service. Hence no award of salvage with reference to the tugboat alone can enter in the case; but compensation for services to the tugboat should be considered in estimating the award for what was done on and for both boats.

Under the circumstances, it seems that an award of $100 for the services rendered by Breen and Hazzard would be fair; and, as Hazzard alone is prosecuting his claim, he may have a salvage award of $50 against the two vessels.

McDERMOTT v. HAYES (two cases).

(District Court, D. Massachusetts. March 11, 1912.)

Nos. 207, 208 (C. C. Nos. 859, 860).

ATTACHMENT (§ 293*)—MOTION TO DISSOLVE—PROTECTING RIGHTS OF INTERVENER.

Under the facts appearing, a receiver, who had attached property conceded to in fact belong to an intervener, required to give bond for the protection of the intervener's rights; the attachment to otherwise be dissolved.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 640, 641; Dec. Dig. § 293.*]

At Law. Actions by Frank P. McDermott, receiver, against Alfred S. Hayes. On intervening petition and demurrer thereto. Order requiring plaintiff to give bond.

Nelson B. Vanderhoof, for plaintiff.
Alfred S. Hayes, for defendant.

ALDRICH, District Judge. This case has been heard upon briefs and orally. The intervening petition is received nunc pro tunc, and as of a time anterior to the appointment of Mr. Charles K. Darling as master. The fact being found, and it being conceded on the oral arguments, that the property attached in fact belongs to the intervening party it seems to me that a situation is created in which it is at least doubtful whether the attachment by a receiver should be upheld without some safeguard to the actual owner, who manifestly is being damaged by the existence of the attachment.

Query, whether an attachment by a receiver stands quite like the ordinary one by an attaching creditor; but, whether it does or not, an attachment, without actual notice by a creditor, who has parted with nothing on the strength of the record, does not stand quite like a bona fide purchaser without notice, who pays out money in reliance upon the record title.

To the end that both parties shall be safeguarded, it is ordered that the attachment be dissolved unless within five days the receiver

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

give bond in the sum of $20,000, conditioned upon the payment of all damage sustained by reason of the attachment, in the event of its being held invalid in this intervening proceeding or elsewhere.

There is considerable to be said in favor of the position that there was enough known by the defendant company to put it upon inquiry. The party in whom the title stands, and who is the defendant, was at the time the title was created an officer in the Continental Telephone Company, of which the plaintiff is now the receiver. The defendant was a director, a member of the executive committee, assistant treasurer, and secretary of the board of directors. He, at least, had actual knowledge of the trust. Whether that is the legal knowledge of the company, or actual knowledge of the company, I do not undertake to determine, or whether that alone was enough to put the company on inquiry; but influenced somewhat by the strong equitable grounds of actual conceded ownership by the intervening party, somewhat by the status of the receiver as an attaching creditor, somewhat by circumstances in respect to the duty to inquire, somewhat by the question of actual notice of an officer of the company, and somewhat by the strong case made that the receiver has adequate security without the attachment in question, I am inclined to make the order indicated above.

Therefore it is ordered that the attachment of the property described in the intervening petition be dissolved, unless the attaching creditor within five days shall file with the clerk a bond conditioned as above indicated, and to his satisfaction.

The above order applies to each of the law cases, numbered 859 and 860.

If an equitable appeal is taken in favor of any party aggrieved, and such appeal shall be held not the remedy, on the ground that it should have been by writ of error, then it is understood that the right of exception shall not have been prejudiced by reason of the lapse of time.

UNITED STATES v. CAMINATA.

(District Court, E. D. Pennsylvania. March 29, 1912.)

No. 12.

1. CUSTOMS DUTIES (§ 125*)—OPIUM—IMPORTATION—ELEMENTS OF OFFENSE.

Act Cong. Feb. 9, 1909, c. 100, § 1, 35 Stat. 614 (U. S. Comp. St. Supp. 1909, p. 658), prohibits the importation of opium into the United States except for medicinal purposes under regulations, and section 2 provides that if any person shall knowingly import or bring into the United States any opium contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation and concealment or sale of such opium, or derivative therefrom, after importation, he shall be guilty of an offense. *Held*, that the offense described in section 2 is committed whenever smoking opium is fraudulently and knowingly brought by the offender within the territorial limits of the United States; the offense being complete, though the opium may not have been landed from the ship, or carried across the customs lines.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 266; Dec. Dig. § 125.*]

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

2. CUSTOMS DUTIES (§ 134*)—OPIUM—WRONGFUL IMPORTATION—POSSESSION.
Act Cong. Feb. 9, 1909, c. 100, 35 Stat. 614 (U. S. Comp. St. Supp. 1909, p. 658), prohibits the importation of smoking opium, and declares that, whenever a defendant is shown to have or to have had possession of opium or a preparation thereof, such possession shall be deemed sufficient to authorize a conviction, unless defendant shall explain the same to the satisfaction of the jury. *Held*, that where the steward of a vessel, bound for Philadelphia, was found to have smoking opium in his possession as the vessel was proceeding up Delaware Bay, such possession was sufficient to sustain a conviction for violating the act.
[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 336–339; Dec. Dig. § 134.*]

Prosecution by the United States against Manoel Caminata. On motions for new trial and arrest of judgment. Overruled.

Jasper Yeates Brinton, Asst. U. S. Atty.
J. Addison Abrams, for defendant.

J. B. McPHERSON, District Judge. [1] The argument on behalf of the government will appear by the following summary of the excellent brief presented by the Assistant United States Attorney:

"This motion presents a question of wide importance to the government, vitally affecting the future enforcement of the Opium Act of 1909 (Act Feb. 9, 1909, 35 St. 614). By the first section of that act, it is made unlawful 'to import into the United States opium in any form or any preparation or derivative therefrom: Provided, that opium, * * * other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations.'

"By the second section it is provided 'that if any person shall fraudulently or knowingly import or bring into the United States or assist in so doing, any opium or any preparation or derivative therefrom contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such opium or preparation or derivative therefrom, after importation, knowing the same to have been imported contrary to law,' such person shall be deemed guilty of an offense and the opium shall be forfeited. This section further provides that whenever, on a trial for a violation of the section, 'the defendant is shown to have or to have had possession of such opium or preparation or derivative therefrom, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury.'

"The evidence clearly showed that the opium in this case was brought within the territorial boundaries of the United States, to wit, into Delaware Bay, upon a vessel on which the defendant was steward. The inference was unavoidable that it had been thus fraudulently and knowingly brought in contrary to law by some one. It was found in defendant's possession, thus fairly raising the presumption of guilt as declared by the court to the jury. There was further direct evidence that the defendant was guilty of the crime. At the time of his arrest, defendant was within the port of Philadelphia, and thus within the jurisdiction of the state of Pennsylvania and of this court. The opium had been previously seized on the vessel by the officers of the government.

"On the above facts, defendant contends that the offense described in the act is not committed until the opium is brought on shore, and relies in support of his contention upon the celebrated case of Keck v. United States, 172 U. S. 434 [19 Sup. Ct. 254, 43 L. Ed. 505], and other cases arising under the customs laws.

"The government submits in the first instance that this contention is based on a totally false analogy and on a misconception of the true purpose and character of the opium act. This act is not a customs law designed to avoid fraud upon the revenue, but is purely a prohibitory statute, absolutely for-

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

bidding the bringing into this country from abroad of an article deemed by Congress to be injurious to the health and morals of our people. The act has no relation to the customs system, and the fine distinctions which are discussed in the customs cases, relating to the time when the obligation to pay customs duties first accrues, have no bearing whatever upon a case of this character. The words 'import or bring' as used in this act, should be interpreted in their natural and literal meaning in the light of the purpose of the act in which they occur. Interpreted thus, they clearly prohibit the bringing of the prohibited article within the territorial boundaries of the United States—that is, alike within the waters or upon the lands—and to say that the commission of the offense is suspended until the actual landing of the goods misses wholly the prohibitive character of the act.

"Wholly apart from the distinction above suggested, the Keck Case lends no comfort to the defendant. The question there presented turned entirely on the definition of the word 'smuggling' as it occurred in R. S. 2865 (U. S. Comp. St. 1901, p. 1905). While, the indictment in that case included a count under R. S. 3082 (U. S. Comp. St. 1901, p. 2014), a section which includes the words 'import or bring,' this count was summarily disposed of by the Supreme Court on the ground of vagueness, and no question of the interpretation of these words was then or subsequently raised. Moreover, a distinction fatal to defendant's analogy was carefully drawn in the opinion of the court itself between the technical act of smuggling and those miscellaneous acts precedent to this special offense which might well include such acts as would fall within the description of 'import or bring.' See specially the language of the court [172 U. S.] on pages 449 and 454 [19 Sup. Ct. 254, 43 L. Ed. 505], and note also Anti-moiety Act of June 22, 1874 (18 Stat. at L. 186, c. 391 [U. S. Comp. St. 1901, p. 2018]). Nor has any case been discovered where the word 'import' has been limited to the actual landing of goods, its narrowest definition even under the customs laws being a restriction to the bringing within a port. Moreover, even under the customs laws, a possible distinction has been suggested between the words 'import' and 'bring in.' Thus, in the case of United States v. Chesbrough [D. C.] 176 Fed. 778, cited by the defendant, Judge Rellstab uses this significant language:

" 'Section 3082 uses the phrase "import or bring." The demurrant contends that these words are synonymous. They may or may not be, *according to the legislative purpose for which they are used.*'

"The government merely asks the court to interpret the act in the light of the *legislative purpose* referred to by Judge Rellstab. It is well known that in the great majority of cases of this character the prohibited opium, which is readily concealed and easily brought ashore and disposed of, can only be successfully seized before it is landed. On the one hand, the defendant contends for a narrow technical construction of the act that would largely defeat its purpose. On the other hand, the government contends for the natural and literal interpretation that will enable that purpose to be carried into effect."

I agree with this reasoning, and hold:

(1) That the offense described in section 2 is committed whenever smoking opium is fraudulently and knowingly brought by an offender within the territorial limits of the United States. The offense is then complete, although the opium may not have been landed from a ship, or been carried across the customs lines.

[2] (2) That the offender's possession of such opium within the territory of the United States—his possession of it elsewhere is not now in question—is sufficient evidence of guilt to justify a jury in convicting.

In the present case the prisoner was arrested, and smoking opium was found in his possession, while the vessel on which he was employed was moving up the Delaware river and was near the city of Philadelphia, her port of destination.

The motions are overruled.

In re IRON CLAD MFG. CO.

(District Court, E. D. New York. March 15, 1912.)

1. BANKRUPTCY (§ 293*)—RECOVERY OF ASSETS—PLENARY SUIT—JURISDICTION.
A plenary suit against a third person to assert title to money or property claimed as assets of the bankrupt can be brought only in a court having jurisdiction generally over such a suit, and cannot be maintained as a step in the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417: Dec. Dig. § 293.*

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

2. BANKRUPTCY (§ 293*)—RECOVERY OF ASSETS—BANKRUPTCY COURT—JURISDICTION.
The bankruptcy court, in the exercise of its jurisdiction to cause the assets of the bankrupt to be collected, may compel the bankrupt or his agent to deliver money or assets of the bankrupt's estate, and by summary proceedings compel the surrender of the property where there is no bona fide claim of adverse title, but not so if the person in whose hands the property is claims a right of property or possession therein in good faith.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.*]

3. BANKRUPTCY (§ 293*)—ASSETS—POSSESSION—ADMINISTRATION.
A court of bankruptcy may recover property of the bankrupt in summary proceedings if it is held by the bankrupt's agent or bailee without claim of title, or if it has been fraudulently transferred to some other person, and can be traced into the hands of the latter and the court's jurisdiction is consented to, or in spite of objection if the fraud is indisputable on the record, or where it appears that an independent corporation or agent has property to which no title is claimed or over which it is necessary to extend a restraining order or receivership to prevent irreparable injury until the property over which the court has jurisdiction can be located and disposed of.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.*]

4. BANKRUPTCY (§ 288*)—PROPERTY OF BANKRUPT—RECOVERY—SUMMARY PROCEEDINGS.
Facts *held* insufficient to show that the claim of third persons to certain assets, alleged to belong to the bankrupt, was so clearly unfounded on the face of the record as to authorize a determination thereof by a court of bankruptcy in summary proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 444–447; Dec. Dig. § 288.*]

In the matter of bankruptcy proceedings of the Iron Clad Manufacturing Company. Renewal of an application for an order to compel the American Steel Barrel Company and Elizabeth C. Seaman, individually and as president of such corporation, to turn over to the bankrupt's trustee the stock certificates, books, and assets of the American Steel Barrel Company for administration as assets of the bankrupt. Application denied.

See, also, 193 Fed. 781.

Whitridge, Butler & Rice (John A. Garver, Edwin T. Rice, and Charles A. Riegelman, of counsel), for petitioning creditors.

Leo Oppenheimer, for unsecured creditors.

Adolph Kiendl, for receiver.

James A. Allen, specially, for respondents American Steel Barrel Company and Elizabeth C. Seaman.

CHATFIELD, District Judge.[1] The present application is a renewal of a motion made herein in June, 1911, based upon an order to show cause why the American Steel Barrel Company, a corporation, and Elizabeth C. Seaman, individually and as president of the American Steel Barrel Company, should not turn over to the receiver in bankruptcy of the Iron Clad Manufacturing Company all stock certificates, books, records, documents, manufacturing plant, machinery, tools, property, and assets of the American Steel Barrel Company. The trustee of the Iron Clad Manufacturing Company has now been brought in as the proposed recipient or person alleged to be entitled to this property; the papers having been finally submitted upon February 8, 1912.

On the first hearing, on June 20, 1911, the respondents, the American Steel Barrel Company and Mrs. Seaman, appeared specially by their attorney, and objected to the power and jurisdiction of this court to consider the matters raised by the moving papers. The minutes of the court (which were not included in the record used upon review by petition to the Circuit Court of Appeals) show that the respondents, citing Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, claimed that the court was without power in this summary way to determine the issues raised or to grant any part of the relief asked for. The court directed the respondents to go on with the proceedings, and reserved a ruling upon the objection to jurisdiction based upon their special appearance, until it could be seen whether they could show a bona fide claim of title to the property claimed and possessed by them. The court held that at the outset it must pass upon the record then presented, and determine whether or not the property sought was that of the alleged bankrupt, holding that, if the property were that of the alleged bankrupt, the court had jurisdiction to make a summary order. There being opportunity upon the final submission for but a cursory examination of the papers, the motion was denied with leave to renew or transfer to another judge, in order that a careful consideration of the record might be had. The application to another judge, for a transfer of the motion and reconsideration thereof, was denied, but no order was entered

[1] Before any order was entered upon this opinion, the creditors made an application for further hearing. They then filed an affidavit of bias, under section 21 of the federal Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1090 [U. S. Comp. St. Supp. 1911, p. 133]), and asked before Judge Mayer (to whom the case was sent for further conduct thereof) for leave to present witnesses and testimony on a renewal of the motion. Judge Mayer was unable to hear the witnesses personally, and has referred to a special master the issue of whether the creditors can show the claim of title to be merely colorable, and this reference is now proceeding.

thereon, and subsequently, in order to enable the petitioners to bring the motion on again before the writer, if it were wished, an order was made denying the motion without prejudice, and with leave to renew upon the same or additional papers. At the same time the court refused to sign an order presented as an alternative, which, in effect, suggested apparently a withdrawal of the court's previous conclusion that a cursory examination of the record seemed to show a claim of title by a third party in possession, and provided that the question as to the bona fides of that claim should be sent to a referee as special commissioner to pass upon this question for the court. In refusing to sign this alternative order, which seemed unnecessary as the court had indicated its willingness to hear the renewal motion itself, the court made the following memorandum:

"As the motion was denied for lack of jurisdiction (inasmuch as the papers did not show ownership by the Iron Clad, but only an apparent indebtedness to the Iron Clad, or an investment by the Iron Clad in the Barrel Co. and an apparent ownership of both companies by a person who is solvent and responsible for her acts individually and as an officer and director) I do not see how the issues can be referred. A question of title is involved requiring a plenary suit unless fraudulent concealment of assets by the Iron Clad (acting through those operating it) is shown. Any further examination under 21a can be had or a Master may be appointed to take testimony offered on a renewal of the motion on proper allegations, but for such relief a separate order should be made. "T. I. C.,
"U. S. J."

It appears by the record that a review of these proceedings was had without including either the minutes of the proceedings upon the first motion, or a statement of the submission of this alternative order and the circumstances under which the memorandum opinion just quoted was made. The Circuit Court of Appeals (191 Fed. 831) thereupon handed down its opinion and issued a mandate to the effect that the previous order, in so far as it held that the court did not have jurisdiction to summarily determine whether the claim of the third party was bona fide, should be reversed, and that the court should proceed to exercise that jurisdiction. The court having previously so done, and feeling that the Circuit Court of Appeals had not had the entire record before it, then placed upon the calendar for rehearing the original motion, in accordance with the privilege which had been given to the petitioners and appellants in the order appealed from, and upon this rehearing an amended petition, setting up the previous record and at the same time referring to an adjudication had in bankruptcy in the matter of the petition against the Iron Clad Manufacturing Company, upon the 2d day of December, 1911, was filed. This amended and supplemental petition recites the various matters upon which the petitioning creditors now rely to show that the entire property of the American Steel Barrel Company should be considered as assets of the Iron Clad Manufacturing Company. The respondents, namely, the American Steel Barrel Company and Mrs. Seaman, individually and as president of the American Steel Barrel Company, have interposed objections and filed various affidavits or answers to the summary inquiry, while still insisting on their plea that the court is without jurisdiction to pass upon the claim of title to the property in their posses-

sion. They have also objected to a rehearing of the motion, upon the ground that this court upon the former hearing passed summarily upon the question of the bona fides of the respondents' claim to the property, and that the so-called "reversal" by the Circuit Court of Appeals did not affect that ruling, inasmuch as this court had not refused to entertain that jurisdiction.

This last objection was overruled in open court, upon the 15th day of December, 1911, under the previous order of this court expressly allowing a renewal of the motion. The respondents thereupon interposed, under their special appearance and allegations of possession, a claim that all the property involved in this motion belonged to the American Steel Barrel Company, and was not that of the Iron Clad Manufacturing Company or of its creditors; also, that the capital stock of the American Steel Barrel Company was at the time of the argument of this motion the property of one George A. Wheelock, who also appeared and claimed all of this stock by purchase for value from Elizabeth C. Seaman, the previous owner, except four shares. It is alleged that one share has been retained by Mrs. Seaman in order to qualify her as a director.

At a further hearing, upon the 22d day of December, 1911, an opportunity was given to both parties to call witnesses upon the issue raised for summary determination, namely, as to whether the claim by the American Steel Barrel Company to the property, and by George A. Wheelock to the stock previously owned by Elizabeth C. Seaman, was a bona fide claim of title, or was so fraudulent as to be invalid upon the face of the record, and to be in that sense a colorable title only. No testimony was presented other than that contained in the affidavits and answers filed by the respondents and in certain reply affidavits presented on behalf of the creditors and submitted with their brief upon the 8th day of February, 1912. Before analyzing the matters set forth in these affidavits, certain questions perhaps should be stated as premises.

[1] Under the decision in Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, the proposition has remained settled that a plenary suit against a third party to assert title to money or property claimed as assets of the bankrupt can be brought only in a court having jurisdiction generally over such plenary suit, and cannot be maintained as a step in the bankruptcy proceedings.

[2] In White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, and Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, it was decided that the bankruptcy court has jurisdiction to cause the assets of the bankrupt to be collected; that is, to compel the bankrupt or his agent to deliver up money or assets of his estate, and by summary proceedings to compel the surrender of that property, where no adverse claim (that is, no bona fide claim, of adverse title, as opposed to mere actual possession) exists, as a step in the bankruptcy proceeding. In the last case the court, upon page 15 of 184 U. S., page 275 of 22 Sup. Ct. (46 L. Ed. 405), says:

"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 a claim actually existed at the time of the filing of the petition."

As was said in the case of Bryan v. Bernheimer, supra, a purchase of property claimed as a part of the bankrupt estate by a person having knowledge of that claim cannot give the purchaser any claim of title superior to that of the person from whom he bought.

In the present instance the title and claim of Mr. Wheelock to the stock of the American Steel Barrel Company is no better nor greater than that of Mrs. Seaman individually thereto. The actual purchase by Mr. Wheelock is attacked by the creditors as improbable, but upon his statement that he has paid Mrs. Seaman therefor, and upon the apparent obligation which he has thereby assumed, it would seem that it makes no difference if he has paid over the $25,000 purchase price for the stock and taken the risk of losing that consideration, if the stock belongs to the Iron Clad Manufacturing Company or its creditors. If the claim of Mrs. Seaman and of the American Steel Barrel Company to its property and to this stock be a bona fide claim, then the sale to Mr. Wheelock is valid as against Mrs. Seaman, until such time as the title of Mrs. Seaman and the American Steel Barrel Company may be successfully assailed in a suit at law or an action in equity. But his title is no better and no greater than theirs.

We have, therefore, only to consider the transfer to Mr. Wheelock, in so far as it may be evidence upon the question of bona fides. As to this, the creditors point out that Mr. Wheelock is by profession a bookmaker, and a resident of the upper part of New York, who has not taken over the management of the property nor had himself elected a director, but left it in the hands of Mrs. Seaman. These charges bear directly upon the probability of Mr. Wheelock having invested in the property with the chance of losing the amount of his investment, but do not throw much light upon the question as to whether or not this property bought by him with knowledge of the creditors' claims was that of the Iron Clad Manufacturing Company.

But, before disposing of the question of this sale of stock to Mr. Wheelock, we must proceed a little further in an attempt to follow down the decisions of the courts in determining and stating the power of a bankruptcy court to take possession of property in the hands of persons who on the one hand are alleged to be mere agents for the bankrupt, and, on the other hand, hold themselves out to be owners and claimants under a title which gives them the legal right to retain possession as against the receiver or trustee, until their title is defeated.

In the Matter of Friedman, 161 Fed. 260, 88 C. C. A. 306, the Circuit Court of Appeals in the Second Circuit approved of a summary order to third parties, directing them to pay over sums of money claimed by some of them to be their own, and the possession of which even was denied by certain of the third parties. The lower court had decided these questions after a hearing against the respondents, and the Circuit Court of Appeals, under the authority of Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, directed the property to be turned over, although there is an indication that the opinion of the Circuit Court of Appeals was based upon the failure of these parties to ob-

ject to the jurisdiction of the bankruptcy court to determine the question summarily, as to whether the property was that of the bankrupt. Similarly, in the case of In re Berkowitz, 173 Fed. 1013, the bankruptcy court ordered certain property in the possession of the Berkowitz Tailoring Company, a corporation, to be seized by the receiver of one Berkowitz, upon evidence that the property of Berkowitz had been turned over to the corporation, and that the corporation had apparently been organized by the bankrupt's brothers as an instrument to enable the bankrupt to carry out a concealment of his assets. The record shows that the brothers of the bankrupt had invested some $2,000 in the capital stock of the corporation, and that the bankrupt had invested $25. The court made no attempt to interfere with the corporation nor its capital stock, but upon evidence showing palpable fraud in the operations of this corporation by Berkowitz, and, in the absence of any objection to the jurisdiction of the court, it was held that the bankrupt was using and was allowed to use the independent corporation as a cloak for his own operations. Hence the court said that any property plainly his own, but as to which the corporation was being used as his agent, was subject to a restraining order, and, as between the bankrupt and his own creditors, was liable to seizure for the payment of his debts in the bankruptcy proceeding. Also, in the Matter of Kane, 131 Fed. 386, certain moneys in the hands of a third party, but shown (after a consideration of the evidence) to be the property of the bankrupt and to be held by the third party merely as agent or bailee, were ordered turned over to the receiver or trustee where the asserted adverse claim was found merely colorable. The court says:

"If the claim is asserted in good faith, substantiated by verified pleadings or by oral testimony, then the objection to the jurisdiction of the court is controlling."

But the balance of the opinion shows that this language is intended to mean that unless the court, upon the verified pleadings or testimony, can find that the claim was not asserted in good faith, the objection must be sustained.

The next case which we must consider and which enunciated the doctrine upon which most of these proceedings are based is In re Muncie Pulp Co., 139 Fed. 546, 71 C. C. A. 530, decided by the Circuit Court of Appeals for this circuit. A corporation, through its officers, caused the organization of another corporation in order to comply with certain state laws, and caused themselves to be made officers of the new corporation. Certain property of the old corporation was transferred to this new corporation, and it was managed by the officers and directors, in order to carry out the business and purposes of the old corporation. The capital stock of the new corporation was held in the name of the officers of the old corporation, and the entire activities of this new corporation were in reality but the transactions of an agent holding this property of the original corporation for its benefit and use. Upon these facts, an application was made to compel the transfer of the capital stock of the new corporation, and the property which had been previously transferred from the

original corporation which was then in bankruptcy. The court based its decision upon the apparent conclusion that the whole transaction had been a transfer of the bankrupt's property to an agent, and that, therefore, the court had jurisdiction to order the property of the bankrupt, in the possession of a bailee or agent, delivered into the custody of a receiver.

Later, in the case of In re Holbrook Shoe & Leather Co., 165 Fed. 973, the bankrupt's trustee filed a petition for a direction to the Packard Shoe Company to turn over to the trustee in bankruptcy certain property within its possession which it was alleged to hold as agent of the bankrupt corporation. It was shown that the Packard Shoe Company had been organized for taking over the stock and property of the bankrupt corporation, in order to hinder and defraud the creditors of the bankrupt; that this was done at a time when the bankrupt corporation was insolvent; that the property of the new corporation had been derived from the bankrupt corporation; and that 800 shares out of a possible 1,000 had been transferred as consideration for this stock of goods from the new corporation to the bankrupt. The evidence also showed that the new corporation was apparently arranging to dispose of its property and had passed a resolution directing its sale under circumstances which of themselves would arouse suspicion. The court upheld the order of the referee under these circumstances restraining the sale of the property of the Packard Shoe Company, and holding that the property of the Packard Shoe Company should be turned over to the trustee.

In the decision of the Circuit Court of Appeals for the Second Circuit, in the case of In re Watertown Paper Co., 169 Fed. 252, 94 C. C. A. 528, we reach the other side of the question. There the court says:

"Unless, therefore, it can be shown that some exception to the general rule of separate corporate existence and liability applies in this case, it must follow that the claim of the Pulp Company should have been allowed. The only exceptions to that rule possibly applicable here are: (1) The legal fiction of distinct corporate existence will be disregarded, when necessary to circumvent fraud. (2) It may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of another corporation."

In that case the court refers to the Muncie Pulp Co. Case, supra, but holds that the case under consideration is not like that of the Muncie Pulp Company. In the Watertown Paper Co. Case, supra, the money to furnish the Pulp Company's plant was advanced from the Paper Company, and was charged to certain individuals, who controlled and were large owners of the Paper Company. The Pulp Company corporation was, the court says, a conduit through which the money of these parties passed to meet their obligations. The two corporations mingled their affairs, but it did not appear that the Paper Company had any claim, legal or equitable, to the stock of the Pulp Company. The controlling stockholders regarded the two corporations as being in a general way different departments of their business. The stockholders were not entirely the same. Each corporation had its own creditors, its own assets, and conducted its business in its own name. Books of account were kept, and the two corpora-

tions were apparently managed and conducted as different departments of one considerable business, of which the people referred to as the Remingtons were the controlling stockholders. The court calls attention to the line of cases holding that when a corporation creates another corporation for a particular purpose, and holds all its stock, the latter will be treated as the agent of the former, or as an instrumentality for carrying out its purposes. In these cases the controlling corporation has been held liable for the debts of the subordinate company. But, as was pointed out by the Circuit Court of Appeals, that principle did not apply to the Paper Company Case, nor does it apply in the present instance, for here the so-called agent or instrumentality is not the bankrupt corporation. The Iron Clad Manufacturing Company is in bankruptcy, and the creditors are claiming that the assets of the American Steel Barrel Company, a solvent corporation, should be used for the payment of the debts of the Iron Clad Manufacturing Company, of which the American Steel Barrel Company is alleged to be an agent; while the converse is the situation in the line of cases referred to in the paragraph just quoted.

The present case must stand upon the doctrine upon which the Muncie Pulp Company Case is based, as applied in the case of In re Rieger, Kapner & Altmark, 157 Fed. 609, if the creditors have the right to take the capital stock and assets of an apparently solvent corporation and administer them as the property of the bankrupt, under circumstances much like those in which this right was denied, in the case of the Watertown Paper Co., supra. In the Rieger, Kapner & Altmark Case, supra, a partnership had been adjudicated a bankrupt, and the receiver of the partnership was directed to take possession of the property of a corporation in which the capital stock was owned by the partners of the bankrupt firm, and which manufactured goods to be sold by the firm. Separate books were kept, but the result of an accounting between the firm and the corporation was open to dispute. The court reviews the various cases to which we have referred, finds that the partners used the assets of the corporation in order to give them a double line of credit, that the corporation was subsidiary to and the mere agent of the partnership, and that the partners had acquired the corporate stock; in other words, organized the corporation for that purpose. While holding that the partnership firm, acting as selling agent of the corporation, obtained the advantage of property rights in the capital stock and in the management of this apparently solvent corporation, the court nevertheless held that because these owners of this stock had mismanaged their partnership property, and had not kept their activities separate, to the extent of avoiding fraud upon the partnership creditors who relied upon the representations of the availability of the assets of the corporation, all of the assets of the independent corporation should be available for the creditors of the bankrupt partnership, in order that these individual and partnership creditors should not be denied participation in the administration of so much of the bankrupt's estate as might be found in the possession of the corporation. The court further held that to compel the partnership creditors to remain silent spectators until the

corporate creditors shall have been paid in full out of the proceeds of the sale of the corporate property, or out of the proceeds of the business if it should be continued, or until the corporate property is exhausted, is to deny them a right guaranteed by the bankruptcy act, and is consequently fraudulent in law. The court further held that:

"The individual partnership creditors have a direct interest in the corporate assets, for, assuming, without deciding, that the innocent corporate creditors must first be paid out of the corporate property, the residue, if any, would pass for administration to the trustee in bankruptcy."

In order to prevent ultimate loss, the court in that case extended the receivership to the property in the possession of the corporation, giving such receiver the power to exercise the rights of all parties in interest. But it did not determine, nor apparently attempt to determine, in a summary way or otherwise, whether or not the title to the property of the solvent corporation was in the bankrupt estate, and certainly did not determine that the corporate assets were held by it merely as agent or bailee. The court was apparently attempting to prevent dissipation of the assets, and in view of the fact that the bankrupts were partners, and that their personal holding of all the stock of the corporation put the bankruptcy court in control of the entire stock of the corporation, a plain reason existed why, under circumstances indicating such apparent fraud, the bankruptcy court should exercise the right of these stockholders to prevent further fraud, and the extension of the receivership was the only practical and legal way. But the doctrine of this case has to be extended materially, and the rights of the corporate creditors and corporate stockholders seriously interfered with, before, in the situation shown in the Watertown Pulp Company Case, supra, an order can be made treating the property of a solvent corporation as that of a bankrupt corporation, and in a summary proceeding holding that this property belongs to the creditors of the bankrupt corporation, without the right of the respondents to a determination of their claims, in an action in a court having jurisdiction to try the same.

[3] The whole line of cases seems to depend upon three principles. First, the property of a bankrupt, held by an agent or bailee without claim of title, can be administered by the court in the bankruptcy proceeding; second, if the property of a bankrupt has been fraudulently transferred to some other person, and can be traced into the hands of that other person, then in a summary proceeding, if the jurisdiction be consented to, or in spite of objection if the fraud be indisputable upon the record presented by the parties, the bankruptcy court may proceed to deal with the property as to which title did not pass by such fraudulent transfer; and, third, if upon the admitted situation of the parties it appears in a summary proceeding that an independent corporation or agent has property to which no title is claimed or which seems to fall within the class just defined, a restraining order, or, if necessary, a receivership with respect to that property may be ordered by the bankruptcy court to prevent irreparable injury, until the property over which the bankruptcy court does have jurisdiction can be located and disposed of. Having thus considered the principles and their application as set forth in the decided cases,

it is necessary to analyze the exact situation in the present case, to determine into which class it falls and what rights the creditors appear to have.

[4] The application is to compel the American Steel Barrel Company, as a corporation, and Mrs. Seaman, as an individual and as an officer of the American Steel Barrel Company, to turn over the capital stock of the American Steel Barrel Company, and also to deliver to the trustee of the Iron Clad Manufacturing Company all of the assets of that corporation, not as security nor to prevent loss, nor because any such right as the lien of a judgment or an equitable claim upon an accounting has been shown to exist against the American Steel Barrel Company, but for the alleged reason that these assets and the capital stock belong to the Iron Clad Manufacturing Company, and hence that a summary determination as to their possession can be made.

At the time of the first application, certain elements of necessity for preserving those assets might have been made the basis of an order for a temporary receivership, similar to that in the case of Rieger, Kapner & Altmark, supra; but the creditors, instead of renewing or following up their application, as this court intended them to do, and apparently anticipating that in the face of the interposed answer and prior to adjudication greater difficulty would be experienced than afterward, preferred to appeal; and have only renewed their application after having brought in the trustee, who now has title to the estate of the bankrupt, the Iron Clad Manufacturing Company, and who has the right to bring any plenary action for which a cause can be shown.

The determination, therefore, that the assets or the stock of the American Steel Barrel Company belong to the estate of the Iron Clad Manufacturing Company, in a summary proceeding of this nature on behalf of the trustee in bankruptcy, is equivalent not to a mere order for the preservation or administration of the assets, but to an actual finding that the American Steel Barrel Company has no title thereto, and no right to administer these assets, nor to answer for any claim that may exist with reference thereto. It would seem that strong evidence of fraud and strong necessity for the intervention of such a summary remedy would be necessary before it can be held that the claim of title, under which the American Steel Barrel Company seeks to defend its property and answer in a court of law or equity whatever claims might be brought against it, should be held to be merely colorable or fictitious.

In addition to this, the stock in question, now held by Mr. Wheelock (but at the time the petition in bankruptcy was filed apparently standing in the name of Mrs. Seaman), was nominally the property of Mrs. Seaman individually. The question of whether she as an officer and owner of the stock of the Iron Clad Manufacturing Company can be shown to be merely the agent of the Iron Clad Manufacturing Company in thus holding the stock of the American Steel Barrel Company might be tried at the same time and upon the same testimony, but its decision will not furnish automatically an answer to the ques-

tion as to whether the trustee of the Iron Clad Manufacturing Company is entitled as well to take the assets of the American Barrel Company.

If the position of the American Steel Barrel Company be that of the Remington Pulp Company, in the case in 169 Fed. 252, 94 C. C. A. 528, it might be held that the shares of stock were the property of the bankrupt estate, and yet that the corporation was so independent and held its assets under a claim of title such that it could not be deprived thereof, without the obtaining of judgment in an action. It appears from the record and there is nothing to indicate the contrary that the Iron Clad Manufacturing Company had been in existence many years and had built up a continually increasing business; that at a time as long ago as July 18, 1907, the real estate and buildings of both corporations were appraised at the sum of $974,000, and of this $714,000 represented the property owned by the Iron Clad Manufacturing Company alone. This property was subject to a $75,000 first mortgage which is now being foreclosed, and the papers show plainly that for many years prior to 1905 at least the stock of the Iron Clad Manufacturing Company should have paid dividends and was increasing in value. This condition seems not to have changed substantially at the time the American Steel Barrel Company was incorporated.

The creditors attack the incorporation of the American Steel Barrel Company as having been organized by the use of dummies; but, as is shown in the creditors' own affidavits, this was the usual arrangement by which men skilled in such matters prepare the preliminary papers and start a corporation upon its way, turning it over when organized to the persons actually interested. Such directors are not fairly characterized as "dummy directors," except in the sense that they are doing no more than to perform, in a perfectly legal manner, with no pecuniary interest in the business itself, the necessary and legal requirements, for a proper compensation. The argument which the creditors seek to draw from their criticism of this method of organization casts some light upon their attitude in concluding that fraud is apparent throughout all of the transactions. The capital stock of the American Steel Barrel Company was immediately increased from $2,000 to $25,000. A brother of Mrs. Seaman was active in the organization, under her direction, and became a director and officer of the company. Money for purchasing the capital stock is claimed by Mrs. Seaman to have been paid by her personally. The creditors' affidavits furnish the suggestion, and substantially prove that it was advanced out of the bank account of the Iron Clad Manufacturing Company at Mrs. Seaman's direction. Neither party has shown clearly whether or not it was charged to her or what credit the Iron Clad Manufacturing Company received therefor on its own books. All of the real estate occupied by the American Steel Barrel Company and standing in its name is shown by the papers to have been purchased through the efforts of one Maximilian Kahn, a broker employed by Mrs. Seaman, with the exception of one lot which was obtained in foreclosure, and that lot was bid in by a broker acting for

the Iron Clad Manufacturing Company. Again, the money with which these lots were paid for came out of the treasury of the Iron Clad Manufacturing Company; but the evidence does not show clearly whether this was charged to Mrs. Seaman or what credit the Iron Clad Manufacturing Company received therefor.

After the American Steel Barrel Company began its business, which is shown by the papers to have been profitable and increasingly prosperous, a considerable tract of real estate belonging to the Iron Clad Manufacturing Company was used by the American Steel Barrel Company, under an arrangement claimed to have been a lease, but which now turns out to be a verbal direction by Mrs. Seaman as to the use of this part of the Iron Clad Manufacturing Company plant. In the same way the large and expensive power plant of the Iron Clad Manufacturing Company, which included an engineroom with dynamo for furnishing electric current, has been run more and more for the benefit of the American Steel Barrel Company and less and less for the Iron Clad Manufacturing Company, until at the time of the receivership the power plant was entirely too large for the Iron Clad Manufacturing Company's activities, and the balance for this use was going heavily against the American Steel Barrel Company. In the same way, the purchase of machinery, tools, materials, general equipment, and all sorts of supplies was made with the money of the Iron Clad Manufacturing Company or on its orders. Certain methods of charging up to the American Steel Barrel Company its proportion of all these items was followed; but community of office and clerks. with the sharing of shops, workmen, and plant, led to a confusion which increases the difficulty of tracing any item through the various books of the Iron Clad Manufacturing Company and the American Steel Barrel Company. The wages of the workmen who performed work for the American Steel Barrel Company in the Iron Clad Manufacturing Company's plant were paid by the Iron Clad Manufacturing Company, but separate and different colored time checks were used for tabulating their work, and were charged up on the books against the American Steel Barrel Company. The affidavits indicate, and the situation seems to have been, that the funds of both companies were used, not only by the orders of Mrs. Seaman, but by others, from time to time as occasion demanded, and it would also seem that in many instances the accounts were confused. It may well be doubted whether or not the books show the proportions which the American Steel Barrel Company should bear of many of these transactions. Some of the real estate stands in the personal name of Mrs. Seaman and is not involved in this motion, but the papers show that in the same way the consideration with which this real estate was purchased apparently came from the Iron Clad Manufacturing Company, and was paid by it to Mrs. Seaman at her direction. Some investment was made by her from her own private funds, and recently, according to the affidavits, she has increased these advances both to the Iron Clad Manufacturing Company and to the American Steel Barrel Company, and in so doing has not distinguished upon the books of the concerns whether or not these credits are due to her as presi-

dent of the Iron Clad Manufacturing Company, or as president of the American Steel Barrel Company, or as an individual.

It appears from the record that certain officers and employés of the Iron Clad Manufacturing Company have made such use of its funds and have so interchanged expenditures and cash items represented by checks that there now exist claims amounting to much more than the entire indebtedness of the Iron Clad Manufacturing Company, which Mrs. Seaman (and through her the trustee in bankruptcy) alleges were wrongfully paid upon false or forged checks, and which, according to the papers upon this motion, are in no way the acts of Mrs. Seaman or of the officers of the corporation through whose acts the creditors claim that the stock and assets of the American Steel Barrel Company belong to the Iron Clad Manufacturing Company.

It also appears from the record that between 1907 and 1911 there has been a 40 per cent. depreciation in the value of the real estate of both companies, which of itself may have created the condition of insolvency. An apparent balance in favor of the Iron Clad Manufacturing Company against the American Steel Barrel Company has (according to the affidavits presented and the claims filed with the referee) been wiped out, and, if these claims be allowed, to have been changed from a balance of over $300,000, against the American Steel Barrel Company, to $445,811.89, which the American Steel Barrel Company claims is owed by the Iron Clad Manufacturing Company to it. If these figures be verified and allowed to any appreciable extent, it would indicate that the Iron Clad Manufacturing Company has run behind through loss of business, bad management, or the possible criminal acts of individuals, and also diminution in the value of its real estate of some $280,000, and that the property of the American Steel Barrel Company has been used to stop the loss of Iron Clad Manufacturing Company assets to an exceedingly large amount. There is shown by the papers a claim of Mrs. Seaman for salary throughout the various years and for other advances (which was waived by her for the purpose of determining the question of solvency but which is now presented for allowance) amounting to over $200,000, and, as has been indicated; the capital stock of these companies has never been considered nor have the individual cash accounts of the stockholders ever been charged against them.

It appears from the papers that the Iron Clad Manufacturing Company and the American Steel Barrel Company were owned by Mrs. Seaman, were conducted by her, were managed by her as her personal property, and, in so far as there is any estoppel with respect to the American Steel Barrel Company, it arises from the acts of Mrs. Seaman. The Iron Clad Manufacturing Company would be certainly estopped from denying that it has treated and claimed much of the property of the American Steel Barrel Company as its own. But it is impossible to hold that title to the property of another, or a claim of title to that property, can be successfully made out by representations on the part of the claimant where the authority of the person making the representations is not shown to have been given by the party whom it is sought to estop; i. e., the American Steel Barrel

Company. The creditors show statements to R. G. Dun & Co. by the Iron Clad Manufacturing Company, signed by Mrs. Seaman, and including an item entitled "American Steel Barrel Company" in the column labeled "Assets." In the statement of December 1, 1906, this amount was fixed at $75,000; in 1907, $100,000; and in 1909, $161,328.92. A further item of $43,927.97 was also included, but this refers to certain Baltimore real estate, and was put in by mistake on the part of the creditors. The statement for 1909 calls the item above set forth "Investment—American Steel Barrel Company." Some of the witnesses whose testimony is presented have stated that these amounts represent the balance of debit and credit items. In June, 1907, the American Steel Barrel Company issued a statement showing assets of $262,761.59, with an item of accounts payable due to the Iron Clad Manufacturing Company of $13,638.55. The testimony further shows that R. G. Dun & Co. issued ratings upon the American Steel Barrel Company as a separate corporation each year, and have furnished such information without regard to the Iron Clad Manufacturing Company's statements or ratings, also made by them. The real estate and buildings of the American Steel Barrel Company are shown by the papers to have cost $142,000, its capital stock was $25,000, and in 1907 this real estate was apparently appraised at $260,000.

The respondents deny all statements of intention to admit more than a debit relation, but it must be presumed that, in so far as Mrs. Seaman knew of the claims by the Iron Clad Manufacturing Company in the above statements, she would be estopped, and the American Steel Barrel Company would be estopped, so far as claims upon her stock might be concerned, from denying the amount of the items above set forth, and, if the items can be substantiated, from admitting whatever they represent against the American Steel Barrel Company. Mr. Nutt, the former accountant of the Iron Clad Manufacturing Company, has testified that they represent apparently debit balances; but how the Iron Clad Manufacturing Company invested or advanced these amounts to the American Steel Barrel Company, or the basis for this computation or valuation, nowhere appears. No interest has ever been claimed and no dividends from the American Steel Barrel Company have ever been demanded. If this represents indebtedness, the item may have increased or diminished. The Iron Clad Manufacturing Company may be entitled to interest upon whatever amount may have been advanced as a loan, or an accounting for profits if an actual investment was made. But we have no guide upon the present proceedings from which to determine the situation, and the statements amount only to an admission by Mrs. Seaman and the American Steel Barrel Company of some sort of liability for the amounts in question, and a responsibility to account for whatever it may be shown that these items represent. A written statement by one Maj. Gilman, who was a director and financial manager of the Iron Clad Manufacturing Company (and who is alleged also to have been manager of the American Steel Barrel Company, although this is specifically denied, and no proof is shown beyond inference from

his own statement), that the Iron Clad Manufacturing Company owned the stocks and bonds of the American Steel Barrel Company, is not evidence of title, nor shown to be any admission within the scope of his authority as to the American Steel Barrel Company. Certain cuts or representations of the entire plant, upon the letter heads of both companies, might be considered evidence if any one were deceived thereby, but do not show ownership of one distinct entity by the other. Similarly,.the fact that an appraisal of the property standing in the name of the Iron Clad Manufacturing Company was made to include the land of the American Steel Barrel Company, because Maj. Gilman told the appraiser that all of the real estate was a part of the plant, and that the appraiser thereupon used this direction instead of the description of the property covered by the mortgage, does not show that the American Steel Barrel Company and Mrs. Seaman knew of the error, or intended it to be committed. Some action might lie thereon, but title in the Iron Clad Manufacturing Company is not conclusively established thereby. The appraiser did not have before him the description of the property which the Iron Clad Manufacturing Company intended to be appraised, and the American Steel Barrel Company did not participate at all in the transaction.

It appears that raw materials and supplies for the use of the American Steel Barrel Company were ordered through a purchasing agent of the Iron Clad Manufacturing Company, and if credit were needed, and if the Iron Clad Manufacturing Company had credit, this may have induced the creditor to make the sale. John M. Dierkes, a witness called by Mrs. Seaman, testified that the Iron Clad Manufacturing Company received substantially all the proceeds of the sale of manufactured products by the American Steel Barrel Company, since the American Steel Barrel Company commenced business. He testified, further, that the Iron Clad Manufacturing Company received substantially all of the large profits which were earned by the American Steel Barrel Company. These items of testimony would show plainly that if the creditors of the American Steel Barrel Company were seeking to show that the Iron Clad Manufacturing Company had received assets belonging to the American Steel Barrel Company, or were seeking to estop it and the Iron Clad Manufacturing Company from denying that the creditors of the American Steel Barrel Company had rights against the Iron Clad Manufacturing Company, the question would be easier.

But does the converse follow? If the Iron Clad Manufacturing Company is indebted to the American Steel Barrel Company to this extent, and if the Iron Clad Manufacturing Company has received the proceeds of sales of the property in return for these purchases, or as items upon the other side of the account, the matter would seem to be one of debit and credit, and does not furnish us any evidence on the question now before the court. The testimony does not show plain ownership of the American Steel Barrel Company and of its assets by the Iron Clad Manufacturing Company, even though the American Steel Barrel Company and Mrs. Seaman have allowed the Iron Clad

Manufacturing Company to incur debts and use the property of the American Steel Barrel Company to pay the same without action by the American Steel Barrel Company independent of the Iron Clad Manufacturing Company as its agent. In making the return for the federal incorporation tax, in September, 1910, and again in November, 1910, Mrs. Seaman verified the report given to the government. In each case the American Steel Barrel Company was said by her to be a subsidiary of the Iron Clad Manufacturing Company. At the time of the latter report, she stated that a separate report could not be made for the American Steel Barrel Company "which is a subsidiary company." The affidavit goes on to say that the American Steel Barrel Company has "never been separated from the main company. It is simply a department. The same presses do the work for both companies. The same pay rolls are used for both companies and no separate books were kept, so that it is impossible for us to divide or separate them. The one report covers both." These papers describe the American Steel Barrel Company as being a subsidiary of the Iron Clad Manufacturing Company, in the sense that the interests and the business of the companies were so intermixed that no separate report could be rendered to the government which would correctly differentiate between the two companies. But it is also apparent that the officers of the government, knowing that each was a separate corporation, might well have inquired whether or not each was not doing more than $5,000 worth of business per annum, and whether the companies were not subject to taxes, even though the totals be so merged that they could not be distinguished. The affidavit does not show that the Iron Clad Manufacturing Company owned the assets of the American Steel Barrel Company, when it is also taken into consideration that Mrs. Seaman at that time owned the capital stock of both companies, and that the claim of the Iron Clad Manufacturing Company to ownership of the American Steel Barrel Company would certainly depend upon ownership by the Iron Clad Manufacturing Company of Mrs. Seaman's individual holdings of stock, and of her own personal and private property. In other words, the Iron Clad Manufacturing Company must trace into the hands of Mrs. Seaman property of its own, such that she must be held to have been a trustee for the Iron Clad Manufacturing Company and not for herself as an individual, and that the investments which she made in the American Steel Barrel Company property, or in its own stock, were made for the Iron Clad Manufacturing Company and its creditors and not for herself, or that she was guilty of such fraud that the creditors of the Iron Clad Manufacturing Company have the right to treat her as a trustee for themselves in her dealings with the American Steel Barrel Company.

It does not seem that the proof goes nearly to the extent necessary to show these things. The progressive changes in the value of the Iron Clad Manufacturing Company's business, and the progressive improvement in the value of the American Steel Barrel Company's business, would indicate that Mrs. Seaman was allowing one of her properties to increase in value, and another to decrease, and that she personally may be responsible, or may have made herself responsible

to any creditor who extended credit to the company which was going down in value, on her representation of facts; and, to the extent to which she used the capital stock, or the right to ownership of the valuable or increasingly valuable company, in obtaining credit for the other company, that this capital stock, or her rights in the prosperous company, should be made subject to any credit which was obtained by her on the strength thereof. But we are not concerned with that on the present motion. We have to determine whether or not her claim that the assets as well as the real estate of the American Steel Barrel Company are actually the property of the company is plainly and certainly false. It cannot make any difference on this motion whether she or the American Steel Barrel Company may be held liable for any credit or for any contract which she obtained upon the strength of those representations.

The affidavit of Thatcher M. Brown, verified the 22d day of June, 1911, shows that credit was extended to Mrs. Seaman as an individual, and as representing the Iron Clad Manufacturing Company, upon a statement that she owned her city home, and that the Iron Clad Manufacturing Company owned certain real estate appraised at $970,000. It now appears, as has been said, that some $260,000 worth of this real estate was not included in the property covered by the trust mortgage, and not in the property now standing in the name of the Iron Clad Manufacturing Company. It also appears that Brown Bros. & Co. extended credit upon delivery of certain bonds and securities, which were covered by the trust mortgage in question, and that the issue of this trust mortgage, viz., $550,000, in addition to the $75,000 first mortgage, make a total indebtedness greater in amount than the present appraised value of the real estate of the Iron Clad Manufacturing Company. But, whether or not this mortgage be a good investment at the present time, the appraised value of the real estate of the Iron Clad Manufacturing Company, at the time the mortgage was made, was much more than the face value of the mortgage; and there seems to be nothing in the affidavit to indicate that any representation was made as to the ownership of the American Steel Barrel Company beyond the valuation placed thereon by the appraiser, who does not seem to have appraised the property by the description in any of the instruments, but rather to have appraised all of the property pointed out to him by the manager as constituting the plant.

Again, it may be that the American Steel Barrel Company would be estopped, and that Mrs. Seaman would be compelled to make good for the acts of her agent in any deception (if it amounted to that) by which the property of the American Steel Barrel Company was included in the extension of credit. But this does not go so far as to show that the title to the American Steel Barrel Company's property is in the Iron Clad Manufacturing Company, and that the fraud for which damages might be asked is such as to vitiate the ownership or the claim of title to the property of the American Steel Barrel Company as a separate corporation. The books of the company were certainly confused. Taxes upon the property of the American Steel Barrel Company, and interest on its mortgages, were paid by the Iron Clad Manufacturing Company, and no proper entries of these were

made in the books. The profits of the American Steel Barrel Company were paid to the Iron Clad Manufacturing Company, and, if these payments had been made as dividends on stock, or by formal action of the corporation (apparently thus admitting ownership), it would seem that Mrs. Seaman and the American Steel Barrel Company would be estopped from claiming that the matter is actually one of debit and credit. But inasmuch as Mrs. Seaman was the owner of both, and inasmuch as she has erroneously assumed the right to do with the property of both concerns as she pleased, then the question which we have here is whether or not the fact that Mrs. Seaman undertook to treat the assets of both properties as if they were responsible for the debts of either company, or for her own use, is making the property of either company merely an asset of the other, or whether it gives the right to the creditors of the one first getting into difficulties to look to the property of the other, because the name of the one in difficulties is that which has been applied generally to all of Mrs. Seaman's property, and because that company is the older and has acquired the greater known business reputation.

A further question is presented by the trustee and by the creditors. If we were determining whether or not damages had resulted from the acts of Mrs. Seaman or of the American Steel Barrel Company, and whether or not those damages could be assessed, if we were considering whether or not, in an equitable way, the property of all the parties concerned should be taken into the custody of the court and protected, so that whatever may belong to the bankrupt can be secured for it, assuming thereby that some portion of the property can be traced and that it is inseparable from other portions, so that the bankruptcy court would have a right to assume possession of the whole, to the extent of protecting these assets, or if this motion were an attempt to actually trace assets into the hands of the American Steel Barrel Company, or if the parties had consented to the jurisdiction of this court, it might be possible to take further testimony or to work out some conclusion from what testimony we have. But this is not the case. The creditors do not ask for any such relief. They ask to have the receivership extended solely upon the ground that the property of the American Steel Barrel Company belongs to the Iron Clad Manufacturing Company, and that the capital stock of the American Steel Barrel Company did not belong to Mrs. Seaman, but that it also belonged to the Iron Clad Manufacturing Company and was wrongfully withheld by her. An adjudication having been had, the question of turning the property over to the receiver can no longer be considered. We have no opportunity to consider issuing merely a restraining order, or to treat the receiver as a custodian pending the further order of the court, which is what the court apparently assumed in the case of Rieger, Kapner & Altmark, supra.

If in a summary proceeding the court holds that the property of the American Steel Barrel Company is actually that of the Iron Clad Manufacturing Company, and directs that it be turned over to the trustee who now stands in the place of the receiver, such determination is equivalent to a finding that no one has title thereto except the

Iron Clad Manufacturing Company, and that we have thrown out of consideration the claim of Mrs. Seaman or of Mr. Wheelock to the capital stock of the American Steel Barrel Company, and the claim of that company to the property and real estate in its possession by determining upon the face of the record that its claim is not a claim of title; that, even if they be wrongdoers, they have not the right to be held responsible for their wrongs and to have the damages assessed. We must hold, on the other hand, if the view of the creditors be taken, that no title ever passed, and that all of the capital stock and all of the assets are shown upon the present record conclusively to be property of the Iron Clad Manufacturing Company, and to be available as a whole for the purposes and needs of the bankrupt estate. This might have resulted, prior to the adjudication in bankruptcy, in making the Iron Clad Manufacturing Company solvent. It might have resulted in ousting this court of jurisdiction to consider the case at all; but at the present time this question cannot be considered. The adjudication in bankruptcy has been had, the question of insolvency has been determined, upon the assets which the Iron Clad Manufacturing Company had upon the 23d day of May, 1911, which did not include any of those now claimed by this motion. The creditors have claimed that this court had jurisdiction to adjudicate the Iron Clad Manufacturing Company insolvent, upon the showing of assets it had according to the statements that were presented upon the trial of the issue. The creditors did not treat any of the assets of the American Steel Barrel Company, nor the capital stock of that company held by Mrs. Seaman, as property of the Iron Clad Manufacturing Company, and they apparently thereby admitted that for the purpose of their claim that this property was not in the Iron Clad Manufacturing Company. If the property was held by Mrs. Seaman or the American Steel Barrel Company, in fraud of the Iron Clad Manufacturing Company, it was available as an asset of the Iron Clad Manufacturing Company to the creditors of that company, and should have been included in the proof as to the assets of the Iron Clad Manufacturing Company at the time of adjudication. Of course, as between Mrs. Seaman and the creditors, her failure to introduce evidence or to admit that the property of the American Steel Barrel Company, and the capital stock, was available as an asset of the Iron Clad Manufacturing Company, would be sufficient to close her mouth from now questioning the fact that the creditors did not include the property. But when the court is merely considering whether or not her claim of title to this property is a bona fide title, or whether it is colorable only, it is impossible to escape the conclusion that if the creditors considered the property of the American Steel Barrel Company, and its capital stock, to be property of the Iron Clad Manufacturing Company, and merely in the possession of a third party, that claim should have been presented upon the trial of the question of solvency. Their failure to raise the question at that time would indicate that there is sufficient dispute as to the title to make it impossible to dispose of it summarily upon a motion of this sort.

As the motion stands at present, if the property should be turned

over to the trustee as property of the Iron Clad Manufacturing Company, no issue as to damages based on fraud, and no claim of debt could ever be determined and liquidated. The creditors and the trustee in bankruptcy would never have to prove any specific item or any specific fraud as to which damages could be assessed. The creditors of the American Steel Barrel Company would either become general creditors of the Iron Clad Manufacturing Company, having been dealing with an agent for an undisclosed principal, or they would have to be taken care of out of the proceeds of the American Steel Barrel Company's property, and would have to have the assets of the American Steel Barrel Company realized upon in the bankruptcy proceedings of the Iron Clad Manufacturing Company. The creditors of the American Steel Barrel Company, as well as of the Iron Clad Manufacturing Company, would take the chance of the assets proving to be sufficient for their needs. In view of the fact that the trust mortgage to secure bonds to the sum of $550,000 is outstanding, and that these bonds have apparently been sold for a very small amount, and that the balance stands as a deficiency, so that the right to foreclose this mortgage, in addition to the mortgage for $75,000 upon the real estate of the Iron Clad Manufacturing Company, is also being acted upon by the secured creditors, some of whom were also petitioning creditors in the case, and in view of the fact that if these large deficiency claims be proven, and the property be disposed of upon foreclosure, considerable further deficiency judgments may be created, it would seem that the unsecured creditors of the Iron Clad Manufacturing Company are likely to receive a very small percentage, if they receive anything at all, upon their claims. It is alleged that there are no creditors of the American Steel Barrel Company except a mortgagee, whose lien seems to be valid. But the stockholders and their creditors, or any one now becoming a creditor for merchandise, would be in a difficult situation to protect their rights, if the property of the American Steel Barrel Company be turned over to the trustee in bankruptcy, and if the rights of the creditors of the Iron Clad Manufacturing Company against the American Steel Barrel Company shall not be definitely determined and the amounts fixed in some suit or proceeding where the various interests can be heard and compared. In fact, the turning over of this property to the trustee in bankruptcy would not be a determination of creditors' rights, but would be equivalent to a determination that the respondents herein have no rights, and this has not been conclusively shown.

Under these circumstances and bearing in mind that the American Steel Barrel Company now claims a large debt from the Iron Clad Manufacturing Company, and that in endeavoring to prove this claim it will be necessary for the American Steel Barrel Company to show the amount which it previously owed to the Iron Clad Manufacturing Company, or which had been invested in the American Steel Barrel Company by the Iron Clad Manufacturing Company, and that these amounts have been paid, it is impossible to conclude that a bona fide claim of title cannot exist on the part of the respondents to the property as to which these questions arise. The only basis for such a

claim would be the joinder of all these property rights in Mrs. Seaman, at the time when the alleged fraudulent acts by her are said to have occurred. But as the companies and she herself were then abundantly solvent, and no reason for fraud has been shown, her claim of title cannot be held to be merely colorable, and the demand by Mrs. Seaman and the American Steel Barrel Company, that the creditors should not obtain this property without suit, must be sustained.

As to the stock held by Mrs. Seaman, the question is apparently even more simple. A very difficult matter of bookkeeping is shown, and a very difficult question of fact is presented as to whether Mrs. Seaman owed money to the Iron Clad Manufacturing Company, or whether the Iron Clad Manufacturing Company owed money to Mrs. Seaman. It depends upon the alleged criminal acts of many people. This cannot be determined upon this motion. Her claim to the capital stock, and that of Mr. Wheelock as her successor, or her claim to the proceeds thereof, is such that the creditors can ask no more than that she be temporarily restrained, and that now Mr. Wheelock be temporarily restrained, from disposing of his capital stock without notice to or consent of this court under the circumstances. In the same way, the American Steel Barrel Company should be restrained from disposing of its property as a whole, and the trustee should be given opportunity to substantiate his claims against that company, with the certainty that the assets will not be removed beyond the reach of the court; but further than that the court cannot go.

The objection to a summary proceeding to determine the claim of title of third parties in possession must be sustained.

THE TWILIGHT.

(District Court, S. D. Alabama. March 11, 1912.)

No. 1,316.

SHIPPING (§ 181*)—CONSTRUCTION OF CHARTER—COMPUTING DEMURRAGE OR DISPATCH MONEY.

A charter party, which provided the lay days for loading, and also provided for demurrage and dispatch money, contained a provision that "charterers may finish loading on the day the steamer is cleared at the custom house, without counting it as a lay day used, neither shall it count for dispatch money." *Held*, that the meaning of such provision was neither obscure nor doubtful, but that by the plain meaning of the words used its effect was that, in case the charterer did not finish loading within the lay days fixed, but finished on the same day the vessel cleared, such day should not count in computing demurrage, while in case it completed loading within the lay days, and on the day the vessel cleared, the charterer could not count such day as one saved in computing dispatch money earned.

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

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

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

In Admiralty. Suit by the Gulf States Shipping Company against the steamship Twilight. Decree for respondent.

N. R. Leigh, Jr., and Elliott G. Rickarby, for libelant.
Gregory L. & H. T. Smith, for respondent.

TOULMIN, District Judge. This is a suit brought by the libelant against the steamship Twilight to recover a sum of money alleged to be due it as dispatch money. The respondent answers, denying the indebtedness, and says that libelant presented a claim against respondent for dispatch money, which was correct and due, and which claim was paid in full.

This suit is for dispatch money for *one* day, alleged to have been omitted from the account presented and paid, through mistake of libelant in making up said account. This dispute between the parties arises on the interpretation of a clause in the charter party made between them on which the claim for dispatch money is based. The clause in question reads thus, after providing for the number of days allowed charterer for loading the vessel:

"If sooner loaded, the steamer to pay charterers or their agents the sum of 2d. sterling per net register ton per day dispatch money for every day saved, including Sundays and legal holidays, and pro rata for any part of a day saved. *Charterers may finish loading on the day the steamer is cleared at the custom house, without counting it as a lay day used, neither shall it count for dispatch money.*"

A charter party is but an ordinary contract, and is to be interpreted by the ordinary principles of contract law. The purpose of all interpretation is to ascertain and to give effect to the intention of the parties to a contract expressed by their writings. The intention of the parties, when manifest, or when ascertained, from the written contract, must control and be enforced, unless that intention is directly contrary to the plain sense of the binding words of the agreement. American Bonding Co. v. Pueblo Inv. Co., 150 Fed. 27, 28, 80 C. C. A. 97, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357; A. Leschen & Sons Rope Co. v. Mayflower G. M. & R. Co., 173 Fed. 856, 97 C. C. A. 465.

The charter party provides that any delay in loading by the charterer beyond the time allowed under the charter party entitles the vessel to demurrage. It also provides that for any time saved to the vessel in loading an allowance shall be made to the charterer, called "dispatch money," which is an amount to be paid by the vessel to the charterer for loading in less time than that permitted by the charter party. It is agreed by the parties in this case that the lay days permitted by the contract were 24.92; that there were four Sundays and one holiday (excepted). The loading began on June 6th, and was finished and the vessel cleared on June 19th. Thus was consumed in loading and clearing 12 days. The loading was finished and the vessel cleared on the twelfth day. It is also provided in the charter party that, in case demurrage is incurred, Sundays and legal holidays are counted, on the ground that the demurrage is an allowance for the time during which the ship would otherwise be on her voyage.

The same reason applies to dispatch money; Sundays and holidays being counted. But it is stipulated in the charter party that:

"Charterers may finish loading on the day the steamer is cleared at the custom house, without counting it as a lay day used, neither shall it count for dispatch money."

But for that provision in the charter party the charterer would be charged with the loading on the twelfth day, but the day on which the loading was finished and the vessel cleared was, by the terms of the contract, not to be counted in any claim for demurrage, nor counted for dispatch money. The lay days were definitely fixed in the contract, and before its performance was entered upon, and the stipulation above referred to was necessarily entered into before it could be known when the loading would be finished and the vessel cleared. The terms of said stipulation clearly indicate that it was to be operative, whether the loading was finished and the vessel cleared during the lay days or after they had ended. That the parties so contemplated I have no doubt. My interpretation of the clause of the charter party in question is that the day on which the loading may be finished and the vessel cleared is reckoned as a lay day, but not a lay day used in counting demurrage days, which could only arise after the expiration of the lay days; neither shall it be counted in a claim for dispatch money, which could only arise during the running of the lay days fixed by the contract. By any other interpretation, no effect would be given to that clause. It provides a rule which seems to me to be reasonable and just.

The language of the contract in this instance is not, in my opinion, contradictory, obscure, or ambiguous, or its meaning so doubtful as that the contract is fairly susceptible of two constructions. No custom, as shown or sought to be shown in this case, has any field of operation, so far as the question under consideration is concerned, as I view it. I think that the interpretation put upon the contract by the person who made out the account for dispatch money, which was paid by the vessel, was the correct one. The intention of the parties to the contract, as he ascertained it from the writing itself, was, in my opinion, in accordance with the plain sense of the binding words of the contract.

Lay days allowed by charter party	24.92
Days in loading	11.
	13.92
Day loading finished and vessel cleared, and not to be counted in claim for dispatch money	1.
	12.92
Add Sundays	2.
Holidays	1.
Days saved, for which dispatch money was due and has been paid before this suit.	15.92

My opinion is that the libelant is not entitled to recover, and the libel is therefore dismissed.

COLSTON v. AUSTIN RUN MINING CO.

(Circuit Court of Appeals, Third Circuit. April 3, 1912.)

No. 1,584.

BANKRUPTCY (§ 56*)—"ACT OF BANKRUPTCY."

Where a validly created and subsisting lien for more than four months before the filing of a petition in involuntary bankruptcy of the debtor is enforced within the statutory four months and while the debtor is insolvent, the mere failure of the debtor, while insolvent, to vacate or discharge the lien within the statutory period, and at least five days before a sale or final disposition of the property affected, does not constitute an "act of bankruptcy," within Bankruptcy Act July 1, 1898, c. 541, § 3a, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), defining acts of bankruptcy, since the priority obtained by reason of the lien is obtained when the lien attaches.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 61–65, 67, 68, 86–96; Dec. Dig. § 56.*

For other definitions, see Words and Phrases, vol. 1, p. 118; vol. 8, p. 7562.]

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

Petition in involuntary bankruptcy by Fred M. Colston and others against the Austin Run Mining Company. From a decree of dismissal, rendered after sustaining a demurrer to the petition, petitioner named appeals. Affirmed.

The following is the opinion of the court below, by Bradford, District Judge.

This case is before the court on demurrer to a petition in involuntary bankruptcy filed by Thomas M. Mackey and others against the Austin Run Mining Company, a corporation of Delaware. The clause setting forth the act of bankruptcy is as follows:

"And your petitioners further represent that said Austin Run Mining Company is insolvent, and that within four months next preceding the date of this petition, the said Austin Run Mining Company committed an act of bankruptcy, in that it did heretofore, to wit, on the 31st day of May, A. D. 1911, suffer and permit while insolvent, William J. Westcott, a creditor, to obtain a preference over other creditors of said corporation through legal proceedings, in an action of foreign attachment and to obtain a decree therein against the said Austin Run Mining Company, for payment of a debt of $41,080.69, entered in the Corporation Court of the City of Fredericksburg, in the County of Stafford, in the State of Virginia, and in said legal proceedings an order of sale was made on said date by said court, whereby all the real and personal property of said Austin Run Mining Company, situated in the County of Stafford, State of Virginia, consisting of lands, railways, sidings, cars, buildings, mines, mining rights, franchises, tools and other property of the said corporation, were ordered to be sold at public sale, after due notice, and the same is advertised to be sold on Friday, August 18, 1911, at the courthouse at Fredericksburg, in the State of Virginia, for the satisfaction of said debt of $41,080.69, and certain liens and claims in the order of priority thereof. Whereby the said William J. Westcott is about to obtain an unlawful preference over other creditors of the said Austin Run Mining Company by the payment of said debt, and the said Austin Run Mining Company not having at least five days before the said sale and final disposition of said property affected by said preference vacated or dis-

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

charged such preference. The said property about to be sold being all the property of the said corporation."

In section 3a of the bankruptcy act it is provided:

"Acts of bankruptcy by a person shall consist of his having * * * (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."

And in section 3b it is provided:

"A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act."

Admittedly the only subdivision of section 3a which by any possibility can apply to the facts here admitted on demurrer is the third. The petition states in effect that in the foreign attachment proceedings a decree for the payment of the debt of $41,080.69 was recovered, and that an order of sale of the attached property was made May 31, 1911, which was within the space of four months next preceding the date of filing the petition. Evidently what is relied upon as constituting a preference is, not the creation of the lien under and by virtue of the foreign attachment, but the order of sale within the statutory period coupled with the failure on the part of the alleged bankrupt to secure a discharge of the property from sale or liability to sale under such order. For the petition after referring to the order of sale and advertisement thereunder avers "whereby the said William J. Wescott is about to obtain an unlawful preference * * * by the payment of said debt," etc. But the burden rested on the petitioning creditors to set forth that the lien under and by virtue of the foreign attachment was created during the statutory period of four months if it was essential to a sufficient averment of an act of bankruptcy under section 3a (3) that the creation of the lien should have occurred during that period. It is nowhere alleged in the petition, however, when the foreign attachment issued and became operative as a lien. The language employed in the petition is such that no violence would be done to it by holding either that the lien came into existence only during such period, or that it was created prior to its commencement. It cannot be assumed that the lien was created within and not prior to that period. Where a pleading is fairly susceptible of two constructions it is an elementary rule that, other things being equal, that construction will be adopted which is less favorable to the pleader. This Court is, therefore, bound to assume that the lien of the foreign attachment became operative prior to the commencement of the four months, and in making this assumption no injustice can be done to any one, for it was distinctly admitted by the counsel for the petitioning creditors in open court during the hearing on demurrer, and the argument of counsel on both sides proceeded on the ground, that the lien of the foreign attachment was a valid lien upon the property of the alleged bankrupt, subsequently ordered to be sold, much longer than four months next before the filing of the petition in bankruptcy. The question thus is presented whether an attempted enforcement while insolvent within the space of four months next before the filing of a petition in involuntary bankruptcy of a lien on the property of the alleged bankrupt validly created and subsisting for more than that period, coupled with an omission by him to secure, at least five days before a sale or final disposition of such property, the vacation or discharge of such lien, constitutes an act of bankruptcy under section 3a. Mere failure while insolvent to vacate or discharge the lien within the statutory period of four months and at least five days before a sale or final disposition of the property affected clearly does not constitute an act of bankruptcy. In addition to such failure it is essential that the alleged bankrupt should within that period of four months have "suffered or permitted while insolvent" the lien to be obtained; for the "act of bankruptcy" by section 3b must have occurred within four months next before the filing of the petition, and its commission includes a combination of three essential elements, namely, first, suffering or permitting the obtaining of the lien of the foreign attachment; second, insolvency of the alleged bankrupt at the time; and,

third, failure to vacate or discharge the lien in manner above mentioned. There are several provisions of the bankruptcy act pertinent in this connection. While section 3a (3) mentions a "preference through legal proceedings," sections 60a, 67c and 67f also relate to preferences and throw much light on the point to be decided. Section 60a defines a preference through legal proceedings as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition * * * procured or suffered a judgment to be entered against himself in favor of any person * * * and the effect of the enforcement of such judgment * * * will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Section 67c provides for the dissolution by the adjudication of bankruptcy of liens resulting from judicial proceedings under certain circumstances, as follows:

"A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien," etc.

Section 67f, relating to the same general subject, provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent at at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate," etc.

It is impossible to read these various provisions without being forced to the conclusion that no lien or preference created or suffered by the bankrupt in legal proceedings is avoided or rendered voidable by the adjudication in bankruptcy unless created or suffered within the period of four months next preceding the filing of the petition. And it is equally clear that a judgment or decree merely for the enforcement of a pre-existing lien is not in the contemplation of the bankruptcy act a preference, and consequently if founded on a lien existing prior to the statutory period of four months will not be set aside or injuriously affected, although obtained within that period. This doctrine has been authoritatively applied even where the lien was not perfect in the sense of being absolute, unconditional and indefeasible. In Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, it was held that the bringing of a judgment creditor's bill more than four months before the filing of a petition in bankruptcy created an equitable lien on the assets of the bankrupt, though contingent in a certain sense, and that a judgment or decree for the enforcement of the lien recovered less than four months before the filing of the petition was not obnoxious to the provisions of the bankruptcy act. The court, through Chief Justice Fuller, after quoting section 67f, said:

"In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized.

When it is obtained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial."

If a valid lien antedates the statutory period of four months a judicial ascertainment of the extent of such lien and the enforcement of it are legitimate and proper; not being forbidden by any of the provisions of the bankruptcy act. And this is true in certain cases where the lien is only inchoate at the commencement of the statutory period and where something must still be done to render it perfect. In Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, it appears that in April, 1891, one Moore, in Vermont, gave to the defendant a chattel mortgage of certain existing livery property and of similar property thereafter to be purchased or acquired by him. Moore filed a petition in voluntary bankruptcy June 30, 1900, and shortly thereafter was duly adjudged a bankrupt. The chattel mortgage had been duly executed and recorded years before the filing of the petition in bankruptcy. The defendant, within four months before the filing of the petition, took possession under the chattel mortgage of all the livery property then on hand, it being after-acquired property, and June 11, 1900, caused the same to be sold at public auction by the sheriff. The suit was brought by the trustee in bankruptcy to recover from the defendant the proceeds of sale on the ground, as claimed, that the action of the defendant in taking possession and making sale of the after-acquired property was unlawful under the provisions of the bankruptcy act. The Court, after referring to Sabin v. Camp (C. C.) 98 Fed. 974, said:

"The principle that the taking possession may sometimes be held to relate back to the time when the right so to do was created is recognized in the above case. So in this case, although there was no actual existing lien upon this after-acquired property until the taking of possession, yet there was a positive agreement, as contained in the mortgage and existing of record, under which the inchoate lien might be asserted and enforced, and when enforced by the taking of possession, that possession, under the facts of this case, related back to the time of the execution of the mortgage of April, 1891, as it was only by virtue of that mortgage that possession could be taken. The Supreme Court of Vermont has held that such a mortgage gives an existing lien by contract, which may be enforced by the actual taking of possession, and such lien can only be avoided by an execution or attachment creditor, whose lien actually attaches before the taking of possession by the mortgagee. Although this after-acquired property was subject to the lien of an attaching or an execution creditor, if perfected before the mortgagee took possession under his mortgage, yet if there were no such creditor, the enforcement of the lien by taking possession would be legal, even if within the four months provided in the act. There is a distinction between the bald creation of a lien within the four months, and the enforcement of one provided for in a mortgage executed years before the passage of the act, by virtue of which mortgage and because of the condition broken, the title to the property becomes vested in the mortgagee, and a subsequent taking possession becomes valid, except as above stated."

In line with Thompson v. Fairbanks is the subsequent case of Fisher v. Zollinger, 149 Fed. 54, 79 C. C. A. 76, decided by the circuit court of appeals for the sixth circuit.

In the case of In re Blair (D. C.) 108 Fed. 529, it was held that where there was an attachment on mesne process more than four months before the filing of the petition in bankruptcy, the obtaining of judgment and levy of execution within that period were not forbidden by the bankruptcy act. The Court said:

"It is urged that whatever be the lien created by an attachment standing alone, that lien cannot be enforced by judgment entered or levy made within four months of the filing of the petition. Where, however, the lien is created by the attachment, the judgment and levy create no new or additional lien, but only enforce a lien already existing. Hence in this case the levy and

execution did not affect the property attached with a lien avoided by the bankrupt act, but only enforced a lien already existing, which lien the bankrupt act expressly protected. The meaning of the subsection [67f] appears to be this: Under some circumstances, all liens obtained through legal proceedings are avoided, in whatever part of the suit or by whatever form of proceeding they are created. If the lien is created by the levy, then the lien of the levy is avoided; if created by the judgment, then the lien of the judgment is avoided; if created by the attachment, then the lien of the attachment is avoided; but, if the lien created by the attachment is saved, that lien may be enforced by appropriate proceedings, even though such proceedings include a judgment and levy made within the limited time."

So in the case of In re Beaver Coal Co., 113 Fed. 889, 51 C. C. A. 519, it was held by the circuit court of appeals for the ninth circuit that section 67f does not invalidate the lien of an attachment obtained more than four months before the filing of the petition in bankruptcy, though the judgment and order of sale necessary for its enforcement are not secured until after the commencement of that period. The Court said:

"The judgment order so made does not create a new lien nor discharge the old. It directs only the enforcement of the lien. It is similar in its nature to a decree for the foreclosure of a mortgage. It sustains the attachment lien and subjects the attached property to its satisfaction. Construing the language above quoted from section 67f, we think it refers solely to liens, and that it does not mean that all judgments rendered within four months prior to bankruptcy shall be null and void. The use of the words 'judgments * * * or other liens' indicates that it was the purpose of the act to avoid liens only which were obtained by judicial proceedings within the prescribed time, and not to declare void judgments as such. This view is in harmony with other provisions of the bankruptcy law. Judgments rendered, even after bankruptcy, are sustained as determining the claim thereby adjudged. Section 63a. In brief, the intention of the act was to set aside preference liens obtained by legal proceedings within four months prior to bankruptcy. The lien in the present case was 'obtained' by the attachment. The bankruptcy law recognizes all valid liens that existed four months prior to bankruptcy proceedings. The attachment lien was not discharged nor was its nature altered by the judgment. It required no judgment or levy to make it good as a lien. It would have remained a valid lien if no judgment had been taken. No lien was 'obtained' by the judgment, and none was lost thereby."

The foregoing cases and others unnecessary to cite show that the enforcement by sale within the period of four months next before the filing of the petition in bankruptcy of a lien or other preference obtained through judicial proceedings more than four months before such filing is not in contravention of any of the provisions of the bankruptcy act, and virtually control the decision of the point now before this court. For it follows as a corollary from the doctrine of those cases that the omission of the debtor to prevent the creditor from doing precisely what the law allows him to do cannot be imputed to him as a fault, actual or constructive, or render that an act of bankruptcy which without such permissible action on the part of the creditor would fail to furnish the basis for an adjudication. In Owen v. Brown, 120 Fed. 812, 57 C. C. A. 180, the circuit court of appeals for the eighth circuit dealt with a case in which the alleged act of bankruptcy consisted of the failure of the alleged bankrupt to vacate and discharge five days before sale a judgment which had become a lien on real estate more than four months before the filing of the petition, in fact prior to the passage of the bankruptcy act. The court held that the petition could not be sustained, saying:

"The contention of the appellants is that the judgment creditor obtained a preference and the act of bankruptcy was committed when the defendant's real estate was sold on execution, without regard to the date of the judgment on which the execution was issued, and regardless of the fact that the judgment was a lien on the real estate of the defendant sold on the execution from the date of its rendition. This contention finds no support in the

bankrupt act or on principle. * * * The 'preference through legal proceedings' mentioned in subdivision 3 is a preference obtained by such means within four months next preceding the filing of the petition in bankruptcy. Neither the third subdivision of section 3a, nor any other provision of the bankrupt act, contemplates that valid judgment liens on real property acquired before tthe passage of the act, or more than four months before the filing of the petition in bankruptcy, shall be vacated; or that the due enforcement of such liens by execution shall constitute an illegal preference, which would be exactly tantamount to vacating or annulling the lien itself. * * * The judgment creditor's right to have this real estate sold on execution and the proceeds of the sale applied to the payment of his judgment was acquired when the lien of the judgment attached to the real estate and not when the execution sale took place. As the judgment creditor did not, within four months of the filing of the petition in bankruptcy, obtain 'a preference through legal proceedings' there was no 'such preference' for the defendant to vacate or discharge, and the third subdivision of section 3a does not, therefore, apply to this case. The preference was obtained when the lien attached, and not when it was enforced. When the creditor obtains no preference within four months the debtor suffers or permits none for which he can be adjudged a bankrupt. Under the construction of the act contended for by the appellants it would be useless for a creditor to take a mortgage or obtain a judgment lien on the property of his debtor in any case; for years after he obtained his lien, and whenever by appropriate judicial proceedings he enforced the same to procure satisfaction of his debt, he would be met by the proposition that by the 'legal proceedings' he had resorted to to enforce his lien he had thereby obtained 'a preference through legal proceedings'; and the judgment debtor, for suffering or permitting such preference, would be adjudged a bankrupt, and the proceeds of the creditor's security would inure to the equal benefit of all the debtor's creditors. The bankrupt act does not work any such fell destruction of securities."

The court further held that the decisions of Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, and Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128, "must be held to conclude this question," saying:

"Though other provisions of the bankrupt act were under consideration in those cases, the reasoning of the court is equally applicable to the provision of the act under consideration in this case."

While there is some conflict in the cases a clear preponderance of the decisions, both in number and weight of reasoning, supports the conclusion that the omission of the alleged bankrupt to vacate or discharge the attachment lien or the judgment or order of sale was, under the circumstances, wholly without culpability, and that no act of bankruptcy has been committed. It is not necessary to discuss or refer to the several other objections raised on demurrer. The petition must be dismissed, with costs.

Charles L. Smyth (Ward W. Pierson and J. Howard Reber, on the brief), for appellant.

Claude L. Roth (John W. Brady, on the brief), for appellee.

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

GRAY, Circuit Judge. This is an appeal by a creditor or creditors of the Austin Run Mining Company, a corporation of the state of Delaware, from the judgment of the court below sustaining a demurrer to the petition filed by said creditors, alleging that the said respondent had committed an act of bankruptcy, in that on the 31st day of May, 1911, it had permitted, while insolvent, one William J. Westcott, a creditor, to obtain a preference over other creditors of said corporation, through legal proceedings in an action of foreign attach-

ment in the state of Virginia, and to afterwards obtain a decree thereon for the payment of a debt of $41,080.69, entered in a court of that state; that in said legal proceedings, an order of sale was made on said date by the court, whereby all the real and personal property of the respondent corporation, situated in the county of Stafford, state of Virginia, was ordered to be sold at public sale; and that the same was advertised to be sold on Friday, August 13, 1911; by which order of sale, it is alleged that Westcott was about to obtain an unlawful preference over other creditors of the Austin Run Mining Company by the payment of said debt, that company not having, at least five days before said sale and final disposition of said property affected by such preference vacated and discharged the same.

To the petition thus filed, a demurrer was interposed by the alleged bankrupt, on the general ground that the said petition did not state facts sufficient to warrant an adjudication of bankruptcy. The petition did not state the date on which the writ of foreign attachment issued and the lien thereof became operative. The court, however, felt bound to assume that the lien of the foreign attachment became operative prior to the commencement of the four months preceding the filing of the petition, and it was afterwards admitted by the counsel for the petitioning creditors during the hearing on the demurrer, and the argument of counsel on both sides proceeded on the ground, that the lien of the foreign attachment was a valid lien upon the property of the alleged bankrupt subsequently ordered to be sold, much longer than four months next before the filing of the petition in bankruptcy.

The question is thus presented, as stated by the court below, whether an attempted enforcement while insolvent within the space of four months next before the filing of a petition in involuntary bankruptcy, of a lien on the property of the alleged bankrupt validly created and subsisting for more than that period, coupled with an omission by him to secure, at least five days before a sale or final disposition of such property, the vacation or discharge of such lien, constitutes an act of bankruptcy under section 3a of the Bankruptcy Act. There has been some conflict in the decisions upon this question, but we agree with the learned judge of the court below that both reason and the weight of authority compel the conclusion that mere failure, while insolvent, to vacate or discharge the lien within the statutory period of four months, and at least five days before a sale or final disposition of the property affected, does not constitute an act of bankruptcy. Priority is obtained when a lien attaches, and not when it is enforced. The date of the sale is immaterial in this respect; whenever it takes place, it relates back to the date when the lien attached. The attaching creditor in the case before us, therefore, did not obtain a preference by the decree liquidating his debt. In the language of Mr. Chief Justice Fuller, in Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122:

"A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute (section 67f of the Bankruptcy Act of 1898), which is plainly confined to judgments creating liens."

It is not our purpose, however, to discuss at length the interesting question raised by this appeal. The authorities in support of our conclusion, as well as those that conflict therewith, have been elaborately discussed in the well-reasoned opinion of the learned judge of the court below, and its decree is hereby affirmed.

MUNROE et al. v. CITY OF CHICAGO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1912.)

No. 1,832.

NAVIGABLE WATERS (§ 20*)—FAILURE TO OPEN BRIDGE—LIABILITY FOR INJURY TO VESSEL.

The steamer Markham, going up Chicago river at night, when 800 feet away, signaled for the opening of the bascule bridge at Taylor street, owned by the city. The bridge was not opened, and the steamer proceeded for 400 or 500 feet at slow speed, signaling twice more, and then stopped and backed; but her momentum and the current carried her against the bridge and she was injured. The bridge was equipped, as required by the government regulations, with two red lights in the center, one on the end of each opening section, which changed to green lights when the sections and lights were raised. The weather was clear, and such lights could be seen by the steamer. An ordinance also required a signal light to be shown where for any reason the bridge could not be opened; but it was not observed. *Held* that, under the settled rules in admiralty, that it is incumbent on the owner of a bridge over a navigable stream to keep some one in charge to operate the same on proper signal, that the right of navigation is paramount, and that a vessel, having signaled, may properly proceed at slow speed, on the assumption that the bridge will open, until it appears by proper warning or in reasonable view of the situation that it will not, the steamer was not in fault, and that the city was liable for her injury.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 73-99; Dec. Dig. § 20.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in admiralty by William Munroe, the Michigan Trust Company, trustee of the estate of Thomas Munroe, William Brinen, A. F. Temple, and W. J. Brinen, as owners of the steamer Markham, against the City of Chicago. Decree for respondent (186 Fed. 564), and libelants appeal. Reversed.

This appeal is from a decree in admiralty which dismisses the libel in personam filed by the appellants, as owners of the steamer George C. Markham, to recover for damages sustained by the steamer, through collision with a bascule bridge crossing the Chicago river, alleged to be caused by negligence on the part of the city of Chicago in maintaining and operating the bridge. Dismissal resulted upon final hearing of the issues; and the facts in evidence, in reference to the navigation of the steamer and the signals upon the bridge—which failed to open in response to the signals from the steamer—are thus stated in the opinion filed by the trial court:

"On October 19, 1909, the steamer Markham was bound up the Chicago river, and while opposite Polk street signaled for the Taylor street bridge.

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

The first signal was given when about 800 feet from the bridge. The Markham was proceeding under slow check, as slow, in fact, as it was possible for her to go and maintain steerage. It was about 5 o'clock in the morning. The atmosphere was clear, and the captain could see the two red lights in the center of the bridge. This bridge was of the jack-knife or bascule variety, and was equipped with the lights prescribed by the Lighthouse Board under the direction of the Department of Commerce and Labor, namely: There were placed on each leaf, near the point where they touched, and on the upstream and downstream sides, a square lantern swinging behind a frame containing a circular panel of red and green colored glass, with the result that when the bridge was closed there would be shown on the upstream and downstream sides two red lights close together in the center of the bridge, and when completely open two green lights at an elevation on each side of the opening. There were also stationary red lights at the lower side of each leaf, showing the width of the channel. The lights in the center of the bridge flashed red when the bridge was down, and green when the bridge was open. On the morning of the accident, the bridge was down, with the two red lights in the center showing, indicating that the bridge was closed.

"When the Markham had proceeded 200 or 250 feet, after her first signal, her master signaled again for the bridge to open. The bridge was not opened, nor was any bell rung (indicating to those on the street that the bridge was opening, or about to be opened), nor was any other signal given which could have led the master of the vessel to believe that the bridge was to be opened. The steamer then proceeded about 200 feet further down stream, when she signaled a third time and stopped her engines. The current was carrying the boat towards the bridge at about 3 miles an hour, and the captain, at this point realizing that the bridge was not going to open, backed the steamer. The momentum of the boat, however, carried it against the bridge, and a damage resulted, it is claimed, of $1,000, The pilot house was taken off and one of the spars broken."

Other facts, deemed material and controlling, are stated in our opinion.

Charles E. Kremer, for appellant.

Wm. H. Sexton, for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The appellants' libel was dismissed upon final hearing, pursuant to the conclusion stated in the opinion of the trial court, that "the accident in this case was due entirely to the fault of the master of the" steamer. All material facts—both in reference to the navigation of the steamer and of alleged negligence on the part of the city, whereon reversal is sought—are undisputed under the testimony, and we believe the rule of admiralty law which must be applied thereto leaves the inferences of ultimate fact free from difficulty. In Clement v. Metropolitan West Side E. Ry. Co., 123 Fed. 271, 273, 59 C. C. A. 289, 291. Judge Jenkins, speaking for this court, thus aptly defines the duties of the parties respectively:

"A bridge spanning a navigable river is an obstruction to navigation, tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary; the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition thereto. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the

bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights, giving warning of the position of the bridge and of its opening and closing. If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open the bridge and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked, and to critically examine the situation before proceeding (City of Chicago v. Mullen, 54 C. C. A. 94, 116 Fed. 292), but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened (Manistee Lumber Company v. City of Chicago [D. C.] 44 Fed. 87; Central Railroad Company of New Jersey v. Pennsylvania Railroad Company, 8 C. C. A. 86, 59 Fed. 192), when it becomes the duty of the vessel, if possible, to stop, and, if necessary, to go astern."

And we understand the rule so stated to be the well-established doctrine of admiralty, applicable to the case at bar. As the opinion of the trial court recites (in conformity with the testimony), the steamer, laden with lumber, bound up the Chicago river, was about "800 feet from the bridge" when her "first signal was given," and "was proceeding under slow check, as slow, in fact, as it was possible for her to go and maintain steerage," moving with a current (variously estimated) at 2 or 3 miles an hour. Her signal for the bridge was twice repeated, with headway under further check, until within about 200 feet of the bridge, when she attempted to stop and back up, on discovering that no start was made in opening the draw. She was then unable to keep away from the bridge and the collision ensued. These occurrences were about 5 o'clock in the morning, "the atmosphere was clear," and the "two red lights in the center of the bridge" were in plain view throughout the approach. The finding of fault on the part of the steamer is therein predicated substantially: That these lights "complied with the requirements of the Lighthouse Board"; that the master of the steamer knew, when 800 feet away, that "the bridge was down"; that "the bridge tender gave no signal to proceed" and "no indication that the bridge was going to open," so that the master was not misled; and that "there was no time when he had any right to believe that the bridge was going to open," and he was bound "to keep his boat under such control" as to avoid collision. We believe this conclusion to be inconsistent with the above-mentioned rule, that "in the absence of proper warning" the vessel has "the right to assume that the bridge will be timely opened for passage," and that it cannot be upheld in the light of further circumstances which appear in evidence.

The regulations of the Lighthouse Board referred to (for display of two red lights) are applicable alike to all bridges spanning navigable waters, in thoroughfares of all grades of use, to indicate whether the draw is closed or open, so that the lights are down when the bridge is normally closed, and are in no sense indicative that the bridge will not open, on signal, for passage of a vessel. In populous cities, having numerous bridges over navigable waters, regulation may be need-

ful, consistent as well with the rights of navigation and with the requirements of street traffic and other exigencies, to give warning when a bridge cannot be immediately opened for passage of a vessel. So the city of Chicago has provided by ordinance for "vessel signals" to be maintained "at the several bridges over the Chicago river and its branches" (section 992), to consist of a red ball for use in the daytime and a red lantern (as specified) for the nighttime, to be elevated on the bridge "when upon the approach of any vessel," having "signaled for the bridge," the "bridge tender for any reason cannot open the bridge," and so remain until it can be opened (section 993). The reasonableness of this provision is unquestioned, and we believe it entitles the navigator to expect such warning, if any cause prevented opening of the bridge upon his signal for it. Not only was no such warning given—nor notice in any form that the bridge could or would not be opened for the steamer—but it appears in evidence that this bridge was not equipped with such signals, although they were provided and used on other bridges of the city spanning the river. We believe, therefore, that no fault appears in the steamer's approach, under the check described, beyond the place of first signal, although it was then observed that "the bridge was down."

But the further question arises whether culpable fault appears in approaching within 200 or 300 feet of the bridge, even under her least speed for keeping steerageway; and its solution rests on other circumstances in evidence. The bridge was equipped with electrical power, with a bridge tender on each side to operate the two leaves of the bridge, and the opening was speedily accomplished when power and attendants were in readiness. It appears, however, that one of the bridge tenders had been called from his station and was on the dock when the steamer signaled for the bridge; that, recalled (by the signals or outcries), he hastened to the bridge, and in the excitement of the close approach of the steamer turned on the current so hurriedly that "the fuse blew out," so that the bridge could not be opened until another fuse was inserted, causing such delay that collision could not be avoided. The testimony does not establish the distance of the steamer from the bridge when this fuse accident occurred, but it is fairly presumable that no collision would have occurred otherwise. So—while the appellants' contention of defect in the electrical equipment is unsupported by the evidence—we believe no ground appears for condemnation of the steamer, as not "prudently proceeding under slow speed," in the absence of any warning that the bridge was not properly attended for timely opening. Not only was no warning given of the absence of the bridge tender, but it further appears in evidence that barges passed under the bridge, upbound, during the approach of the steamer, that men on the barges called out to the bridge tenders to open the bridge for the steamer, and that their cries were heard by the master of the steamer, who reasonably assumed that no further delay would occur. Without warning of any cause for delay therein, we believe that the steamer's approach was not unreasonable under the circumstances, and that she was placed in extremis by the failure of the bridge tenders to open the bridge, when it was too

late to haul over to the docks—the only other course reasonably open to her, during the approach, to abide the opening.

We are of opinion, therefore, that the collision was caused by failure on the part of the city to provide and give the warning signal, in conformity with its ordinance, that the bridge could not be opened promptly for an approaching vessel; that when the bridge tender was called away, leaving no one to operate the bridge meantime, the duty arose to give warning of the immediate disability, so that any vessel bound through the bridge in this busy channel could govern its course accordingly; and that the city of Chicago is answerable for the ensuing collision damages.

The decree of the District Court in admiralty is reversed accordingly, with direction to enter a decree in favor of the libelants and proceed thereupon for assessment of damages in conformity with the admiralty rules.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS et al. v. PARRISH.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1912.)

No. 2,186.

1. UNITED STATES (§ 110*)—RIGHT TO ALLOWANCE—CLAIMS AGAINST GOVERNMENT—INTEREST.

Generally interest is not allowable on claims against the United States or against a state unless the government has stipulated to pay interest, or interest is given by express statutory provision.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 93; Dec. Dig. § 110.*]

2. INTEREST (§ 13*)—RIGHT TO ALLOWANCE.

Against debtors generally, interest is awarded, not only by virtue of contract therefor, express or implied, but, under proper circumstances and in the exercise of a proper discretion, as compensation for delay or default of the debtor.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 25; Dec. Dig. § 13.*]

3. ARMY AND NAVY (§ 52*)—SOLDIERS' HOME—INTEREST ON CLAIM.

Under a cross-bill against the National Home for Disabled Volunteer Soldiers, which was incorporated under Act Cong. March 21, 1866, c. 21, 14 Stat. 10, and acts amendatory thereto (Rev. St. § 4825 [U. S. Comp. St. 1901, p. 3337]), with power to sue and be sued, etc., by which damages were sought and recovered for default of the Home under a building contract, which the latter was authorized to make, interest upon the recovery is allowable against the Home.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 100–102; Dec. Dig. § 52.*]

4. ARMY AND NAVY (§ 52*)—SOLDIERS' HOME—ACTION—COSTS.

Under Rev. St. § 1001 (U. S. Comp. St. 1901, p. 713), and Circuit Court of Appeals rule No. 31 (150 Fed. XXXV, 79 C. C. A. XXXV), an affirmance of a decree on a cross-complaint against the National Home for Disabled Volunteer Soldiers should be made without costs on appeal, where the appeal was taken by direction of the federal department of justice.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 100–102; Dec. Dig. § 52.*]

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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 Eastern District of Tennessee.

Action by the National Home for Disabled Volunteer Soldiers and another against J. E. Parrish. From the judgment, plaintiffs appeal. Affirmed.

Samuel C. Williams, for appellants.

Shields, Cates & Mountcastle and Harr & Burrow, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. The National Home for Disabled Volunteer Soldiers is incorporated under congressional act of March 21, 1866 (14 Stat. 10, c. 21), and the acts amendatory thereto (Rev. Stat. § 4825 [U. S. Comp. St. 1901, p. 3337]). By act of January 28, 1901 (31 Stat. c. 184, p. 745), the board of managers of the Home was authorized to purchase grounds and erect buildings for what is now called the Mountain Branch of the Home, near Johnson City, Tenn.; an appropriation being made for the purpose. On November 19, 1901, the Home, through its general treasurer, contracted with the appellee for the construction of a group of buildings for this Mountain Branch of the Home. After the construction was partly performed, the Home annulled the contract for failure of the contractor to fulfill its terms, and the buildings were completed by the Home authorities. Under proceedings in equity instituted by the Home and its General Treasurer (cross-bill being filed by the appellee), the conflicting claims and equities of the parties growing out of the contract and the proceedings thereunder, including the completion of the buildings by the Home authorities, were fully tried out, with the result that appellee was, by final decree, held entitled to recover against the Home the net amount of $21,139.12, after allowing in the latter's favor the payments made to appellee, the expense of completing the buildings, and deductions on account of defects and omissions. To this sum was added interest from February 15, 1904, the date when (as stated in the decree) "the Home went into complete possession of said property, using and enjoying the same for its purposes." In an opinion filed as basis for the final decree the presiding judge stated that the Home "had in its hands, at the time of annulment, reserved percentages, on its own estimate of work previously done, aggregating $23,353, or more than the principal sum now found to be due Parrish [appellee] on the basis of the accounting." The errors assigned challenge only the award of interest.

[1] The general rule is well settled that interest is not allowed on claims against the United States, or against a state, unless either the government has stipulated to pay interest, or such interest is given by express statutory provision. Gordon v. United States, 7 Wall. 188, 19 L. Ed. 35; Angarica v. Bayard, 127 U. S. 251, 260, 8 Sup. Ct. 1156, 32 L. Ed. 159; United States v. North Carolina, 136 U. S. 211, 216, 217, 10 Sup. Ct. 920, 34 L. Ed. 336; South Dakota v. North Carolina, 192 U. S. 286, 321, 24 Sup. Ct. 269, 48 L. Ed. 448; Bledsoe v. State, 64 N. C. 392, 397. And by express statute such is the rule (as to in-

terest before judgment) in suits against the United States in the Court of Claims and in the District and Circuit Courts of the United States under the Tucker act (Rev. Stat. § 1091 [U. S. Comp. St. 1901, p. 747]; Tillson v. United States, 100 U. S. 43, 47, 25 L. Ed. 543; Harvey v. United States, 113 U. S. 243, 248, 249, 5 Sup. Ct. 465, 28 L. Ed. 987).

[2] This suit is not in form against the United States. Appellants insist, however, that it is such in substance; that the National Home is but an agency of the federal government; that the corporation known as the National Home for Disabled Volunteer Soldiers is organized merely as a means of carrying out the eleemosynary purposes of the United States in caring for its disabled soldiers; that the activities of the Home are thus those of the general government; and that, as any recovery against the Home can in fact be paid only through congressional appropriation, the situation is to all practical intents the same as if the decree were rendered directly against the United States. We think the Home is, in a proper sense, an administrative agency of the federal government. Ohio v. Thomas, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699; Overholser v. National Home, 68 Ohio St. 236, 67 N. E. 487, 62 L. R. A. 936, 96 Am. St. Rep. 658. The Circuit Court expressed the opinion that, as the "suit is not against the government directly, the strict rule of law forbidding the allowance of interest is not applicable, but that, as it is a suit against a national home as a governmental agency, in reference to a matter as to which it is specifically authorized to contract, interest may be allowed against it, as against any other litigant, upon equitable terms."

Whether, apart from the statutory authority given the Home to make contracts, and the power to sue and to be sued (to which we shall later refer), the case is taken out of the rule of nonliability for interest, from the mere fact that the suit is not directly against the United States, we do not find it necessary to determine; nor did the learned judge who presided below decide that question. It is to be noted, however, that no case has been cited, nor has any been found by us, in which the rule of nonliability to interest has been applied elsewhere than in a proceeding directly against the government, state or national, or one in which payment directly from the national or state treasury was sought. The case of Bledsoe v. State, supra, which was cited with approval in United States v. North Carolina, supra, and on which case appellants place great reliance, is not strongly in point. In that case, although the claims under consideration were for supplies furnished the State Asylum, they were under express constitutional provision audited by the court as claims against the state. The fact that the action of the court was only recommendatory to the Legislature is not important. It is further to be noted that in suits against collectors to recover moneys paid under protest, even though the recovery is by express statute payable directly from the United States treasury, upon certificate of probable cause, recovery of interest is allowed (Erskine v. Van Arsdale, 15 Wall. 75, 77, 21 L. Ed. 63; Kinney v. Conant [C. C. A. 1] 166 Fed. 720, 721, 92 C.

C. A. 410; Treat v. Farmers' Loan & Trust Co. [C. C. A. 2] 185 Fed. 760, 108 C. C. A. 98); interest having, however, been denied in Redfield v. Ystalyfera Iron Co., 110 U. S. 174, 176, 3 Sup. Ct. 570, 28 L. Ed. 109, on the ground of plaintiff's laches, and in Redfield v. Bartels, 139 U. S. 694, 703, 11 Sup. Ct. 683, 35 L. Ed. 310, allowed, under the peculiar facts of that case, only from the commencement of suit. But the act incorporating the Home gave the board of managers—

"perpetual succession, with powers to take, hold, and convey real and personal property, establish a common seal, and to sue and be sued in courts of law and equity; and to make by-laws, rules, and regulations, not inconsistent with law, for carrying on the business and government of the Home, and to affix penalties thereto."

Appellants urge, however, that this statutory subjection to suit does not make the Home liable to a recovery which the United States would not be liable to under a similar statute; that the law merely imposes a liability to suit, as distinguished from a liability in suit. In support of this contention, reliance is had upon cases such as Overholzer v. National Home, supra; Maia v. Eastern Hospital, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577; Moody v. State Prison, 128 N. C. 12, 38 S. E. 131, 53 L. R. A. 855; Lyle v. National Home (C. C.) 170 Fed. 842, which hold that administrative government agencies, state or federal, are not liable to actions for torts arising through the negligence or misconduct of the officers of such institutions. These decisions seem to rest largely upon the proposition that statutes imposing power and liability to sue and to be sued relate to such matters only as are within the corporate powers of the defendant sued. But in the case before us the board of managers was expressly authorized to erect the buildings in question, and by necessary implication to make contracts therefor. The contract on which recovery has been had was clearly within the statutory authority given the Home. It is true that the statute did not expressly authorize the awarding of interest, in case of default on the part of the Home in performing such contract. But it did of necessity impose liability for damages for breach of the contract.

[3] Against debtors generally, interest is awarded, not only by virtue of contract therefor, express or implied, but, under proper circumstances and in the exercise of a proper discretion, as compensation for delay or default of the debtor. United States v. Sherman, 98 U. S. 565, 567, 25 L. Ed. 235; Treat v. Farmers' Loan & Trust Co., supra, at pages 760, 764, of 185 Fed., 108 C. C. A. 98. The ground for refusal to allow interest against the government is that "delay or default cannot be attributed to the government. It is presumed to be always ready to pay its debts." United States v. Sherman, supra, at pages 567, 568, of 98 U. S., 25 L. Ed. 235; Erskine v. Van Arsdale supra, at page 77 of 15 Wall., 21 L. Ed. 63. We are cited to no authority, and we have found none, holding that such presumption applies in favor of a governmental agency such as the Home in question. Appellants urge that controlling analogies are suggested by decisions denying the application of the statute of limitations to suits by such governmental institutions (Eastern State Hospital v. Graves' Com-

mittee, 105 Va. 151, 52 S. E. 837, 3 L. R. A. (N. S.) 746, 8 Ann. Cas. 701), denying liability of buildings under construction as governmental institutions to the provisions of mechanics' lien statutes (Phillips v. University, 97 Va. 472, 34 S. E. 66, 47 L. R. A. 284), and denying liability to taxation of property held in trust for a state (Auditor General v. Regents, 83 Mich. 467, 47 N. W. 440, 10 L. R. A. 376). But in our opinion such analogies are not complete. The statute incorporating the Home, construed in connection with the act providing for the erection of the buildings, made the Home liable in suit to damages for noncompliance with its contract. While the question is not free from difficulty, nor its solution entirely clear, we think the liability imposed by these statutory provisions included by natural implication the usual elements of applicable damage, including interest, in a proper case and in the exercise of a proper discretion, for delay and default in performance. The fact of the omission from the statutes referred to of any provision for exemption from interest, as is expressly contained in the Tucker act relating to suits directly against the United States, is, we think, significant. Had Congress intended the claimed immunity, it would seem natural to have so declared. That the case presented is a proper one for the allowance of interest (if allowable under any circumstances, against a governmental agency) is clear. As said by the presiding judge below:

"It [the Home] obtained possession of the buildings shortly after the annulment, and the buildings were completed, as reported by the master, and agreed by counsel at bar, on or before February 15, 1904, since which time it has been in complete possession of the property, using and enjoying the same for its charitable purposes."

As already said, interest was awarded only from February 15, 1904, and an award of principal and interest combined will, as said by the trial judge, "result in an aggregate decree for less than the reasonable value of the property which it [the Home] obtained at the annulment, as otherwise fixed on a quantum meruit basis."

[4] We think the decree of the Circuit Court is right, and should be affirmed, but without costs of this court, as the appeal was taken by direction of the department of justice of the United States government. Rev. Stat. § 1001 (U. S. Comp. St. 1901, p. 713); C. C. A. Rule No. 31 (150 Fed. xxxv, 79 C. C. A. xxxv); Treat v. Farmers' Loan & Trust Co. (C. C. A. 2) 185 Fed. 760, 763, 765, 108 C. C. A. 98.

In re CHANDLER et al.

FITCH v. BROOKS et al.

(Circuit Court of Appeals, Seventh Circuit. January 22, 1912.)

No. 1,869.

BANKRUPTCY (§ 262*)—ASSETS—SALE—CONFIRMATION.

A bankrupt's trustee was directed to advertise for bids for certain assets of the bankrupt, to be accompanied by a certified check for $5,000, to be open September 21, 1911; the sale to be subject to confirmation by the court, objections to be filed on or before September 26, 1911, and

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

heard on October 3d following. Two bids were received, one from petitioner for $45,000, and one from W. for $40,000. Petitioner was notified that his bid was the highest and that it would lie over until September 26th, and objections thereto would be heard on October 3d. On September 25th the referee notified the petitioner that objections had been filed, which were based on the gross inadequacy of price, and at the hearing the referee reopened the bidding, when H. bid $50,000, and, petitioner refusing to bid more, the property was sold to H. The referee, refused W.'s application for the return of his check, but offered to deliver petitioner's check, which he refused to accept. *Held*, that the trustee was only authorized to receive bids under the order of sale, and not to sell, and there was no sale until the one made to H. for $50,000, and hence petitioner's bid gave him no standing to complain either of its rejection or of the sale to H.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 363–365; Dec. Dig. § 262.*]

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

In the matter of bankruptcy proceedings of Charles V. Chandler and another, copartners doing business under the name of C. V. Chandler & Co., Bank of Macomb. Petition by Fred H. Fitch to review an order of the District Court confirming a sale of the bankrupt's assets to another than petitioner. Dismissed.

A trustee in bankruptcy, who had been directed to solicit sealed bids for and thereupon to sell certain property, subject only to confirmation of the sale by the court, subsequently, on August 21, 1911, after the withdrawal of the bids made pursuant to such order, was again directed to solicit sealed bids, to be submitted, with certified check for not less than $5,000, either to him or to the referee, on or before 2 o'clock p. m. on the 21st day of September, 1911. This order further provided as follows:

"All bids to be subject to the approval of the court, and the terms of payment of the purchase money shall be as follows: The deposit shall be applied upon the purchase price made by the successful bidder upon the confirmation of the sale, and the remainder to be paid in ten (10) days thereafter, unless otherwise ordered by the court. The deposit made by each bidder shall stand as a guaranty that if he is the successful bidder that the bidder will comply with the terms of his bid and the order of the court, and in default thereof that the same shall be forfeited to the estate as agreed and liquidated damages. It is further ordered that all objections to any bid made shall be made and filed with the court on or before the 26th day of September, 1911, and the same shall be set down for hearing at 10 o'clock on October 3, 1911."

The notice of sale, after stating that the bids would be opened at the hour specified, in the presence of the referee, added: "The right is reserved by the referee to reject any and all bids pursuant to said order." Two bids, one of the petitioner, Fred H. Fitch, for $45,000, and one of William A. Work for $40,000, were the only ones received that complied with the order.

Subsequently the referee notified Fitch that his bid was the highest received, and that under the notice it would lie over until September 26th, and, if objections should be filed as to the amount of the bid, the hearing would be had on the 3d of October. On September 25th the referee notified Fitch that such objections had been filed, that the hearing would be on October 3d, and that he would not have to pay anything until the sale was confirmed. The objections filed were based on the gross inadequacy of price.

At the hearing on October 3d the referee stated that he would reopen the bidding, and that, if no one present offered more, he would confirm the sale to petitioner. Thereupon a bid of $50,000 was made by one Harris. Fitch

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

had full opportunity then and there to raise his bid, but refused to do so. The referee thereupon sold the property to Harris, over Fitch's objection, and directed the certified checks to be returned to Fitch and Work. He had refused Work's application, made September 21st, for a return of his check. Work accepted, but Fitch declined to accept, his check.

A petition is filed by Fitch to review the order of the court.

Edmund D. Adcock, for petitioner.

S. Shope Page, Milton J. Foreman, George T. Page, Andrew L. Hainline, T. B. Switzer, and Philip E. Elting, for respondent.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

MACK, Circuit Judge. The only sale in this case was to Harris. The trustee in bankruptcy was not empowered under the order of August 21st to sell, but only to solicit sealed bids. If the order had directed him to sell, and if he had accepted Fitch's bid, subject only to confirmation by the court, a different question would be presented.

In this case, not only was no such authority granted under the second order, but no sale, either absolute or conditioned on confirmation, was in fact made by the trustee or referee. It is conceded that, even though the notice, as well as the order, had failed expressly to reserve the right to reject any and all bids, such right would necessarily be implied, inasmuch as the mere bid, without something in the nature of an acceptance, could give even the highest bidder no rights.

It is argued, however, that the notices given to Fitch by the referee and the retention of his check constituted an acceptance of his bid, subject only to such objections as can be made to judicial sales. Inasmuch as the referee retained both Work's and Fitch's checks, Work might urge with equal right that his bid had been accepted—perhaps even with greater right, inasmuch as his express demand for its return had been refused.

The order expressly provided that objections could be made, not merely to a sale, but to any bids. The objections were to the bid. The referee refrained from knocking down the property until he had considered the objections. Having considered them, he declined to accept Fitch's bid and to sell the property to him. The bid gave Fitch no standing to complain either of its rejection or of the sale to Harris.

As we find no error in these proceedings, the petition to revise will be dismissed.

TAYLOR et al. v. HERNDON.

(Circuit Court of Appeals, Fifth Circuit. March 5, 1912. Rehearing Denied April 2, 1912.)

No. 2,299.

EQUITY (§ 388*)—ANCILLARY SUIT—DISMISSAL WITHOUT PREJUDICE.

The defendant in a pending action of trespass to try title in a federal court filed an ancillary bill to establish an equitable title. No cross-bill was filed. *Held* that, on a finding that the evidence was insufficient to

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

establish the equitable title alleged by complainant, the court should not decree title in defendant, but should dismiss the bill without prejudice.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 827–829; Dec. Dig. § 388.*]

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

Suit in equity by Mrs. E. L. Taylor and others against W. S. Herndon. Decree for defendant, and complainants appeal. Reversed.

W. D. Gordon, for appellants.

B. B. Cain and H. E. Lasseter, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge. The case does not satisfactorily show that Dr. Taylor owned or claimed to own the certificate on which the patent for the land in controversy was issued to William H. Chambers, assignee, his heirs or assigns. Dr. Taylor's letter of November 2d, 1874, to C. A. Nations, in reference to the certificate and survey, describes him as "agent and locator," and this letter is neither contradicted nor explained. The court below, therefore, correctly found that the appellants had failed to prove such an equitable title in Dr. Taylor or his heirs as would warrant the presumption of a sale and transfer of the said certificate of William H. Chambers in 1836 or 1837 to Dr. Joseph Taylor.

The evidence does not show that the appellee here, defendant below, is an innocent purchaser for value without notice of the title or claim of title asserted by the appellants. The finding to the contrary should be eliminated from the decree. All the judges agree that the complainants' bill in the court below should be dismissed, but a majority are of opinion that the dismissal should be without prejudice.

The decree of the Circuit Court is reversed, and the cause is remanded, with instructions to enter a decree dismissing the bill without prejudice. See Rogers v. Durant, 106 U. S. 644, 1 Sup. Ct. 623, 27 L. Ed. 303; Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451.

UNITED CIGARETTE MACH. CO., Limited, v. WINSTON CIGARETTE MACH. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. March 7, 1912.)

No. 1,055.

1. ACCOUNT (§ 17*)—JURISDICTION—ACCOUNTING.

A bill in equity by a buyer of patents covering cigarette machinery, with the exclusive right to sell the same except in the United States and Canada, and with the right to require the seller to construct and deliver machines to the buyer for a specified price, which sets out the contract between the parties, and shows that the buyer has exclusive right to sell the machines except in the United States and Canada, and to construct machines for use except in the United States and Canada, and which gives the buyer the benefit of such exclusive right, and which

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

shows that the managing officer of the seller sold eight machines in foreign countries and thereby deprived the buyer of the profits therefrom, and that the seller, through its manager, supplied an old machine in violation of the agreement causing damages, and that the buyer is entitled to a lien on the shares of stock registered in the name of the seller and its managing officer, and which prays for injunctive relief and for an accounting for unlawful selling, etc., does not state a cause of action for an accounting either on the theory of mutual accounts or on the theory of complexity.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 77–82, 84–88; Dec. Dig. § 17.*]

2. DISCOVERY (§ 19*)—JURISDICTION.

The bill does not show a cause of action in equity for a discovery.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 20–26; Dec. Dig. § 19.*]

3. INJUNCTION (§ 59*)—JURISDICTION—RESTRAINING BREACH OF CONTRACT.

The jurisdiction of equity to restrain a breach of contract depends on the inadequacy of the remedy at law, and a bill in equity by a foreign corporation to restrain a breach of contract by a domestic corporation and its managing officer, personally liable for the wrongs complained of, which alleges the insolvency of the domestic corporation, but which shows that it holds stock of the foreign corporation which has under its charter a lien for liabilities of holders of stock and which does not show the insolvency of the officer, does not state facts justifying relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 114–116, 128; Dec. Dig. § 59.*]

4. CORPORATIONS (§ 306*)—TORTIOUS ACTS OF OFFICERS—PERSONAL LIABILITY TO THIRD PERSONS.

The managing officer of a corporation, who fraudulently violated a contract by the corporation with a third person causing injury to the third person and resulting in profits to the officer, is liable to the third person.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1457, 1458; Dec. Dig. § 306.*]

5. CORPORATIONS (§ 163*)—LIEN ON STOCK AND DIVIDENDS—BONA FIDE PURCHASERS.

The charter of a corporation, which provides that it shall have a first lien on all stock registered in the name of each member for his liabilities to it, and that the lien shall extend to all dividends declared on the stock, gives to the corporation a lien on the stock and dividends, and a member cannot transfer his stock to prevent satisfaction of a pecuniary recovery by the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 577, 609–614; Dec. Dig. § 163.*]

6. INJUNCTION (§ 57*)—RESTRAINING BREACH OF CONTRACT—EQUITABLE JURISDICTION.

An injunction will not issue to restrain the breach of a long term contract, since such an injunction is a negative enforcement of specific performance which is denied where performance will be continuous and will require protracted supervision by the court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 111–113; Dec. Dig. § 57.*]

7. CORPORATIONS (§ 169*)—EQUITY (§ 51*)—JURISDICTION—MULTIPLICITY OF SUITS.

A bill by a foreign corporation against a domestic corporation and its managing officer, to restrain a breach of a contract for the sale of patents of machinery with the exclusive right of sale of same except in the United States and Canada, and for the ascertainment of damages for

the breach of the contract committed by the managing officer of the domestic corporation, and for a lien on stock registered in the names of the domestic corporation and its managing officer, which alleges that the officer has sued for dividends on the stock and that he may do so again but does not show that he will institute vexatious litigation, does not state a cause of action for equitable relief to prevent a multiplicity of suits, and the foreign corporation must obtain a judgment at law before it can proceed in equity to enforce its lien.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 577, 620–623; Dec. Dig. § 169;* Equity, Cent. Dig. §§ 167–171; Dec. Dig. § 51.*]

8. CORPORATIONS (§ 169*)—JUDGMENT FOR DIVIDENDS—SET-OFF.
Where a foreign corporation, having a first lien on stock registered in the names of each member for liabilities to the corporation, reduces a claim against a domestic corporation and its managing officer holding stock for damages for breach of contract, the judgment can, under Code Va. 1904, § 3298, be set off against the officer's suit at law for dividends.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 577, 620–623; Dec. Dig. § 169.*]

9. CORPORATIONS (§ 165*)—LIEN ON CORPORATE STOCK—"LIABILITY."
The charter of a corporation, which declares that it shall have a first lien on all stock registered in the names of each member for his liabilities to the corporation, and that the lien shall extend to all dividends, embraces a demand for damages for breach of contract by a stockholder receiving the stock in consideration that the corporation may purchase at a fixed low price machines to be made by the stockholder; the word "liability" meaning responsibility, or the state of one who is bound in law and justice to do something which may be enforced by action (quoting 5 Words and Phrases, 4111, 4114, 4115).

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 577, 605; Dec. Dig. § 165.*]

10. CORPORATIONS (§ 169*)—JURISDICTION—ENFORCEMENT OF LIEN.
The lien given to a corporation by its charter, declaring that it shall have a first lien on all stock registered in the name of each member for his liabilities to the corporation, and that the lien shall extend to dividends declared, is an equitable lien; but where the enforcement of the lien can only arise after the corporation has successfully maintained its claim to damages, which is the primary issue, equity does not have jurisdiction of an action for damages and the enforcement of the lien, though equity will award damages incidental to equitable relief.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 577, 620–623; Dec. Dig. § 169.*]

Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Greensboro.

Suit by the United Cigarette Machine Company, Limited, against the Winston Cigarette Machine Company and another. From a decree of dismissal, complainant appeals. Affirmed.

J. T. Coleman and A. B. Kimball (Coleman, Easley & Coleman and King & Kimball, on the brief), for appellant.

William P. Bynum (Manly, Hendren & Womble, on the brief), for appellees.

Before PRITCHARD, Circuit Judge, and McDOWELL and SMITH, District Judges.

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

McDOWELL, District Judge. The appellant was complainant below. The bill cannot be so condensed as to adequately state the case, and it is here set out in full:

"Bill of Complaint.

"In the Circuit Court of the United States of America for the Western District of North Carolina.

"United Cigarette Machine Company, Limited, v. Winston Cigarette Machine Company et al. In Equity.

"To the Honorable Judges of said Court:

"The United Cigarette Machine Company, Limited, a corporation created, organized, and existing under the laws of, and a citizen of, England, brings its bill of complaint against W. T. Brown, a citizen of the state of North Carolina, and residing in the Western district thereof, and the Winston Cigarette Machine Company, a corporation created, organized, and existing under the laws of, and a citizen of, the said state of North Carolina, having its principal office and place of business at Winston, in the Western district of the said state of North Carolina.

"I. And thereupon your orator charges, avers, complains, and says that heretofore, to wit, on the 24th day of August, 1899, the Winston Cigarette Machine Company (hereinafter referred to as the Winston Company) entered into an agreement with your orator whereby the Winston Company sold, assigned, granted, and conveyed to complainant certain schedule patents set forth in a schedule attached to the said agreement, and also each and every other patent relating to or covering cigarette machinery of which the Winston Company was the owner or to which it was entitled, including each and every pending application for such patent or patents, and also and particularly the invention in cigarette machinery known as the Briggs cigarette machine, together with each and all improvements in cigarette machinery which the Winston Company then owned or was entitled to or might thereafter acquire or become entitled to, with the exclusive right to sell, hire, or otherwise dispose of the same or any of them throughout the world, except the United States and Canada, and also the right to apply for and obtain patents covering them or any of them, or any parts thereof, in any country or countries.

"The Winston Company, by the same contract, also granted, sold, and assigned to your orator the complete set of working drawings and patterns of its improved cigarette machinery, and all other drawings and patterns thereof; it being provided, however, that the same should, subject to certain provisions and conditions set out and expressed in said contract, remain in the possession of the Winston Company. And it was further provided that the Winston Company should from time to time, to the extent that such machines should be desired by the plaintiff or its successors and after reasonable notice to do so, construct and deliver, securely packed on board cars at Winston, N. C., complete cigarette machines equipped with latest improvements, for each of which said machines, substantially of the then present type, so packed and delivered, your orator should pay to the Winston Company the sum of $450. with the understanding that should any material additions or improvements of such machines be authorized, your orator should pay a reasonable and fair price therefor in addition to the $450 per machine; the cost of such additions or improvements to be agreed upon between the parties before the same were made. Each machine constructed and delivered as aforesaid was to be in first-class working condition, made of good material and in a workmanlike manner, and should be thoroughly tested by the Winston Company before delivery. Each and every Briggs machine sold or hired by your orator was to be constructed by the Winston Company for the price, and on the conditions, hereinbefore stated; but your orator was to be at liberty, nevertheless, to have constructed elsewhere pieces and parts of such machines if it should desire to do so.

"The Winston Company agreed that the persons from time to time engaged by it to construct and build cigarette machines should at no time furnish any of said machines to any party other than the Winston Company and its

licensees, for use in the United States and Canada, and to your orator and its licensees for use in the rest of the world; and to this end the Winston Company covenanted that it would securely obligate by contract every person engaged then or thereafter in constructing such machines, and that such contracts should inure to the benefit of your orator for the entire world, except the United States and Canada.

"In the event of any breach of the agreement on the part of the Winston Company or its successors in properly constructing and promptly delivering such machines and parts as might be ordered as aforesaid, or in the event of any other breach, your orator was thereupon to have the right to have delivered to it all of said drawings and patterns (which were to embrace the latest improvements), and thereafter your orator or its successors should be at liberty to construct such machines and parts thereof at any other place; but before withdrawing said drawings and patterns, reasonable time was to be given to the Winston Company in which to have duplicate drawings and patterns made to be retained by it, to be used only in constructing machines the use of which was to be confined to the United States and Canada; and no other copies or duplicates of drawings or patterns, or any part thereof, were to be made, or permitted to be made, except with the written consent of your orator.

"It was further provided, among other things, that your orator should succeed to the rights of the Winston Company in certain contracts in said agreement mentioned between the Winston Company and W. C. Briggs, as well as in any other contract or contracts it had or might thereafter acquire with any person, firm, or corporation relating to the acquisition by the Winston Company of inventions in cigarette machines, or by which any person, firm, or corporation should be debarred from or restricted in acquiring or otherwise becoming interested in cigarette machines, or the handling of the same, but with the proviso that your orator should thereby incur no obligation or liability to pay anything on account of any such contract.

"It was further provided in said agreement, in effect, that the Winston Company should account for and pay over to your orator all moneys theretofore received, as well as such moneys as should be thereafter received by or become due to the Winston Company on account of certain machines enumerated in a schedule attached to the said contract and sold by the Winston Company since June 13, 1899; the Winston Company reserving to itself on account of each such machine the cost price thereof of $415 per machine.

"It was further provided in said agreement that if your orator should desire to sue any user of the Briggs machine, it should notify, by letter, the Winston Company, and thereupon the Winston Company should promptly furnish to your orator copies of all papers relating to or evidencing the sale of any machine involved in any such contemplated suit, and in due time should furnish your orator the original papers to the extent needed as evidence in any such suit.

"It was further provided in said agreement that, except as therein otherwise provided, the United States and Canada should be excepted from the operation of the contract, but that all cigarette machines placed by the Winston Company in the United States and Canada should be so placed in pursuance of a contract, distinct in its terms, providing that the parties with whom such machines should be placed should in no event operate the same or permit the same to be shipped outside of the United States or Canada.

"It was further provided in said agreement that the Winston Company should turn over to your orator all letters and other papers giving information as to cigarette machine business and would-be purchasers or hirers thereof, except such papers and letters as relate to the use of the machines in the United States or Canada, and that the Winston Company should thereafter, from time to time, furnish to your orator all letters received by it, and communicate all inquiries made of it, relating to the cigarette machine business for any part of the world outside of the United States and Canada; and further that the Winston Company should forthwith furnish to complainant full particulars as to any machine or machines it may have sold, other than those enumerated in certain schedules attached to the contract, giving the names of the parties to whom sold, their residences, the numbers of the ma-

chines, and the prices at which sold, and that the Winston Company, and all other necessary parties should, from time to time, as requested by your orator and at its instance, execute and do all assurances and things necessary for giving your orator the full benefit of the said agreement.

"It was stipulated in the said agreement that the term 'United States' as used therein should be construed to mean that section of country designated and known as the United States just prior to the late war with Spain, and should not include any of the West Indies, Philippine Islands, or Sandwich Islands.

"The consideration for the said sale and for the covenants entered into as aforesaid by the Winston Company was the sum of £27,000, to be paid and satisfied by the allotment by complainant to the Winston Company, or as the Winston Company should direct, 27,000 shares of £1 each in the capital of the complainant company.

"Your orator further shows that subsequently, to wit, on the 6th day of April, 1900, by a further agreement then made between and duly executed by the said Winston Cigarette Machine Company and your orator, certain modifications and amendments of the said contract of the 24th day of August, 1899, were made, of which mention need be made of only two, namely: (1) That your orator should, in addition to other rights secured to it by the said contract of August 24, 1899, have the right at any time to construct, or have constructed on its own account and for its own purposes, Briggs cigarette machines, as a whole and in parts, in the United States or elsewhere, such machines so constructed to be used outside of the United States and Canada, and, to this end, that your orator should have the right to secure duplicate drawings and patterns of the Briggs machine from the Winston Company; and (2) that the consideration to the Winston Company should be the sum of £25,000, which should be paid and satisfied by the allotment by your orator to the Winston Company, or as it might direct, of 25,000 shares, of £1 each, in the capital of the complainant company, which said shares should be credited as fully paid, and numbered as in said contract provided—the Winston Company having, in consideration of certain amendments of the original contract embodied in the later one, agreed to reduce the consideration £2,000, and subject only to the changes in said later contract particularly specified and expressly authorized, it was stipulated that the original contract should be and remain in full force and effect.

"At the time of the execution of the said later agreement, a certain W. T. Brown was president of the said Winston Cigarette Machine Company, and the said contract was signed and executed by the said company acting by and through the said Brown as president.

"A copy of the said original contract, including the schedules therein referred to and thereto attached, and also a copy of the said later agreement of April 6, 1900—both which contracts were duly signed, executed, and delivered by the parties thereto—are herewith filed as exhibits with this bill and designated respectively 'Exhibit No. 1' and 'Exhibit No. 2.'

"Your orator shows that of the 25,000 shares of its capital which were to be (and were) allotted as aforesaid to the Winston Company, or as it might direct, all except 186 shares (which stand registered in the name of the Winston Company upon the books of your orator) were, by the direction of the Winston Company, allotted to its officers, directors, or other persons, 2,577 of such shares being allotted to the said W. T. Brown and now still standing registered in his name upon the books of complainant company.

"II. Your orator further shows that notwithstanding the solemn agreements aforesaid, the said W. T. Brown, the president, managing director, and chief (if not the sole) business representative, as well as a large stockholder of the said Winston Cigarette Machine Company, and who for years has dominated and directed its affairs—acting in the name of said company, but in his own interest and for his own benefit as well—has sold numerous Briggs cigarette machines to be used, as the said Brown well knew and intended, outside of the United States and Canada.

"As at present advised, your orator can designate only the following such sales: (1) Two, some time in the year 1900, to be used in Porto Rico; (2) two, on or about July 1, 1903, for use in Lima, Peru; (3) one, some time in the

spring or summer of 1904, to the Imperial Tobacco Company, Limited, of St. Johns, Newfoundland, to be used in its factory there; (4) three, on or about July 1, 1904, for use in Valparaiso, Chile.

"Your orator charges that each of the foregoing eight Briggs cigarette machines was sold at a price largely in excess of $500, and that all of them have been paid for by the respective purchasers, and that while such payments may have been made ostensibly to the said Winston Company, nevertheless the said W. T. Brown, individually and personally, got the benefit of the money in whole or in part.

"Your orator charges that the said W. T. Brown and the said Winston Company knowingly, fraudulently, tortiously, secretly, and deceitfully sold and supplied, either in his, the said Brown's, name, or in the name of the Winston Company, the aforesaid eight Briggs cigarette machines to purchasers outside of the United States and Canada, or to be used outside the United States and Canada, thereby depriving your orator of its just rights and profits in the premises and of a material part of the consideration for the shares of its capital standing in the name of the said W. T. Brown and the said Winston Company as aforesaid, upon which shares, as well as upon all unpaid dividends thereon, your orator is given a lien by its charter and articles of association, as hereinafter explained, for any liability of the said Brown or of the said Winston Company to your orator.

"Your orator charges that the said W. T. Brown, fraudulently, and with intent to injure your orator for his own enrichment, procured, directed, and accomplished, by and through his official and representative relations with the Winston Company, the violation of the aforesaid contracts between your orator and the said company, thereby realizing for himself and the said company large profits, to wit, $2,000 on each machine so sold as aforesaid, which profits your orator was entitled to and otherwise would have made and received.

"In this connection your orator avers that the said W. T. Brown has caused the Winston Company to refuse, from time to time, to furnish your orator, and the said company, when applied to by your orator therefor, has refused to furnish to your orator parts or attachments for Briggs cigarette machines. For instance, on one occasion, having furnished your orator a Briggs machine minus certain attachments and parts, to wit, a bronzer and cut-off, your orator's repeated orders for the drawings and patterns of the missing parts, in order that your orator might manufacture them for the machine aforesaid, were entirely ignored. On another occasion your orator ordered of the Winston Company certain repair parts for a Briggs machine, which order was likewise ignored, as was also a subsequent letter of your orator making inquiry in reference to the last-mentioned order.

"As further evidencing the conduct of the said Brown in bringing about and accomplishing the violation and unlawful disregard of the contracts aforesaid by the Winston Company, your orator shows that under the provision of the said contract, whereby the price to be paid by it to the Winston Company for the manufacture of Briggs machines was fixed at $450 per machine, plus the cost of additions and improvements, which cost was to be agreed upon between the parties before such improvements should be made or furnished by the Winston Company, there was an understanding and agreement between your orator and the Winston Company whereby the price to be paid by your orator for the manufacture and delivery on board cars of the latest improved model, type, or style of the Briggs machine should be $500 each; and on or about January 16, 1908, your orator placed with the Winston Company an order for a Briggs machine of the latest improved model, with all the latest improvements, said machine to be shipped to W. R. Grace & Company, of New York City, and to be forwarded by them to Lima, Peru, in response to which order the said W. T. Brown caused to be shipped a machine to W. R. Grace & Co., with sight draft for $500 attached to the bill of lading therefor, which draft was paid and the machine forwarded without being unpacked or examined, to Lima, Peru. Upon its arrival at its ultimate destination, it was discovered that the machine was not the latest improved model, but an old style machine—and probably a secondhand one at that. Of course, the machine was rejected by the

purchaser and thrown back on your orator's hands. Nevertheless, the said W. T. Brown, on behalf of the Winston Company, refused to furnish a new machine of the type or style ordered, in place of the old machine shipped as aforesaid, with the result that your orator had to construct and manufacture a new machine at its own shops in Lynchburg with which to replace the old machine foisted upon it by the said Brown as aforesaid and for which the price of a new machine had been collected as aforesaid. Your orator is out of pocket the $500, paid for the machine, besides $118.13 paid for the transportation of the said machine to Lima and back, and has still on its hands the old machine, which is worthless. The Winston Company, by and through the said Brown, who is its sole business representative, declines and refuses to pay the transportation charges aforesaid and refuses to take back the old machine and refund the price paid for it. Your orator charges that this dishonest and fraudulent conduct on the part, or in the name, of the Winston Company is in truth and in fact the fraud of the said Brown as well, and that he was—in part, at least, if not altogether—the beneficiary.

"Your orator is advised and insists that the said Brown, as well as the Winston Company, is liable and responsible to it to the extent of the profits realized upon the illegal and fraudulent sales aforesaid of Briggs machines and also for the $618.13 out of which your orator was defrauded as aforesaid by palming off on it the old machine instead of the new one ordered; and that your orator has a lien, as hereinafter pointed out, upon the shares of its capital registered in the name of the said Brown and the said Winston Company as aforesaid and upon the unpaid dividends thereon.

"III. Your orator further shows that section 24 of its charter or articles of association is in the following words, to wit:

" '24. The company shall have a first and paramount lien upon all the shares registered in the name of each member (whether solely or jointly with others) for its debts, liabilities and engagements, solely or jointly with any other person to or with the company, whether the period for the payment, fulfilment or discharge thereof shall have actually arrived or not. And such lien shall extend to all dividends from time to time declared in respect of such shares.'

"Your orator is advised and insists that by reason of the aforesaid liability to it of the said Brown, and the said Winston Company, and by reason of the provision aforesaid of your orator's charter or articles of association, your orator is entitled to a lien upon the shares registered as aforesaid in the names of the said Brown and the said Winston Company, as well as upon all the dividends thereon declared from time to time and unpaid, and is also entitled to subject to the lien aforesaid, for the liability aforesaid, the shares aforesaid owned by and registered in the names of the said Brown and the said Winston Company, as well as all the unpaid dividends declared on or in respect of such shares.

"Your orator is informed, believes, and charges that the eight Briggs cigarette machines sold as hereinbefore stated, in violation of the contract, original and supplemental, between your orator and the Winston Company, were sold at a price averaging $1,500, or $2,000 each, and it may be at a larger price; that the said defendants realized a profit of from $1,000 to $1,500 on each of the said eight machines, and it may be more; that but for the unlawful sales of the said machines by the said defendants as aforesaid, your orator, as it had the exclusive right to do, could and would have sold the said machines to the purchasers to whom the said defendants sold them, and could and would have realized the same or greater profits from such sales; that the liability of the said defendants in the premises to your orator largely exceeds $2,000, even if the said defendants have sold, in violation of the contracts aforesaid, only the eight machines aforesaid.

"Your orator is informed, believes, and charges that the Winston Cigarette Machine Company is financially irresponsible, and that the said Brown has used the name of the said company, in making sales of Briggs machines in violation of the contracts aforesaid, as a cloak for the dishonest disregard of the said contracts for his own benefit; and as your orator believes and charges, unless restrained by the court, such sales will continue to be made to your orator's irreparable injury.

"IV. Your orator shows that it has retained and refused to pay to the said defendants certain dividends declared upon the shares of your orator's capital owned by them or standing in their name on your orator's books; that heretofore, to wit, in June, 1908, the said W. T. Brown instituted an action at law against your orator in the corporation court for the city of Lynchburg, Va., for the recovery of certain of the dividends which had been theretofore declared upon the shares aforesaid standing in his name, which dividends your orator had withheld and refused to pay; that your orator, being advised that it could not assert in the said action at law its aforesaid lien upon the said shares and the dividends declared in respect thereof, suffered judgment for the said dividends to go against it by default, and then sought by a bill in equity in the said corporation court for the city of Lynchburg, Va., to subject the said dividends, for which the said Brown had recovered judgment against your orator as aforesaid, to the lien thereof given by your orator's articles of association as aforesaid, but the said Brown being a nonresident of the state of Virginia, and declining to appear except specially, for the purpose of challenging the jurisdiction of the court, the said court was of the opinion and held that it was without jurisdiction to enforce the lien aforesaid, and accordingly dismissed your orator's bill upon that *sole* ground—the result being that your orator was compelled to pay the judgment which said Brown had recovered by default as aforesaid.

"Since the recovery of the judgment aforesaid, other dividends have been declared upon the shares of your orator's capital, and the said Brown is demanding that your orator pay to him the dividends upon the said shares standing in his name as aforesaid, and doubtless he will proceed against your orator by another action at law in the corporation court of Lynchburg, Va., for the recovery of a judgment for the dividends declared subsequently to the institution of his former action, unless proceedings be instituted by your orator, in a court of equity having jurisdiction of the said Brown, to enforce its lien aforesaid upon the shares of the said Brown and upon the unpaid dividends thereon.

"V. Forasmuch as your orator is without remedy save in a court of equity, where alone such matters are cognizable and relievable, and to the end that the said defendants may severally make full, true, direct, and perfect answers to all the several averments in this bill, as well as to the several specific interrogatories numbered, set forth, and written at the foot of this bill—but not under oath which is hereby expressly waived—your orator prays:

"(1) That the said defendants, and each of them, their agents and representatives, respectively, may be perpetually enjoined and inhibited from hereafter selling to be shipped or used outside of the United States and Canada, as in the said contracts defined, any Briggs cigarette machines, in violation of the said contract.

"(2) That the liability of the defendants to your orator on account of the hereinbefore recited premises, and the hereinbefore mentioned unlawful sales of Briggs cigarette machines, may be fixed, ascertained, and determined by the court.

"(3) That the aforesaid shares of your orator's capital owned by or registered in the names of the defendants respectively, together with all unpaid dividends which have been heretofore at any time declared upon the said shares, or which may hereafter during the progress of this suit and before final decree be declared upon the same, may be appropriately subjected to your orator's lien, by reason of the aforesaid provision of its charter or articles of association, upon the said shares and dividends.

"(4) That, meanwhile, the said defendants and each of them may be enjoined and inhibited from instituting, prosecuting, or maintaining any action, suit, or proceeding against your orator in any other court for the recovery of the unpaid dividends which have been heretofore at any time *been* declared upon the said shares, or which may hereafter, during the progress and pendency of this suit and before final decree, be declared upon the same.

"(5) That your orator may have a proper writ of subpœna directed to the said W. T. Brown and the said Winston Cigarette Machine Company commanding them and each of them, at the proper time and place and under proper penalty, to appear and make full, true, direct, and perfect answers to all and singular the several averments of this bill, and to perform and abide such orders and decrees as may be passed and pronounced by the court in the progress of this cause.

"(6) That your orator may be granted and afforded all such other, further, and general relief in the premises as the nature of its case may require and to the court shall seem meet and appropriate.

"And your orator will ever pray, etc.

"The said defendants are, and each of them is, required to answer the following interrogatories numbered respectively 1, 2, 3, 4, 5, 6, and 7:

"(1) State how many Briggs cigarette machines have been sold by or in the name of the Winston Cigarette Machine Company since the 24th day of August, 1899, or placed by or in the name of the said company in the United States and Canada since the said 24th day of August, 1899; to whom sold, or with whom placed, giving the date of each such sale or placing, and the residence of the party or parties to whom sold or with whom placed, and the contents of any contract or contracts, in pursuance of which any such machine so sold or placed since the date aforesaid may have been sold or placed, with reference to operating any such machine or machines, or permitting the same to be shipped, outside of the United States and Canada.

"(2) State whether or not during the year 1900, or at any time since the 24th day of August, 1899, you, the Winston Cigarette Machine Company, or you, W. T. Brown, as agent, officer, or representative of the said company, or acting in its name, sold, directly or indirectly, any Briggs cigarette machines to be shipped to or used in Porto Rico, or which were in fact shipped to or used in Porto Rico, giving the dates, the names, and residences of the person or persons to whom any Briggs cigarette machines were so sold, shipped, or consigned, and the price or prices obtained therefor.

"(3) State whether or not in the year 1903, or at any time since the 24th day of August, 1899, you, the Winston Cigarette Machine Company, or you, W. T. Brown, acting as agent, officer, representative of, or in the name of, the Winston Cigarette Machine Company, sold, directly or indirectly, any Briggs cigarette machines to be used in Lima, Peru, or which were in fact shipped to Lima, Peru, or used there, giving the number of the machines, the date of the transaction or transactions, the name of the purchaser or purchasers, consignee or consignees, and the price at which any such machine or machines were sold.

"(4) State whether or not in the year 1904, or at any time since the 24th day of August, 1899, you, the Winston Cigarette Machine Company, or you, W. T. Brown, as agent, officer, or representative of, or acting in the name of, the Winston Cigarette Machine Company, sold to the Imperial Tobacco Company, Limited, of St. Johns, Newfoundland, or to any other person to be used in Newfoundland, any Briggs cigarette machines, giving the date of any such sales, the name of the purchaser or purchasers, and the amount for which any such machine or machines were sold.

"(5) State whether or not during the year 1905, or at any time since the 24th day of August, 1899, you, the Winston Cigarette Machine Company, or you, W. T. Brown, acting as agent, officer, or representative of the said Winston Cigarette Machine Company, or acting in its name, sold any Briggs cigarette machine or machines for use in Lima, Peru, or which were in fact afterwards shipped to Peru, giving the date of any such sales or shipments, the name of the purchaser or purchasers, consignee or consignees, and the price for which such machine or machines were sold.

"(6) State whether or not you, the Winston Cigarette Machine Company, or you, W. T. Brown, as agent, officer or representative of the Winston Cigarette Machine Company, or otherwise acting in its name or in its behalf, at any time since the 24th day of August, 1899, sold any Briggs cigarette machines to be shipped or used outside of the United States and Canada, or which were shipped or used outside the United States and Canada, giving the names of all such purchasers or consignees, or any such, the date

of such transactions or shipments, and the price obtained for each such machine.

"(7) Please produce and file any and all documentary evidence or papers in your possession or control, or in the possession or control of either of you, with reference to any such sale or sales, or shipment or shipments, for use or to be shipped outside of the United States and Canada, including all correspondence between you, or either of you, and any purchaser or consignee of any Briggs cigarette machine or machines outside of the United States and Canada, and any contract that may have been entered into between the Winston Cigarette Machine Company, in its name or on its behalf, and such consignees or purchasers, or any such, with reference to the use or shipment of such machine or machines outside of the United States and Canada."

The trial court dismissed the bill without prejudice for want of equity cognizance.

[1] We find no ground for sustaining equity jurisdiction on the theory of a right to an accounting. The bill discloses no mutual accounts in the proper sense of the term (3 Pomeroy Eq. Jurisp. [2d Ed.] § 1421), and there is no such intricacy or complexity of accounts alleged as to give equity jurisdiction.

[2] Nor is such showing made of the need of a discovery as to give equity jurisdiction, even in the light of Carpenter v. Winn, 221 U. S. 533, 539, 31 Sup. Ct. 683, 55 L. Ed. 842; Russell v. Clark, 7 Cranch, 69, 91, 3 L. Ed. 271; U. S. v. Bitter Root Co., 200 U. S. 451, 472, 475, 26 Sup. Ct. 318, 50 L. Ed. 550; 1 Pom. Eq. Jurisp. (2d. Ed.) § 229.

[3] The prayer for injunction to restrain the alleged breaches of contract next deserves consideration. The test of equity jurisdiction in cases such as this is the inadequacy of the remedy at law. 3 Pom. Eq. § 1341. The only suggestion of inadequacy of the legal remedy lies in the allegation that the Winston Company is insolvent. One of the defendants, Brown, is not alleged to be insolvent. The one that is alleged to be insolvent stands on the books of complainant as the owner of 186 shares of the capital stock of the complainant company.

[4] The liability of Brown to the complainant, if the allegations of the bill be sustained, has not been questioned and is supported by an array of authority. See, for instance, Angle v. R. Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; 38 Cyc. 509; Employers' Club v. Blosser, 122 Ga. 509, 50 S. E. 353, 69 L. R. A. 90, 106 Am. St. Rep. 137, 2 Ann. Cas. 694; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203; Morgan v. Andrews, 107 Mich. 33, 64 N. W. 869; 10 Cent. Dig. Conspiracy, § 7 et seq.; 4 Dec. Dig. Conspiracy, § 8; Motley v. Detroit Co. (C. C.) 161 Fed. 389; 2 Addison Torts, 740; 30 Cyc. 177, 178; 8 Cyc. 660; 4 Ency. Pl. & Pr. 740; Raymond v. Yarrington, 96 Tex. 443, 72 S. W. 580, 73 S. W. 800, 62 L. R. A. 962, 97 Am. St. Rep. 914; Martens v. Reilly, 109 Wis. 464, 84 N. W. 804.

[5] As will be hereafter shown, complainant has a lien on the stock of the Winston Company, and on dividends accruing thereon, reserved

in its articles of association. In 2 Cook Corp. (5th Ed.) § 523, it is said:

"When a lien is expressly given to the corporation by its charter or by statute, all persons purchasing the stock are affected by the statute and must take notice of it. A statutory lien need not be set out in the certificate of stock in order to give notice to the transferee."

See, also, 10 Cyc. 585.

To the extent of the value of the shares held by the Winston Company, therefore, that defendant is not insolvent; and it cannot by transfer of its shares prevent satisfaction of a pecuniary recovery against it by complaintant. We find in the case before us no such inadequacy of the remedy at law as would warrant injunction.

[6] Under the circumstances of this case, another reason for refusing an injunction lies in a rule, to which there are exceptions not here of interest, that an injunction will not be issued to restrain a breach of a long term contract. The contract at bar is without time limit. An injunction to prevent breaches of contract is frequently a negative enforcement of specific performance. 3 Pom. Eq. § 1341. Specific performance is frequently denied of contracts "whose performance would be continuous and would require protracted supervision and direction." Id., § 1405, note p. 2167. See, also, Strang v. Railroad Co., 101 Fed. 511, 517, 41 C. C. A. 474; Ross v. Railroad Co., Woolw. 26, 20 Fed. Cas. 1245, 1250; Texas & P. R. Co. v. Marshall, 136 U. S. 393, 405, 10 Sup. Ct. 846, 34 L. Ed. 385; Marble Co. v. Ripley, 10 Wall. 339, 358, 19 L. Ed. 955; Shubert v. Woodward, 167 Fed. 47, 56, 57, 92 C. C. A. 509; Sewerage Board v. Howard, 175 Fed. 555, 559, 99 C. C. A. 177; Berliner Co. v. Seaman, 110 Fed. 30, 34, 49 C. C. A. 99; General Electric Co. v. Westinghouse (C. C.) 144 Fed. 458, 462.

[7, 8] Equity jurisdiction to prevent a multiplicity of suits seems to us to be also wanting. The fact that by the decree below complainant is confronted by the necessity of recovering judgment at law before it can proceed in equity to enforce its lien presents no case of multiplicity of suits within the correct meaning of the term. It is but the usual course of a claimant to damages that he recover judgment at law and thereafter enforces the lien he may acquire by suit in equity. The fact that Brown has heretofore sued for dividends and that he may do so again is also not sufficient. Once complainant has reduced its claim for damages to judgment, such judgment can be set off against Brown's possible suit at law for dividends in the law court in Virginia. Section 3298, Code Va.; 5 Rob. Pr. 964; 1 Barton Law Pr. (2d. Ed.) 510. Moreover, the mere fact that Brown will "doubtless" sue again for dividends is not enough. The right of complainant to damages is resisted and has not been adjudicated. The case is analogous to that of complainant seeking relief from anticipated repeated actions of ejectment where complainant's title has not been established at law. "In such cases * * * equity will not interfere on behalf of plaintiff * * * until the plaintiff's title has been sufficiently established by the decision of at least one action

at law in his favor." 1 Pom. Eq. § 253. The same author says (1 Pom. § 254):

"* * * A court of equity will not exercise jurisdiction on this particular ground, unless its interference is *clearly necessary* to promote the ends of justice and to shield the plaintiff from a litigation which is *evidently vexatious*."

In 1 High on Injunctions (2d Ed.) § 61, it is said:

"Equity will interfere * * * to restrain useless and vexatious litigation. * * *"

The facts asserted in the bill do not warrant a belief that Brown will institute vexatious litigation. See, also, Boise Co. v. Boise City, 213 U. S. 276, 286, 29 Sup. Ct. 426, 53 L. Ed. 796; 22 Cyc. 769. It has been well said that:

"Mere apprehensions or fears on the part of the person seeking relief that the defendant may institute actions against him in the future will not warrant a court of equity in enjoining the bringing of such actions." 1 High, Injunc. § 64.

The bill here asserts apprehension on complainant's part, but does not allege threats by Brown.

There are no allegations in the bill charging that complainant has now a lien on shares of its stock heretofore transferred by the Winston Company to others than Brown. Consequently multiplicity of suits cannot be predicated on the theory that complainant now has a lien on stock originally issued to the Winston Company and transferred to others than Brown prior to the filing of this bill.

[9] We now reach the ground for equity jurisdiction most strongly relied upon by complainant. The bill asserts that complainant has a lien on the shares of stock owned by the defendants and on dividends due and to become due to them and prays for the enforcement of this lien. The language of the articles of association of the complainant corporation is:

"The company shall have a first and paramount lien upon all the shares registered in the name of each member * * * for his debts, liabilities, and engagements * * * to or with the company, whether the period for the payment, fulfillment, or discharge thereof shall have actually arrived or not. And such lien shall extend to all dividends from time to time declared in respect of such shares."

The right to reserve a lien by the charter or articles of association of a corporation is not questioned. 2 Cook Corps. (5th Ed.) § 520 et seq.; 2 Thomp. Corps. §§ 2322, 2327; 3 Thomp. Corps. § 3247; 10 Cyc. 580; Union Bank v. Laird, 2 Wheat. 390, 4 L. Ed. 269; Bohmer v. Bank, 77 Va. 445.

That the lien here reserved embraces a demand for damages such as is here asserted is questioned; but we are of opinion that it does. The language used is too broad to be restricted to mere engagements to pay subscriptions to the stock of the company. "Liability" is an exceedingly comprehensive term. Bouvier defines it as:

"Responsibility; the state of one who is bound in law and justice to do something which may be enforced by action."

See, also, 5 Words and Phrases, 4111, 4114, 4115.

Moreover, we have nothing in the record before us on which to found a supposition that the incorporators of the complainant company contemplated only the ordinary subscriptions to its stock payable in money. The stock held by the defendants was issued in consideration that the complainant company should have, inter alia, the right to purchase at a fixed low price machines to be made by the Winston Company and the sole right to sell them except in the United States and Canada. It may even be that no issues of stock were contemplated except under similar circumstances, or that at least a large proportion of the stock was intended to be so issued. And if contracts such as that which is set up at bar were contemplated by the incorporators, it is not improbable that the word "liabilities" was used for the very purpose of embracing just such a claim as is here asserted. But, in any event, the word is too broad to be restricted to obligations fixed in amount by agreement of the parties or by judgment. In 25 Cyc. 223, the word "liability" is defined as:

"A broad term; [which] may be employed as meaning a state of being liable, * * * responsibility; * * * the condition of being actually or potentially subject to an obligation. * * *"

In Rapelje & Lawrence Law Dict. it is said:

"It is used either generally, as including every kind of obligation, or in the more special sense to denote inchoate, future, *unascertained*, or imperfect obligations, as opposed to '*debts*,' the essence of which is that they *are ascertained* and certain." 25 Cyc. 223, note.

In Lattin v. Gillette, 95 Cal. 319, 30 Pac. 546, 29 Am. St. Rep. 115, it is said:

"The word 'liability' * * * is the condition in which an individual is placed *after a breach of his contract*, or a violation of any obligation resting upon him." 18 Am. & Eng. Ency. (2d. Ed.) note p. 848.

See, also, Cochran v. U. S., 157 U. S. 296, 15 Sup. Ct. 628, 39 L. Ed. 704. As one of the commonest uses of the word "liability" is to express an obligation or responsibility which may be enforced by action, this word must be held to embrace an unadjudicated demand for damages. It seems to us therefore that the language quoted was intended to and does embrace the liability here asserted and does give a lien on the stock and dividends as is alleged.

[10] The lien thus given is an equitable lien (Walker v. Brown, 165 U. S. 654, 664, 17 Sup. Ct. 453, 41 L. Ed. 865; 3 Pom. Eq. § 1235), and the fact that it is enforceable only in equity gives to the contention now under consideration such force as it possesses. From such examination as we have been able to make of the authorities it would seem that an unadjudicated demand for damages which is secured by lien is quite unusual. While there may be such cases reported, we have failed to find any decided case in which this exact combination of facts actually existed. The fact that there is equity jurisdiction in the federal courts to enforce mortgages for future advances (Jones v. Guaranty Co., 101 U. S. 622, 25 L. Ed. 1030), to enforce an equitable lien to secure such advances (Walker v. Brown, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865), and to enforce mechanic's liens (Sheffield Co. v. Witherow, 149 U. S. 574, 579, 13 Sup. Ct. 936, 37 L. Ed. 853;

Idaho Co. v. Bradbury, 132 U. S. 509, 515, 10 Sup. Ct. 177, 33 L. Ed. 433), is not sufficient to guide us here, for in all of those cases the complainant was a contract creditor and not a mere claimant of damages. This is also true as to Seymour v. Freer, 8 Wall. 202, 19 L. Ed. 306; Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383; Wylie v. Coxe, 15 How. 415, 14 L. Ed. 753; Wehner v. Bauer (C. C.) 160 Fed. 240; and George v. Wallace, 135 Fed. 286, 292, 68 C. C. A. 40—in which last case it is said:

"A suit for the enforcement of a lien or for the enforcement and administration of a trust is one peculiarly of equitable cognizance, and may be maintained by a *contract creditor* whose claim has not been reduced to judgment."

In Case v. Beauregard, 101 U. S. 688, 691 (25 L. Ed. 1004), it was said:

"* * * It may be said that whenever a creditor has a trust in his favor or a lien upon property for the *debt* due him he may go into equity without exhausting legal processes or remedies."

In Jackson v. Bell, 31 N. J. Eq. 554, 558, it is said that:

"A claim for uncertain and unliquidated damages is not a debt."

It is highly probable that the word "debt" in the foregoing quotation from the Supreme Court was not used as including an unadjudicated demand for damages, for the case before it (99 U. S. 119, 25 L. Ed. 370) was that of a contract creditor.

Lilienthal v. McCormick, 117 Fed. 89, 98, 54 C. C. A. 475, and Witz v. Mullin, 90 Va. 805, 807, 20 S. E. 783, are cases which may be thought to suggest inferentially that equity jurisdiction exists to enforce a lien securing a claim for damages. But in neither was this question actually decided, and in the latter Judge Lewis said:

"It is certainly a proposition not to be disputed that a claim to damages for a breach of contract, merely sounding in damages, is not a fit subject for the jurisdiction of a court of equity."

In Oelricks v. Spain, 15 Wall. 211, 228 (21 L. Ed. 43), it is said:

"Besides, there is an element of trust in the case, which, wherever it exists, always confers jurisdiction in equity."

But this was not a suit to enforce a claim for damages, and the ground of equity jurisdiction chiefly relied upon was the equity to prevent multiplicity of suits. Clews v. Jamieson, 182 U. S. 461, 481, 21 Sup. Ct. 845, 45 L. Ed. 1183, was a suit in which damages for breach of contract were sought. But in the opinion it is said:

"Upon all the facts we think that the jurisdiction of the court was plainly established *because* under the circumstances the complainants had no adequate and full remedy at law."

It is certainly true that equity will award damages as incidental to equitable relief. 2 Story Eq. Jurisp. (6th Ed.) §§ 794, 799; Ferson v. Sanger, 8 Fed. Cas. 1165, 1168; Magic Co. v. Elm City Co., 16 Fed. Cas. 403; Burdell v. Comstock (C. C.) 15 Fed. 395; Insc. Co. v. Garrett, 125 Fed. 589, 593, 60 C. C. A. 395; Clews v. Jamieson, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183.

In the case at bar it is clear that the demand for damages is not

incidental to the equitable remedy of enforcement of complainant's lien. The prayers for injunction, discovery, and accounting not being well founded, the claim for damages is the principal demand, and enforcement of the lien is incidental and auxiliary thereto. Indeed, the right to the enforcement of the lien can only arise after complainant has successfully maintained its claim to a right to damages. If the trial court had taken jurisdiction, it would have been in order to award damages primarily and not incidentally. The jurisdiction therefore cannot possibly be maintained on the theory that damages would be here awarded as incidental to the equitable relief prayed. And this conclusion leads to the further conclusion that there is no equity jurisdiction here because the case is in chief a demand for damages, such as is peculiarly appropriate to the jurisdiction of the law court, with an equitable feature which is merely auxiliary and incidental to the demand for damages. The bill presents no equity to avoid multiplicity of suits, no equity for discovery, accounting, or injunction. Therefore the doctrine that the equity court having jurisdiction for one purpose will do complete justice goes not so far as to embrace this case, as in it the sole right to equitable relief is dependent on and merely auxiliary to a disputed demand for unadjudicated damages.

In Swan Co. v. Frank, 148 U. S. 603, 609, 612, 13 Sup. Ct. 691, 693 (37 L. Ed. 577), complainant asserted in equity an unadjudicated demand for damages against stockholders of corporations who held funds alleged to be impressed with a trust in favor of complainant. The court said:

"The theory of the bill is that the assets of the vendor corporations which have been distributed to and received by the defendants as stockholders constitute a *trust fund* for the payment of all debts and demands against the companies, and may therefore be followed in the hands of, and recovered from, such stockholders, to the extent necessary to discharge valid claims against the corporations from which they were received. The funds sought to be reached are undoubtedly applicable, under proper proceedings against all necessary parties, to the payment, so far as may be needed, of outstanding indebtedness against the corporations which distributed the same; but the difficulty here is that the complainant has not adopted the requisite and necessary procedure to subject said funds thereto. It has no judgment against the corporations by which it was defrauded, nor are such corporations made parties defendant to the suit or brought before the court. * * *

"We are also clearly of opinion that the court below was correct in sustaining the demurrer to the bill upon the other ground assigned, that the complainant had not previously reduced its demand against the vendor corporations to judgment. That claim was purely legal, involving a trial at law before a jury. Until reduced to judgment at law, it could not be made the basis of relief in equity. This is well settled by the decisions of this court in Taylor v. Bowker, 111 U. S. 110 [4 Sup. Ct. 397, 28 L. Ed. 368]; National Tube Works Co. v. Ballou, 146 U. S. 517, 523 [13 Sup. Ct. 165, 36 L. Ed. 1070]; and Scott v. Neely, 140 U. S. 106, 115 [11 Sup. Ct. 712, 35 L. Ed. 358]. In this latter case the subject is fully reviewed and the question settled so far as the federal courts are concerned."

If the Supreme Court, in deciding this case, regarded the claim of the complainant as secured by a trust, or a right analogous thereto, this case is conclusive of the case before us. The language of the court indicates an opinion that the trust existed. If the court had regarded a trust merely as a right presently enforceable in equity, it

would probably have refused jurisdiction with the simple declaration that no trust existed in favor of a mere claimant of damages. But it is not impossible to conceive of a trust enforceable only after the beneficiary has taken some preliminary proceeding, and the opinion in question strongly suggests that such was the theory of the court. The lien of a vendor exists before the purchase money secured thereby becomes due, although no right to enforce the lien arises until after default. The trust created by an ordinary deed of trust exists from the delivery of the deed, although the right to sue for its enforcement does not exist until the obligation secured thereby has been broken.

The decree below must be affirmed at the cost of appellant.

Affirmed.

TRANSIT DEVELOPMENT CO. v. CHEATHAM ELECTRIC SWITCHING DEVICE CO.

NASSAU ELECTRIC R. CO. v. SAME.

(Circuit Court of Appeals, Second Circuit. February 2, 1912.)

Nos. 164, 165.

1. APPEAL AND ERROR (§ 999*)—REVIEW—QUESTIONS OF FACT.
   In the federal courts, questions of fact, which have been determined by the verdict of a jury, properly instructed, are not reviewable by the appellate court.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912–3921, 3923, 3924; Dec. Dig. § 999.*]

2. PATENTS (§ 276*)—ACTIONS AT LAW FOR INFRINGEMENT—QUESTIONS FOR JURY.
   In an action at law for infringement, upon conflicting proof, it is a question for the jury to pass on whether the patented invention is of a primary character and the patent a pioneer patent.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 240, 432–434; Dec. Dig. § 276.*]

3. PATENTS (§ 274*)—ACTION FOR INFRINGEMENT—DAMAGES—PROOF OF DAMAGES.
   To entitle the owner of a patent to recover damages from a user of infringing devices, he is not required to prove that, if defendant had not used such devices, he would have purchased those made under the patent.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 419–421; Dec. Dig. § 274.*]

4. PATENTS (§ 276*)—VALIDITY AND INFRINGEMENT—RAILWAY ELECTRIC SWITCH.
   The charge of the court, in an action to recover damages for infringement of Cheatham patents, No. 612,702 and No. 917,541, for electric railway switches, resulting in a verdict finding validity and infringement, considered, and *held* not erroneous.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 240, 432–434; Dec. Dig. § 276.*]

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

Actions at law by the Cheatham Electric Switching Device Company against the Transit Development Company and the Nassau Elec-

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

tric Railroad Company, respectively. Judgments for plaintiff, and defendants bring error. Affirmed.

◦See, also, 190 Fed. 202.

These two actions come before this court for review upon writs of error to the Circuit Court. The actions were tried together as one action in the trial court, and assignments of error have been argued together in this court. A single opinion will therefore dispose of both causes. The actions are each for infringement of two patents. The first was issued October 18, 1898, to Robert V. Cheatham for an automatical electrically controlled railway switch. The single claim involved reads as follows:

"3. In an electrically controlled switch-operating mechanism, the combination with a trolley wire, and trolley wheel, and a double solenoid having a core armature connected with the switch point-rail, of parallel contact strips supported at opposite sides of the trolley wire and having upward inclined ends, one of said strips being integral throughout and the other being divided into three sections, an electro-magnet having a spring armature and two contact plates for said armature, the winding of said electro-magnet being connected with the trolley wire and with the integral contact strip, a wire connecting the spring armature with the middle section of the divided contact strip, and wires connecting the contact plates of said spring armature with the windings of the double solenoid, substantially as described."

The second patent, No. 917,541, was issued to the same inventor April 6, 1909, for an electric switching device for railways. Two claims involved read:

"1. In a device of the class described a trolley pan having parallel flat strips with flat bottoms inclined at an angle to the horizontal and conducting bars secured to said inclined lower surfaces.

"2. In a device of the class described a trolley pan having parallel flat strips with inclined lower surfaces, conducting bars, insulated from each other and secured to said lower surfaces, and means for throwing a switch point connected with some of said conducting bars."

Kiddle & Wendell and W. C. Margeson (Alfred W. Kiddle and Charles A. Wendell, of counsel), for plaintiffs in error.

O. E. Edwards, Jr., and Hamilton R. Squier, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The amount of the verdict was $551.44 against the Transit Company, being damages for eight infringing devices; that against the Nassau Company was $413.58, being damages for six infringing devices, which six devices were part of the eight included in the Transit action. The plaintiff is not entitled to double damages for the same infringement, but it is not necessary to discuss this part of the case, because any error of that sort in the verdicts was cured by the court's direction at the foot of the judgment, instructing the clerk not to issue execution against the Nassau Company if the judgment against the Transit Company were collected.

[1] There was such a conflict of testimony (including the experts') touching the main issues as made it the duty of the trial judge to submit to the jury the two fundamental questions of fact: "Was there invention?" "Was there infringement?" As we pointed out recently in Heide v. Panoulias, 188 Fed. 915, 110 C. C. A. 656, when questions of fact are disposed of by the trier of the facts in an equity suit, his decision may be reviewed on appeal. When disposed of by the verdict of a jury, properly instructed, its decisions on those points are not re-

viewable by the appellate court. The case at bar is like that considered by the Supreme Court in Bischoff v. Wethered, 76 U. S. 812, 19 L. Ed. 829, where the record contained "much more than a few certified copies of issued patents," which the court would be entirely competent to construe for itself. The only question, therefore, for this court to determine, touching invention and infringement, is whether there was error in the instructions given to the jury or in some refusal to charge as requested by defendants.

The colloquial charge was a long one, and to one part of it only was there an exception reserved. This exception reads:

"To so much of the charge which seems to indicate that Cheatham's first patent covered the mechanism broadly, whereby the motorman could leave the current off or on to throw the switch point, without regard to the mechanism by which this result is accomplished, and not limited to the devices as shown and described in claim 3."

The passages in the charge apparently referred to are found at folios 1,380 and 1,381, where the court told the jury it was for them to decide whether or not Cheatham "had an idea which was entirely new as to accomplishing this thing in this way." Immediately thereafter, in referring to this suggested "new idea," the judge spoke of it as "taking the current from one trolley wheel, so as to throw the switch if power were used, or to leave the switch alone, or throw it back, if no power were used." Standing alone and apart from anything else in the charge this statement might possibly be understood as intimating that the invention consisted in a method of manipulating the flow of the current rather than in the combination of mechanical elements by which such manipulation was accomplished. But it should be noted that in endeavoring to make the situation plain to the jury the court did not use these words "method" and "combination" in the technical sense familiar to patent lawyers and experts, and of which a jury of laymen would have no appreciation. He used the words as they are understood in common parlance. Moreover, whatever there might have been which was misleading in the words above quoted, it was promptly and fully corrected. When defendant's counsel asked for an exception in the language above quoted, the court said:

"Of course, I do not intend to charge that he could do that, except by any particular device, or the device with an equivalent structure. I am not claiming that he would do it by an entirely different method. The jury will understand that, if I have used general language in that way, wherever I have referred to Mr. Cheatham having a method for doing this, I have meant a method as described in claim 3 of this patent."

Subsequently, at the request of defendants, the court charged that:

"The words 'substantially as described,' as set forth in claim 3 of patent 612,702, are words of limitation, and these words limit the elements of the claim to elements in combination having the form and constructed and operating as shown and described in the specifications."

This was the last instruction to the jury on this whole subject of methods and combinations. It is so plain and specific that it must be assumed that they understood it, and, since it states the law of the case accurately, defendant can take nothing by reason of its exception

to the less carefully expressed language of the colloquial charge. This disposes of assignments of error 5, 6c, and 6d.

Error is assigned to refusals to instruct the jury that defendant's devices did not infringe claim 3 of the first patent, because neither of defendants' contact strips has upturned ends to deflect the trolley wheel. That involved a question of fact, upon which there was conflicting testimony. The trial court properly left it to the jury to determine, and to its instructions to them on the subject of equivalents no exception was reserved. The jury's conclusion on the conflicting evidence is final. This disposes of assignments 6a and 6b.

Assignment of error 6g is to a refusal to charge that, in view of the state of the art, claim 3 cannot be construed to cover defendants' devices. This may be similarly disposed of. There was conflicting evidence, and the question was sent to the jury under instructions not excepted to.

A like disposition must, for similar reasons, be made of assignment 6h, the refusal of a request to charge that claims 1 and 2 of patent 917,541 cannot be construed to cover defendant's devices.

Assignment 6e is to refusal to charge that:

"Neither of the two patents sued upon is a pioneer or primary invention, and hence is not entitled broadly to the doctrine of equivalents, but is only entitled to a narrow range of equivalents."

The court so charged as to the second patent, but refused so to charge as to the first one. In the course of the colloquial charge the court did not instruct the jury that the plaintiff was a "pioneer," as defendants upon the argument contended that he did. What the court said was that:

"*If* Mr. Cheatham had an idea which was entirely new as to accomplishing this thing in this way, *then* the language of the patent would give him a pioneer patent."

[2] The question of pioneership depends, of course, upon the prior state of the art and the skill of the calling, matters of fact about which there was a conflict of testimony; so the court left it to the jury to decide whether or not the first patent was a pioneer. He gave them proper instructions on that point, which were not excepted to. Their conclusion on such point is final. Upon conflicting proof it is a question for the jury to pass upon whether a patented invention is of a primary character and the patent a "pioneer patent." Royer v. Schultz Belting Company, 135 U. S. 319, 10 Sup. Ct. 833, 34 L. Ed. 214.

[3] Assignment 6f is to a refusal to charge that:

"Inasmuch as plaintiff has not proven that it would have received any order for its switching devices from either of the defendants, it cannot recover."

We think this request was unsound. It would require plaintiff specifically to prove what in the nature of things can only be established by inference. When a person buys and installs an infringing device, it is to be assumed he does so because he finds it desirable or necessary to do so; and the natural inference would be that, if he had not got the infringing device from the infringing manufacturer, he would have

got the equivalent device of the patent from some one licensed to make it, or if no one is so licensed, and the owner of the patent himself manufactures, then from such owner.

No exception was reserved to those parts of the charge which stated the correlations of the two defendant companies and specified the unit of damages per device. There is nothing, therefore, before us to which the argument as to possible error in calculating such unit can be advanced, and we cannot look into it. The only request as to the measure of damages was that the jury be charged that:

"Plaintiff cannot in any event recover a verdict for the use of the six machines against the defendant Nassau Company, and eight machines against the Transit Company, but can at most recover a verdict for eight switches in both cases."

This was charged.

[4] By exception to a refusal to dismiss the complaint at the close of the case defendants are entitled to present here (assignment 4) the grounds stated upon such motion, viz., that there was no proof of infringement by defendants or either of them. This assignment, however, is without merit. It appears by stipulation that the Nassau Company was a *user* of six of the infringing switches. From the stipulation, taken in connection with the agreement between the defendants and other companies, the jury were entitled to find that those six switches were bought by the Nassau Company from the Transit Company, which was therefore a *seller* of them. As to the other two switches which the Transit Company bought, we have not been able to find specific evidence of their subsequent sale or use. But the court's attention was not called, either by motion or request, to the contention that there was some defect of proof as to these two, and the language of defendants' request last above quoted would seem to indicate that it was conceded that there was sufficient proof for the jury to consider as to whether they also had been sold or used. Under these circumstances we can find no error in the verdict which includes these in the assessment of damages against the Transit Company.

There has been no argument of any of the errors assigned to the admission or exclusion of testimony, so these need not be considered.

The judgment is affirmed, with costs.

McCASKEY REGISTER CO. v. DIVENS.

(Circuit Court of Appeals, Third Circuit. March 28, 1912.)

No. 1,509.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ACCOUNT RECORDING APPLIANCES.

The McCaskey patent, No. 783,126, for a credit accounting appliance, consisting of apparatus and appliances for carrying out a system for keeping records of credit sales and of payments made thereon, in view of the prior art must be narrowly construed and practically confined to its exact disclosures without the benefit of the doctrine of equivalents. As so construed, *held* not infringed.

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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 Western District of Pennsylvania.

Suit in equity by the McCaskey Register Company against John R. Divens. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 181 Fed. 171.

Melville Church (John H. Roney and Edward R. Alexander, on the brief), for appellant.

Clarence P. Byrnes (F. W. Bond, on the brief), for appellee.

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

CROSS, District Judge. In the court below the appellant was complainant in a suit instituted against the appellee and defendant for an alleged infringement of patent No. 783,126, issued February 21, 1905, to one P. A. McCaskey, which had been duly assigned by him to the complainant. The Circuit Court, finding that the defendant had not infringed the patent, dismissed the bill of complaint with costs. Although there are 22 claims in the patent, Nos. 2, 13, 15, and 22 only are in suit, and to them reference will later be made. The patent is for a "credit accounting appliance," and the patentee in his specification described it in general terms as follows:

"This invention relates to systems for keeping records of credit sales of merchandise and also the cash payments thereon; and the invention has reference particularly to the apparatus and appliances for carrying out the systems.

"The objects are to improve credit systems that are carried out by means of duplicate account slips or bills and bill holders in lieu of regular sets of account books, and to improve the various means employed for carrying out such systems as referred to above, so that the apparatus and appliances therefor may be conveniently handled and at the same time be inexpensive in first cost and economical in use.

"With the above-mentioned and other objects in view, the invention consists in improved apparatus and appliances whereby credit accounts may be recorded and kept, in the novel features of construction of the apparatus and appliances comprised in the means for carrying out the credit system, and in the novel combinations and arrangements of parts, as hereinafter particularly described, and pointed out in the appended claims."

It should be noted that the patent relates only to the apparatus and appliances for carrying out a system for keeping records of credit sales and of payments made thereon, and does not in any wise embrace the system itself, for, although McCaskey sought to have his patent include the system, his application therefor was denied. Briefly described, the apparatus consists of a loose-leaf book having the metal leaves pivotally attached to a base and mounted in a cabinet. Upon both sides of the leaves are spring clips for attaching and holding the account slips. The clips are arranged in rows or columns in spaces separated from each other by strips of wood or partitions, which are the rubbing strips of claim 15 of the patent. The leaves attached to the base are removable from the cabinet for the purpose of being placed in a safe or elsewhere as desired, and in order to prevent the leaves of the book from opening when thus removed, the bill

holder frame is provided with a yoke which clamps and holds the leaves securely. There are a number of patents in the prior art which disclose in combination substantially all that is shown by the patent in suit. It is not, however, deemed necessary to consider them in detail, since this was sufficiently done by the court below. Accordingly, reference will be made to but one, that of McCaskey, No. 717,247, issued December 30, 1902, but little more than two years prior to the patent in suit. This earlier patent of McCaskey discloses in combination substantially all that the patent in suit discloses. The essential particulars in which his later patent differs from his earlier are that in the patent in suit he put clips, tab holders, index tabs, and rubbing strips on the back as well as on the front of his leaves, and changed the location of his tab holders on the wire clips, from their former position on the upper end of the clips to one more central. There was nothing new, however, in putting clips and tab holders on both sides of the leaves; it is clearly shown in the prior art and was merely a mechanical duplication of parts, which did not involve invention. The same is true of the position of the tab holders on the clips; for whether they be located thereon at the upper or lower ends, or in the middle, is largely a matter of convenience. Their function would be the same. Hence if in practical use it were found more convenient, or less obstructive, to locate them at one point than at another, the requisite change in their location would immediately be suggested to the user, while the means involved in making it would be of the most simple and obvious mechanical character. What was said above with reference to putting the clips and tab holders on both sides of the leaves may also be said of a similar disposition of the rubbing strips, which are in reality little more than partitions, intended to keep the account slips apart and in columns. Moreover, they were shown in the McCaskey earlier patent, on one side of the leaf, and the placing of them on the reverse side did not involve invention.

From what has been said, it is obvious that the patent is a very narrow one, and that, if it is sustained, it must be narrowly construed and practically confined to its exact disclosures. No broad construction is permissible, nor can the doctrine of equivalents be applied without encountering the prior art and destroying the patent. Thus construed, the defendant has not infringed it. The feature of claim 2 is the provision of a yoke for temporarily preventing pivotal movements of the bill holders or leaves relatively to the frame. The claim is broad enough to cover any kind of a yoke, but so many kinds appear in the prior art or in general use that almost any kind was open to adoption. McCaskey chose one form and must abide by his selection. The defendant's device shows a yoke which in structure and location is so different from the complainant's that, under the circumstances, it cannot be held to infringe it. The complainant's yoke, applied to the defendant's device, would be inoperative. Claims 13 and 22, with other elements in combination, provide for bill clamps mounted on the bill holders, tab holders attached to the bill clamps, and index tabs mounted on, or attached to, the tab holders. The only difference between the two claims lies in the fact that in claim 13 the

tab holders are required to be attached to the bill clamps "near the free ends thereof." The specific features of both claims are the introduction of the elements of tab holders and index tabs. McCaskey's earlier patent shows similar indexing devices, but somewhat differently located. The claims under consideration must be restricted to their expressed terms, as explained by the drawings and specification. The complainant is limited to what is shown and claimed. The defendant has neither tab holders nor index tabs within the meaning of these claims. We have no hesitancy in holding, under the circumstances, that the defendant's device does not infringe them.

Claim 15 calls, in addition to other elements, for bill holders mounted on the frame and having pairs of apertures therein, bill clamps mounted oppositely on both sides of the bill holders and having members extending through the apertures to opposite sides thereof, and rubbing strips on the bill holders in pairs on opposing holders and cooperating one with another. As already stated, rubbing strips or partitions were old in the art, and while the defendant's device shows similar strips, they do not in his case perform the function of those of the patent in suit. In that patent, when the leaves are removed from the cabinet and clamped together for removal to a safe or elsewhere, the leaves in the process of adjustment necessarily slip one over the other for a space of about four inches, and the rubbing strips perform the function during that operation of keeping the account slips in place. On the contrary, the defendant's leaves, on being removed and clamped together for the purpose mentioned, do not, or not to any material extent, slip or rub one over the other, for the reason that the leaves of the defendant's device are pivoted to the frame on a common axis, that is to say, on a single rod extending along the front of the frame; whereas, the complainant's are pivoted to the frame by separate rods and move on different axes which causes them to slip or rub against each other, as above mentioned. The claim under consideration also provides for apertures in the bill holders, with bill clamps mounted oppositely on both sides of the bill holders, and having members extending through the apertures to opposite sides thereof. In the defendant's device, the ends of the bill clamps or clips are not passed through apertures in the bill holders, but through apertures in the rubbing strips or partitions. Hence it appears that the rubbing strips in this device perform not the same but a different function from that which they perform in the complainant's. The whole case has been carefully considered, with the result that other material differences in the devices have been found to exist, which, however, it is not deemed necessary to specially set forth or consider. It is sufficient to say that the defendant's device does not infringe the claims in suit.

Accordingly, the decree of the court below is affirmed, with costs.

F. E. MYERS & BRO. v. FAIRBANKS, MORSE & CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1912.)

No. 1,756.

1. PATENTS (§ 328*)—INVENTION—POWER FORCE-PUMP.
The Myers patent, No. 670,902, for a power force-pump, is void for lack of invention, in view of the Walrath patent, No. 281,809, for a steam engine, which accomplished the object stated by Myers to be the purpose of his device in practically the same way; no invention being required to adopt the same means to accomplish the same end in a pump.
2. PATENTS (§ 27*)—INVENTION—ADAPTATION OF OLD MEANS TO ANALOGOUS SUBJECT.
It does not involve invention to apply an old process or machine or idea to a similar or analogous subject, with no change in the manner of the application and no substantially different result.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by Francis E. Myers and Phillip A. Myers, partners as F. E. Myers & Bro., against Fairbanks, Morse & Co. Decree for defendant, and complainants appeal. Affirmed.

H. A. Toulmin, for appellants.

Howard M. Cox and Dwight B. Cheever, for appellee.

Before BAKER and SEAMAN, Circuit Judges, and ANDERSON, District Judge.

ANDERSON, District Judge. This is an appeal from a decree dismissing the bill in a suit by Francis E. Myers and Phillip A. Myers, under the partnership name of F. E. Myers & Bro., against Fairbanks, Morse & Co., alleging infringement of the Myers patent, No. 670,902, March 26, 1901, for improvements in power force-pumps.

[1] The object of the patentee is stated by him in his patent thus:

"My invention relates to power force-pumps; and the object thereof is to provide a compactly-built pump, adapted to operate in the ordinary way, having great strength and of few parts, so that an efficient device may be built at a comparatively small cost."

And further:

"As it is the object of this invention to reduce the number of parts of the pump, to lessen the cost of manufacture of the same, and to arrange the parts thereof in a compact form and in such positions that the strain will be at the minimum, I have sought to use and place every part of the pump to the best advantage."

The claim is:

"In combination in a pump, the horizontal cylinder, a power-shaft, a bearing for the power-shaft carried by the cylinder-head at the upper part thereof, a transmitting-shaft, a bearing therefor also carried by the cylinder-head centrally thereof and below the upper bearing, the toothed wheels on the transmitting-shaft and extending along each side of the horizontal cylinder, the pinions on the power-shaft engaging with the toothed wheels, the pitmen,

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

one on each side of the cylinder connected to the toothed wheels, and the connection between the pitmen and the piston-rod, substantially as described."

Appellants' counsel in his brief says:

"The pump of this patent * * * comprises a mechanical entirety, whose component parts are incapable of division or separate use."

After paraphrasing the description in the patent itself, appellants' counsel goes on to say:

"It is observable that all these working parts are mounted upon or carried by the cylinder structure; that in this sense the pump is self-contained: that the two shafts are close up to the cylinder, *with no lost space* between them; that all strains produced by the pumping action in drawing and forcing water are met ultimately by the cylinder."

And:

"The claim of the patent is directed to cover this unique and distinctly new entirety, whose component parts are incapable of division or separate use."

Appellants' chief expert says in answer to the question:

"Please state briefly what you understand to be the invention embraced in and covered by this patent. A. (1) The patent in question relates to power force-pumps and appears to set forth a distinctly peculiar organization of parts to bring about an exceedingly compact structure for efficiency and one susceptible of economical construction."

It will thus be seen that what is claimed for Myers is that he took various elements, each of which was old, and brought them together in a new unitary structure. The object was to produce a pump that is "self-contained" and compactly and economically built. The idea was to mount the cylinder upon a strong base and to attach all of the working parts to the cylinder, "as distinguished from putting the cylinder on a frame and carrying the shafts some distance from the cylinder on another and distant part of the frame," as stated by appellants' counsel in his brief.

If Myers had been the first to accomplish this, it might be necessary to inquire whether it involved invention; but, was Myers the first to conceive the idea set forth in his patent and embodied in his pump? If he was not, the decree below should be affirmed. We think the idea of this patent is clearly foreshadowed in the Walrath patent, No. 281,809, issued July 24, 1883. Walrath claimed to have "invented certain new and useful improvements in steam engines," and he stated the object of his invention as follows:

"This invention was designed more especially to improve and simplify the construction of the steam engine of such steam pumps as are used on portable and traction engines, where they are subjected to rough usage, in most cases by unskilled persons. However, the invention is applicable to other steam engines. My object is to use as few parts as possible in a compact arrangement, so that the steam engine shall be less liable to get out of order than the steam engines now usually employed in steam pumps, and so that the parts may be built very strong, without unduly adding to the weight of the engine."

The court below said of this Walrath patent:

"The Walrath patent, No. 281,809, for a steam engine, is an extremely close approach to whatever advantages there might be in the assembling of the various parts of the patent in suit. This shows a cylinder-head carrying an

integral bearing for the fly-wheel shaft. The pitman and its connection with the piston-rod very closely resemble that of the patent in suit. Duplicate the pitman and wheel of this patent, add speed-reducing gearing of the patent in suit, making, of course, the necessary changes in the cylinder to adapt it to be used as a pump, and we have an exact copy of the device of the patent in suit. Walrath had precisely the same objects in mind as Myers; i. e., compactness, simplicity, and the use of few parts. Certainly a designer of pumps would find in this Walrath patent the broad essential ideas of the pump of the patent in suit."

We not only agree with the court below that "Walrath had precisely the same objects in mind as Myers, i. e., compactness, simplicity, and use of few parts," but we think that he accomplished it in the same way. He mounted the cylinder upon a strong base and attached the working parts to the cylinder. He had the same problem to solve as Myers, and he solved it in the same way, and for so doing he procured a patent for a steam engine for a steam pump.

[2] It does not involve invention to apply an old process or machine or idea to a similar or analogous subject, with no change in the manner of the application and no substantially different result. Blake v. San Francisco, 113 U. S. 679, 5 Sup. Ct. 692, 28 L. Ed. 1070. Walrath taught Myers that the way to get the result desired in a steam engine was to mount the cylinder on a strong base and attach the working parts to the cylinder in the manner shown in his patent. It cannot amount to invention to adopt the same means to accomplish the same end in a pump.

The decree dismissing the bill is affirmed.

DANIELS v. WAGNER.

(District Court, D. Oregon. March 18, 1912.)

No. 3,712.

PUBLIC LANDS (§ 29*)—FOREST RESERVE—EXCHANGE FOR LIEU LAND—VESTED RIGHTS.

Complainant, owning certain land within a forest reserve, pursuant to Act Cong. June 4, 1897, c. 2, 30 Stat. 36 (U. S. Comp. St. 1901, p. 1541), authorizing a selection of other lands in lieu thereof, filed deeds conveying the reserved land to the United States, with the requisite abstracts of title, and at the same time selected certain land in controversy, which was then vacant unappropriated land of the United States, open to settlement. Before the applications for exchange had been accepted or acted on by the local land office, defendant applied to enter the land so selected under the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]). *Held*, that complainant, by filing the deeds to the forest reserve land, with his lieu land selection, did not thereby acquire a vested right to the lieu land so selected, until the selection had been approved by the Commissioner of the General Land Office, prior to which time such Commissioner had power to disapprove the selection and award the land to defendant under his timber and stone application.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 41–47; Dec. Dig. § 29.*]

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

In Equity. Suit by A. D. Daniels against Jesse E. Wagner. On demurrer to bill. Sustained.

Platt & Platt, for plaintiff.
F. H. Mills, for defendant.

BEAN, District Judge. This is a suit for a decree declaring the defendant to hold the legal title to certain real property in section 2, township 37 S., range 10 E., in trust for the plaintiff. The facts as they appear from the bill, in brief, are that on June 4, 1897, Congress passed an act providing, among other things:

"That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent." Act June 4, 1897, c. 2, 30 Stat. 36 (U. S. Comp. St. 1901, p. 1541).

By virtue of the provisions of this law there was filed on February 8, 1904, in the local land office, for and on behalf of the plaintiff, deeds by the owners of certain lands in the San Francisco Mountain forest reserve, accompanied by the requisite abstract of title, conveying such lands to the United States, and at the same time applications were made to select in lieu thereof the land in controversy; the same being at the time vacant, unappropriated lands of the United States, and open to settlement. Before the applications for exchange had been accepted or acted upon by the local land office, or by it forwarded to or considered by the Commissioner of the General Land Office, the defendant applied to enter the lands so selected under the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]). Subsequently such proceedings were had in the Land Department that the applications were rejected, the entry of the defendant approved, and patent issued to him.

The plaintiff now claims that by filing the relinquishments in the local land office, and designating the tracts desired to be selected in lieu of that relinquished, he acquired a vested right or interest in the land so selected, which could not be impaired by subsequent applications to purchase the same under the Timber and Stone Act, and he seeks to invoke the rule applicable to homestead and pre-emption entries. I do not think the cases are at all analogous. The homestead and pre-emption laws were intended for the benefit of actual settlers, and so tender have the courts been of the rights of such settlers that, applying the doctrine that equity will consider that as done which ought to have been done, they have held that when a qualified entryman enters upon public lands open to settlement under the homestead or pre-emption laws, with the intent of acquiring title thereto, he has a vested right therein, of which he can only be deprived by his failure to comply with the conditions of the law, and that one to whom the Land Department may subsequently convey the title will be decreed to hold it in trust for the entryman. Lytle et al. v. Arkansas, 9 How. 314, 13 L. Ed. 153; Nelson v. N. P., 188 U. S. 108, 23 Sup. Ct. 302, 47 L. Ed. 406.

The act of 1897, under which plaintiff claims, however, merely signifies the willingness of the government to exchange vacant land open to settlement for an equal area of land within the limits of a forest reservation covered by a bona fide claim or patent, and no rights are acquired by the selector until his application for the exchange is approved. No method of procedure for effecting the exchange is provided by law. The general administration of the forestry reservation acts, however, and the adjudication of the various questions arising therein, are vested in the Land Department. It has power and authority to adopt, and has adopted, rules and regulations governing the procedure in relinquishing lands within a reservation and the selection of other lands in lieu thereof, of which the courts will take judicial knowledge. Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064. By the rules and regulations so formulated, one desiring to relinquish lands and select other lands in lieu thereof, where final certificate or patent has issued, is required to make a quitclaim deed to the United States for the land offered in exchange, have it recorded in the proper county, and file the same (accompanied by an abstract of title duly authenticated, showing a chain of title from the government back to the United States, to the property offered) in the local land office, and at the same time designate the particular tract which he desires in lieu of that relinquished.

"All applications for change of entry or settlement under this law must be forwarded by the local land officers to the Commissioner of the General Land Office for consideration, together with a report as to the status of the land applied for." William S. Tevis, 29 Land Dec. Dep. Int. 575.

There is some language of Judge Ross in Olive L. & D. Co. v. Olmstead (C. C.) 103 Fed. 568, which is susceptible of the construction that the selector of lands under the act of 1897 becomes the equitable owner thereof upon the filing of his deed of relinquishment and notice of selection in the local land office and the acceptance thereof by such office; but in the subsequent case of the Cosmos Ex. Co. v. Gray Eagle Oil Co. (C. C.) 104 Fed. 20, the learned judge explains that the Olive Case was decided without reference to the rules of the Land Department regulating the procedure of applicants for exchange of lands under the act of 1897, and in the latter case he holds that under the rules so promulgated the local land office has no authority to approve a selection, but is required to refer the question to the General Land Office for its consideration, and that the selector has no vested interest in the land selected by him until the application is approved by the Land Department.

This ruling was affirmed by the Court of Appeals (Cosmos v. Gray Eagle, 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230), and by the Supreme Court (Cosmos v. Gray Eagle, 190 U. S. 303, 23 Sup. Ct. 692, 24 Sup. Ct. 860, 47 L. Ed. 1064). In the latter case the court said that the complete equitable title of the selector is not "made out and cannot exist until a favorable decision by that department (General Land Office) has been made regarding the sufficiency" of the proof and his right to the selected land, and that "there must be a

decision made somewhere regarding the rights asserted by the selector of the land under the act before complete equitable title to the land can exist; the mere filing of papers cannot create such a title; the applicant must comply with and conform to the statute, and the selector cannot decide the question for himself"; and that authority to determine whether the selector has complied with the provisions of the act and the regulations of the department is not vested in the local land officers, but in the Commissioner of the General Land Office, and, until he has approved the application, the selector is not vested with the equitable title to the land he assumes to select.

Under this rule, it seems to me that the plaintiff acquires no title or right to the land selected by him by the mere filing of his application, and that it was within the power and jurisdiction of the Land Department to reject the same and award the land to a subsequent entryman under the Timber and Stone Act, and as a consequence that the plaintiff is not entitled to the relief prayed for in his bill.

The demurrer will be sustained.

LEWIS v. C. E. SHERIN CO.

(District Court, S. D. New York. March 16, 1912.)

CONTRACTS (§ 204*)—DAMAGES (§ 120*)—CONSTRUCTION—OBLIGATION OF PARTIES.

A contract binding defendant to pay plaintiff a weekly salary for five years, in consideration of plaintiff furnishing appropriate paragraphs for advertising purposes of the quality and standard evidenced by a book written and published by plaintiff, and giving defendant the exclusive right to the services of plaintiff for five years, and the exclusive right to use any of the material in the book published, requires plaintiff to furnish paragraphs for advertising purposes of the quality and standard evidenced by the book, and plaintiff, who is ready and willing to carry out the contract and furnish suitable paragraphs, is entitled to recover as damages for breach of contract by defendant the full amount which he would have received under the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 916, 917; Dec. Dig. § 204;* Damages, Cent. Dig. §§ 291–305; Dec. Dig. § 120.*]

At Law. Action by Arthur G. Lewis against the C. E. Sherin Company. Judgment for plaintiff.

Hugh Gordon Miller, for plaintiff.
Joseph P. Bickerton, Jr., for defendant.

HOLT, District Judge. In this case I concur in the opinion of Judge Hough in the memorandum handed down by him, opening the default, in respect to the construction of the contract. By the contract, the defendant agreed to pay the plaintiff a salary of $80 a week for five years, in consideration of the plaintiff furnishing appropriate and acceptable paragraphs for advertising purposes to the extent

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

of at least 80 per month, or not less than 1,000 per year, if desired by the defendant. The contract also provides that:

"The said paragraphs written by the said second party [the plaintiff] shall be of the same quality and standard as evidenced by his previous work, as written and published in his book entitled 'Stub Ends of Thought and Verse.'"

The effect of this contract was, in my opinion, that the paragraphs furnished would be appropriate and acceptable if they were of the same quality and standard as evidenced by his previous work as written and published in said book. The defendant called upon the plaintiff, after the contract was executed, for paragraphs to be furnished in connection with various advertisements. They were furnished, and at first a very large proportion of them were accepted. Subsequently a very large proportion of those furnished were rejected; but, in my opinion, all of those that were furnished were generally of the same quality and standard as evidenced in the plaintiff's previous work as written and published in his book entitled "Stub Ends of Thought and Verse." The book contains a large number of brief, epigrammatic sentences, mostly in prose, but some in verse, appropriate for use as mottoes or sentiments.

It is obvious that the plaintiff was not employed to write ordinary advertisements; but the idea of the contract was to print, in connection with ordinary advertisements, some brief and catching general sentiment, which would add to the novelty and attractiveness of the advertisement. The contract gave the defendant the exclusive right to the services of the plaintiff for five years, and the exclusive right to use any of the material in the book which he had published, and, so long as the plaintiff was ready and willing to perform the contract on his part, it was binding upon the defendant. After the defendant had paid the plaintiff $80 a week for 10 weeks, it stopped making such payments, and stopped notifying the plaintiff to furnish more material. I think that the defendant at that time was guilty of a breach of the contract, and that the plaintiff has been at all times ready and willing to carry out the contract. The result is that the plaintiff, in my opinion, is entitled to recover, as damages for the breach of the contract, the full amount which he would have received, if it had not been broken. Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Weed v. Burt, 78 N. Y. 191.

The amount agreed to be paid by the defendant to the plaintiff under this contract was the sum of $80 per week for five years, which would amount in the aggregate to $20,800. The defendant has paid the plaintiff $800. The plaintiff is therefore entitled, in my opinion, to a judgment for $20,000, the amount demanded in the complaint.

Ex parte N. K. FAIRBANK CO.

(District Court, M. D. Alabama, N. D. February 29, 1912. Additional Opinion, March 12, 1912.)

No. 911.

1. JUDGES (§ 51*)—CHANGE OF JUDGE—APPLICATION—AFFIDAVITS.

Affidavits for a change of judge for alleged prejudice, affirming in legal effect only that affiants were "informed and believed" that the judge had a personal bias or prejudice against the defendant or in favor of the plaintiff, but not charging that such was the fact, were insufficient to disqualify him.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224–231; Dec. Dig. § 51.*]

2. JUDGES (§ 51*)—CHANGE OF JUDGE—AFFIDAVITS—REQUISITES.

Judicial Code, § 21 (Act March 3, 1911, c. 231, 36 Stat. 1090), provides that, whenever a party shall make and file an affidavit that the judge has a personal bias or prejudice either against him or in favor of any opposite party to the suit, the judge shall proceed no further, but another judge shall be designated to hear the matter, and that every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists. *Held*, that where affidavits to disqualify a judge stated only that the affiants were "informed and believed" that the judge had a personal bias or prejudice against the defendant or in favor of the plaintiff, but did not state the facts and the reasons for the belief, except certain correspondence which on its face showed the absence of either bias or prejudice between the parties, they were insufficient.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224–231; Dec. Dig. § 51.*]

3. JUDGES (§ 51*) — PREJUDICE — AFFIDAVITS — CERTIFICATES OF COUNSEL — "COUNSEL OF RECORD."

Affidavits of prejudice to disqualify a judge, certified to have been made in good faith by nonresident counsel who had never been admitted as attorneys of the court and who had never been recognized as counselors at law in any proceeding had in the court, were not certified by "counsel of record," as required by Judicial Code, § 21 (Act March 3, 1911, c. 231, 36 Stat. 1090).

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224–231; Dec. Dig. § 51.*]

4. JUDGES (§ 51*)—CHANGE OF JUDGE—APPLICATION—FILING—TIME.

Judicial Code, § 21 (Act March 3, 1911, c. 231, 36 Stat. 1090), provides for the disqualification of a judge for prejudice on an affidavit filed less than 10 days before the beginning of the term of the court, or that good cause should be shown for failure to file within that time. *Held*, that the Code having taken effect January 1, 1912, affidavits in a then pending cause to disqualify a judge not filed until February 12, 1912, were too late, in the absence of a showing of excuse for failure to file within the time.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224–231; Dec. Dig. § 51.*]

5. JUDGES (§ 51*)—CHANGE OF JUDGE—BIAS—EVIDENCE.

Facts admitted in support of an application for change of judge *held* to show, as a matter of law, that the judge had no prejudice against the petitioner, or bias in favor of the plaintiff.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224–231; Dec. Dig. § 51.*]

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

6. JUDGES (§§ 39, 45, 47*)—DISQUALIFICATION—GROUNDS.

In the United States a federal judge is disqualified for substantial or direct interest in the event of the litigation, because of close ties of blood or affinity to one or the other of the parties, or where he has been of counsel or a witness in the case.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 184, 186, 208–212, 214–219, 222, 223; Dec. Dig. §§ 39, 45, 47.*]

7. JUDGES (§ 51*)—DISQUALIFICATION—PROCEDURE.

Judicial Code, § 20 (Act March 3, 1911, c. 231, 36 Stat. 1090), provides that whenever it appears that the judge of any District Court is in any way concerned in interest in any suit pending therein, or has been of counsel, or is a material witness for either party, or is so related to or connected with either party as to render it improper for him to sit on the trial, it shall be his duty, on application of either party, to cause the fact to be entered on the records of the court, etc., and section 21 provides for the disqualification of the judge by affidavit of either party. *Held*, that a judge has no option but to retire if he is in truth interested in the suit, or has been of counsel, or has advised as to matters involved therein, or is a material witness, or is related by blood or affinity to either of the parties within the forbidden degree at the common law; but with reference to whether he is otherwise "so connected" with either party as to render it improper for him to sit on the trial of the case, he may sit, or not, in his discretion.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224–231; Dec. Dig. § 51.*]

8. JUDGES (§ 51*)—DISQUALIFICATION—STATUTES—PROCEDURE—PREJUDICE—DETERMINATION OF FACTS.

Judicial Code, § 21 (Act March 3, 1911, c. 231, 36 Stat. 1090), provides that, whenever a party shall make and file an affidavit that the judge has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated to hear the matter, that every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists and shall be filed, etc. *Held*, that the mere filing of an affidavit of prejudice under such section does not disqualify a judge, where the facts stated of themselves show as a matter of law that no prejudice exists.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224–231; Dec. Dig. § 51.*]

9. CONSTITUTIONAL LAW (§ 55*)—DISQUALIFICATION—STATUTES—ENCROACHMENT ON JUDICIARY.

Judicial Code, § 21 (Act March 3, 1911, c. 231, 36 Stat. 1090), provides that, whenever a party to an action or proceeding shall make and file an affidavit that the judge before whom the action or proceeding is to be heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another shall be designated to try the case, and that every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists. *Held*, that such section, if construed literally to mean that the mere filing of such affidavit is sufficient to disqualify the judge without a hearing or determination of whether the facts stated are true or show disqualification, would be unconstitutional as depriving the courts of judicial power and vesting the same in the litigants to that extent.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 58–62, 69, 71, 80, 81, 83; Dec. Dig. § 55.*]

In the matter of the application of N. K. Fairbank Company for a change of judge. Application denied.

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

This was an application on behalf of the N. K. Fairbank Company that the presiding judge recuse himself on the trial of the case of the Jackson Lumber Company v. N. K. Fairbank Company.

On the 20th of February, 1912, the clerk of the court called the attention of the presiding judge to the following letter from Mr. J. F. Merryman:

"St. Louis, Mo., February 12, 1912.

"To the Clerk of the U. S. District Court, Montgomery, Ala. — Dear Sir: I am inclosing you herein an application for a change of venue and the affidavits of certain officials of the N. K. Fairbank Co. in the case of the Jackson Lumber Company, a corporation, plaintiff, v. The N. K. Fairbank Co., a corporation, defendant, now pending in your court. Please call the attention of Judge Jones to these affidavits and this application, all of which are made under the new Judicial Code, which went into effect on the 1st day of January, 1912. I am,

"Very respectfully, [Signed] J. F. Merryman."

The clerk replied that the papers had been filed on the 14th of February, but were not presented to the presiding judge until the 20th of February, on account of a death in the judge's family.

The facts alleged in the petition, to state them in their chronological order, were as follows: On November 22, 1911, the presiding judge received the following letter from Circuit Judge D. D. Shelby:

"United States Circuit Court of Appeals, Fifth Circuit.

"David D. Shelby, U. S. Circuit Judge.

"New Orleans, La., Nov. 22, 1911.

"Hon. Thomas G. Jones, United States Judge, Montgomery, Alabama — My Dear Judge Jones: See inclosed a copy of a petition presented here. I doubt if a judge could be found at this time to go to Montgomery, and we would not like to designate one unless we first heard from you that you could not hear the case. No reason is stated in the petition why the case has not been heard since its removal to the federal court November 19th, 1907, but, so far as the petition shows, it may not have been at issue. It occurred to me that if you were informed of the petitioner's anxiety for a trial, you might set it down for hearing at an early date and that this would be satisfactory to all parties. I know that recently you have been very much engrossed by the hearing of important cases, but you may have a chance at some time soon to give these parties a hearing.

"Yours sincerely, [Signed] David D. Shelby."

The letter inclosed the following petition:

"In the Circuit Court of the United States for the Middle District of Alabama, at Montgomery. No. ———.

"Jackson Lumber Company v. The N. K. Fairbank Company.

"To the Honorable the Circuit Judges of the Fifth Circuit:

"The petition of the N. K. Fairbank Company, defendant in the above-entitled cause, with respect, shows that the same was removed into said court from the circuit court of Covington county, state of Alabama, on the 19th day of November, 1907, and the transcript duly filed in said Circuit Court of the United States, on the 4th day of December, 1907, as will appear by reference to the certificate of the clerk hereto annexed, and made a part hereof; that, in spite of diligent effort, your petitioner has been unable, up to the present time, to secure a trial of said cause; that, at very great expense, it has procured the attendance of witnesses at said court, expecting and urging a trial, but various matters and things intervened to prevent; that one of its witnesses has already died, and there is danger of others, whose oral testimony is desired, becoming scattered and rendering it impossible for petitioner to secure their attendance; that his honor, the presiding judge of said court, has recently announced his purpose to hold a court for two weeks at Dothan, Alabama, and will not resume the trial of causes in said Circuit Court at Montgomery until late in December, and that petitioner has reason to believe, and does verily believe, that, unless another judge shall be presently assigned to hold said court, at Montgomery, for the trial of said cause among others, petitioner will be greatly delayed

through no fault of its own, and may lose the opportunity to present its defense fully as it desires and is now able to do. And petitioner represents that, in (sic) replying (applying) for the assignment of a District Judge to hold said court temporarily, or during the absence of the presiding judge, no disrespect whatsoever is meant to the latter.

Prayer.

"The premises considered, your petitioner respectfully prays that it may please your honor to assign and direct a District Judge to proceed and hold said court, within some short date, for the purpose of trying and disposing of said cause at least; and that the clerk of said court be directed to notify all parties of such assignment. And, as in duty bound, etc.

"[Signed] T. M. & J. D. Miller, Attorneys for Defendant.

"United States Circuit Court, Middle District of Alabama.

"Jackson Lumber Company v. N. K. Fairbank Company.

"I, Harvey E. Jones, clerk of said court, do hereby certify that the above-stated cause was removed from the circuit court of Covington county, state of Alabama, to the Circuit Court of the United States for the Middle District of Alabama, on the 19th day of November, 1907, and that the transcript from the state court was filed in this court on the 4th day of December, 1907; that said case is still pending on the docket of said court, and has never been tried.

"In witness whereof, I have hereunto set my hand and official seal, this the 13th day of November, 1911.

"[Signed] Harvey E. Jones,

"[Seal] Clerk Circuit Court of the United States for the Middle District of Alabama."

The presiding judge replied as follows to Judge Shelby:

"Montgomery, Ala., November 23, 1911.

"Hon. D. D. Shelby, U. S. Circuit Judge, New Orleans, La. — My Dear Judge: I have yours of the 22d inst. inclosing a copy of the petition of Messrs. T. M. & D. J. Miller relative to the trial of the case of the Jackson Lumber Company against the N. K. Fairbank Company.

"These gentlemen have never appeared in this court, and it is only charitable to suppose that the petition they file, with the evident inferences they seek to have drawn therefrom, was filed in ignorance of the truth. One would suppose, from reading the petition, that the case had been in this court since the 4th of December, 1907, all the time at issue, and that the defendant never had an opportunity for a trial. The truth is directly the reverse. It is a suit commenced against a nonresident by attachment in the state court and removed to this court, and was not at issue until the spring term, 1908, which commenced on the first Monday in May of that year. At that term I was holding a very heavy criminal docket and the rate litigation pressed heavily upon me and at times I was in the Northern district. My recollection is that the common-law docket was not called at that term as it was impossible to do so. Mr. Dimmick, who was then clerk of the court was in bad health and seems to have taken no pains to have entered up anything, except where judgments were rendered, and did not enter up upon the docket the various continuances and why they were taken. I inclose a certified copy of the docket with the entries made upon it by him in his lifetime down to 1911, when the present clerk took office and entered the last order of continuance.

"Refreshing my recollection from conversations with Mr. Ball, local counsel for the Fairbank Co., and Mr. Holloway, attorney for the plaintiff, I recall that this case was called for trial among others in 1909, and that in consequence of some long drawn out and bitter litigation in cases ahead of it, that it was thought best to let the case go over for the term. At another term the case was set down for trial and owing to the extremely hot weather, at the unanimous request of the bar, the common law docket was continued for the term. I have an impression, tho I am not sure this is the case, that it once went over on account of the death of a member of the

family of one of the attorneys. On the 26th of December, 1910, the defendant filed the last of its depositions.

"At the May term this year, although I had a son who was critically ill and who afterwards died, the docket was regularly called and this case set down for trial. On the date fixed, May 9, it was continued at the instance of the plaintiff because W. S. Harlan, the president of the plaintiff company and a material witness, was then serving a term in the Federal Penitentiary at Atlanta for peonage. This did not cause an attendance of witnesses because counsel notified the other side in advance. His term of service would expire before the next term of the court, and he was the main witness for the plaintiff and at their instance the case was continued for the term, and while the defendant's attorneys did not consent to it, the justice of that disposition of the case was not contested. More than this, I had several conferences with the local counsel of the Fairbank Company, Messrs. Ball & Samford, and had taken the pains to explain to them why I could not tell them the exact date when the civil docket would be called again here—whether in October or December, or possibly in January. These gentlemen were informed that the Rate Cases had been set down for argument in October and that there were a number of pressing matters to be disposed of here, among them the Mobile Depot Case and the litigation between the light companies and also much business in bankruptcy and some cases where the government was suing for large amounts. They were also informed that I had to hold a term at Dothan, and when that term was ended I would see that the case had its turn with others and would give it an early call upon the docket. It is but just to them, to state that while Messrs. Ball & Samford got the certificate from the clerk, they had nothing to do with this application and did not know that it would be made or the terms of it.

"The dispute is about a few thousand dollars worth of turpentine which the plaintiff alleges the defendant owes them. The Fairbank Company is the defendant and is suffering no hardship other than is incident in all other litigation where for unforeseen causes the trial of a case is prevented when it is set down for hearing.

"I know of no judge who would be available at this time to come here, even if the Circuit Judges on a complaint of this sort, would think of sending a judge into another's district for trying the case of some preferred suitor, who has had several days in court and who in due time will have another. The gentlemen who drew this complaint certainly took no pains to find out the facts, and under the circumstances I do not care to advise with them, especially as they have local counsel who are able and faithful, who have been fully advised and who know all the facts. I will say to you, however, that this case will be probably reached sometime in January or February, after my return from Dothan, and then I shall take it up in its regular place on the docket and try it. The clients of these gentlemen, if not the Messrs. Miller themselves, were fully advised before this application was filed, and the real purport seems to be to complain of a judge because for good cause shown continuances were had of the case.

"With kind regards, yours sincerely, [Signed] Thos. G. Jones."

A copy of this letter was given to Messrs. Ball & Samford, the attorneys who appeared for the defendant in this court, with the request that it be sent to the Messrs. Miller. The application and affidavits inclosed in Mr. Merryman's letter and presented by the clerk to the presiding judge on February 20, 1912, are as follows:

"United States of America, Northern Division of the Middle District of Alabama—ss.:

"In the U. S. District Court for the Northern Division of the Middle District of Alabama, December Term, 1911.

"Jackson Lumber Company (a Corporation), Plaintiff, v. The N. K. Fairbank Company (a Corporation), Defendant.

"State of Illinois, County of Cook—ss.:

"The defendant, the N. K. Fairbank Company, a corporation, acting by and through L. C. Doggett, its vice president, and F. H. Brennan, its secretary and treasurer, makes and files the following affidavit, pursuant to section 21

of chapter 1 of an act to codify, revise and amend the laws relating to the judiciary of the Congress of the United States, approved March 3, 1911, and taking effect January 1, 1912. L. C. Doggett, the affiant herein, would most respectfully show that the N. K. Fairbank Company, defendant herein, is a corporation duly organized and existing under the laws of the state of Illinois, with its principal office in the Tribune Building in the city of Chicago, county of Cook and state of Illinois; that it has places of business in St. Louis, state of Missouri, in Montreal, Canada, and at 27 Beaver street, in the city of New York, state of New York; that R. F. Munro, Esq., a citizen of the city and state of New York, is the president of the defendant corporation; that the affiant is a citizen of the city of Chicago, county of Cook and state of Illinois, and is the first vice president of the defendant corporation; that at the time of the making of this application the said R. F. Munro, defendant's said president, is not in the city of Chicago; and that said affiant is in charge of said defendant's business and holds the highest official position of defendant's corporation at the present time in the state of Illinois.

"Affiant would further show that defendant is engaged in the business of manufacturing soap, refining lard and cotton seed oil products, and that in November, 1907, the plaintiff brought by an attachment a suit in the state court of Alabama against the defendant, and that thereupon the defendant removed said cause to the Circuit Court of the United States for the Middle District of Alabama on the 4th day of December, 1907, and that said cause has been pending in said Circuit Court until the 1st day of January, 1912, on which day it was lodged in this court by the Judicial Code of the United States of America, approved March 3, 1911, and taking effect and being in force on and after the 1st day of January, 1912.

"Affiant would further show that defendant during the month of November, 1911, instructed its counsel, Messrs. Ball & Samford, to procure a certificate from the clerk of the United States Circuit Court at Montgomery, Ala., showing the date of the transfer of this cause from the state to the federal court and the docket entries of the cause in question, and by its counsel, Messrs. Miller & Miller, of New Orleans, filed a petition requesting the judge of the Circuit Court to appoint a special judge to try this case, and attaching to the said petition the certificate of the clerk aforesaid.

"Affiant further shows the court that the petition aforesaid was not intended as an act of discourtesy to the Honorable Thomas G. Jones, and that said petition was expressed in polite and courteous language, and followed the usual practice in such cases made and provided, which practice by the Judicial Code has now been enacted into a statute and is known as sections 14, 15 and 16, of chapter 1 of an act to codify, revise and amend the laws relating to the judiciary, approved March 3, 1911, and taking effect January 1, 1912.

"Affiant further shows that said petition was referred by the Honorable D. D. Shelby, Judge of the United States Circuit Court, to the Honorable Thomas G. Jones, Judge of the United States District Court, and that thereupon the said Judge Thomas G. Jones became very indignant and incensed at defendant's counsel, as affiant is informed and believes, and replied to Judge D. D. Shelby, the United States Circuit Judge aforesaid, in a manner showing his bias against the defendant herein. A copy of the letter of said Thomas G. Jones aforesaid is herewith filed with this petition, marked 'Exhibit A,' and made a part hereof.

"Affiant further shows that it is very unusual for a court to become incensed at a litigant for simply calling attention to a four years' delay in the trial of a cause and to engage in a personal discussion with said litigant, as indicated by the letter filed aforesaid, but affiant further affirms that the filing of this petition and the correspondence of the judge in relation thereto has raised such a prejudice in the mind of the judge against this defendant that defendant believes that the Honorable Thomas G. Jones cannot fairly try the issues involved in this case, and that he has a personal bias or prejudice against the defendant and in favor of the plaintiff.

"Affiant would further state that the defendant is informed and believes that Mr. W. S. Harlan, one of the officials of plaintiff corporation, has such

an influence over the mind of this court that the defendant cannot obtain a fair and impartial hearing of this cause, and further affiant saith not.

"[Signed] L. C. Doggett.

"State of Illinois, County of Cook—ss.:

"L. C. Doggett, being duly sworn, on his oath states that the matters and things set forth in the foregoing affidavit are true, except the facts stated therein on information and belief, and these he believes to be true.

"[Signed] L. C. Doggett.

"Subscribed and sworn to before me this the 25th day of January, 1912. My commission expires on Sept. 8, 1912.

"[Signed] A. S. Anderson, Notary Public. [Seal.]

"State of Illinois, County of Cook—ss.:

"F. H. Brennan, being duly sworn, on his oath states that he is secretary and treasurer of the N. K. Fairbank Company, the defendant corporation, and that during the past four years he has had the immediate charge and supervision over the litigation of defendant, and that he has read the foregoing affidavit of L. C. Doggett, defendant's vice president, and that he believes the matters and things set forth therein are true, and that Hon. Thomas G. Jones, the District Judge aforesaid, cannot fairly try the issues in this case, for the reason that he has a personal bias or prejudice against the defendant and in favor of the plaintiff. [Signed] F. H. Brennan.

"Subscribed and sworn to before me this 25th day of January, 1912. My commission expires on Sept. 8, 1912.

"[Signed] A. S. Anderson, Notary Public. [Seal.]

"I hereby certify that I am the attorney of the N. K. Fairbank Co., the defendant in the above-entitled cause, and that I reside in the city of St. Louis, and am a member of the bar of the city of St. Louis of the state of Missouri, and that I have prepared the foregoing affidavits at the request and as the attorney of the defendant, and that I prepared the former petition which was presented by Messrs. Miller & Miller, attorneys of New Orleans, to the judge of the United States Circuit Court at New Orleans, and I further certify that I am familiar with the proceedings in this cause, and that the affidavit and application for a change of venue herein are made in good faith and not for the purpose of delay or hindrance of the proceedings herein, and therefore the defendant prays that the said Thomas G. Jones, judge of the District Court for the Northern Division of the Middle District, shall proceed no further in the hearing hereof, and defendant further prays that the said Thomas G. Jones shall cause this fact to be entered on the records of the court, and also for an order that an authenticated copy thereof shall be forthwith certified to the senior Circuit Judge of this circuit, and for all further proceedings hereof as provided in sections 14, 20, 21 and 23 of an act to codify, revise and amend the laws relating to the judiciary of the Congress of the United States, approved March 3, 1911, and taking effect January 1, 1912.

"[Signed] J. F. Merryman, Attorney for Defendant."

Exhibit A therein being the correspondence between the presiding judge and Judge Shelby.

JONES, District Judge. On the 12th of February, 1912, Mr. J. F. Merryman, who describes himself in the papers as "the attorney of the N. K. Fairbank Company" and "a resident member of the bar of the city of St. Louis of the state of Missouri," mailed from that city to the clerk of the court here an application and affidavits, praying that the presiding judge proceed no further in the case of the Jackson Lumber Company v. N. K. Fairbank Company, and certify the matter to the senior Circuit Judge of this circuit pursuant to the provisions of the Judicial Code. The papers, as the correspondence between Mr. Merryman and the clerk shows, were not presented to the presiding judge until February 20, 1912, on account of a death in his

family, but were marked "Filed" by the clerk on the 14th of February, 1912, the date of their receipt; the judge having no knowledge or information of their existence until their presentation to him on February 20, 1912.

Messrs. Ball & Samford, the counsel of record of the Fairbank Company in this court, each advise the judge that they had and are taking no part in this application, and so far as they are concerned they are willing to try the case before the presiding judge.

[1] The matter thus presented has been duly considered, and I now give my conclusions, reserving for another time the filing of a more extended opinion. Assuming without deciding the constitutionality of the statute, the application and affidavits are fatally defective, whether construed separately or in connection with the application to which they refer, because they do not charge as a matter of fact that the judge "has a personal bias or prejudice against the defendant or in favor of the plaintiff." They affirm in legal effect only that affiants are "informed and believe" such is the fact. Pollard, Assignee, et al. v. Southern Fertilizer Company, 122 Ala. 410, 25 South. 169; Schilcer v. Brock & Spight, 124 Ala. 626, 27 South. 473.

[2] Second. They are not accompanied by any statement, as the Judicial Code explicitly requires, "of the facts and the reasons for the belief," save in one immaterial instance, the correspondence, which on its face, both as matter of law and morals, disproves the existence of either bias or prejudice between the parties.

[3] Third. The certificate of good faith is not made by any "counsel of record" of this court. The gentleman who makes the certificate has never been admitted as an attorney of this court. He has never signed the roll of its attorneys or taken the oath as required by its rules, and has never been recognized by the court as a counselor thereof in any proceeding had in this or any other cause in this court. Ex parte Secombe, 19 How. 9, 15 L. Ed. 565.

[4] Fourth. If the Judicial Code applies to a case pending at the time it went into effect, which it does not (Henry v. Harris et al. [C. C.] 191 Fed. 868), the petitioner has failed to bring itself within its provisions, because it did not present the application within 10 days after the Code went into effect on January 1, 1912, but delayed attempting to file the affidavits until February 12, 1912, during which period the court was always open in the term at which the case stood for trial, and the affidavits and application offer no excuse for the failure to act within the time prescribed by the statute. State v. Donlan, 32 Mont. 256, 80 Pac. 244.

[5] Fifth. The correspondence between the presiding judge and Judge Shelby, made an exhibit to the petition, shows on its face as a matter of law that the presiding judge has no prejudice against the defendant or bias for the plaintiff. It does not even show prejudice against the petitioner's attorney who wrote the application which called forth the letter to Judge Shelby. Conn v. Chadwick, 17 Fla. 429; City of Emporia v. Volmer, 12 Kan. 627; State v. Ingalls, 17 Iowa, 8; People v. Williams, 24 Cal. 31; State v. Bohan, 19 Kan. 54; Turner v. Commonwealth, 2 Metc. (Ky.) 629; People v. Findley,

132 Cal. 304, 64 Pac. 472; Higgins v. San Diego, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209; Smith v. Commonwealth, 108 Ky. 56, 55 S. W. 718.

The application and affidavits make no case under the statute and disclose nothing which could excuse, much less justify, the presiding judge in abdicating his duty under the Constitution and laws. The affidavits and application were marked "Filed" by the clerk without the knowledge or order of the presiding judge. Not conforming to the statute, but being defective in the particulars stated, they were not entitled to be filed under the plain terms of the Judicial Code, and could only be presented to the judge. Wolf v. Marmet, 72 Ohio St. 578, 583, 74 N. E. 1076.

It is exceedingly desirable that the action of the presiding judge in this matter be reviewed. He will give any co-operation in his power to a speedy decision, if the petitioner will advise him that it desires to take steps to that end, and if so advised will not try the case on the day set on the docket, but will postpone the hearing to some other day.

It is considered that the indorsement of filing upon said papers by the clerk on February 14, 1912, be, and the same is hereby, expunged; and that the prayer of the N. K. Fairbank Company that the presiding judge recuse himself and certify the matter to the senior Circuit Judge of this circuit be, and they are, each severally and separately overruled and denied, at the cost of the petitioner.

Additional Opinion.

The petition and affidavits were mailed from St. Louis to the clerk without brief or argument in support of the application. The counsel of record of the petitioner, although representing their client in other matters in the case, declined to have anything to do, one way or the other, with the application. The matter is of no legal concern to the plaintiff in this suit, and its attorneys could not appear on this application except as amici curiæ and have not done so. Being deprived of the benefit of argument at the bar by the attorneys of the parties, I sought the advice of a number of eminent members of the bar as amici curiæ as to the validity and construction of the statute and other matters raised before passing upon them, and since the denial of the application I have again gone over the whole matter carefully. All the members of the bar with whom I advised, and such of my brothers of the state bench as I had opportunity to consult, concurred in the opinion that there was nothing in the matters set up in the petition which could afford the presiding judge the slightest justification or excuse, in ethics or morals, for refusing to sit in the case. All the members of the bar with whom I consulted advised that the application was properly denied, except two of them, and the reasons for their contrary conclusion, based on pure matter of law, are fully stated in a subsequent part of this opinion.

At the common law substantial or direct interest in the event of the litigation, or close ties of blood or affinity, were the only causes of disqualification of a judge. As late as 1859 the House of Lords, in

Thellusson v. Rendlesham, 7 H. L. Cases, 429, held that having been of counsel did not necessarily disqualify the judge. He was privileged to retire from the bench because of such relation, but was not bound to do so, especially when he was the only judge of the court. See the remarks of the Lord Chancellor and of Lord Brougham in that case at pages 429 and 430. See, also, Lyon v. State Bank, 1 Stew. (Ala.) 462; Blackburn v. Craufurd, 22 Md. 447; Bank of North America v. Fitzsimons, 2 Bin. (Pa.) 454; Taylor v. Williams, 26 Tex. 583. However, the practice of eminent judges to voluntarily recuse themselves when they had been of counsel created precedents which gradually rooted themselves into the common law of England, and became a part of it (though not technically acknowledged as such), and made the prior relation of counsel in the matter, as well as interest in the suit and close ties of blood or affinity, absolute grounds of the disqualification of the judge. These are the only causes for the disqualification of a judge under the common law of England as now administered in England.

[6, 7] It was held in the early cases in the United States, in the absence of a statute, that there could be no peremptory challenge of a judge because he had been of counsel in the case. In practice, however, connection as counsel in the case was treated in this country as a positive disqualification, as much so as kinship or interest in the event of the suit. As early as 1821, a statute, now embodied in section 20 of the Judicial Code, dealt with the case of a judge, "whenever it appears he is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it, in his opinion, improper for him to sit on the trial," and made it his duty, "on application by either party, to cause the facts to be entered on the minutes of the court," and he was then required to order an authenticated copy of the record certified to another court, etc. Spencer v. Lapsley, 20 How. 266, 15 L. Ed. 902. The words in section 20 of the Judicial Code, "as to render it, in his opinion, improper for him to sit on the trial," so far as I can ascertain, have never been construed to leave it to the judge's option whether he should retire from the case if he were in truth interested in the suit, or he had been of counsel or advised as to matters involved in it, or is a material witness, or related by blood or affinity to either of the parties within the forbidden degrees at the common law; but only to leave it to his conscience and judgment to sit or not when from other causes he is "so connected" with either party "as to render it, in his opinion, improper for him to sit on the trial" of the case. The presumption at the common law in this respect, which has always been followed by the federal courts, is conclusive that a judge is not a fit person to sit on the trial of a case where he is interested or his close kin or relatives are concerned, and perhaps where he has been an attorney in the case. On the other hand, in the absence of such conditions, the presumption of the rectitude of the judge in the discharge of his duties in all other situations was indisputable; and hence the objection to a judge for any other than the causes named was unknown to the federal juris-

prudence until the enactment of the Judicial Code. Up to that time the experience of statesmen, lawgivers, and judges for centuries had taught that it was not wise to allow a challenge of a judge on the allegation of personal bias or prejudice, an intangible fact, a mere mental status which is hard to prove and still harder to disprove, and that the abuses and evils resulting from allowing such challenges would far outweigh any good which could be effected by permitting them. The fact, however, that this had been the rule for centuries past does not necessarily prove that the old rule was wisest and best.

All reforms and changes must have a beginning. At one time, as appears by the Statute 8 Rich. II, c. 2:

"No man of law shall thenceforth be justice of assize or of the common delivery of jails in his own country."

And by the Statute 33 Henry VIII, c. 24:

"No justice nor other man learned in the law of this realm shall use or exercise the office of justice of assize within any county where the said judge was born or doth inhabit, on pain to forfeit for every offence contrary to said act 100 pounds."

Though these statutes had long been in force, the Statute 12 Geo. II, c. 27, wisely changed the old rule, and made it lawful thereafter:

"For the chief justice and the justices of either bench and the chief baron and the other barons of the Court of Exchequer, and to and for any other person or persons learned in the law, who shall be appointed justice or justices of oyer and terminer or of jail delivery in any county or counties in that part of England called Great Britain, to exercise the office in any such county notwithstanding they or any of them shall have been born or do inhabit within any such county or counties."

The reason of our present statute may have been that Congress believed that the judges in these days are not as impartial as their predecessors were in the past, or that litigants and attorneys, in the fierce struggles which are daily waged in the courts concerning life, liberty, and property, and the antagonisms they beget between the parties, and not infrequently between their attorneys and the courts, are more conservative and self-contained than litigants and their advocates in the days of old, and would not be prone to abuse the right given by the statute. At all events, Congress thought there was an evil which should be remedied by changing the old rule. It is the duty of courts and judges to enforce its policy in this respect as enacted in the Judicial Code, as far as can be done without violating the Constitution.

The statute relied on to sustain the application is found in section 21 of the Judicial Code, and reads as follows:

"Sec. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time.

No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accomplained by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

The section, on its face, is a peremptory command "whenever a party shall make and file an affidavit," conforming to the terms of the statute, that the presiding judge shall "proceed no further," and that "another judge shall be designated to try the case." The decisions in states having statutes similar to the Judicial Code are conflicting. The courts in some of the states hold that the affidavit shuts off all judicial inquiry, and, even though the facts alleged may be insufficient to show bias or prejudice, that the judge is bound to grant the application. In other jurisdictions it is held that, while the truth of the facts alleged cannot be contested, yet if the facts alleged, taking them to be true, do not show personal bias or prejudice, the application should be refused. Other cases hold that the truth of the affidavit is subject to contest, to be tried before the judge in question, and upon the proof made before him the application must be granted or overruled.

The law and public opinion have long since departed from the policy of bygone ages, illustrated in the statutes of Richard and Henry, that a judge ought not to exercise his functions in the county where he was born, or in the place "he doth inhabit." Ever since the courts of the United States were organized, the laws of the United States have provided that a judge "shall be appointed for each district," save in exceptional cases, and made the judge guilty of a high misdemeanor if he did not reside in his district, or one of them, if he was judge of more than one. If the judge "lives, moves and has his being" among the people, he must in the course of his life imbibe bias or prejudice in the popular sense as to very many persons.

"Prejudice or bias," in the ordinary sense of the term, and not censurable in its character, may arise from innumerable conditions in life. A man ordinarily has a bias in favor of the political party to which he belongs, or a prejudice in some degree against its opponents. The same thing is true in a degree as to the church of which he is a member, and he is generally prejudiced or biased more or less about his race, his country, and its institutions. He cannot avoid forming to some extent bias or prejudice regarding men and affairs in nearly every matter as to which he has to inform his judgment or regulate his conduct in the walks of daily life. He must have neighbors, friends, and acquaintances, business and social relations, and be a part of his day and generation. Evidently the ordinary results of such associations and the impressions they create in the mind of the judge are not the "personal bias or prejudice" to which the statute refers. The impressions, whether favorable or unfavorable, of men, which a judge receives, or his convictions about them growing out of his contact or acquaintance with them in the ordinary walks of life, cannot fall within the evil the statute designs to suppress, unless they are so strong that they result in personal bias or prejudice as to in-

dividual suitors, dominating the judge to such an extent that they beget a mental or moral condition which makes the judge willing to do wrong although he sees the right, regarding the justiciable matters brought before him, or else, though the judge's intentions be good, render him incapable of rightly seeing the justice of the cause, or impartially enforcing the right involved as between the parties to the suit.

[8] It is not the proper construction of the Judicial Code to hold that Congress intended that any reason that a litigant may choose to assign in his affidavit, however absurd or ridiculous in point of law or morals, will disqualify the judge, or render it improper for him to preside in the case. "The statute meant that the cause should be a legal and substantial one." 2 Metc. (Ky.) 629. The facts stated must be strong enough to overcome the presumption of the trial judge's integrity and of the clearness of his perceptions. State v. Bohan, 19 Kan. 54. "The affidavit or affidavits must not only state facts, but the facts stated must establish to the satisfaction of a reasonable mind that the judge has a bias or prejudice which will in all probability prevent him from dealing fairly with the defendant." People v. Findley, 132 Cal. 304, 64 Pac. 472. If the reasons assigned are frivolous, the court must deny the application. State v. Chantlain, 42 La. Ann. 719, 7 South. 669. The rule is nowhere better stated than by Judge Brewer, afterwards Justice Brewer of the United States Supreme Court, in City of Emporia v. Volmer, 12 Kan. 627, where he says:

"That such facts and circumstances must be proved by affidavits, or other extrinsic testimony, as clearly show that there exists a prejudice on the part of the judge towards the defendant, and unless this prejudice clearly appears, a reviewing court will sustain an overruling of the application on the ground that the judge must have been personally conscious of the falsity or nonexistence of the grounds alleged. It is not sufficient that a prima facie case only be shown, such a case as would require the sustaining of a challenge to a juror. It must be strong enough to overthrow the presumption in favor of the trial judge's integrity and of the clearness of his perceptions. See, as going beyond the views herein expressed, the cases of Hungerford v. Cushing, 2 Wis. 397, and Table M. M. Co. v. Wallers D. M. Co., 4 Nev. 218, 97 Am. Dec. 526; and, as sustaining these views, Gordon v. State, 3 Iowa, 412, State v. Ingalls, 17 Iowa 10, Boswell v. Flockhart, 35 Va. 364, and People v. Williams, 24 Cal. 31. Under these circumstances, there can be no impropriety in the judge placing a statement upon the record of such facts as may explain the reasons for his rulings, or account for the statements or charges made in the application."

Every practitioner or judge of experience understands full well, under the circumstances of this case, that the statements in the application made at New Orleans, though in form the utterances of the defendant, were in fact and in truth the suggestions of some of its attorneys. Knowing how prone clients are to follow the advice of their attorneys, especially when they suggest that a judge is biased or prejudiced against them, no normal judge, with any regard for the oath of his office or the ordinary instincts of fair play, would blame the defendant here for following the advice of its attorney, or would be tempted, much less permit himself, to do injustice to the client on the merits of the case, because it had taken the advice of its attorney.

The only reason stated as a fact, and not alleged on information and belief, to show personal bias or prejudice between the parties, is the correspondence between the presiding judge and Judge Shelby, which is made an exhibit to the petition and refers to the application made to the Circuit Judges to designate another judge to try this case. No reference whatever was made to the merits of the litigation, or preference expressed between the parties, or intimation of any kind given either as to the law or the facts of the case. The letter was written in the discharge of judicial duty, concerning the trial of a case pending in the court, in reply to a letter of the Circuit Judge advising the writer of the application made by the petitioner here to send another judge into the Middle district of Alabama specially to try this case "at least." The application was made without the knowledge of the regular judge or consultation with him. It showed that the writer of it knew that "the presiding judge has recently announced his purpose to hold a term of the court at Dothan for two weeks and will not resume the trial of causes in said Circuit Court until late in December." The fair presumption was that the defendant must have gotten this information from its local attorneys, and that they had also correctly informed the defendant, before it applied to the Circuit Judges, of the causes which had prevented the trial of the case. The general terms in which the application was couched, particularly when taken in connection with the recitals in the clerk's certificate appended to the application in place of an affidavit, which was drawn by defendant's counsel, was calculated to produce upon the minds of the Ciruit Judges the impression that the presiding judge, either by lack of diligence or some other fault or neglect, had not given the defendant's case due consideration or opportunity to be tried, and that the circumstances under which the delay had occurred were so extraordinary and worked such oppression of the defendant that another judge should be sent forthwith into the district to try this case "at least." One who knew nothing of the facts, except as disclosed in the application and the clerk's certificate, would never have supposed that there had been any continuances of the case by the consent of the defendant, or for other good cause, or that the last of defendant's depositions had been filed as late as December 26, 1910; nor in the absence of knowledge of the record, which was possessed by the presiding judge when he wrote to Judge Shelby, that the defendant in its preparation for trial had not even asked the publication of any of its depositions, or procured subpœnas to require the attendance of any witnesses to testify orally at any time.

The presiding judge could not be expected to know, what did not then appear, but is now alleged to be a fact, that the defendant had instructed its attorney to get a certificate of the "docket entries," but that in following those instructions its attorneys drafted a certificate for the clerk which omitted intentionally, apparently, all the docket entries, save those which showed when the case was removed and the date of the filing of the transcript in this court, and made no mention whatever of the time of the filing of the pleas which showed when the case was first at issue, or the date of such of the continuances as

appeared on the docket and the reasons therefor. The situation as stated in the application was so different from the real situation that it induced me to say in the letter to Judge Shelby:

"It is but just to them to state, that while Messrs. Ball & Samford got the certificate from the clerk, that they had nothing to do with this application and did not know that it would be made or the terms of it."

The application sent to New Orleans, in the terms in which it was couched, and not giving material information about the case known to the local counsel of the defendant, and therefore known to it, was an effort, on a one-sided statement of the case, to get another judge sent into this district as a favor to the litigant, and under the circumstances was manifestly unjust to the presiding judge, and, notwithstanding the polite language in which its purpose was veiled, was exceedingly discourteous.

It was certainly not the duty of the judge, when the application was called to his attention in the manner in which it was, to sit dumb and refrain from stating that the client, if not the lawyers themselves, were fully advised of the facts before this application was filed; that the truth was the reverse of the past history of the case as sought to be portrayed in the petition; that "the real purport seems to be to complain of a judge because for good cause shown continuances were had of the case"; or that he did not care to confer further with attorneys who had not appeared in the case and were so misinformed about it, as to setting it "down for hearing at an early date," that would be "satisfactory to all parties," as suggested in Judge Shelby's letter, when the defendant had local counsel with whom the judge had already conferred and who had been fully advised.

Common sense and the authorities alike teach that such expressions of opinion by a judge in the discharge of duty, concerning either the conduct of a litigant or its attorneys, are not evidence of personal prejudice or bias as to either, and such comments and expressions have never yet been held, either in law or morals, to unfit a judge to try a case in which such observations have been made. The letter, for that matter, does not show any personal prejudice against the attorney who wrote that application, and prejudice of a judge against a counsel of a party, when it exists, does not disqualify a judge from presiding in a case in which the lawyer is engaged or prove prejudice against his client; otherwise, every time a judge reproved or deprecated the conduct of an attorney in the trial of a case, and no matter how justly even as to matters preparatory to bringing it to trial, another judge would have to be called in. Higgins v. San Diego, supra; Conn v. Chadwick, supra; State v. District Court, 22 Mont. 220, 56 Pac. 219; Hutchinson v. Manchester St. Ry., 73 N. H. 271, 60 Atl. 1011.

Little comment is needed upon that portion of the petition which alleges on "information and belief" that Harlan has such influence over the mind of the court that defendant cannot obtain a fair and impartial hearing. The affidavits in support of the petition are nothing more than the naked assertion that the vice president and treasurer of the defendant "have been informed and believe that the de-

fendant has been informed and believes" that it cannot obtain justice, etc. From whom the information was obtained, or when, or what its nature, is carefully concealed.

The petitioner gives no reasons why it believes what it has heard, except that it has heard it, and does not even aver that it has made the slightest inquiry whether its informer stated the truth. "The attorney of the defendant" certified that he "prepared the foregoing affidavits," and wrote the petition that characterized the letter to Judge Shelby correcting the statements about "a four years' delay" as "engaging in a personal discussion with a litigant." The corporate entity is not morally responsible for the utterances others put in its mouth. Conscious that they can have no influence whatever on the mind of the court in passing upon the merits of the case, I feel it my imperative duty to sit. To do otherwise would set the evil precedent of weakly betraying a trust, because a litigant retailed on information and belief anonymous slanders of a judge.

As stated, all of the attorneys consulted, with two exceptions, advised, conceding the statute to be constitutional, that the judge was bound to inquire whether the facts and reasons set up were sufficient to show personal bias or prejudice, and, if they did not, to overrule the petition, and that, while the petition here did not make a case under the statute, still, if it did, section 21 of the Judicial Code as now framed is unconstitutional. The two who advised to the contrary held that the statute, being highly remedial, applied to cases pending at the time it took effect, and that a petition presented under it came in time if filed at the first term at which the statute became operative and before the cause was set down for trial; that the court's ruling as to what attorney stood in the relation of "counsel of record" was too restrictive; and that, the petition having alleged the correspondence as a matter of fact, the presiding judge, under the plain terms of the statute, could not pass upon the sufficiency of the facts averred to show personal bias or prejudice, but was bound to "proceed no further," unless the statute were unconstitutional and they were of the opinion that the section is constitutional. If there be error in the ruling that the petition did not conform to the statute, or if it did conform, in holding that the facts alleged were insufficient to prove bias or prejudice, still there would be no error in overruling the application if the statute itself be unconstitutional. We are thus necessarily brought to the consideration of that question.

[9] The power to designate another than the regular judge to hold a term of court, when the regular judge is disqualified or cannot attend, or to try particular cases on the calendar as to which the regular judge is in law disqualified, is not necessarily judicial. That is frequently done by the Governor, the head of the executive department; but such exercise of power by a member of the executive department presents quite a different question from arming a Governor with the power to determine that the regular judge, on the facts of a particular case, is disqualified to try it, and thereupon empowering him to designate another judge. Certainly it has never been held, in the federal jurisprudence at least, that such a function could lawfully be

committed to a party to the suit, and that his mere ex parte affidavit, regardless of its truth, could make it the absolute duty of the regular judge to recuse himself, and lay a peremptory command upon another judge to send some judge to displace the regular judge in his own court, because a litigant made an affidavit that the latter is disqualified to sit under the facts of a particular case. If the power to decide, upon the facts of a given case pending in the court, that a judge is disqualified to sit in it, is judicial, it is manifest that such a power cannot be exercised except by some member of the judicial department, and that the question cannot be adjudicated by the command of the statute that an ex parte affidavit of a litigant shall ipso facto disqualify a judge. This results inevitably from the nature of the judicial power of the United States, and the separation of our government into three great departments, none of which can exercise any power properly belonging to the other.

As said in Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377, the Constitution divides the powers of the government which it establishes into the three departments—the executive, the legislative, and the judicial—and unlimited power is conferred on no department or officer of the government. It is essential to the successful working of the system that the lines which separate those departments shall be clearly defined and closely followed, and that neither of them shall be permitted to encroach upon the powers exclusively confided to the others. That instrument has marked out, in its three primary articles, the allotment of power to those departments, and no judicial power, except in the instances expressly mentioned in the Constitution, is vested in Congress or either branch of it. On the contrary, it declares that the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time establish and ordain. The only instances in which the Congress or either of its houses is vested with judicial power are in the matter of impeachments, deciding contested elections, and determining the qualifications of its members, punishing them for disorderly conduct, and dealing with contumacious witnesses which are lawfully called before it. Aside from these matters, the power of Congress is purely legislative, and it cannot, save as to such matters, exercise any judicial power whatever in any degree, or to any extent, in any case.

The difference between the departments undoubtedly is that the Legislature makes, the executive executes, and the judiciary construes, the law. Wayman v. Southard, 10 Wheat. 46, 6 L. Ed. 253. That which distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is, in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling within its provisions. To adjudicate upon, and protect, the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department. As said by Woodbury, J., in Merrill v. Sherburne, 1 N. H. 199, 203 (8 Am. Dec. 52):

"No particular definition of judicial power is given in the Constitution, and, considering the general nature of the instrument, none was to be expected. * * * These words possess a customary signification, and a definition of them would have been useless. * * * On general principles, therefore, those inquiries, deliberations, orders, and decrees, which are peculiar to such a department, must in their nature be judicial acts. * * * It is the province of judges to determine what is the law upon existing cases. In fine, the law is applied by one and made by the other. To do the first therefore—to compare the claims of parties with the law of the land before established—is in its nature a judicial act. To declare what the law is or has been is judicial power; to declare what the law shall be is legislative power."

What the judicial power included was well understood in the mother country long before the adoption of the Constitution, and that instrument in using the term "judicial power" necessarily included in the grant of the power its well-known attributes at the common law. 1 Kent, Com. 336; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508.

The cases to which the judicial power extends are all defined in section 2 of article 3 of the Constitution. The suit in which this petition is filed falls strictly within the class of "cases" to which the judicial power extends, and over which this court is given jurisdiction —"a suit of a civil nature between citizens of different states." The fate of the petition depends upon the application of the Constitution and laws, and involves the determination of the right of a party, claimed under the particular facts of his case, to have certain judicial steps taken therein by the judge of the court in which the petition is pending. Plainly, therefore, the petition presents a judicial question which can be decided only by a court or judge, and then only by the exercise of judicial power.

When Congress creates an inferior court and distributes to it jurisdiction over such subject-matters falling within the judicial power as Congress sees proper to confer, the particular court eo instanti is armed, by virtue of the Constitution itself, with all the power essential to preserve its independence, to prevent the usurpation of its powers by other departments, and to enable the court to exercise the judicial power thus conferred as to every matter involving a judicial determination in any case before it. While Congress may regulate the methods of practice and procedure in the court in many respects, it cannot exercise this power of regulation so as to take from the courts, under the guise of regulating its procedure, the right to exercise judicial power as to any matter arising in the case whose disposition properly calls for the exercise of judicial power. One of these inherent powers of the courts, indisputably judicial, and indispensable to the independence of the courts, is the power to determine for themselves whether a judge of the court lawfully appointed and qualified is disqualified on the state of facts presented in a particular case to sit on the trial of it. Trustees, etc., v. Bailey, 10 Fla. 213; Waterhouse v. Marten, 1 Peck (Tenn.) 374; Philadelphia v. Fox, 64 Pa. 169; State v. De Maio, 70 N. J. Law, 220, 58 Atl. 173.

Is not the real operation of section 21 of the Judicial Code to arm the litigant, in everything except mere form, with the judicial power of the court, and to leave it absolutely to the litigant to decide and de-

termine, in his own case upon the particular facts as he selects and presents them in his ex parte affidavit, whether they are true or false, that the judge is disqualified, although in truth and in fact the judge may have neither bias nor prejudice and is in every way competent to sit on the trial of the case? Unquestionably personal prejudice or bias as to parties may be made a cause for disqualifying a judge on the trial of a particular case. When, however, as here, the statute does not undertake to define or prescribe the facts which shall constitute bias or prejudice or the evidence which shall prove it, and commands that an ex parte affidavit of a litigant shall establish not only that the facts selected and grouped in the affidavit constitute personal bias or prejudice in the eye of the law, but that their existence is to be taken as conclusively proved by the ex parte affidavit, whether true or false, and ipso facto disqualify the judge—has not Congress inevitably delegated to the litigant, in effect, the legislative power to prescribe and define the causes which when proved shall constitute personal prejudice or bias, and also delegated to the litigant the judicial power of determining in his own case, upon its particular facts as he makes them to appear in his affidavit, both the law and fact in his favor, and thereupon of stripping the judge of his functions in his own court, without any investigation by him or hearing by any other judicial officer?

It has been the law for centuries that a judge "ought not to withdraw upon a recusation unless the cause is true in fact and sufficient in law, because the office of judge is one necessary for the administration of justice from which a judge should not be permitted to withdraw without sufficient ground." As said in Ex parte State Bar Association, 92 Ala. 117, 8 South. 769:

> "It can never rest in the discretion of a judge whether he shall sit in a given case. If he is not disqualified under the Constitution, it is his duty to sit—a duty he cannot delegate or repudiate, and which no consent can devolve upon another."

Quite true it is that the judge has no concern in presiding on the trial of any particular case, and no litigant has any right to have a particular judge try his case; but every litigant under the Constitution and laws has the right to insist that his case be tried by the regular judge, if he is holding the court, unless he is shown to be disqualified, and it is essential to the orderly administration of justice and the integrity of the Constitution that judges appointed under it to administer its judicial power shall not be wrongfully driven from the judgment seats in any case, whether it results from open violence or the improper control of the courts or judges by other departments of the government. If the right of a duly appointed and qualified judge to sit in a particular case under its particular facts is challenged, the question must be determined by the other judges of the court if there are more than one, and by him alone if he is the only judge, subject to such judicial revision of his action as the law may provide. Authorities supra. Congress cannot directly or indirectly decide such questions. It cannot lawfully enact that a judge, who is in truth qualified, is in law disqualified, because a suitor makes an affidavit to

that effect, and make that ex parte statement conclusive proof of the disqualification and cut off all judicial inquiry as to the judge's competency. It cannot enact lawfully that any state of facts or reasons which a litigant may choose to array, when presented in his affidavit, shall ipso facto disqualify the judge. It may lawfully enact that where the state of facts disclosed by an affidavit, if true, show conditions which, according to experience, and in the light of human nature, prove unfitness and lack of impartiality in a particular case, that such facts, if found to exist by some judicial tribunal, shall disqualify the judge in question and prevent his trial of the case, but it cannot make the ex parte affidavit of the litigant conclusive proof of the facts or lawfully require the judge, without judicial inquiry by him or some other judge, eo instanti to abdicate his functions.

It is not proof or evidence of the unfitness of a judge in a particular case that an honest but suspicious suitor, or a vicious and dishonest one, swears that he cannot obtain justice before him. Such an affidavit proves only the animus or belief of the man who makes it. It does not prove partisanship or personal prejudice or bias in the judge. If the judge is not biased or prejudiced in fact, a false allegation or imputation that he is, made in the affidavit of a litigant, cannot change the actual mental or moral status of a judge or unfit him to try a particular case. Affidavits cannot change a pure and impartial judge into a bad official. It is the existence of bias or prejudice, and not the charge, whether honestly or dishonestly made, which constitutes the disqualification. A man by an ex parte affidavit may conclude his own rights or destroy his own reputation, but he can never conclude the rights of others or impose a discreditable status upon a public official by his mere statement of that which does not exist, however solemnly alleged in an ex parte affidavit. To hold otherwise would be to strike down a great principle of justice, which cannot be abandoned without destroying the very foundations of our jurisprudence.

In such search of the reports as I have been able to make in the time at my disposal, I do not find decisions in more than two of the states having statutes similar to the Judicial Code where objections such as these now presented have either been raised or overruled. In a number of states having similar statutes, sometimes, however, by force of constitutional provisions, and in others where the constitutional provisions regarding the displacement of judges are different from the Constitution of the United States, the courts have constantly treated such statutes as constitutional. Those courts would not be bound by their former decisions, if the constitutionality of the statute were assailed on the grounds now suggested. Boyd v. Alabama, 94 U. S. 648, 24 L. Ed. 302. Perhaps the leading case upholding the constitutionality of statutes less guarded than the Judicial Code is State ex rel. v. Clancey, 30 Mont. 529, 539, 77 Pac. 312, 315, where the court likens the question to a change of venue and says:

"No one has yet denied the right of the Legislature to provide for a change of venue on such terms as it may propose."

"Change of venue," if one speaks at all accurately, means only a change of the place of the trial from one county to another county or district, and the expression is sometimes used to denote the transfer of a case from one court to another in the same district or county. It is a misuse of terms to say that the venue is changed when the trial is had in the court where the suit was brought and some other than the regular judge is called in to preside on the trial, in the very court in which the record has all the while remained. The questions arising on a change of venue are far different in nature and constitutional consequence from those involved in a proceeding to displace the regular judge as to a case in his own court, and bring another judge there to try it upon an ex parte affidavit of a suitor, although the judge may not be disqualified in truth, and by the mere filing of the affidavit shut off all judicial inquiry by the judge concerned or any other judicial officer, as to the truth of the facts alleged upon which alone the right to displace the judge depends. In a change of venue no attempt is made to strip a judge of his functions in his own court, and the functions and rights of the regular judge therein are in no wise altered or impaired by the transfer of the particular case; while the reverse is true when the case remains in the court and the regular judge is taken from the bench on an ex parte affidavit of bias or prejudice, regardless of whether it is true or false, but which ipso facto strips him of his functions in the particular case.

To say that the challenge itself, regardless of the grounds for it, itself works a disqualification of the judge because it puts him in a class which it is the policy of the Constitution not to permit to try such questions, is to beg the whole question. The contention rests on a wholly unfounded premise. The judge of a federal court holds his office during good behavior, and the constitutional provisions regarding his induction into office and his displacement therefrom forbid that he be stripped of any of his functions except upon conviction by the Senate of high crimes and misdemeanors after he has had opportunity to be heard; or in consequence of the existence of a peculiar state of facts in particular cases declared by law and ascertained by the courts. The Constitution and laws require that he sit in every case in his court, unless he is excluded for causes which disqualify him, the nature of which must be ascertained by law, and the existence of which must be declared by some judicial tribunal. Congress has no power to change the Constitution and revise its policy or to get rid of a judge in any case, in any other way than the Constitution provides. The judge's general fitness and qualification are adjudged by the operation of the Constitution itself when he is appointed, confirmed, commissioned, and qualified. They cannot be gainsaid or attacked except by impeachment as the Constitution provides. If he be an improper person to exercise his functions in any particular case, it must be because of the existence of facts which under the law unfit him to impartially administer justice in it, and the existence of these causes must be ascertained by some judicial tribunal. What these causes are we have seen in an earlier part of this opinion. Congress has no power to declare, what the legislation in some of the states necessarily as-

serts, that a competent judge is disqualified because a suitor swears that he believes he is. Neither, when the litigant assigns reasons, can Congress enact that the assignment of such reasons, if they are insufficient in law and morals to prove disqualification, shall be taken to have conclusively proved it. The reasons alleged must be substantial and sufficient, and their truth must be ascertained by a proper tribunal, before the judge can be required to abdicate his functions. Congress has no power to leave it to the arbitrary discretion of a litigant to determine whether or not the judge is a fit person to preside in a particular case, and make his affidavit work a disqualification, although its allegations may be insufficient in law and untrue in point of fact. To so hold would be to decide that under the Constitution and laws a litigant may disqualify a competent judge whenever he chooses, if he is willing to run the risk of prosecution for perjury; and this, too, in the teeth of the Constitution, which provides other and exclusive modes for determining such questions.

The reason of many decided cases, and the express decisions in some of them, compel the conclusion that statutes like the one under consideration are unconstitutional. See Conn v. Chadwick, 17 Fla. 440; Board of Commissioners v. State, 120 Ind. 282, 22 N. E. 255; White, Auditor, v. State ex rel., 123 Ala. 577, 26 South. 343; Petition of Splain, 123 Pa. 527, 540, 16 Atl. 481; Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377 (7 headnote); Mabry v. Baxter, 11 Heisk. (Tenn.) 689, 691; Cooley's Constitutional Limitations (5th Ed.) p. 115, § 96, and see cases there cited in margins.

No sophistry can conceal the plain situation, if the command of the statute be followed. It compels the judge, on presentation of the affidavit and application with proper certificate of counsel and compliance with the other requisites of the statute, to vacate the bench without any inquiry or investigation, as to the truth or effect of the facts alleged in the petition by the judge in question or any other judicial authority. The affidavit maker in fact, though not in name, puts on the judicial robes and excludes the presiding judge and all other judicial authority from any voice in determining the matter, and by the mere filing of his affidavit renders judgment of disqualification and executes it. In the words of Chief Justice Nickelson, in Mabry v. Baxter, supra:

"The act in question is legislative in form, but it operates expressly on suits pending in the court. * * * To obtain a new right conferred, the suitor is to make a motion in the court. This motion must be acted upon by the judge and a record made, and the statute prescribes what the judgment shall be. The judge makes the order nominally, but as he has no discretion and acts under the Legislature, it is to all intents and purposes the act of the Legislature and an exercise by it of judicial power."

To quote the language of the Supreme Court of Alabama in Sanders v. Cabaniss, 43 Ala. 173, dealing with a statute identical in principle:

"The chancellor is expressly prohibited from exercising any judgment whatever in the matter, nor is he allowed under any circumstances to deny the application; grant it he must. He is in fact made the mere instrument of the Legislature to register its will—nothing more. This we hold was a clear and undoubted exercise of judicial power on the part of the Legislature, and that, too, in the most objectionable way—by indirection."

The question presented is the same in principle as that decided in United States v. Klein, 80 U. S. 129, 146, 20 L. Ed. 519, where Chief Justice Chase says:

"It is evident from this statement that the denial of jurisdiction * * * is founded solely on the application of a rule of decisions in causes pending prescribed by Congress."

And asks:

"What is this but to prescribe a rule for the decision of a cause in a particular way? Can we do so without allowing one party to the controversy to decide it in his own favor? Can we do so without allowing that the Legislature may prescribe rules of decision to the judicial department of the government in cases pending before it?"

The court answered all these questions in the negative.

The fact that it is unpleasant to a judge whose impartiality is questioned to pass upon an allegation of his unworthiness to try a case, or that he is not the fittest trier of such questions, does not authorize Congress to disregard the limitations of the Constitution and confer upon the litigant the arbitrary power to condemn the judge and decide the matter in his own favor. There must be some trier of the question, and from the necessity of the case it must be the judge himself, unless it is tried by some other judge or court. An awkward situation does not authorize a violation of the Constitution to remedy it. The remedy lies close at the hands of the legislative power. It is the duty of the Legislature not only to see that the courts are pure and impartial, but that justice shall be so administered that they shall be free from suspicion. I do not doubt the power of Congress, when a judge is challenged for personal prejudice or bias, to require that he shall proceed no further, until the truth of the challenge is investigated and determined by another judge, and to enact that the judge in question shall preside or not, in the future stages of the litigation, as the other judge may find to be just and right. Beyond this Congress has no constitutional warrant to go, or to make the affidavit of a suitor automatically work out a disqualification of a judge throughout every stage of his case.

The inherent powers of courts and judges set up to administer the judicial power of the United States have always been held to include ample authority to protect them against insult and assault, whether by physical violence or contumelious behavior and words, and it has been held time and time again that the possession of such powers is essential to their independence and well-being. In a petition giving facts to show personal bias or prejudice, an unscrupulous litigant, if his passions or those of his attorney permit the one to swear, and the other to certify that he swears in good faith, may willfully and falsely charge the presiding judge with high crimes and misdemeanors or other disreputable things without a semblance of truth or decent excuse for doing so. Shackled by this statute, if it be valid, an innocent judge is compelled to enter the slanders upon the records of the court and slink from the discharge of his duty in the particular case as though he were already convicted of crime. If the courts are to last, if they are to perform their functions under the Constitution and ex-

ercise the powers committed to them, no such summary way of dealing with, and it may be destroying, a judge can have the force of law. While any conscientious judge would gladly welcome any effort on constitutional lines to remedy the evils at which this statute is aimed, and would feel a sense of relief if the statute were so altered as to conform to the Constitution and thus free him from the embarrassments resulting under the present statute, yet, when this is attempted by a statute which outlaws the judge and drives him from the bench in the particular case on the allegations of an affidavit, whether true or false, which condemn him without any defense or hearing of any kind as an unfaithful and incompetent judge, a court which is mindful of its obligation to the Constitution and the sacredness of its oath of office must decline to give the statute any effect and treat it as a nullity. If the judge is suspected, whether rightfully or wrongfully, of bias or prejudice, the existence of that bias or prejudice must be ascertained by some judicial authority, and the judge must not be left defenseless against such assaults because a litigant in his court makes an ex parte affidavit. If the matter be referred to some other judge, all the rights of the litigant are preserved and also the dignity and honor of the courts. This is not the case under the present statute. It makes the affidavit maker, in effect, lawmaker, judge, and executioner. The judge may be entirely blameless, but he is not permitted to defend himself or show the falsity of the accusation, and thus is branded for all time on the records of his court as an unworthy judge.

UPDIKE v. MACE et al.

(District Court, S. D. New York. March 6, 1912.)

1. WITNESSES (§ 149*)—COMPETENCY—TRANSACTION WITH PERSON SINCE DECEASED.

In a suit to impose a trust on a part of the residue of an estate, willed by testator to his widow, subject to the alleged trust, against the executor of the widow, evidence of complainant, the alleged beneficiary, with reference to statements and conversations had between her and the widow, were incompetent under Rev. St. § 858 (U. S. Comp. St. 1901, p. 659), prohibiting testimony by any party in any suit against an executor concerning any transaction with or statement by the testator; but evidence of declarations of testator are admissible, his executor not being a party to the suit.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 651, 652; Dec. Dig. § 149.*]

2. EVIDENCE (§ 317*)—HEARSAY—DECLARATIONS OF DECEDENT.

Declarations of a testator as to his intentions with respect to the making of his will are inadmissible to establish an intent on his part to create a trust in favor of complainant; such declarations being hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174–1192; Dec. Dig. § 317.*]

3. WILLS (§ 487*)—EVIDENCE—DECLARATIONS OF TESTATOR.

Declarations of a testator as to his intentions with respect to the making of his will are inadmissible to show his intention to create a trust

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

in favor of complainant, as such declarations would be in effect the establishment of a testamentary disposition by parol.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026–1032; Dec. Dig. § 487.*]

4. TRUSTS (§ 25*)—EXPRESS TRUST—ACT CONSTITUTING.

Testator at the deathbed of his son agreed to carry out the dying request of the son that the share of the father's estate that would have gone to the son if he had survived the father should go to the son's surviving wife. Testator, having failed to mention the son's wife in his will, stated that, though she was not remembered in the will, he had made arrangements with his wife to make the trust which he had promised in favor of the son's wife, and that she should have the full share of what the son would have received if he had lived. *Held*, that testator's statements were insufficient to establish the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 34–37; Dec. Dig. § 25.*]

5. TRUSTS (§ 44*)—PAROL TRUST—PROOF.

Evidence *held* insufficient to show the creation of a trust by which testator and his widow were to give a part of testator's residuary estate devised to the widow to complainant or to show the specific amount of the residuary estate to be charged.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66–68; Dec. Dig. § 44.*]

6. LIMITATION OF ACTIONS (§ 83*)—DEATH AND APPOINTMENT OF EXECUTOR.

Where complainant claimed that testator created a trust of a portion of his residuary estate, bequeathed to his widow, for complainant's benefit, which residue consisted of both real and personal property, complainant's right to sue to enforce the trust did not accrue until one year after the appointment of testator's executors, and was therefore not barred until the expiration of ten years thereafter.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 426, 431–438; Dec. Dig. § 83.*]

7. EQUITY (§ 87*)—STALE DEMANDS.

The defense that an equitable claim is stale is now generally governed by the question whether the statute of limitations applies.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242–244, 395; Dec. Dig. § 87.*]

In Equity. Suit by Sarah E. Updike against Arthur J. Mace, individually, and against Arthur J. Mace and James Edward Rice, as executors of the will of Malinda G. Mace, deceased. Decree for defendants.

Franklin Bien, for complainant.

Ralph Hickox (J. Parker Kirlin, of counsel), for defendants.

HOLT, District Judge. This is a suit in equity brought by the complainant, a citizen of New Jersey, against the defendants, citizens of New York, to establish an oral trust, in favor of the complainant, on the residuary estate of Levi H. Mace, which was devised and bequeathed to his wife, Malinda G. Mace.

Levi H. Mace, a resident of Williamsbridge, N. Y., died October 20, 1896, in the seventy-second year of his age. He left surviving his wife, Malinda G. Mace, and three sons: Edward, Henry, and Arthur. They had another son, Elwood H. Mace, to whom the complainant, whose maiden name was Sarah Robinson, was married

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

on May 28, 1878. He died intestate about three years after the marriage, on May 5, 1881. He was at the time of the marriage 19, and she 20, years of age. No children were born of this marriage. The complainant made her home at the Mace homestead during her marriage to Elwood H. Mace, and for about five years after his death. In February, 1886, she remarried. Her second husband was Alfred Dillon. Upon her marriage to Dillon, she left the home of Levi H. Mace, and never lived there again. Alfred Dillon died in August, 1887. In 1889, the complainant married George E. Updike, who is still living.

Levi H. Mace left a will, dated October 10, 1896, which was duly admitted to probate November 7, 1896. By it he devised and bequeathed to his wife the real estate in New York occupied by his firm; to his son Arthur, $50,000 previously advanced to him; to the wife and children of his son Arthur, $75,000; to each of his sons Edward and Henry, $100,000 in trust; to Josephine Norris, who had formerly resided in his family, $1,000; and to his wife, the residue of his estate, by the following clause in his will:

"Tenth. I give, devise and bequeath all the rest, residue and remainder of my property, real, personal and mixed, and wheresoever situate to my wife, Malinda G. Mace. Such devise and bequest to be in lieu of and in full compensation for all dower, dower rights and thirds that she may have in any and all of my estate."

The complainant was not referred to in any part of the will.

Malinda G. Mace died November 17, 1906, at the age of 78, having survived her husband about 10 years. She made two wills during her widowhood, one in March, 1897, about five months after her husband's death, and one April 28, 1903, which last will was duly admitted to probate December 2, 1906. By this will Mrs. Mace, after giving certain small legacies and annuities to her three sisters, gave $50,000 to each of her sons Edward and Henry, in trust; $25,000 to the wife and $50,000 to the two daughters of her son Arthur; and the residue of her property to her son Arthur. The complainant was not referred to in either of the wills of Mrs. Mace.

Levi H. Mace left an estate of the value of about $345,000. The value of the residuary estate devised and bequeathed to his wife was about $129,000. The share of the estate which Elwood H. Mace would have received if he had survived his father, and his father had died intestate, would have been about $63,000. The complainant alleges in the bill that the residuary estate devised and bequeathed by Levi H. Mace to his wife was "charged with a trust to transfer and pay over to the complainant so much thereof as would equal in value the amount or share of the estate of Levi H. Mace which would have passed to and become the property of Elwood H. Mace had he survived Levi H. Mace and Levi H. Mace had died intestate.

[1] The evidence in this case was taken out of court in accordance with the usual equity practice. The testimony of Mrs. Updike contains many statements of conversations between her and Levi H. Mace and between her and Malinda G. Mace. All this evidence is objected to as being inadmissible by section 858 of the U. S. Re-

vised Statutes (U. S. Comp. St. 1901, p. 659), prohibiting testimony, by any party, in any suit against an executor, of any transaction with or statement by the testator. In my opinion, any testimony by Mrs. Updike as to transactions with or statements of Malinda G. Mace is inadmissible in this suit, because prohibited by such statute, and I shall disregard it. Her testimony as to transactions with or statements of Levi H. Mace, I think, with some hesitation, is not inadmissible because prohibited by said statute, although, of course, it may be inadmissible on other grounds.

About an hour before Elwood H. Mace's death, there were present, at his bedside, his wife, his father and mother, his two brothers Edward and Henry, and Mrs. Healey, a friend of the family. A conversation took place at that time between Elwood H. Mace and his father. Mrs. Updike testifies that Elwood said to his father:

"I have only one request to make, that you will give to Sarah what would be mine if I were spared to live."

And that his father replied:

"Yes, Elwood, she shall have what would have been yours, if God had spared you; she has been a noble wife to you and a daughter to us."

Edward Mace testifies:

"Elwood Mace said, 'What will become of Sarah?' Father said: 'Don't worry about that, Elwood; she will be provided for.'"

Henry Mace testifies:

"He says to my father, 'Look out for Sarah.' My father * * * said: 'Elwood, don't worry about that; she will be looked after.'"

Mrs. Healey testifies:

"He (Elwood) says, 'Will you look after Sarah, or attend to Sarah?' * * * He (Levi H. Mace) said: 'Don't worry about that; that will be attended to.'"

[2-4] Mrs. Updike testified that Levi H. Mace told her, shortly after his will was executed, that she "was not remembered in the will, but he had made arrangements" with his wife "making the trust which he had promised to give Elwood's share to" the complainant. This evidence was duly objected to, and in my opinion was inadmissible as hearsay, if not on other grounds, and I disregard it. Mrs. Updike's brother, John M. Robinson, testified that he had various conversations with Levi H. Mace in which he said that it was his intention to divide all his property, and that "Sarah should have the full share of what Elwood would have received if he had lived." This testimony was objected to and was in my opinion inadmissible, both as hearsay and as attemptng to establish a testamentary disposition of property by parol. In any event, it did not purport to establish any trust.

[5] The other testimony relied on by the complainant consists of letters written by Malinda G. Mace and the evidence of witnesses to conversations with Malinda G. Mace. About 60 letters by Malinda G. Mace are in evidence, most of which were written to Mrs. Updike. They usually treat of affairs of the family, of friends

and relatives, and of the church to which she belonged. They show feelings of affection on her part towards Mrs. Updike, and that her son Arthur was not friendly to Mrs. Updike. Most of these letters contain nothing pertinent to this case, but a few contain statements much relied on by the complainant. These letters are as follows:

"Wmbridg Oct. 27 (1896)

"Dear Sarah After I got hom I thought perhaps you might tell Lelia what I told you yesterday she would tell Arthur sure dont breath to a soul I will see that you get it as soon as things gets settled and i know how to arrange it—I will be up to get my waist fitted soon your ever loving mother

"M G Mace

"I send by Johson in haste."

"Wimbridg Nov 7 (1896)

"Dear Sarah Your note received. I know you feel bad that I am unable to visit you but Arthur threatens me all the time what he will do so for peace I think best it will all come out right I know it will be hard for you and me to be separated so many years together and my love the same as the rest that mighty dollar for fear you would get your share. I think Arthur feels that your Father had made some request to me and that is why they watch so even the servants is asked whom comes and where I go. Arthur seems to arrange always for some one to go with me but I will give him a trial and see what he will do about giving up drink. After the Holidays I will meet you at Mrs. St. jons and then I will talk better just keep all to yourself

"From your ever loving mother M G Mace."

"Williamsbridg March 18 (1901)

"Dear Sarah I will meet you at the church at Mrs. Haltets funeral tomorrow afternoon i want to see you particular I think i can soon arrange to give you some Mortgages but the trouble is that the lawyer might tell Arthur as they are together so much—I wish you had your share my worry would be at rest—

Yours in haste with love mother M G Mace."

"Wmsbridg Aug. 10th (1903)

"Dear Sarah Your note at hand I am glad Johny did not attempt any law as it would kill me I hope to see some way out soon but Arthur takes all the business out of my hands so I feel some day I will have to tell him—for it only right you have your share you Father to you through me—thank Johny for me and tell him I will to give your share soon—if I could manage better—The folks all out and Arthur has been away several days God knows where—I heard he is at City Island drinking—so if he don't tonight I will go look for him as the children are away in the mountains * * * Sarah just bear with me a little longer and I will try to manage all for you my pen is so poor cant write—I will be up soon and take lunch with you

"from your ever loving mother M G Mace."

"Wmsbridg Aug 10th 1903

"Dear Sarah Your received I am glad Johny considers me so much in this case you ought to have have your share long ago but i dont see how i can get it for you without Arthur finding out Your Father left that request in secret with knowing how much i love you he was sure of me doing it but he did not stop to think that i could not manage any business i thought to have Mr. Guyer help me arrange it for you as he also know about how your Father loved you but his death was so soon after he left me to think for myself every way i plan i could not do it without Arthur know it and i could not stand the trouble he would make i do everything to please him for the hope he will give up drink and the fast life Oh

Sarah how this breaks my heart but it seems hopeless as he goes away and stay days and we dont know where he is God help me to do what is right for all.

"Your ever loving Mother M G Mace."
"In care of Mrs. Hallett."

Various witnesses testify to conversations with Malinda G. Mace substantially as follows:

Mrs. St. John, the wife of the pastor of the church at Williamsbridge of which Mrs. Mace was a member, testified, in substance, that Mrs. Mace and Mrs. Updike used to meet at the parsonage between the date of Mr. Mace's death and July, 1907, and in conversations there Mrs. Mace said that Mrs. Updike was to receive Elwood's share, which would be one-quarter.

Mrs. Westervelt, a friend of Mrs. Mace, testified that she had a conversation with Mrs. Mace and Mrs. Updike in 1903, in which Mrs. Mace said to Mrs. Westervelt that there was nothing said about Mrs. Updike in the will, "but Mr. Mace left that to me to give her her share."

Mrs. Palmer, a member of the same church as Mrs. Mace, testified that in May, 1897, Mrs. Mace told her that "Mr. Mace did remember Sarah, but had left it in trust for me to pay to her Alley's share," and that later, in Mrs. Updike's presence, Mrs. Mace made substantially the same statement.

Mrs. Martin, who was housekeeper for Mrs. Mace from June, 1895, to 1897, testified that Mrs. Mace once told her:

"'I am afraid, the way Arthur is going on, that I shall not be able to give Sarah what it due her, because,' she says, 'it is not easy to get such an amount of money together, about,' she says, as near as I can remember, '$250,000, which is Sarah's share."

Mrs. Poland, a sister of Mrs. Mace, testified that after Mr. Mace's death she had a conversation with Mrs. Mace. When asked to state the conversation, she replied:

"She made this secret trust."

When asked for whom, she replied:

"Mrs. Sarah Updike. She could not pay it out. She could not have the money because Mr. Arthur took care of all the property. It seemed to worry her."

Mr. Rauschaupt, a photographer at Mt. Vernon, testifies that he once called on Mrs. Mace to deliver a package from Mrs. Updike. He never saw Mrs. Mace at any other time. He said that "she started with a story to the effect that she was sorry she could not give Mrs. Updike what she was entitled to, but no doubt she would get something, as there was something held in trust for her by her."

Edward H. Mace, one of the sons, testified that he had a conversation with his mother about three months before she died in which she said:

"'It is nothing but money all the time. I have to pay Sarah's money too.' Says I, 'why don't you pay her then?' * * * I made the remark that she had money in the East River Savings Bank and some certificates. * * * She says, 'That is not enough.'"

Mrs. Weaver, a friend of Mrs. Mace, testified that some time after the death of Mr. Mace she and Mrs. Mace would visit Mrs. Updike, and every time Mrs. Mace would say:

"I am very sorry I cannot give her Alley's share he (Mr. Mace) gave me to give her."

This is substantially the evidence upon which the complainant relies in this case. In estimating the weight to be given to the evidence, I may say, in respect to the promise made by Levi H. Mace to his son Elwood, upon his deathbed, that I accept the version as given by Edward and Henry Mace and Mrs. Healey rather than the version given by Mrs. Updike. It seems to me more probable that Elwood H. Mace, at such a time, should have simply asked his father to take care of his wife, and that his father should have replied that she would be provided for, than it was for him to have asked his father to give to his wife what would be his if he were spared to live, and that his father should have replied, "She shall have what would have been yours if God had spared you." In any case, if Mrs. Updike's version of the promise were accepted, it would have no legal validity. Levi H. Mace, even if such a promise had been given, would have been legally free to dispose of his property by will, or in any other manner, without giving any share of it to the complainant, and the only real relevancy of all the evidence in respect to the deathbed promise to Elwood is to show the affectionate and tender nature of the relations between Mr. and Mrs. Mace and the complainant at that time. In respect to the evidence contained in the letters written by Mrs. Mace, it is to be observed generally that there are but few among the many letters written which contain any reference to any matters involved in this suit; that those which do contain such references are somewhat obscure; and that, while Mrs. Mace appears in them, and by all the testimony, to have been a good, kind, and religious woman, she also appears, by all her letters, to have been a woman without much capacity for clear and accurate statement.

Most of the witnesses as to statements made by Mrs. Mace in conversation are very old ladies, friends or contemporaries of Mrs. Mace. They were testifying to conversations, many of which had taken place some years before they gave their evidence. Most of them, although undoubtedly women who were conscientious and who intended to be truthful, appear by their evidence to have been more or less rambling and diffuse, and lacking in clearness and precision in their statements. I distrust the accuracy of some of the witnesses. Almost all of them, before testifying, had been visited by Mrs. Updike, and had talked over with her the events as to which they testified. I am, however, convinced, notwithstanding the generally unsatisfactory nature of this evidence, that Mrs. Mace, at times during her widowhood, felt that there was an obligation upon her to transfer some money or property to the complainant, and that that obligation was connected in her mind with something which her husband had said to her; but there is, in my opinion, no evidence, sufficient to support a finding in this case, that Levi H. Mace ever told his wife that his residuary estate given to her was to be charged with a trust in favor of Mrs. Updike,

or that Mrs. Mace ever agreed with her husband that she would accept the residuary estate charged with such trust. Nor, if such a conclusion could be reached, is there sufficient evidence in this case to enable a conclusion to be reached as to how much of the residuary estate was intended to be paid to Mrs. Updike. The complaint charges that amount to be what would have been the share which would have passed to Elwood H. Mace, had he survived Levi H. Mace and Levi H. Mace had died intestate; but whether it was that share, which would have amounted to about $63,000, or whether it was $250,000, which Mrs. Martin testified that Mrs. Mace said was the value of the share, or whether it was one-quarter of the residuary estate given to Mrs. Mace, or what the amount was, is left entirely vague by the evidence in the case.

On the other hand, in considering the evidence in this case in opposition to the complainant's claim, there are, at the outset, the weighty facts that the wills of Levi H. Mace and of Malinda G. Mace make no provision whatever for the complainant. A will has always been recognized in the law as one of the most seriously considered and solemn legal instruments to which the greatest weight should be given. Levi H. Mace was a man of strong will, and of large business experience and capacity. There was no reason, if he wished to make any provision for the complainant, either in the way of a trust or otherwise, why he should not have inserted it in his will. If he wished to give his residuary estate to his wife for her life, and to charge it with a trust for the benefit of the complainant after his wife's death, the natural and appropriate method of doing so would have been to insert a provision to that effect in his will. He provided in his will for all his children and the wife and daughter of his son Arthur. He gave a legacy of $1,000 to Josephine Norris, who had been brought up in his family on substantially the footing of a daughter, although never legally adopted, but who, when Mr. Mace made his will, had left his family. But he left no such legacy to the complainant. The complainant had lived in his house during the three years of her marriage to Elwood H. Mace, and during the five years of her subsequent widowhood. She appears to have been given a home there without charge. She received gifts of money, and of other things, from Mr. and Mrs. Mace, and she stood all the time, until her second marriage, upon the footing of a daughter-in-law to Mr. and Mrs. Mace, for whom they had feelings of affection. When she married Mr. Dillon, she left the Mace homestead, and never lived there again. The presumption is that her second husband supported her. When he died, and she married a third time, the presumption is that Mr. Updike, her last husband, supported her.

If Mr. Mace had given her in his will a legacy, such as he gave Josephine Norris, or even if he had made such a provision for her in his will as she claims he directed should be made by his wife, undoubtedly the past relations between them would have explained such testamentary disposition in her behalf; but on the other hand there was nothing unusual or strange in the fact that Levi H. Mace did not consider, after the complainant had married Mr. Dillon, and subse-

quently had married Mr. Updike, that he was under any obligation to bequeath any portion of his property to a daughter-in-law who had married again, to the exclusion of his own wife and children. Moreover, if for any reason a man of Mr. Mace's strong will and business sagacity had preferred, instead of making a direct provision for the complainant in his own will, to create an oral trust with his wife, by which his wife's residuary estate was to be charged with a sum which would be equivalent to his son Elwood's share if he died intestate, he must have seen that the widow probably would not accept the residuary estate charged with the proposed trust. The tenth paragraph of his will, which gave her the residuary estate, provided that the devise and bequest should be "in lieu of and in full compensation for all dower, dower rights and thirds that she may have in any or all of my estate." The value of Mr. Mace's residuary estate was about $129,000. The value of Elwood's estimated share was about $63,000. If Mrs. Mace had accepted the residuary estate, and out of it paid to the complainant the estimated value of Elwood's share, Mrs. Mace would have had left about $66,000. But the value of her thirds and dower in the estate, if she had claimed them, would have been about $90,000, and the probability is that, if the gift of the residuary estate to Mrs. Mace had been charged with a trust, in the will of Mr. Mace, such as it is claimed it was charged with, Mrs. Mace would have refused to accept the provisions of the will, and would have demanded her dower and thirds; that, at least, she might do so her husband as a practical business man probably knew.

Moreover, the fact that Mrs. Malinda Mace made two wills, one about five months after her husband's death, and one about three years before her own death, neither of which made any provision for Mrs. Updike, is of the greatest importance. Some of her letters, and some of the witnesses who have testified to conversations with her, assert, in substance, that her son Arthur controlled the business, and was hostile to Mrs. Updike, and that Mrs. Mace was unable to do anything for Mrs. Updike for that reason; but there is nothing to indicate that her son Arthur or anybody else controlled her or influenced her in the making of these two wills. The second will mainly differs from the first in the fact that she increased her legacies to her sons Edward and Henry to the extent of $100,000, which her son Arthur, who was her residuary legatee, would not have been likely to permit her to do if she was under his influence or control. The lawyer who drafted her second will testified that, in the preliminary consultations in respect to it, Mrs. Updike was mentioned. He objected to stating what was said about her on the ground that it was a confidential statement to Mrs. Mace's legal adviser, and what Mrs. Mace said was not stated; but it does appear that at the time she was making her last will Mrs. Updike was in her thoughts, and yet no provision is made in the will in her behalf. Mrs. Mace appears to have been a good, just, and conscientious woman. Whatever feeling she had, at various times during her widowhood, of her obligation to do something for Mrs. Updike, her deliberate conclusion was, when she made her wills, to make no provision for her, and

nothing but the clearest and strongest proof of the establishment of such an oral trust as is alleged in this case should be permitted to outweigh the fact that neither in the will of Levi H. Mace, or of Malinda G. Mace, was any provision made for the complainant.

This suit is evidently based on the rule established by a line of cases of which O'Hara v. Dudley, 95 N. Y. 403, 47 Am. Rep. 53, and Amherst College v. Ritch, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305, are perhaps the leading authorities, establishing that when a testator bequeaths property outright in a will, apparently in absolute ownership, but it is proved that the devisee or legatee has agreed that, in consideration of the transfer of the property to him in absolute ownership he will accept it charged with a trust, such legatee, if he refuses to carry out the trust, may be obliged to do so, under the theory that, upon a refusal to do so, he holds the property as a trustee ex maleficio. This legal theory is easily capable of abuse. It is an exception to the general principle that all trusts affecting real estate must be evidenced by writing, and in its practical application it generally amounts to an effort to vary the provisions of a written will, executed with all the formalities required by law, as a result of oral testimony. In order to establish such a trust, there must be clear and convincing proof that there was a specific agreement between the testator and the legatee that such a trust should exist. The evidence must go further than to show that the testator requested the legatee to execute such a trust. It must appear, not only that the testator requested the legatee to carry out such a trust, but that the legatee agreed with the testator during his lifetime that he would carry out such a trust, and that the legacy was given and accepted in reliance upon such an agreement. Moreover, the subject-matter of the trust must be clearly proved. If, in the case at bar, a trust had been satisfactorily proved, there would still remain the fact that there is no satisfactory evidence upon which a court could determine how much of the residuary estate bequeathed by Levi H. Mace to his wife it was the duty of the wife to pay over to Mrs. Updike. The evidence in the case is, in my opinion, too vague and inconclusive to establish either that there was any trust created by an agreement between Levi H. Mace and his wife, or what was the specific amount with which the residuary estate was charged.

[6] The defendants have pleaded the statute of limitations and the staleness of the claim as a defense. In view of the conclusion to which I have arrived on the merits, it is perhaps unnecessary to pass upon this defense; but I will briefly give my conclusions upon it. In the first place, as the cause of action alleged is a continuing trust, it is perhaps questionable whether the statute of limitations began to run until Mrs. Mace's death, or at least until a demand was made on her to execute the trust. But I think, on the whole, that the ten-year statute applies, and that the statute began to run as soon as a suit could be brought. Levi H. Mace died October 20, 1896. This suit was brought June 4, 1907. If the complainant's cause of action accrued instantly on Levi H. Mace's death, the action was barred. But I do not see how the suit could have been brought

until Mrs. Mace received the residuary estate. The executors were not obliged to transfer the personal estate for a year after their appointment. The residuary estate given to Mrs. Mace consisted of both realty and personalty, and the alleged trust would have been a charge on both as an entirety. Upon the whole, I do not think this suit could have been brought against Mrs. Mace until at least a year after her husband's death. If that is so, this suit was begun in time.

[7] The defense that the claim is stale is now generally governed by the question whether the statute of limitations applies. But it is still true that equity does not favor stale claims. Mrs. Updike might have sued on this claim many years before Mrs. Mace died. If she had done so, Mrs. Mace could have been heard in explanation of her letters and statements and of her action generally.

My conclusion is that the bill should be dismissed on the merits, with costs.

PENNSYLVANIA STEEL CO. v. WASHINGTON & BERKELEY BRIDGE CO.

(District Court, N. D. West Virginia. April 2, 1912.)

1. CONTRIBUTION (§ 5*)—JOINT WRONGDOERS.

The rule that, in a case of equal or mutual fault, the condition of the party defending is the better one, based on the principle of public policy that there is no contribution between wrongdoers, applies only in cases where there has been an intentional violation of law, and the wrongdoer is presumed to have known that the act was unlawful, and not where the injury occurs out of a duty resting primarily on one of the parties, and but for his negligence there would have been no cause of action against the other.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 6–9; Dec. Dig. § 5.*]

2. INDEMNITY (§ 13*)—NEGLIGENCE—PERSONS ULTIMATELY LIABLE.

In negligence cases based on the failure to perform legal duties and obligations—acts not malum in se but malum prohibitum—a party secondarily liable may recover indemnity against the party primarily liable.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 29–35; Dec. Dig. § 13.*]

3. STIPULATIONS (§ 14*)—CONSTRUCTION—EFFECT.

Where, in a suit by one of two joint tort-feasors to recover indemnity for a liability enforced in a prior action by the person injured, a demurrer was filed to the declaration, and a stipulation authorizing the court in passing on a demurrer to consider the record in the original action with the evidence and contract introduced therein, such stipulation did not authorize the court to determine issues of fact tendered by the declaration.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24–37; Dec. Dig. § 14.*]

4. INDEMNITY (§ 15*)—JOINT TORT-FEASORS—PERSONS PRIMARILY AND ULTIMATELY LIABLE—NATURE OF ACTION.

Where a person injured has recovered judgment against a defendant claiming to be secondarily liable only, the right of the latter to recover indemnity against the person primarily liable is not based on contract, but on tort to indemnify, for which no promise express or implied arises,

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

warranting resort to assumpsit, and hence such relief is properly sought by a declaration in trespass on the case.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 36–47; Dec. Dig. § 15.*]

5. INDEMNITY (§§ 3, 9*)—CONTRACT—CONSTRUCTION—EJUSDEM GENERIS—"OR OTHERWISE."

Plaintiff, having contracted to construct the superstructure of a bridge, agreed to indemnify the bridge company against all liability or damage on account of accident whether occasioned by the omission or negligence of plaintiff, its agents, or workmen "or otherwise," during the continuance of the agreement, plaintiff to pay all judgments recovered by reason of such accident by reason of any suit or suits against the bridge company, including costs, expenses, etc., and to give the bridge company an indemnifying bond against all claims for damages to persons or property of whatsoever nature arising during construction of the bridge. *Held*, that the words "or otherwise" did not broaden the scope of plaintiff's liability which was limited to accidents arising from acts of negligence and omissions by plaintiff, its agents and servants, and, so construed, was not contrary to public policy.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 2–6, 16, 17; Dec. Dig. §§ 3, 9.*]

At Law. Action by the Pennsylvania Steel Company against the Washington & Berkeley Bridge Company. On demurrer to declaration. Overruled.

The plaintiff, a corporation under the laws of Pennsylvania, has filed a declaration in trespass on the case against the defendant, a corporation under the laws of West Virginia, in which it substantially alleges that the defendant, being duly authorized to construct a bridge over the Potomac river between the counties of Washington, Md., and Berkeley, W. Va., entered into a contract with the Elmore & Hamilton Contracting Company to construct the abutments and piers for said bridge in concrete; that said company did so construct such abutments and piers; that by subsequent contract between plaintiff Steel Company and defendant Bridge Company the plaintiff was to erect the iron or steel superstructure upon said piers; that while erecting such superstructure, under this contract, and under the supervision and direction of defendant's engineer, authorized by contract with defendant to supervise all work done by contractors, and while plaintiff and its employés were using due care and caution, pier No. 10, "being green, defective, and insufficient," of which condition defendant had knowledge, or by the exercise of reasonable care and caution on its or its engineer's part could have known, broke down under the weight of the structural iron or steel being placed thereon by plaintiff under the instruction and supervision of defendant's engineer, by reason whereof Frank L. Benning, one of plaintiff's employés, was thrown from the bridge many feet into the river below and greatly injured; that said Benning instituted an action on the case in Washington, Md., against plaintiff to recover damages for such injury, which suit was defended by plaintiff but resulted in verdict and judgment against it, in favor of Benning, for $13,500 and costs; that said judgment has been paid by plaintiff; that after institution of said action by Benning plaintiff served written notice upon defendant of the pendency thereof, authorizing it to appear and make defense thereto, and, further, that plaintiff would hold it responsible for any recovery had therein. A second count alleges, in addition, a practice and custom of the trade in the construction of bridges for the contractor for the superstructure to rely upon the inspection of the bridge company's engineer as to the foundations on which the superstructure must rest, and not have its own engineer make such inspection, and that in this instance such custom was followed by plaintiff. To this declaration a demurrer has been interposed and a stipulation of parties entered of record made, to the effect that, in determining this demurrer, the court may consider

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

the record and evidence in the Benning Case, and all the contracts set forth and referred to in the declaration.

Faulkner, Walker & Woods and Lane & Keedy, for plaintiff.
Wagaman & Wagaman and Brown & Brown, for defendant.

DAYTON, District Judge (after stating the facts as above). It is insisted by counsel for demurrant that this declaration is one in trespass on the case alleging a duty owing it by the defendant, negligence on defendant's part in the performance of that duty, and resultant injury to plaintiff in consequence; that assumpsit, and not trespass on the case, will lie to secure indemnity and contribution wherein allegations that defendant "expressly or impliedly promised to pay" are essential, and wholly wanting and nonessential in the action of case. Therefore demurrant insists:

First. The plaintiff's own case, as made out by the declaration and each count thereof, together with the record in the Benning Case, shows that the plaintiff is guilty of negligence which directly contributed to the injuries, the damages for which are sought to be recovered in this suit.

[1] In support of this proposition, counsel cite the facts that Benning, in his action, charged the plaintiff Steel Company with negligence, which was denied by its plea of not guilty, but which was conclusively established by the verdict of the jury and the judgment of the court of competent jurisdiction trying the issue joined on such plea. Therefore, although it may be assumed that the Bridge Company was also negligent in the premises, the well-known rule that in pari delicto potior est conditio defendentis must be given application here. This rule is based upon the principle of public policy that there is "no contribution between wrongdoers." It is well settled, however, that this principle applies appropriately only to cases where there has been intentional violation of law, and where the wrongdoer is to be presumed to have known that the act was unlawful. It fails when the injury grows out of a duty resting primarily upon one of the parties, and but for his negligence, there would have been no cause of action against the other. Anderson, Dic. of Law, 252; Chicago v. Robbins, 67 U. S. 418, 17 L. Ed. 298; Robbins v. Chicago, 4 Wall. 657, 18 L. Ed. 427; King v. U. S., 1 Ct. Cl. 38; Town of Hamden v. New Haven & N. Co., 27 Conn. 158; Severin v. Eddy, 52 Ill. 189; Pfau v. Williamson, 63 Ill. 16; Gridley v. City of Bloomington, 68 Ill. 47; Catterlin v. City of Frankfort, 79 Ind. 547, 41 Am. Rep. 627; Portland v. At. & St. L. R. Co., 66 Me. 485; Ches. & O. Canal Co. v. Allegheny Co. Com'rs, 57 Md. 201, 40 Am. Rep. 430; Gray v. Boston Gaslight Co., 114 Mass. 149, 19 Am. Rep. 324; Churchill v. Holt, 127 Mass. 165, 34 Am. Rep. 355; City of Wabasha v. Southworth, 54 Minn. 79, 55 N. W. 818; Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469; Oceanic S. N. Co. v. Compania, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685; Philadelphia Co. v. Central Traction Co., 165 Pa. 456, 30 Atl. 934; Maxwell v. L. & N. R. Co., 1 Tenn. Ch. 8; Batty v. Duxbury, 24 Vt. 155; Ladd v. Waterbury, 34 Vt. 426; City of Norwich v. Breed, 30 Conn. 535; C. & N. W. Ry. Co. v. Dunn, 59 Iowa, 619, 13 N. W. 722; Milford v. Holbrook, 9 Allen

(Mass.) 17, 85 Am. Dec. 735; Minneapolis Mill Co. v. Wheeler, 31 Minn. 121, 16 N. W. 698; Old Colony R. Co. v. Slavens, 148 Mass. 363, 19 N. E. 372, 12 Am. St. Rep. 558; Houston & T. C. Ry. Co. v. Williams (Tex. Civ. App.) 31 S. W. 556.

[2] Careful consideration of these and other similar authorities must inevitably lead to the conclusion that in negligence cases based not upon willful wrongdoing, but growing out of legal duties and obligations—acts not malum in se but malum prohibitum—a clear distinction must be drawn between the liability of the party primarily negligent and that of one secondarily so to the extent of being liable to a third party injured. In such case, it is well settled that the second party, while he may not escape liability to the third party injured, may hold the first party, primarily negligent, for indemnity. Such ruling is sound in both law and good morals, in that it secures greater care on the part of all engaged in the work, and lessens the danger of accidents. While this is true, it is also true that the question as to which party is primarily negligent must be carefully determined from the facts in each case. It by no means always follows that the owner, because he is having the work done, is so negligent. The contractor may, by his contract, be made wholly independent of the owner's control or direction, his personal act, without knowledge or consent of the owner, may be the direct cause of injury, a direct result of his want of care, proper qualifications, adequate knowledge of or failure to properly inspect the work, its conditions and surroundings, which he is undertaking to do. This case presents an illustration of the difficulty that may arise in so determining liability. It is insisted by defendant that there is no allegation that this pier 10 was unsafe because of improper workmanship or materials, but that it collapsed solely because the cement in it was not given time to harden. Counsel for plaintiff insist that, while this may be true, the plaintiff in seeking to erect the superstructure on it was doing so under the direction of the defendant's engineer and agent. Per contra counsel for defendant insist that this engineer was not its agent, but an independent contractor of it under the express terms of a contract existing between it and such engineer. Without expressing any opinion as to these contentions, it seems clear that the mere statement of them is sufficient to show that these questions are purely ones of fact and cannot be determined upon demurrer, even under the terms of the stipulation filed.

[3] Under the terms of this stipulation, I am authorized, so far as I deem pertinent in passing upon this demurrer, to consider the record of the Benning Case with the evidence and contract introduced therein. This stipulation cannot permit me to determine the facts that may or may not be presented in this cause upon trial. They may or may not be the same as those introduced on the trial of the Benning Case. I can only say that I regard the allegations of the declaration to be sufficient to charge this engineer to be the agent of defendant, and acting as such, to have directed and advised plaintiff to impose the superstructure upon this pier at the time he did without proper knowledge and inspection of its immatured condition. So far as the form of action is concerned, I find in the Robbins Case, hereinbefore cited

from 4 Wall. 657, 18 L. Ed. 427, the declaration was in case, not assumpsit, and, so far as I can find in all the reported cases of the kind, under common-law pleading, such form of action has been resorted to and sustained.

[4] The reason seems to be based upon the principle that while indemnity is sought, and the measure of recovery may be fixed by the amount of the recovery had against the plaintiff seeking indemnity, yet the original and fundamental basis of recovery is not contract, but tort to indemnify for which no promise express or implied arises, warranting resort to the action of assumpsit. This principle I regard as sound, and I am in full accord with it.

[5] This disposes substantially of all the points relied upon in demurrer, except the second, which by reason of the stipulation it is insisted may be considered. While it is doubtful whether it can be so considered, because the contract upon which it is based between plaintiff and defendant is not made a part of the declaration, but only allegations are made of its execution and of its terms sufficient to introduce it as a part of the evidence necessary to recovery, yet, inasmuch as the question raised touching it clearly appears to be one that immediately upon its introduction will arise and require this court's construction, I have deemed it best to consider it here and now. The tenth paragraph of this contract is as follows:

"As according to the terms of the accompanying specifications, which form a part of this contract, the party of the second part [plaintiff Steel Company] is to indemnify the party of the first part [defendant Bridge Company] against all liability or damage on account of accidents, whether occasioned by the omission or negligence of itself, its agents, or its workmen or otherwise during continuance of this agreement, it is hereby agreed that the party of the second part shall be promptly and duly notified in writing by the party of the first part of the bringing of any such suit or suits, and shall be given the privilege of assuming the sole defense thereof. The party of the second part is to pay all judgments recovered by reason of accidents in any such suit or suits against the party of the first part, including all legal costs, court expenses and other like expenses."

The paragraph of the specifications referred to is as follows:

"Contractor will be required to give a satisfactory bond in the sum of $10,000 indemnifying the Bridge Co., against all claims for damage to persons or property of whatsoever nature arising during the construction of the bridge and as a guarantee that the material will be delivered and erected in accordance with the contract."

Counsel for both sides seem to assume that these provisions are broad enough in terms to protect the Bridge Company from its own negligence, whether its act was or was not the primary cause of injury; in short, a complete indemnity against all claims for damages to person or property of whatever nature arising during the construction of the bridge.

While conceding this, however, counsel for plaintiff insist that such provisions are absolutely void as against public policy, and cite in support of such contention the decision of the Supreme Court of Virginia in Johnson, Adm'r, v. R. & D. R. R. Co., 86 Va. 978, 11 S. E. 829.

A careful consideration of this case does not in my judgment warrant the broad and sweeping construction given it by counsel, whereby

all contracts agreeing to indemnify against negligence that may occur in manufacturing, mining, construction, and other similar operations by private corporations and individuals, would be held void as against public policy, and if such construction can be placed upon its ruling, with the utmost deference, I must be permitted to dissent therefrom. The old English Common Pleas Judge, Burroughs, in Richardson v. Mellish, 2 Bing. 252, declared the doctrine of public policy to be "an unruly horse, and when you once get astride of it you never know where it may carry you. It may lead you from sound law; it is never argued at all but when all other points fail." The vast number of negligence cases being brought and determined in the courts of to-day demonstrate that seldom, if ever, do such corporations and individuals willfully, wantonly, and knowingly do injury either to the public or to their employés; that, while negligence is still classed as tort, it generally results from some unwitting neglect of precaution or duty in the premises. While, therefore, it may be perfectly plain that no one can go to another and secure indemnity against the damages to arise from his willful, premeditated, and determined purpose to kill or injure another, and while it may be further true that public corporations, such as railroads and like carriers of passengers, may not as a matter of public policy be permitted by contract to indemnify against negligence to passengers and their employés, yet it is clear that a distinction must be, and is, drawn by the more recent and better considered cases where such railroads even are held to be entitled to contract for indemnity against their own unintentional negligence in operations without their quasi public functions. Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co., 70 Fed. 201, 17 C. C. A. 62 (see report of this case in 30 L. R. A. 193, where the authorities are exhaustively cited in argument of counsel); Stephens v. S. Pacific Co., 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17; Griswold v. Ry. Co., 90 Iowa, 265, 57 N. W. 843, 24 L. R. A. 647; Greenwich Ins. Co. v. Railway Co., 112 Ky. 598, 66 S. W. 411, 67 S. W. 16, 56 L. R. A. 477, 99 Am. St. Rep. 313; Osgood v. Railway Co., 77 Vt. 334, 60 Atl. 137, 70 L. R. A. 930; Railway Co. v. Mahoney, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. Rep. 503; Railway Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560.

Under modern conditions, when Congress and state Legislatures in this country are considering the passage of employer's liability acts, entitling employés to recover for injuries regardless of defenses of assumed risk and contributory negligence, based largely upon the proposition that under such conditions employers may know in a measure the conditions and extent of liability, and may, by general insurance, indemnify themselves against such, the courts are not warranted longer in my judgment in holding such indemnity insurance contracts void as against public policy, although under other conditions they may have in principle in some instances practically done so. As said in 24 L. R. A. 647, note to Griswold v. Railway Co., supra:

"There are many cases upon which opinions will differ, but the trend of thought at present seems to be towards greater freedom of contracting power and less governmental interference"—citing notes to State v. Loomis, 21 L. R. A. 789, and Commonwealth v. Perry, 14 L. R. A. 325.

I am therefore led to the conclusion that, if the construction placed upon this tenth clause of the contract between plaintiff and defendant by counsel on both sides be the true one, plaintiff cannot recover. But, after earnest study of it, I am convinced that such construction is not warranted. By it the Steel Company agreed to indemnify the Bridge Company "against all liability or damage on account of accidents, whether occasioned by the omission or negligence of itself [the Steel Company], its agents, or workmen, or otherwise, during continuance of this agreement," and to "pay all judgments recovered by reason of accidents in any such suit or suits against the party of the first part [Bridge Company]." What is the meaning of the words "during the continuance of this agreement," and those contained in the specifications "during the construction of the bridge"? They certainly cannot mean under the conditions and circumstances existing that the Steel Company was to indemnify against negligence and accidents occurring in the erection of the piers and abutments by the independent contracts over which it had no control. We must therefore restrict these words to refer to accidents occurring during the erection of the superstructure by the Steel Company itself. But how occurring? The contract says by reason of "the omission or negligence of itself, its agents or its workmen or otherwise." Do these words "or otherwise" broaden the scope of the Steel Company's liability to include all acts of negligence and omission on the part of the Bridge Company its agents and employés that might have been committed by it or them before the Steel Company's contract, or must they be limited by the rule of ejusdem generis requiring that in the construction of statutes, contracts, and other instruments, where an enumeration of specific things is followed by a general word or phrase, the latter is held to refer to things of the same kind as those specified? This rule is well recognized and established. And. Dic. Law, 394; Broom's Legal Maxims (7th Ed.) 651; U. S. v. Buffalo Park, 16 Blatchf. 189, Fed. Cas. No. 14,681; Reiche v. Smythe, 13 Wall. 162, 20 L. Ed. 566; City of Lynchburg v. N. & W. R. R. Co., 80 Va. 237, 56 Am. Rep. 592; Foerderer v. Moors, 91 Fed. 476, 33 C. C. A. 641; City of St. Louis v. Laughlin, 49 Mo. 564; American Manganese Co. v. Manganese Co., 91 Va. 272, 21 S. E. 466; Orange, etc., R. Co. v. Alexandria, 58 Va. 176; Gates v. Richmond, 103 Va. 702, 706, 49 S. E. 965.

It has been very recently applied by the Circuit Court of Appeals for this circuit in Hickman v. Cabot, 183 Fed. 747, 106 C. C. A. 183, where a clause "if by reason of fire, explosion or other cause" in a contract was held not to authorize the shutting down of his carbon factory by a contractor for natural gas to be used therein for the cause that its operation must be at great loss, but must be restricted to causes similar in character to fire and explosion. In view of the principles so recently enunciated by this case and by this court, whose opinions are binding upon me, I feel compelled to restrict the words "or otherwise" used here in this contract to acts of negligence of the Steel Company itself, its agents, its workmen or ones of like character arising in its carrying out its contract in the erection of the superstructure,

and as not including the negligence of the Bridge Company, its engineer, or agents, if such negligence was primarily responsible for the accident.

I will therefore overrule the demurrer.

FARROW v. AMERICAN AGRICULTURAL CHEMICAL CO.

(District Court, S. D. New York. February 16, 1912.)

SHIPPING (§ 177*)—CONSTRUCTION OF CHARTER PARTY—PRIORITY IN DISCHARGING.

Two schooners of different owners, the Howard and the Benedict, were chartered by respondent, each to carry a cargo of fertilizer from Carteret, N. J., to Wilmington, N. C. Each charter party contained a provision that the vessel should load and discharge in turn with other vessels chartered by respondent. The Howard was chartered first, loaded first, sailed first, and arrived first at the mouth of Cape Fear river. A tug came down the next morning and was hailed, but passed out to sea and returned with the Benedict. She, however, took the Howard in the lead and left her at respondent's pier, dropping the Benedict a mile down stream. The Benedict's master went ashore and telephoned her arrival to respondent's agent some 15 minutes before notice was given by the Howard, and the agent compelled the latter to move from the pier and wait the discharge of the Benedict. *Held* that the Howard was entitled to discharge first, and that respondent was liable in damages for the time she was required to wait, regardless of the speed with which she was discharged after she reached the pier.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 576–582, 584; Dec. Dig. § 177.*]

In Admiralty. Suit by William E. Farrow, as master of the schooner Florence Howard, against the American Agricultural Chemical Company. Decree for libelant.

Arthur Lovell, for libelant.

Gifford, Hobbs & Beard (Anson Beard and Mason Wheeler, of counsel), for respondent.

HOLT, District Judge. This action is brought by the master of the schooner Florence Howard to recover for eight days' detention at Wilmington, N. C., in February and March, 1911. The schooner was chartered by the respondent on February 3, 1911, to carry a cargo of about 1,300 tons of fertilizer from Carteret, N. J., to Wilmington. The charter provided:

"It is agreed that the lay days for loading and discharging shall be as follows: Commencing from the time the captain reports himself ready to receive or discharge cargo. Customary dispatch for loading and discharging. Vessel to load and discharge in turn with other vessels chartered by same company."

The schooner Frank W. Benedict was chartered by the respondent on February 11, 1911, to carry a similar cargo, of about 750 tons, between the same ports, and loaded at Carteret after the Howard finished loading. The Benedict's charter contained the clause:

"Vessel to discharge in turn with other vessels chartered by same company."

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

The Howard arrived at Southport, at the mouth of the Cape Fear river, about 17 miles below Wilmington, on February 22d, about 5 p. m., and anchored, waiting for a towboat to tow her up to Wilmington. The Benedict was not anywhere in sight then. At 10 o'clock the next morning, the tug Sea King came down the river, going out to sea. The captain of the Howard hailed the captain of the tug, who was also the harbor master of the port of Wilmington, and asked him to tow the schooner up the river. He waved his hand in reply and proceeded to sea. He came back at 12:30 with the schooner Frank Benedict in tow, and took the schooner Howard in tow also, putting the Howard next the tug and the Benedict astern of the Howard. The captain of the Howard testifies that he asked the captain of the Sea King why he left him and went and got another vessel, as she was bound for the same berth the Howard was, and the captain of the Sea King replied that he was going to put the Howard into the berth first. They towed up the river and reached Wilmington about 5 o'clock p. m. The Sea King dropped the Benedict about a mile below the respondent's dock, where she anchored, and took the Howard on up to the dock. When they reached the dock the berth was empty; but the captain of the Sea King, after making the Howard fast by one line to the dock, sent to the office, about 400 feet away, for the respondent's agent there. The respondent's agent came down and said that the Benedict had just reported to him by telephone, 15 minutes before, and ordered the Howard to leave the berth for the Benedict. The captain of the Howard objected, and said that his vessel was there ahead of the Benedict, ready to discharge; but the captain of the Sea King ordered the Howard's line cast off and removed her to a berth above, where she lay, waiting for the discharging berth, until March 4th, when she was finally put into the berth, the Benedict having finished unloading and left Wilmington. The Howard finished unloading on the evening of March 10th.

I think that the Howard was entitled to be unloaded at Wilmington before the Benedict. The respondent was the charterer of both vessels. They were both consigned to the respondent's agents at Wilmington. The Howard was chartered first, loaded first, sailed first, and reached the mouth of the river first. The harbor master on the tug that took the two vessels up the river recognized the right of the Howard to go up first by putting the Benedict behind the Howard at Southport. The Benedict was cast off about a mile below the dock, and the Howard taken up to the dock, and I think, therefore, that under the clause in the charter providing that the vessels should be discharged in turn the Howard was entitled to be first discharged. The fact that the captain of the Benedict slipped ashore in his launch, went to the office of his agents, and telephoned to the respondent's agent, especially in a small port like Wilmington, while the Howard was being fastened to the dock, seems to me immaterial. It would seem that the agents of the charterer, for some reason, preferred to have the Benedict unloaded first, although she had not arrived first.

I think that the defense that according to the custom of the port of Wilmington the vessel that reported first, however the report was made, was entitled to be discharged first is untenable. In the first

place, the proof is not sufficient to establish that there was any such universal and generally understood custom. In the second place, if there was such a custom, it would not affect the specific provision of the charter party to the effect that the different vessels chartered by the respondent should be discharged in turn.

The point that the charter of the Howard provided that she should be discharged with "customary dispatch," that customary dispatch in the port of Wilmington was at the rate of 100 tons a day, and that, as she had over 1,300 tons aboard, no claim for demurrage could arise until the expiration of 13 days from her arrival, seems to me equally untenable. The claim is not strictly for demurrage. It is for damages for not being permitted to discharge in her turn. The Howard was entitled to go first to the dock, and if she could be discharged more rapidly than 100 tons a day she was entitled to do so, and to have the benefit of the time saved.

My conclusion is that the libelant should have judgment as demanded in the libel.

MEMORANDUM DECISIONS

AMERICAN LUMBER CO. v. WEST et al. (Circuit Court of Appeals, Fifth Circuit. April 9, 1912.) No. 2,338. Appeal from the District Court of the United States for the Southern District of Texas. J. W. Terry (F. J. Duff, on the brief), for appellant. Hiram M. Garwood and Sam Streetman (Andrews, Ball & Streetman and Baker, Botts, Parker & Garwood, on the brief), for appellees. Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. To enable the court to give equitable relief in relation to the matters involved in this suit, Sam Park is an indispensable party. The decree of the District Court is affirmed.

ARCHER v. GREENVILLE SAND & GRAVEL CO. et al. (Circuit Court of Appeals, Fifth Circuit. April 9, 1912.) No. 2,185. Appeal from the Circuit Court of the United States for the Southern District of Mississippi. Percy Bell, for appellant. Walton Shields and Gustave Lemle, for appellees. Before McCORMICK and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. After mature consideration of the questions arising on the present appeal, we are of the opinion that the demurrer, interposed by the appellee to the bill of complaint, was properly sustained. The decree of the trial court, dismissing the bill, is therefore affirmed.

BLOUNT v. DOWNS. GARRISON-NORTON LUMBER CO. v. SAME. (Circuit Court of Appeals, Fifth Circuit. April 9, 1912.) No. 2,233. In Error to the Circuit Court of the United States for the Eastern District of Texas. George C. Greer (Greer & Minor, on the brief), for plaintiffs in error. Will E. Orgain and Chas. T. Butler (Hightower, Orgain & Butler and Baker, Potts, Parker & Garwood, on the brief), for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. The questions presented on this writ of error are substantially the same as on the former writ between the same parties in the same

case, and on consideration we find no sufficient reason to change our ruling and conclusion on the former writ, as reported in Downs v. Blount, 170 Fed. 15, 95 C. C. A. 289, 31 L. R. A. (N. S.) 1076. As to the re-examination on a subsequent writ of error of questions decided under former writ, see Supervisors v. Kennicott, 94 U. S. 498, 24 L. Ed. 260; Clark v. Keith, 106 U. S. 464, 1 Sup. Ct. 568, 27 L. Ed. 302; Chaffin v. Taylor, 116 U. S. 567, 6 Sup. Ct. 518, 29 L. Ed. 727; Thompson v. Maxwell Land Grant Co., 144 U. S 451, 456, 18 Sup. Ct. 121, 42 L. Ed. 539. The judgment of the Circuit Court is affirmed.

THE DIANA. HANSEN v. EMERY et al. (Circuit Court of Appeals, Second Circuit. March 15, 1912.) Nos. 158, 159. Appeals from the District Court of the United States for the Eastern District of New York. Haight, Sandford & Smith (Charles S. Haight, of counsel), for appellant. Burlingham, Montgomery & Beecher (Charles C. Burlingham, Chauncey I. Clark, and Robinson Leech, of counsel), for appellees. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. These causes come here upon appeal from decrees of the District Court, Eastern District of New York, entered in cross-actions brought to recover damages arising out of a collision between the steamship Diana and the bark Boylston. The District Court held the Diana solely in fault for the collision. The opinion of Judge Chatfield will be found in 181 Fed. 263. A majority of this court are of the opinion that the decrees should be affirmed—that in the first cause with interest, and with a single bill of costs, in both causes—upon the opinion of the District Judge.

GRIEB v. EQUITABLE LIFE ASSUR. SOCIETY OF THE UNITED STATES. (Circuit Court of Appeals, Third Circuit. April 16, 1912.) No. 1,579. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. Preston K. Erdman (Henry Preston Erdman, on the brief), for appellant. George D. Hay (Thomas De Witt Cuyler, on the brief), for appellee. Before GRAY and BUFFINGTON, Circuit Judges, and YOUNG, District Judge.

YOUNG, District Judge. This is a bill for reformation of a policy of insurance, for discovery, and an accounting. This case is so thoroughly and correctly decided by the learned judge of the court below, whose opinion is to be found in Grieb v. Equitable Life Assur. Society, 189 Fed. 498, that it would be labor wasted to attempt to add anything to the opinion filed in the case. The decree of the Circuit Court is therefore affirmed.

HENDERSON v. CREELMAN et al. (Circuit Court of Appeals, Fifth Circuit. February 6, 1912. On Petition for Rehearing, April 13, 1912.) No. 2,289. Appeal from the Circuit Court of the United States, for the Middle District of Alabama. Robert L. Harmon, for appellant. Thomas W. Martin, Fred S. Bell, Philip H. Stern, and William L. Martin, for appellees. Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. The judges differing in opinion as to the proper decision of this case, the decree of the Circuit Court is affirmed.

On Petition for Rehearing.

This cause having been considered on the petition for a rehearing, and one of the two judges sitting in the case not desiring nor consenting to a rehearing, it follows that the petition for a rehearing is denied. See our rule 29 (150 Fed. lxx, 79 C. C. A. lxx).

HOWARD v. ATCHISON et al. (Circuit Court of Appeals, Fifth Circuit. April 9, 1912.) No. 2,319. Appeal from the District Court of the United States for the Southern District of Florida. G. Boone Patterson, Peter S. Carter, and H. H. Taylor, for appellant. Geo. Denegre and Joseph Paxton

Blair (Allen & Harris and Denegre & Blair, on the brief), for appellees. Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. For the reasons given in Fountain v. Sawyer, 176 Fed. 92, 99 C. C. A. 612, the decree of the District Court is affirmed.

LUTCHER & MOORE LUMBER CO. et al. v. KNIGHT et al. (Circuit Court of Appeals, Fifth Circuit. April 9, 1912.) No. 2,307. In Error to the Circuit Court of the United States for the Western District of Louisiana. Action at law by W. H. Knight and others against the Lutcher & Moore Lumber Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed. See, also, 183 Fed. 1022, 105 C. C. A. 663. A. P. Pujo, C. D. Moss, and Geo. E. Holland (Pujo, Moss & Williamson, and Holland & Holland, on the brief), for plaintiffs in error. A. J. Murff and M. J. Cunningham (W. T. Cunningham, on the brief), for defendants in error. Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. The judgments rendered in the Fourteenth judicial district court for the state of Louisiana, in and for the parish of Vernon, on November 8, 1883, in the cases of McIlhenny Co. v. D. R. Knight et al., and W. J. Knight, intervener, and of Albert S. Jamison v. D. R. Knight et al., and W. J. Knight, intervener, wherein it was adjudged that the act of sale of July 28, 1882, being the conveyance from Daniel R. Knight and John A. Lovett on the one part to William J. Knight on the other part, of the real estate involved in this suit, was a real sale and not a simulation, constitute and should have the force of res judicata, and be conclusive and binding upon all parties and their privies. It follows that the Lutcher & Moore Lumber Company, claiming title to the lands in controversy under and through Daniel R. Knight and John A. Lovett and William J. Knight, is estopped from attacking the said act of sale and deed in question as a simulation. It also follows that, if there is error under the pleadings and heretofore opinions of the Supreme Court and this court in the rejection of evidence, as charged in the first, second, and third assignments of error, it was not reversible error, being at most error without prejudice. The other assignments of error in this case, complaining of the refusal of the trial judge to permit the defendants to file a third amended answer and his refusal to give certain charges to the jury as requested, are not well taken. Not finding reversible error in the record, the judgment of the Circuit Court is affirmed.

MILLER v. CARLTON. (Circuit Court of Appeals, Fifth Circuit. April 9, 1912.) No. 2,247. Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Mississippi. Charles P. Long and Joseph Loeb, for petitioner. George J. Leftwich and Leftwich & Tubb, for respondent. Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. The theory upon which this cause was heard by the referee, and the order by him passed and confirmed by the judge, in which the petitioner was ordered, upon pain of imprisonment for contempt, to surrender a stock of goods, or, in the alternative, to pay the value of the same, within 20 days from the date of the order, were in direct conflict with the views of this court as expressed in Samel v. Dodd, 142 Fed. 68, 73 C. C. A. 254; and therefore, upon the authority of that case, the order should be, and it is hereby, reversed, and the cause is remanded for further proceedings.

SLATTERY et al. v. BOARD OF COM'RS OF CADDO LEVEE DIST. (Circuit Court of Appeals, Fifth Circuit. April 10, 1912.) No. 2,314. In Error to the Circuit Court of the United States for the Western District of Louisiana. Edward Barnett (Slattery & Slattery, on the brief), for plaintiffs in error. David T. Land, for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. Following McGilvra v. Ross, 215 U. S. 71, 30 Sup. Ct. 27, 54 L. Ed. 95, the decree of the Circuit Court is reversed, and the cause is

remanded, with directions to sustain the exception of no jurisdiction and dismiss plaintiff's petition.

UNITED FRUIT CO. et al. v. STEELE et al. CAMORS et al. v. SAME. STEELE et al. v. UNITED FRUIT CO. et al. (Circuit Court of Appeals, Fifth Circuit. April 9, 1912.) No. 2,298. Appeals and Cross-Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. Wm. C. Dufour and H. G. Dufour, for Charles and Jacob Weinberger. Abraham Goldberg, for Bluefields Steamship Co., A. B. Orr, S. H. Baker, and Victor Camors. Charles Payne Fenner and W. B. Spencer, for United Fruit Co. J. Blanc Monroe, Monte M. Lemann, and Chas. J. Theard, for Frederick Camors and George Rueff. Ernest Dale Owen, W. L. Hughes, J. D. Rouse, Wm. Grant, W. B. Grant, and Henry P. Dart, for Frederick M. Steele and others. Before McCORMICK and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. This cause has been twice argued orally, and has been fully considered, with the aid of elaborate and exhaustive briefs. We have all reached the conclusion that there is no reversible error shown by the record, and that the conclusions of the lower court are sustained by the evidence. The decrees appealed from are therefore affirmed, both on the appeals and the cross-appeal. The appellants are taxed with the costs of the appeals, and the cross-appellants with the costs of the cross-appeal. Affirmed.

UNITED STATES v. BENNETT (eight cases). (Circuit Court of Appeals, Second Circuit. February 26, 1912.) Nos. 99, 100, 104, 105, 109, 110, 116, 117. In Error to the Circuit Court of the United States for the Southern District of New York. A. S. Pratt, U. S. Atty. W. D. Guthrie, for appellees. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. In our opinion, the questions arising in these causes should be certified to the United States Supreme Court, in order that they may be heard before that tribunal with the causes involving similar questions, which have been taken up by direct appeal to the Supreme Court. Counsel may prepare forms of certificate and questions.

WORCESTER GASLIGHT CO. v. COMBUSTION UTILITIES CORPORATION et al. (Circuit Court of Appeals, First Circuit. April 26, 1912.) No. 948. Appeal from the Circuit Court of the United States for the District of Massachusetts. John H. Roney, of Pittsburgh (William A. Copeland and Macleod, Calver, Copeland & Dike, on the brief), for appellant. Harold Binney, of New York City (Odin Roberts, Roberts & Cushman, and Binney & Mastick, on the brief), for appellees. Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. Having carefully considered the propositions of the parties and their counsel, and the opinion of the learned judge who heard this case in the Circuit Court, we are satisfied with his conclusions and the reasons given by him therefor. The decree of the Circuit Court (190 Fed. 155) is affirmed, with costs of appeal to the appellees.

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§ 273 (U.S.C.C.A.) Where an exception makes general reference to a topic discussed in a charge, and the topic constitutes a definite part of the charge clearly distinguishable from other parts, the exception is sufficient for review.—Winfrey v. Missouri, K. & T. Ry. Co., 194 F. 808.

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§ 878 (U.S.C.C.A.) Mere assertion of error in appellee's brief where no cross-appeal was taken did not confer jurisdiction to review the error.—Swager v. Smith, 194 F. 762.

§ 882 (U.S.C.C.A.) Where a case was tried on the theory that contributory negligence would defeat recovery, the error, if any, in a charge on contributory negligence *held* invited and not reviewable.—Winfrey v. Missouri, K. & T. Ry. Co., 194 F. 808.

(E) Presumptions.

§ 928 (U.S.C.C.A.) It will be presumed that a case was submitted to the jury on proper instructions, where the charge was not excepted to and it does not appear in the record.—St. Louis & S. F. R. Co. v. Underwood, 194 F. 363.

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§ 1004 (U.S.C.C.A.) On review of a judgment for plaintiff in a personal injury action, the Circuit Court of Appeals cannot determine whether the verdict was excessive.—Joplin & P. Ry. Co. v. Payne, 194 F. 387.

§ 1009 (U.S.C.C.A.) Finding and decree of chancellor on conflicting evidence are presumptively right, and not to be interfered with, unless obvious error has intervened.—De Laval Separator Co. v. Iowa Dairy Separator Co., 194 F. 423.

§ 1010 (U.S.C.C.A.) A finding of fact by the Circuit Court, though based on doubtful evidence, will not be set aside on appeal, where it is not entirely without support.—Steinhauser v. Order of St. Benedict of New Jersey, 194 F. 289.

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§ 1048 (U.S.C.C.A.) Exclusion of a question asked a witness on the ground of indefiniteness was not reversible error, where it was made more definite and answered.—Sanborn v. Bay, 194 F. 351.

§ 1048 (U.S.C.C.A.) The error in permitting a witness for the successful party to testify that a witness for the defeated party was addicted to the use of morphine where no foundation had been made *held* harmless where the defeated party could not recover under the evidence.—Winfrey v. Missouri, K. & T. Ry. Co., 194 F. 808.

§ 1058 (U.S.C.C.A.) In an action for breach of a marriage promise, any error in excluding defendant's testimony concerning a conversation about plaintiff's property affairs was cured by evidence for defendant concerning conversations about her affairs.—Sanborn v. Bay, 194 F. 351.

Any error in excluding a question asked a witness was cured by his immediately following testimony, which fully answered the question ruled out.—Id.

§ 1058 (U.S.C.C.A.) Error in rejecting testimony of a witness offered in chief is immaterial, where same is given in rebuttal.—Chesterfield Mfg. Co. v. Leota Cotton Mills, 194 F. 358.

§ 1059 (U.S.C.C.A.) In an action for injuries to a railroad brakeman, defendant was not prejudiced by the exclusion of evidence tending to show that the engine at the time of its explosion was in proper condition, where the question of defective condition was withdrawn from the jury.—Chicago, B. & Q. R. Co. v. Upton, 194 F. 371.

(I) Error Waived in Appellate Court.

§ 1078 (U.S.C.C.A.) An issue raised by the pleadings, but not argued in the appellate court, will be treated as abandoned, and not considered.—Texas Co. v. Central Fuel Oil Co., 194 F. 1.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

§ 1236 (U.S.C.C.A.) Judgment on a supersedeas bond given under rule 13 of the Circuit Court of Appeals (150 Fed. xxviii, 79 C. C. A. xxviii), and Rev. St. § 1000 (U. S. Comp. St. 1901, p. 712), on suing out a writ of error to review a judgment for money not otherwise secured, will not, on affirmance, be entered in the appellate court; the proper practice being to enter such judgment on motion in the trial court after remand.—City of Clarksdale v. Williamson, 194 F. 412.

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ARGUMENT OF COUNSEL.

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ARMY AND NAVY.

§ 52 (U.S.C.C.A.) A cross-bill against the National Home for Disabled Volunteer Soldiers, which was incorporated under Act Cong. March 21, 1866, and the acts amendatory thereto (Rev. St. § 4825 [U. S. Comp. St. 1901, p. 3337]), *held* not a suit against the United States as affecting the right to award interest on a claim against the Home.—National Home for Disabled Volunteer Soldiers v. Parrish, 194 F. 940.

Under Rev. St. § 1001 (U. S. Comp. St. 1901, p. 713), and Circuit Court of Appeals rule No. 31 (150 F. xxxv, 79 C. C. A. xxxv), judgment against the National Home for Disabled Volunteer Soldiers *held* properly affirmed without costs on appeal taken by direction of the federal department of justice.—Id.

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V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

§ 177 (U.S.C.C.A.) In the strict legal sense, an attachment on mesne process does not constitute a lien, but the charge or incumbrance created by seizing property under an attachment to await the result of a suit is denominated a lien, and such is its usual designation.—In re Ransford, 194 F. 658.

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§ 144 (U.S.C.C.A.) A contract for attorney's fees *held* unambiguous, and to cover all services in the Circuit Court of Appeals and the Supreme Court.—Salinger v. Mason, 194 F. 382.

Under a contract for attorney's services, the attorneys and not the client were liable for compensation of counsel employed to assist in the litigation.—Id.

(B) Lien.

§ 192 (U.S.C.C.A.) In a proceeding to enforce an attorney's lien, the court properly allowed only such sum as the evidence showed the attorney was entitled to, regardless of the fact that the amount alleged to have been paid by the client was less than the actual amount paid.—Salinger v. Mason, 194 F. 382.

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§ 56 (U.S.C.C.A.) Failure of a debtor to discharge a lien while insolvent within the four months *held* not an act of bankruptcy, under Bankruptcy Act, § 3a; the lien having been a valid subsisting lien before that time.—Colston v. Austin Run Mining Co., 194 F. 929.

§ 58 (U.S.C.C.A.) Definition of "preference" contained in Bankruptcy Act, § 60a, *held* to confine its sufferance or acquirement to two classes of transactions, viz., a judgment obtained within four months before filing of petition and before adjudication, and a transfer by the bankrupt within the same period.—Folger v. Putnam, 194 F. 793.

§ 59 (U.S.C.C.A.) Definition of "preference" contained in Bankruptcy Act, § 60a, *held* to confine its sufferance or acquirement to two classes of transactions, viz., a judgment obtained within four months before filing of petition and before adjudication, and a transfer by the bankrupt within the same period.—Folger v. Putnam, 194 F. 793.

Under Bankruptcy Act, § 3, subd. 3, and section 1, subd. 25, where a debtor while insolvent failed to discharge an attachment within five days prior to the expiration of the four months' period, after which it would have become an unalterable lien on the attached property, he thereby committed an act of bankruptcy and was subject to adjudication.—Id.

§ 60 (U.S.C.C.A.) An assignment of a debtor's property *held* to constitute a general assignment for the benefit of creditors, and as such an act of bankruptcy, within the Bankruptcy Act.—Courtenay Mercantile Co. v. Finch, Van Slyck & McConville, 194 F. 368.

§ 68 (U.S.C.C.A.) In determining whether one sought to be adjudged an involuntary bankrupt is chiefly engaged in the exempt occupation of farming, all his pursuits must be considered as a whole, though he is merely a partner as to some of them.—American Agricultural Chemical Co. v. Brinkley, 194 F. 411.

§ 91 (U.S.C.C.A.) In an involuntary bankruptcy proceeding, evidence *held* to warrant a finding that the debtor was chiefly engaged in the exempt occupation of farming.—American Agricultural Chemical Co. v. Brinkley, 194 F. 411.

§ 91 (U.S.D.C.) Evidence considered, and *held* to show that an alleged bankrupt was insane at the time of his transfer of property charged as the act of bankruptcy and at the time of the contracting of many of the debts necessary to be taken into account to establish his insolvency.—In re Ward, 194 F. 174.

§ 100 (U.S.C.C.A.) Bankruptcy adjudication *held* conclusive against creditors that the bankrupt was insolvent and that he had committed an act of bankruptcy within four months prior to the filing of the petition.—Cook v. Robinson, 194 F. 785.

Adjudication of bankruptcy *held* conclusive against an attaching creditor of the question of the bankrupt's insolvency at the time of the attachment, within four months prior to adjudication in the determination of an intervention by the bankrupt's trustee to recover the attached property (Bankruptcy Act, § 67f). —Id.

(D) Warrant and Custody of Property.

§ 114 (U.S.D.C.) Motions for discharge of a receiver in involuntary proceedings and for an allowance for support of the bankrupt in a sanitarium denied pending appeal from a decree dismissing the petition on the ground of the insanity of the alleged bankrupt.—In re Ward, 194 F. 179.

§ 117 (U.S.D.C.) Where bankruptcy proceedings against a corporation were instituted in Massachusetts, an ancillary receiver appointed in New York, in the absence of any proceedings therefor in the domiciliary jurisdiction, would not be authorized to sell the bankrupt's stock in New York.—In re Brockton Ideal Shoe Co., 194 F. 233.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

§ 140 (U.S.C.C.A.) Modification of the terms of payment for a machine sold under a conditional sale contract *held* not a waiver of the reservation of title, so that, on the buyer's bankruptcy, the seller was entitled to enforce the condition.—Colonial Trust Co. of Waterbury, Conn., v. Thorpe, 194 F. 390.

§ 140 (U.S.D.C.) An executory contract for the sale of lumber to be manufactured construed, and the title to lumber cut to apply on the contract, but not delivered, measured, nor inspected at the time of the bankruptcy of the seller, *held* not to have passed to the purchaser. —In re Clairfield Lumber Co., 194 F. 181.

§ 143 (U.S.C.C.A.) Interest of a bankrupt in a policy on his mother's life which did not become a claim until after adjudication *held* not property belonging to his estate in bankruptcy under Bankr. Act, § 70a.—In re Hogan, 194 F. 846.

§ 157 (U.S.C.C.A.) Bankrupt's trustees, having sued in the state court to set aside conveyances of the bankrupt's real estate for the benefit of all creditors, *held* estopped thereafter to claim repayment of dividends paid on the allowed claims which the conveyances had been executed to secure.—In re Hurst, 194 F. 830.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 184 (U.S.C.C.A.) A deed of trust covering perishable supplies in a hotel and liquors for the bar *held*, under the law of West Virginia, invalid as against the grantor's other creditors in bankruptcy.—Swager v. Smith, 194 F. 762.

§ 188 (U.S.C.C.A.) Under Comp. Laws Mich. § 10,635, a judgment against a bank as garnishee for the amount of funds which the principal defendant had on deposit *held* not to amount to a novation so as to entitle the plaintiff to such funds as against the principal defendant's trustee in bankruptcy.—In re Ransford, 194 F. 658.

§ 198 (U.S.C.C.A.) Bankr. Act, c. 541, § 67c, saves a lien obtained through legal proceedings within four months, unless it was obtained while the debtor was insolvent or the creditor had cause to believe such insolvency, or the lien was sought in fraud of the statute. Subdivision "f" avoids all liens obtained through legal proceedings within the time stated against an insolvent, irrespective of knowledge on the part of the creditor of the fact of insolvency and irrespective of whether the obtaining of the lien had been suffered and permitted by the debtor. *Held*, that the subdivisions are conflicting and repugnant and subdivision "f" controls.—Cook v. Robinson, 194 F. 785.

§ 198 (U.S.C.C.A.) Bankruptcy Act, § 67c, providing for the dissolution of liens, *held* to recognize a preference obtainable through an attachment acquired on mesne process while the debtor was insolvent, the enforcement of which would operate as a preference.—Folger v. Putnam, 194 F. 793.

Under Bankruptcy Act, §§ 67c, 67f, a preference may not only consist of the bankrupt's suffering a judgment to be entered against him, or making a transfer of his property within four months, but also by the creation of a lien by attachment within four months.—Id.

§ 200 (U.S.C.C.A.) Under Bankruptcy Act July 1, 1898, § 67f, a lien acquired by a judgment against a bank as garnishee for the

amount of funds which the principal defendant had on deposit was voided by the institution within four months of bankruptcy proceedings against him.—In re Ransford, 194 F. 658.

§ 217 (U.S.C.C.A.) The District Court has jurisdiction to enjoin in a summary proceeding the collection of a garnishee judgment; the principal defendant having been adjudicated a bankrupt within four months.—In re Ransford, 194 F. 658.

(D) Administration of Estate.

§ 241 (U.S.D.C.) Witness in a bankruptcy proceeding *held* guilty of contempt for giving false testimony.—In re Michaels, 194 F. 552.

§ 250 (U.S.D.C.) Evidence of a bankrupt's financial condition *held* properly considered by a commissioner in passing on the bankrupt's honesty and good faith on an issue whether assets had been unlawfully withheld.—In re Jablin, 194 F. 228.

Evidence *held* to sustain a commissioner's finding that a bankrupt had not been guilty of withholding assets.—Id.

§ 262 (U.S.C.C.A.) A bid for assets of a bankrupt, which was not accepted, *held* to give the bidder no standing to complain either of its rejection or of a sale to another for a higher price.—In re Chandler, 194 F. 944.

(E) Actions by or Against Trustee.

§ 288 (U.S.D.C.) Facts *held* insufficient to show as a matter of law that the claim of third person to assets alleged to belong to a bankrupt was so unfounded as to justify a trial thereof by summary proceedings in bankruptcy.—In re Iron Clad Mfg. Co., 194 F. 906.

§ 293 (U.S.D.C.) A plenary suit against a third person to recover assets alleged to belong to the bankrupt cannot be maintained as a step in the bankruptcy proceedings, but can only be brought in a court having jurisdiction generally over such a suit.—In re Iron Clad Mfg. Co., 194 F. 906.

While a bankruptcy court may compel the bankrupt or his agent to deliver assets by summary proceedings, such jurisdiction cannot be exercised in case the possessor in good faith claims a legal right to possession or property therein.—Id.

Cases in which the bankruptcy court may take jurisdiction over property in the hands of a third person by summary proceedings stated.—Id.

(F) Claims Against and Distribution of Estate.

§ 318 (U.S.D.C.) An oral provision of a partnership dissolution contract that the firm's account should be collected and applied to the payment of firm debts *held* executory, and unenforceable in bankruptcy proceedings against the continuing partner.—In re Wilson, 194 F. 564.

§ 318 (U.S.D.C.) One furnishing materials to a subcontractor of a general contractor of the United States, who gave bond in conformity to Act Cong. Feb. 24, 1905, *held* required to pursue the remedy prescribed by the act, and he cannot prove a claim under the bankrupt law against the estate of the bankrupt general contractor.—In re Hawley, 194 F. 751.

§ 348 (U.S.D.C.) The steward of a bankrupt restaurant corporation, who was also a stockholder, director, and officer, but to whom no stock was ever issued, *held* entitled to priority of payment of wages, under section 64b of the Bankruptcy Act.—In re Swain Co., 194 F. 749.

§ 351 (U.S.D.C.) Where an agreement that the accounts of a firm should be used to pay firm debts was not incorporated in a partnership dissolution agreement, an outgoing partner was not entitled to enforce such provision as against partnership creditors in bankruptcy.—In re Wilson, 194 F. 564.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 408 (U.S.C.C.A.) Facts *held* to justify the denial of a bankrupt's discharge for transferring specified property with intent to defraud his creditors within four months prior to the filing of the petition.—Pirvitz v. Pithan, 194 F. 403.

§ 408 (U.S.D.C.) A bankrupt *held* to have disposed of property and to have destroyed records in violation of the statute, so as to prevent his discharge.—In re Hirshowitz, 194 F. 562.

VIII. OFFENSES AGAINST BANKRUPT LAWS.

§ 495 (U.S.C.C.A.) In a prosecution of a bankrupt for concealment of assets, the burden was on the government to establish defendant's guilt beyond a reasonable doubt.—Chodkowski v. United States, 194 F. 858.

§ 496 (U.S.C.C.A.) In a prosecution of a bankrupt for failure to disclose assets, he was entitled to an instruction that the law presumes that he acted legally and in good faith in conveying the property, and requiring the jury to give him the benefit of such presumption.—Chodkowski v. United States, 194 F. 858.

BANKS AND BANKING.

See Garnishment, § 56.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(E) Insolvency and Dissolution.

§ 80 (U.S.C.C.A.) Checks of third parties on a bank with which they are depositors do not increase the cash in the bank, and present no basis for a preferential payment to the depositor.—Empire State Surety Co. v. Carroll County, 194 F. 593.

The deposit of checks of third parties which are credited to the depositors and used by the bank to pay its debts will lay no foundation for a preferential payment to the depositor.—Id.

Checks of third parties deposited with a bank and collected through a clearing house do not warrant a preferential payment in the absence of proof of the actual balance which the bank received from the clearing house.—Id.

III. FUNCTIONS AND DEALINGS.

(E) Loans and Discounts.

§ 179 (U.S.C.C.) Collaterals deposited with a bank *held* bound not only for the loan evidenced by the note executed at the time of the deposit, but for all other indebtedness of the maker to the bank.—Commercial & Savings Bank v. Robert H. Jenks Lumber Co., 194 F. 732.

IV. NATIONAL BANKS.

§ 287 (U.S.C.C.A.) A receiver of a national bank, who is a party to a decree allowing a preferred claim in a suit in which a creditor of the insolvent bank is entitled to appeal, *held* without authority to compromise with the successful claimant without the consent of the aggrieved creditor, and without order of court.—Empire State Surety Co. v. Carroll County, 194 F. 593.

BEST AND SECONDARY EVIDENCE.

See Evidence, § 158.

BILL OF LADING.

See Shipping, §§ 125, 173.

BILL OF PARTICULARS.

See Pleading, §§ 317, 320.

BILL OF REVIEW.

See Equity, §§ 450–464.

BILLS AND NOTES.

See Carriers, §§ 32, 38; Partnership; Payment, § 67.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(B) Indorsement for Transfer.

§ 267 (U.S.D.C.) While the obligation of the maker of a note is absolute, that of the indorser is conditional on the maker's refusal, and the exercise of due diligence in presentation, protest, etc.—Commercial & Savings Bank v. Robert H. Jenks Lumber Co., 194 F. 739.

BONA FIDE PURCHASERS.

See Public Lands, §§ 120, 138; Vendor and Purchaser.

BONDS.

See Appeal and Error, §§ 373, 460, 1236; Counties; Internal Revenue; Officers; Principal and Surety.

BOUNDARIES.

See Licenses.

BREACH OF MARRIAGE PROMISE

See Appeal and Error, § 1058; Evidence, § 471.

§ 18 (U.S.C.C.A.) In an action for breach of promise of marriage, plaintiff was properly permitted to testify what she received for services rendered at defendant's request in a third person's matters, where plaintiff relied on services to defendant.—Sanborn v. Bay, 194 F. 351.

§ 21 (U.S.C.C.A.) In an action for breach of marriage promise, *held* proper to permit defendant to be asked whether, if he did not intend to marry plaintiff, by his letters and acts, he was playing her to get time for his own benefit, and to get her influence to secure his aunt's property.—Sanborn v. Bay, 194 F. 351.

§ 31 (U.S.C.C.A.) Refusal to set aside a $25,000 verdict for breach of marriage promise on the ground of excessiveness was not an abuse of discretion, where plaintiff's pecuniary loss was more than $15,000, and defendant told her he was worth more than $125,000.—Sanborn v. Bay, 194 F. 351.

BRIDGES.

See Indemnity, §§ 3, 9; Navigable Waters, §§ 19, 20.

BRIEFS.

See Appeal and Error, § 878.

BUCKET SHOPS.

See Gaming.

BURDEN OF PROOF.

See Evidence, § 96.

CANCELLATION OF INSTRUMENTS.

See Deeds, § 196; Indians, §§ 16, 27; Public Lands, § 120.

CAPTION.

See Indictment and Information, § 21.

CARRIERS.

See Abatement and Revival; Commerce.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(B) Interstate and International Transportation.

§ 32 (U.S.D.C.) A railroad company practices discrimination in respect to transportation, in violation of section 6 of the interstate commerce act of February 4, 1887, as amended by Act June 29, 1906, § 2, by systematically extending credit for freight charges to one interstate shipper, while exacting and collecting such charges from other shippers under substantially similar circumstances and conditions.—United States v. Hocking Valley Ry. Co., 194 F. 234.

§ 32 (U.S.D.C.) Where a carrier receives a shipper's note in payment of freight charges for shipments in interstate commerce, it receives a different compensation from that which the law authorizes, to wit, money, in violation of the Elkins act as amended by Act June 29, 1906.—United States v. Sunday Creek Co., 194 F. 252.

§ 32 (U.S.D.C.) Discriminations by an interstate carrier of coal between shippers from points grouped together in its schedules, and from which it makes the same rates, *held* unlawful under Interstate Commerce Act, § 2.—Langdon v. Pennsylvania R. Co., 194 F. 486.

The provision of section 15 of the interstate commerce act as amended by Act June 29, 1906, § 4, permitting a just and reasonable allowance by a carrier for services rendered or instrumentalities furnished in connection with the transportation, is not available as a defense to a carrier in an action to recover for discriminations practiced by the making of a secret allowance to a favored shipper.—Id.

§ 37 (U.S.C.C.A.) In an action against a carrier for willful violation of the 28-hour law of June 29, 1906, *held* to show that it was prevented from unloading the sheep within the 36 hours by accidental or unavoidable causes which could not be avoided by due care and diligence.—Chicago, B. & Q. R. Co. v. United States, 194 F. 342.

§ 38 (U.S.D.C.) The acceptance by a railroad company in settlements with a coal company for interstate shipments of coal of notes of the shipper for a part of its freight charges, in accordance with an agreement and understanding between them, constitutes a "willful failure * * * to strictly observe its tariffs," in violation of section 6 of the interstate commerce act of February 4, 1887, as amended by Act June 29, 1906, § 2.—United States v. Hocking Valley Ry. Co., 194 F. 234.

An indictment against a railroad company for a failure to observe its published tariffs by extending credit to a shipper under joint rates for a part of the freight due is not insufficient because it does not exclude the possibility that it received in cash its own share of such freights.—Id.

§ 38 (U.S.D.C.) An indictment of a coal company for violation of the Elkins act *held* to sufficiently allege the receiving of a discrimination from a carrier in interstate commerce, and was therefore not demurrable.—United States v. Sunday Creek Co., 194 F. 252.

II. CARRIAGE OF GOODS.

(K) Discrimination and Overcharge.

§ 202 (U.S.C.C.A.) In a suit by a shipper to recover reparation for a charge of an excessive freight rate, a declaration failing to charge that complainant paid the excessive rate on his shipment, or that it was paid by any one for him, or on his account, *held* demurrable.—Davis v. Mobile & O. R. Co., 194 F. 374.

III. CARRIAGE OF LIVE STOCK.

§ 204 (U.S.C.C.A.) "Due diligence and foresight," under the 28-hour law, Act June 29, 1906, defined.—Chicago, B. & Q. R. Co. v. United States, 194 F. 342.

"Accidental or unavoidable causes" which cannot be avoided by due diligence and foresight within the meaning of the 28-hour law of June 29, 1906, defined.—Id.

"Willfully," as describing the attitude of a carrier disregarding the 28-hour law of June 29, 1906, defined.—Id.

IV. CARRIAGE OF PASSENGERS.

(A) Relation Between Carrier and Passenger.

§ 234 (U.S.C.C.A.) Whether a waiver of liability for injuries, printed on the back of a pass, is valid and a defense to an action for injuries to the person riding on the pass, by the carrier's negligence, depends on the law of the place where the injury occurred.—Smith v. Atchison, T. & S. F. Ry. Co., 194 F. 79.

(D) Personal Injuries.

§ 281 (U.S.C.C.A.) Trainmen knowing of the intoxicated condition of a passenger *held* required to bestow such care on him as is reasonably necessary for his safety.—Winfrey v. Missouri, K. & T. Ry. Co., 194 F. 808.

§ 305 (U.S.C.C.A.) Negligence of trainmen in failing to safely remove from the train at his destination an intoxicated passenger who was thereafter run over, *held* not the proximate cause of his death.—Winfrey v. Missouri, K. & T. Ry. Co., 194 F. 808.

§ 307 (U.S.C.C.A.) The Oklahoma statute (Comp. Laws 1909, § 428), requiring carriers to use ordinary care for the safety of passengers carried without reward, *held* not applicable to an employé traveling on a pass containing an express waiver of liability for injuries.—Smith v. Atchison, T. & S. F. Ry. Co., 194 F. 79.

(E) Contributory Negligence of Person Injured.

§ 348 (U.S.C.C.A.) An instruction in an action for the death of an intoxicated passenger *held* sufficiently favorable to plaintiff on the issue of intoxication.—Winfrey v. Missouri, K. & T. Ry. Co., 194 F. 808.

CHANCERY.

See Equity.

CHARGE.

See Electricity.

CHARTER PARTIES.

See Shipping, §§ 34–58, 181.

CHILDREN.

See Negligence, § 39.

CITIZENS.

See Indians, § 31.

CLAIMS.

See Army and Navy; Bankruptcy, §§ 318–351; Mechanics' Liens, § 131; Patents, § 101; United States, § 110.

COLLATERAL.

See Banks and Banking, § 179.

COLLATERAL ATTACK.

See Judgment, § 519.

COLLISION.

I. RULES AND PRECAUTIONS FOR PREVENTING COLLISIONS IN GENERAL.

§ 1 (U.S.D.C.) An approaching vessel in a situation of danger has a right to expect that other vessels will move according to the rules governing them in their relative positions.—The Golden Rod, 194 F. 515.

§ 6 (U.S.D.C.) A pilot rule requiring vessels on crossing courses to stop and back whenever danger signals are given is invalid, as violating articles 19 and 21 of inland navigation rules of June 7, 1897 (30 Stat. 101, c. 4 [U. S. Comp. St. 1901, p. 2883]), unless under special circumstances.—The James A. Walsh, 194 F. 549.

VII. VESSELS AT REST, AT ANCHOR, OR AT PIERS.

§ 72 (U.S.C.C.A.) A collision between a tug, which had struck a pier and was not under control, and car floats in tow of a transfer, *held* due to the fault of both vessels.—The Transfer No. 19, 194 F. 77.

X. NARROW CHANNELS, HARBORS, RIVERS, AND CANALS.

§ 95 (U.S.C.C.A.) One of two meeting tugs *held* solely in fault for a collision in East River, in that she did not sufficiently change her course.—The Erin, 194 F. 405.

§ 95 (U.S.D.C.) One of two meeting tugs *held* solely in fault for a collision between their tows in Hell Gate for attempting to overtake and pass another tow in the channel, in violation of pilot rule 7.—The Golden Rod, 194 F. 515.

§ 95 (U.S.D.C.) A steam lighter, crossing East River from Brooklyn in the daytime, *held* solely in fault for a collision with a barge in tow alongside a tug, also crossing, but on a different and crossing course, which made her the privileged vessel.—The James A. Walsh, 194 F. 549.

§ 95 (U.S.D.C.) Two meeting tugs, each with a tow alongside, both *held* in fault for a collision in Delaware river about dusk, where, although each was to the starboard of the other when only 700 feet apart, one gave and the other assented to a signal to pass port to port, and in attempting to execute such dangerous maneuver the collision occurred.—The American, 194 F. 899.

§ 102 (U.S.C.C.A.) Two steam vessels, which came into collision when passing through the draw of a bridge on Harlem River in the evening, after exchanging signals to pass port and port, both *held* in fault; one, which was moving slowly against the tide close to the north side of the center pier, for not reversing to permit the other to pass across her bows to the port side, and the other for not porting more and allowing for the set of the tide, which carried her down upon the other's bows.—The T. N. Wellington, 194 F. 673.

XII. SUITS FOR DAMAGES.

(C) Evidence.

§ 125 (U.S.C.C.A.) A preliminary survey of a vessel injured in collision is not conclusive on the parties as to the extent of the injury, on a hearing before a commissioner in a suit to recover damages for the collision.—The Elmer A. Keeler, 194 F. 339.

A finding by a commissioner of the amount of damages recoverable in a suit for collision, confirmed by the District Court, *held* sustained by competent evidence.—Id.

(D) Damages.

§ 134 (U.S.C.C.A.) The fact that the owner of a vessel injured in collision made temporary repairs, so that she could be used, does not limit his recovery of damages from the vessel in fault to the cost of such repairs.—The Elmer A. Keeler, 194 F. 339.

COMMERCE.

See Courts, § 289.

II. SUBJECTS OF REGULATION.

§ 47 (U.S.C.C.A.) Transportation of persons as well as of property is "commerce," and Congress may regulate their interstate transportation.—Bennett v. United States, 194 F. 630.

Act June 25, 1910, commonly known as the "white slave act," which forbids the inducing of a person to come into a state, with unlawful purpose by the inducer and in aid of such unlawful purpose, is not unconstitutional as an invasion of the police power of the state.—Id.

III. MEANS AND METHODS OF REGULATION.

§ 55 (U.S.C.C.A.) The constitutional power of Congress to regulate interstate commerce includes the power to prohibit in cases where such prohibition is in aid of the lawful protection of the public.—Bennett v. United States, 194 F. 630.

§ 82 (U.S.C.C.A.) An indictment charging defendant with inducing the interstate transportation for an unlawful purpose of Opal Clark, and evidence that the woman transported was known to defendant as Jeanette Clark, and that her real name was entirely different, *held* not to constitute a variance.—Bennett v. United States, 194 F. 630.

§ 82 (U.S.C.C.A.) On a prosecution for inducing the interstate transportation of women for unlawful purposes, evidence *held* to support a conviction.—Harris v. United States, 194 F. 634.

IV. INTERSTATE COMMERCE COMMISSION.

§ 85 (U.S.Com.C.) The powers of the Interstate Commerce Commission to fix rates defined under Interstate Commerce Act, § 15, as amended by Act June 29, 1906, § 4.—Atlantic Coast Line R. Co. v. Interstate Commerce Commission, 194 F. 449.

§ 93 (U.S.Com.C.) Carriers necessarily affected by an order of the Interstate Commerce Commission, although not parties thereto, may maintain a suit to enjoin its enforcement.—Atlantic Coast Line R. Co. v. Interstate Commerce Commission, 194 F. 449.

Any party against whom an order fixing rates is made by the Interstate Commerce Commission may petition the court for redress without joining other parties to the order, such suit being plenary, and the injury, if any, being several, and not joint.—Id.

§ 94 (U.S.Com.C.) A bill in a suit to annul an order of the Interstate Commerce Commission fixing rates *held* insufficient on demurrer.—Atlantic Coast Line R. Co. v. Interstate Commerce Commission, 194 F. 449.

Allegations of the bill in a suit to annul an order of the Interstate Commerce Commission respecting the evidence on which the commission acted *held* sufficient on demurrer.—Id.

§ 97 (U.S.Com.C.) In a suit by carriers to annul an order of the Interstate Commerce Commission, whether there is any evidence to sustain the findings of the commission is a question of law.—Atlantic Coast Line R. Co. v. Interstate Commerce Commission, 194 F. 449.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION.

See Commerce, §§ 85–97.

COMMISSIONERS.

See Bankruptcy, § 250; Collision, § 125; Habeas Corpus, § 92; Internal Revenue.

COMPENSATION.

See Attorney and Client, § 144; Receivers, § 200.

COMPETENCY.

See Evidence, § 541; Witnesses.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

COMPROMISE AND SETTLEMENT.

See Banks and Banking, § 287.

§ 12 (U.S.C.C.A.) A settlement between a federal contractor and his subcontractors *held* to cover per diem expenses and freight on the contractor's outfit going to and coming from the works.—Mosby v. United States, 194 F. 346.

§ 17 (U.S.C.C.A.) Where a dispute between a federal contractor and his sureties and subcontractors was settled on an ample consideration, full effect should be given to the settlement according to its terms.—Mosby v. United States, 194 F. 346.

§ 24 (U.S.C.C.A.) Evidence *held* to authorize a member of a firm, to which certain public improvement work had been sublet, to have submitted to a jury the question whether the contractor should account for $500 received from a note of such member, or whether the contractor should have credit for the amount so paid to the other member of the firm for its benefit.—Mosby v. United States, 194 F. 346.

CONCEALMENT.

See Bankruptcy, § 495.

CONDEMNATION.

See Eminent Domain.

CONDITIONS.

See Contracts, § 226.

CONFLICT OF LAWS.

See Courts, §§ 372, 375; Religious Societies; Shipping, § 34.

CONSIDERATION.

See Contracts, § 63.

CONSPIRACY.

See Corporations, § 496.

I. CIVIL LIABILITY.

(B) Actions.

§ 21 (U.S.C.C.A.) In an action against a railroad aiding in a conspiracy to commit a lynching, *held* error to direct a verdict for defendant.—Rogers v. Vicksburg, S. & P. R. Co., 194 F. 65.

II. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

§ 43 (U.S.C.C.) An indictment for conspiracy to defraud the United States, alleging that defendants conspired to fraudulently obtain state land within a forest reservation to be exchanged for lieu land, as provided by the forest reserve act, *held* to state an offense.—Ex parte Hyde, 194 F. 207.

CONSTITUTIONAL LAW.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

§ 55 (U.S.D.C.) Judicial Code, § 21, providing for the disqualification of a judge on the filing of an affidavit of prejudice, if construed to mean that the mere filing of such affidavit disqualifies, would be unconstitutional as vesting judicial power to that extent in the litigants.—Ex parte N. K. Fairbank Co., 194 F. 978.

XI. DUE PROCESS OF LAW.

§ 252 (U.S.D.C.) Corporations are persons within the protection of the fifth and fourteenth amendments of the federal Constitution.—United States v. McHie, 194 F. 894.

§ 298 (U.S.C.C.) An ordinance requiring an electric company to install service for any citizen on demand *held* void, as taking the property of the company for the private use of an-

other without due process of law.—Minneapolis General Electric Co. v. City of Minneapolis, 194 F. 215.

CONSTRUCTION.

See Contracts, §§ 204, 226; Deeds, § 138; Patents, §§ 160–168; Sales, §§ 71, 88; Wills.

CONTEMPT.

See Bankruptcy, § 241.

CONTRACTS.

See Attorney and Client, § 144; Bills and Notes; Breach of Marriage Promise; Compromise and Settlement; Corporations, §§ 306, 457; Courts, § 269; Damages, § 120; Deeds; Evidence, § 441; Indemnity; Indians, § 31; Injunction, §§ 57, 59; Insurance; Logs and Logging; Municipal Corporations, § 244; Novation; Patents, § 202; Principal and Surety, § 100; Release; Sales; Shipping, §§ 173–184; Specific Performance; Stipulations; Vendor and Purchaser; Venue.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

§ 10 (U.S.C.C.A.) An executory contract by which plaintiff purported to grant to defendant the exclusive right to sell its automobiles within a certain territory, but did not obligate itself to sell the same to defendant and reserved the right to cancel the contract at any time, *held* void for lack of mutuality.—Velie Motor Car Co. v. Kopmeier Motor Car Co., 194 F. 324.

(D) Consideration.

§ 63 (U.S.C.C.A.) A recital in a contract that each party has paid to the other $1 imports no consideration.—Velie Motor Car Co. v. Kopmeier Motor Car Co., 194 F. 324.

(E) Validity of Assent.

§ 99 (U.S.C.C.) Transactions between parent and child *held* not fraudulent per se.—Alcorn v. Alcorn, 194 F. 275.

II. CONSTRUCTION AND OPERATION.

(C) Subject-Matter.

§ 204 (U.S.D.C.) Contract binding defendant to pay plaintiff a weekly salary in consideration of plaintiff furnishing appropriate advertising matter of the quality and standard evidenced by a book written by plaintiff requires plaintiff to furnish paragraphs for advertising purposes of the quality and standard shown by such book.—Lewis v. C. E. Sherin Co., 194 F. 976.

(E) Conditions.

§ 226 (U.S.C.C.A.) Under a contract by which plaintiffs were entitled to a certain compensation in case defendants elected to purchase land under an option, plaintiffs were entitled to recover on defendants' having executed a contract to purchase, though such purchase was never completed.—Strasser v. Bulkley, 194 F. 355.

CONTRIBUTION.

§ 5 (U.S.D.C.) The rule that, in a case of equal or mutual fault, the condition of the party defending is the better one, based on the principle of public policy that there is no contribution between wrongdoers, *held* not to apply, except in a case where there has been an intentional violation of the law.—Pennsylvania Steel Co. v. Washington & Berkeley Bridge Co., 194 F. 1011.

CONTRIBUTORY NEGLIGENCE.

See Negligence, §§ 80–95, 141.

CORPORATIONS.

See Bankruptcy, §§ 117, 348; Banks and Banking; Carriers; Constitutional Law, §§ 252, 298; Electricity; Eminent Domain; Injunction, § 59; Municipal Corporations; Searches and Seizures, § 7; Statutes, §§ 72, 80; Street Railroads.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(F) Lien of Corporation.

§ 163 (U.S.C.C.A.) The lien reserved by the charter of a corporation on its stock and dividends registered in a stockholder's name, for his liabilities to it cannot be defeated by a transfer of the stock.—United Cigarette Mach. Co. v. Winston Cigarette Mach. Co., 194 F. 947.

§ 165 (U.S.C.C.A.) A reservation by a corporation of a lien on its stock and dividends for liability of the holder embraced a claim for damages for breach of contract by a stockholder taking stock in consideration that the corporation purchase at a fixed price machines to be made by the stockholder.—United Cigarette Mach. Co. v. Winston Cigarette Mach. Co., 194 F. 947.

§ 169 (U.S.C.C.A.) A corporation, which by its charter reserved a lien on stock and dividends for liabilities of the holders, *held* compelled to obtain a judgment at law before it could proceed in equity to enforce its lien.—United Cigarette Mach. Co. v. Winston Cigarette Mach. Co., 194 F. 947.

A judgment against a stockholder, obtained by a corporation whose charter reserved a lien on stock and dividends for debts owing it may, under Code Va. 1904, § 3298, be set off against a stockholder's suit at law for dividends.—Id.

Equity was without jurisdiction of an action by a corporation to recover damages and to enforce a lien on its stock, where the question of right to damages was the primary issue and on establishment of which depended the enforcement of the lien.—Id.

V. MEMBERS AND STOCKHOLDERS.

(A) Rights and Liabilities as to Corporation.

§ 180 (U.S.D.C.) A stockholder of a corporation, although the owner of a large majority of the stock, cannot waive or release a claim ex-

isting in favor of the corporation where it has creditors.—Pennsylvania Steel Co. v. New York City Ry. Co., 194 F. 543.

VI. OFFICERS AND AGENTS.

(B) Authority and Functions.

§ 306 (U.S.C.C.A.) The managing officer of a corporation is personally liable to a third person injured by his fraudulent acts for his own profit in violating a contract of the corporation.—United Cigarette Mach. Co. v. Winston Cigarette Mach. Co., 194 F. 947.

VII. CORPORATE POWERS AND LIABILITIES.

(B) Representation of Corporation by Officers and Agents.

§ 426 (U.S.C.C.A.) An assignment of an application for a patent by a corporation by its president, one of three persons composing the board of directors, who owned all of the stock, with knowledge by the other directors, was ratified, where no notice of dissent was given to the assignee, with whom other dealings were had.—United States Light & Heating Co. v. J. B. M. Electric Co., 194 F. 866.

(D) Contracts and Indebtedness.

§ 457 (U.S.D.C.) Defendant corporation having contracted to sell certain ore at specified periods, but being unable to produce all of the same from its own mines, *held* to have incidental power to procure the balance from others in order to fulfill its contract.—Young v. United Zinc Cos., 194 F. 461.

(E) Torts.

§ 496 (U.S.C.C.A.) Corporations are liable in damages for torts and in proper cases may be convicted of conspiracy.—Rogers v. Vicksburg, S. & P. R. Co., 194 F. 65.

(F) Civil Actions.

§ 506 (U.S.C.C.A.) To a suit in a federal court against a corporation to enforce specific performance of a contract made by it in behalf of subsidiary companies which it controls through ownership of their stock, such subsidiary companies are not indispensable nor even necessary parties.—Texas Co. v. Central Fuel Oil Co., 194 F. 1.

VIII. INSOLVENCY AND RECEIVERS.

§ 565 (U.S.D.C.) Where, after the appointment of a receiver for an indorser of a note to claimant bank, the maker paid 60 per cent. of the face of the note, the bank was entitled to prove its claim against the indorser's estate for the full amount, and to receive dividends until the 40 per cent. balance was paid.—Commercial & Savings Bank v. Robert H. Jenks Lumber Co., 194 F. 739.

§ 566 (U.S.C.C.A.) A court of equity *held* to have no authority to displace the lien of mortgages on property of a private corporation in favor of unsecured claims for labor and supplies furnished after execution of the mortgages, nearly a year prior to appointment of the receiver, and used in making improvements.—Spencer v. Taylor Creek Ditch Co., 194 F. 635.

§ 566 (U.S.C.C.) On administration of an insolvent corporation's assets in equity, a secured creditor was entitled to prove his entire claim and to receive dividends up to the balance due after crediting the proceeds of the security.—Commercial & Savings Bank v. Robert H. Jenks Lumber Co., 194 F. 732.

COSTS.

See Admiralty, § 122; Army and Navy; Patents, § 325.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

§ 260 (U.S.C.C.A.) On affirmance of a judgment for personal injury, plaintiff is not entitled to 10 per cent. damages for delay, under Circuit Court of Appeals rule 30 (150 Fed. xxxv; 79 C. C. A. xxxv), where the Circuit Court of Appeals had construed a statute involved differently from that given by the Supreme Court of the state.—Joplin & P. Ry. Co. v. Payne, 194 F. 387.

COUNTIES.

See Judgment, § 519; Mandamus.

II. GOVERNMENT AND OFFICERS.

(D) Officers and Agents.

§ 96 (U.S.C.C.A.) The term of the bond of a county officer fixed by statute and expressed in the bond may not be changed by the fact that the supervisors had prescribed a bond with a shorter term before the bond in suit was made.—Empire State Surety Co. v. Carroll County, 194 F. 593.

COURTS.

See Bankruptcy, §§ 217, 293; Corporations, § 169; Judges; Removal of Causes.

VII. UNITED STATES COURTS.

(A) Jurisdiction and Powers in General.

§ 269 (U.S.C.C.A.) A suit on a contract giving a lien for its performance on oil leases and wells *held* maintainable in a federal court in the district where the property was situated under Act March 3, 1875, § 8, regardless of residence save as to diversity of citizenship.—Texas Co. v. Central Fuel Oil Co., 194 F. 1.

§ 276 (U.S.C.C.A.) The objection of a defendant that a federal court is without jurisdiction because neither complainant nor defendant is a resident of the district, where the requisite diversity of citizenship exists, is waived by the filing of a general demurrer going to the merits of the bill.—Texas Co. v. Central Fuel Oil Co., 194 F. 1.

(B) Jurisdiction Dependent on Nature of Subject-Matter.

§ 289 (U.S.D.C.) Section 15 of the interstate commerce act, as amended by Act June 29, 1906, § 4, *held* not to deprive a Circuit Court of jurisdiction to entertain an action by a shipper under section 9 of the original act of February 4, 1887.—Langdon v. Pennsylvania R. Co., 194 F. 486.

(E) Procedure, and Adoption of Practice of State Courts.

§ 344 (U.S.C.C.A.) The process by which the courts of the United States execute their judgments is not controlled by state law.—Kaill v. Board of Directors of St. Landry Parish, La., 194 F. 73.

§ 351 (U.S.D.C.) Law of New York authorizing examination before trial does not apply to actions in federal courts in that state.—Barnes v. Trees, 194 F. 230.

(F) State Laws as Rules of Decision.

§ 366 (U.S.C.C.A.) A construction of a state statute by the highest court of the state, rendered before the accrual of a particular cause of action, is binding upon the federal courts.—Joplin & P. Ry. Co. v. Payne, 194 F. 387.

§ 372 (U.S.C.C.A.) The validity of a deed of trust of personal property as against the grantor's other creditors in bankruptcy depends on the law of the state.—Swager v. Smith, 194 F. 762.

§ 375 (U.S.C.C.A.) An action under Rev. St. § 1980 (U. S. Comp. St. 1901, p. 1262), for an assault committed in attempting to prevent plaintiff from voting, in violation of the civil rights act, is governed as to limitations by the statutes of the state where brought.—O'Sullivan v. Felix, 194 F. 88.

(H) Circuit Courts of Appeals.

§ 405 (U.S.C.C.A.) Order denying motion to strike from judgment provision directing arrest of defendant *held* final under Carter's Ann. Code Civ. Proc. Alaska, § 504.—Mitchell v. Porter, 194 F. 49.

§ 405 (U.S.C.C.A.) The practice in the federal appellate courts permits a petition for rehearing to contain only a brief suggestion of the points sought to be raised, without argument, which is proper only in case a rehearing is allowed.—Merchants' & Miners' Transp. Co. v. Robinson-Baxter-Dissosway Towing & Transportation Co., 194 F. 361.

§ 406 (U.S.C.C.A.) The Circuit Court of Appeals, in an action at law for alleged wrongful death, will not review the weight of the evidence.—Devine v. Chicago, M. & St. P. Ry. Co., 194 F. 861.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(B) State Courts and United States Courts.

§ 508 (U.S.C.C.) A federal court *held* to have authority, in a suit by the United States to cancel conveyances of Indian lands, to enjoin defendant, pending the suit, from issuing process on judgments of other courts to which the United States was not a party.—United States v. Dowden, 194 F. 475.

§ 508 (U.S.D.C.) A federal District Court *held* not warranted in temporarily enjoining proceedings under an appointment by the state Supreme Court of appraisers in proceedings by a city to condemn a waterworks plant, on the ground that an act authorizing the appointment is unconstitutional, where the state court has not passed on the validity of the act and there is a conflict of authority on the question involved.—Des Moines Water Co. v. City of Des Moines, 194 F. 557.

CRIMINAL LAW.

See Bankruptcy, § 495; Carriers, § 38; Commerce, § 82; Conspiracy, § 43; Customs Duties; Gaming; Indictment and Information; Injunction, § 103; Perjury; Post Office.

VII. FORMER JEOPARDY.

§ 200 (U.S.D.C.) Where accused was indicted, convicted, and fined for issuing money orders in violation of Pen. Code (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1909, p. 1453]) § 210, such conviction was no bar to a subsequent indictment for issuing the same orders in violation of section 218.—United States v. Komie, 194 F. 567.

X. EVIDENCE.

(A) Judicial Notice, Presumptions, and Burden of Proof.

§ 322 (U.S.C.C.A.) Where an indictment was properly returned, it will be presumed that the grand jury and officials properly discharged their respective duties.—Carlisle v. United States, 194 F. 827.

XII. TRIAL.

(E) Arguments and Conduct of Counsel.

§ 721 (U.S.C.C.A.) That the district attorney may not refer in argument to failure of accused to testify did not prevent argument that the government had made out a prima facie case, which had not been contradicted.—Carlisle v. United States, 194 F. 827.

§ 728 (U.S.C.C.A.) An assignment of error to the refusal to grant a new trial because of improper argument by the district attorney cannot be sustained, where the objection was first presented after verdict.—Carlisle v. United States, 194 F. 827.

XV. APPEAL AND ERROR, AND CERTIORARI.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1031 (U.S.C.C.A.) An objection to irregularities in summoning, impaneling, or organizing the grand jury cannot be raised for the first time on appeal.—Burchett v. United States, 194 F. 821.

§ 1050 (U.S.C.C.A.) Denial of a motion to quash an indictment cannot be reviewed, in the absence of an exception noted to the ruling at the time it was made.—Carlisle v. United States, 194 F. 827.

§ 1055 (U.S.C.C.A.) Improper argument by a district attorney cannot be reviewed, in the absence of an exception to a ruling on objections made thereto at the time.—Carlisle v. United States, 194 F. 827.

(D) Record and Proceedings Not in Record.

§ 1086 (U.S.C.C.A.) Instructions will not be reviewed when the record fails to show that an exception was saved at the time of the ruling complained of.—Burchett v. United States, 194 F. 821.

The record in a criminal case should show that the grand jury which returned the indictment was duly sworn.—Id.

§ 1088 (U.S.C.C.A.) That a grand jury was duly sworn is shown by a recital in a record that it was impaneled, and a recital in the caption of the indictment that it was impaneled, sworn, and charged.—Burchett v. United States, 194 F. 821.

(E) Assignment of Errors and Briefs.

§ 1129 (U.S.C.C.A.) Additional assignments of error which the court below permitted counsel to lodge in the clerk's office, but refused to permit to be filed, because the motion therefor was made more than five weeks after allowance of the writ of error, will not be considered by the court of appeals.—Burchett v. United States, 194 F. 821.

An assignment that the trial court erred in impaneling and swearing the jury is insufficient under Circuit Court of Appeals rule 11 (150 F. xxvii, 79 C. C. A. xxvii).—Id.

An assignment of error that the court erred in admitting certain testimony of certain witnesses, as set forth in the bill of exceptions, is insufficient under Circuit Court of Appeals rule 11 (150 F. xxvii, 79 C. C. A. xxvii).—Id.

An assignment of error that the court erred in giving instructions as set forth in the bill of exceptions is insufficient under Circuit Court of Appeals rule 11 (150 F. xxvii, 79 C. C. A. xxvii).—Id.

(G) Review.

§ 1149 (U.S.C.C.A.) Denial of a motion to quash an indictment will not be reviewed, except where there has been such a failure to properly exercise judicial discretion as to cause real injustice.—Carlisle v. United States, 194 F. 827.

CUSTOMS DUTIES.

VII. VIOLATIONS OF CUSTOMS LAWS.

§ 125 (U.S.D.C.) The offense of importing opium created by Act Cong. Feb. 9, 1909, §§ 1, 2, is committed when smoking opium is brought within the territorial limits of the United States, though it is not landed from the ship, or carried across the customs' lines.—United States v. Caminata, 194 F. 903.

§ 134 (U.S.D.C.) Possession of smoking opium by steward of a vessel as it was proceeding up Delaware Bay to the port of Philadelphia *held* sufficient to justify a conviction of importing opium into the United States in violation of Act Cong. Feb. 9, 1909.—United States v. Caminata, 194 F. 903.

DAMAGES.

See Breach of Marriage Promise, § 31; Collision, § 134; Costs; Insurance, § 602.

IV. LIQUIDATED DAMAGES AND PENALTIES.

§ 78 (U.S.C.C.) In a deed to riparian lands excepting the right to water power and requiring the grantee to supply a certain quantity of water for use of the grantor, the provision fixing the amount of damages for failure to supply the water *held* not to cover misappropriation of water.—York Haven Paper Co. v. York Haven Water & Power Co., 194 F. 255.

VI. MEASURE OF DAMAGES.

(C) Breach of Contract.

§ 120 (U.S.C.C.A.) Where a contractor took over and finished the work let to subcontractors, the measure of his damages was the difference between the price under the subcontract and what it cost him to finish the job.—Mosby v. United States, 194 F. 346.

A contractor *held* not entitled to recover against his subcontractors for finishing their work without allegation or proof that it cost him more than the price he was bound to pay under the subcontract.—Id.

§ 120 (U.S.D.C.) Where a contract binds defendant to pay plaintiff a salary for five years in consideration of plaintiff furnishing appropriate advertising matter, plaintiff, who is ready and willing to carry out the contract, may recover as damages for breach the full amount which he would have received under the contract.—Lewis v. C. E. Sherin Co., 194 F. 976.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(B) Evidence.

§ 170 (U.S.C.C.A.) In an action for injuries, evidence that plaintiff had a wife and one child *held* inadmissible.—Union Pac. R. Co. v. McMican, 194 F. 393.

DEATH.

See Abatement and Revival; Courts, § 406.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

§ 31 (U.S.C.C.A.) A husband is his deceased wife's "next of kin," within Code Civ. Proc. Kan. § 422a, authorizing actions for wrongful death.—Joplin & P. Ry. Co. v. Payne, 194 F. 387.

DEEDS.

See Indians, § 27; Injunction, § 48; Navigable Waters, § 37; Public Lands, § 29.

I. REQUISITES AND VALIDITY.

(E) Validity.

§ 72 (U.S.C.C.) The natural influence of a child over his parent *held* not undue influence avoiding a deed, unless so used as to confuse the parent's judgment or to control his will.—Alcorn v. Alcorn, 194 F. 275.

III. CONSTRUCTION AND OPERATION.

(D) Exceptions and Reservations.

§ 138 (U.S.C.C.) The distinction between a "reservation" and an "exception" in a deed is that the subject of the former is something which did not exist before but is created by and grows out of the transaction, while an "exception" is of something or some right previously existing.—York Haven Paper Co. v. York Haven Water & Power Co., 194 F. 255.

IV. PLEADING AND EVIDENCE.

§ 196 (U.S.C.C.) One suing to cancel a deed *held* to have the burden to show that its execution was induced by fraud or undue influence. —Alcorn v. Alcorn, 194 F. 275.

In an action to set aside a deed from a parent to a child, the burden *held* on complainants to show undue influence.—Id.

§ 211 (U.S.C.C.) In an action to set aside a deed from a parent to a child, evidence *held* insufficient to show that defendant secured the deed by fraud or undue influence.—Alcorn v. Alcorn, 194 F. 275.

DELAY.

See Costs; Shipping, §§ 173–184.

DEMURRAGE.

See Shipping, §§ 173–184.

DEMURRER.

See Pleading, § 218.

DEPOSITS.

See Garnishment, § 56.

DESCENT AND DISTRIBUTION.

See Wills.

DESIGN.

See Patents, §§ 99, 252.

DISCHARGE.

See Bankruptcy, § 408; Principal and Surety, § 100.

DISCOVERY.

See Courts, § 351; Equity, §§ 188, 189; Patents, § 292.

I. IN EQUITY.

§ 19 (U.S.C.C.A.) A bill by the purchaser of rights under a patent setting out a contract which gave him exclusive right to sell in certain territory, alleging violation by the seller by sale of 8 machines and furnishing of an old one, and claiming a lien on shares of corporate stock in the purchasing corporation registered in the name of the seller and its managing officer, asking injunctive relief and an accounting, did not state a cause of action in equity on the ground of discovery.—United Cigarette Mach. Co. v. Winston Cigarette Mach. Co., 194 F. 947.

II. UNDER STATUTORY PROVISIONS.

(A) Interrogatories and Examination of Parties and of Other Persons.

§ 70 (U.S.D.C.) In an action at law, the court would not strike out defendant's answer unless he answered certain interrogatories propounded by plaintiff on an examination de bene esse initiated by plaintiff under Rev. St. § 863 (U. S. Comp. St. 1901, p. 661).—Barnes v. Trees, 194 F. 230.

DISCRETION OF COURT.

See Appeal and Error, § 975; Breach of Marriage Promise, § 31; Equity, § 455; Evidence, § 99; Injunction, § 135; New Trial, § 6; Trial, § 303.

DISCRIMINATION.

See Carriers, § 32, 38, 202.

DISMISSAL AND NONSUIT.

See Appeal and Error, § 79; Equity, § 388.

DISQUALIFICATION.

See Judges.

DIVERSE CITIZENSHIP.

See Courts, §§ 269, 276; Removal of Causes, § 36.

DOCUMENTARY EVIDENCE.

See Evidence, § 359.

DUE PROCESS OF LAW.

See Constitutional Law, §§ 252, 298.

EJECTMENT.

See Navigable Waters, § 36

ELECTIONS.

See Action.

ELECTRICITY.

See Constitutional Law, § 298; Eminent Domain.

§ 11 (U.S.C.C.) The city of Minneapolis *held* to have no power under its charter to regulate the charges of an electric company.—Minneapolis General Electric Co. v. City of Minneapolis, 194 F. 215.

An ordinance requiring an electric company to install service for any citizen on demand *held* unconstitutional.—Id.

EMINENT DOMAIN.

See Courts, § 508.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 61 (U.S.C.C.) A municipal corporation has no power nor can power be conferred on it by statute to enact an ordinance the effect of

which will be to take the property of a public service corporation for a private use.—Minneapolis General Electric Co. v. City of Minneapolis, 194 F. 215.

EMPLOYERS' LIABILITY ACTS.

See Removal of Causes, § 3.

EQUITABLE ESTOPPEL.

See Estoppel.

EQUITY.

See Account; Account Stated, § 12; Corporations, §§ 169, 566; Discovery; Estoppel; Indians, § 27; Injunction; Patents, §§ 114, 282-327; Release; Specific Performance; Trusts.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(B) Remedy at Law and Multiplicity of Suits.

§ 51 (U.S.C.C.A.) A bill by a foreign against a domestic corporation and its managing officer to restrain a breach of contract of sale by defendants to plaintiff of exclusive patent right in certain territory, and seeking damages for breach, and to enforce a lien on stock in plaintiff corporation registered in the names of the domestic corporation and its managing officer, and alleging that the officer had sued and threatened to sue for dividends, did not show cause for equitable relief to prevent multiplicity of suits.—United Cigarette Mach. Co. v. Winston Cigarette Mach. Co., 194 F. 947.

II. LACHES AND STALE DEMANDS.

§ 71 (U.S.C.C.) In a suit by a grantor against a grantee more than 10 years after the conveyance where no fraud is shown, the defendant is barred by laches from setting up as a defense that the transaction was unconscionable.—York Haven Paper Co. v. York Haven Water & Power Co., 194 F. 255.

§ 87 (U.S.D.C.) The defense that an equitable claim is stale is now generally governed by the question whether the statute of limitations applies.—Updike v. Mace, 194 F. 1001.

IV. PLEADING.

(B) Plea, Answer, and Disclaimer.

§ 182 (U.S.D.C.) An answer to a bill in equity must be an answer in full to all the charges in the bill.—Monarch Vacuum Cleaner Co. v. Vacuum Cleaner Co., 194 F. 172.

§ 188 (U.S.D.C.) Though a corporation is not bound to answer under oath, it is bound to make discovery.—Monarch Vacuum Cleaner Co. v. Vacuum Cleaner Co., 194 F. 172.

Under equity rule 39 (29 Sup. Ct. xxviii), where defendant incorporates the contents of a negative plea in the answer, he may obtain the effect of such negative plea to avoid discovery.—Id.

Where an answer in equity contains a good affirmative or negative plea, complainant's right to discovery is limited under the thirty-ninth equity rule to so much of the evidence charged as tends to controvert the plea or is material to the issue.—Id.

§ 189 (U.S.D.C.) Though a corporation is not bound to answer under oath, it is bound to make discovery under seal.—Monarch Vacuum Cleaner Co. v. Vacuum Cleaner Co., 194 F. 172.

Where defendant in equity did not take issue with one of the stating parts of the bill, and then answer fully charges of evidence supporting it, and refuse further discovery, as it might have done under equity rule 39, its answer failing to answer fully as to one particular, was objectionable.—Id.

(G) Signature, Verification, Filing, and Service.

§ 316 (U.S.D.C.) The sufficiency of a corporation's answer to a bill is not affected by waiver of answer under oath in the bill.—Monarch Vacuum Cleaner Co. v. Vacuum Cleaner Co., 194 F. 172.

VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.

§ 388 (U.S.C.C.A.) On a finding that the evidence did not sustain an ancillary bill to establish an equitable title, filed by defendant in a pending law action, such bill should be dismissed without prejudice.—Taylor v. Herndon, 194 F. 946.

XI. BILL OF REVIEW.

§ 450 (U.S.C.C.A.) Purchasers of land from one of the parties to a pending suit involving the title *held* not entitled to maintain a bill of review as against a purchaser in good faith from the prevailing party after final decree and in reliance thereon.—Hopkins v. Hebard, 194 F. 301.

§ 454 (U.S.C.C.A.) Leave of court is not required to authorize the filing of a bill for review of errors apparent on the face of the record.—Lewis v. Holmes, 194 F. 842.

§ 455 (U.S.C.C.A.) The filing of a bill of review on the ground of newly discovered evidence is not a matter of right, but leave may be granted or refused by the court in the exercise of a sound discretion in view of the circumstances of the particular case.—Hopkins v. Hebard, 194 F. 301.

§ 456 (U.S.C.C.A.) The granting of leave to file a bill of review is not such an adjudication of the equitable right of the party to maintain it as to preclude a consideration of the question on final hearing and on appeal.—Hopkins v. Hebard, 194 F. 301.

§ 464 (U.S.C.C.A.) The pendency of a prior bill of review, the fact that the present bill was insufficient, that newly discovered evidence was not alleged, that the bill was filed without leave, that there were no specified assignments of error, that it did not appear that complainants would be prejudiced by a dismissal, were no grounds for dismissal on motion of a bill of review for errors apparent on the face of the record.—Lewis v. Holmes, 194 F. 842.

ERROR, WRIT OF.

See Appeal and Error.

ESTATES.

See Wills.

ESTOPPEL.

See Bankruptcy, § 157; False Imprisonment, § 10; Navigable Waters, § 46; Patents, § 129.

III. EQUITABLE ESTOPPEL.

(B) Grounds of Estoppel.

§ 93 (U.S.C.C.) A complainant *held* not estopped to enforce a covenant requiring defendant to furnish water for power purposes by the fact that it did not object to the manner in which defendant constructed its works.—York Haven Paper Co. v. York Haven Water & Power Co., 194 F. 255.

EVIDENCE.

See Appeal and Error, §§ 719, 999–1010, 1048, 1058, 1059; Bankruptcy, §§ 91, 288, 495; Breach of Marriage Promise, § 21; Collision, § 125; Commerce, § 82; Compromise and Settlement, § 24; Criminal Law, §§ 322, 1129; Customs Duties, § 134; Damages, § 170; Deeds, §§ 196, 211; Discovery; False Imprisonment, § 31; Master and Servant, §§ 278, 330; Patents, §§ 62, 81, 274; Payment; Public Lands, § 120; Removal of Causes, § 107; Seamen; Shipping, §§ 58, 184; Trusts, §§ 44, 372; Witnesses.

III. BURDEN OF PROOF.

§ 96 (U.S.C.C.A.) Every infringement of the right to liberty and the pursuit of happiness is presumed unlawful, and the burden is on one infringing it to see that his action is not illegal and to justify it.—Weigel v. Brown, 194 F. 652.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

§ 99 (U.S.C.C.A.) Whether evidence of collateral facts relevant to the issue shall be admitted is largely, if not altogether, within the sound judicial discretion of the trial judge.—Chesterfield Mfg. Co. v. Leota Cotton Mills, 194 F. 358.

§ 114 (U.S.C.C.A.) On the issues whether cotton dyed by defendant for plaintiff had been properly dyed, or, if not, whether the fault was in the cotton or in the dyeing, evidence of defendant dyeing cotton for third persons was irrelevant, without proof that both lots of cotton were put in the same bath.—Chesterfield Mfg. Co. v. Leota Cotton Mills, 194 F. 358.

V. BEST AND SECONDARY EVIDENCE.

§ 158 (U.S.C.C.A.) Parol evidence of notice of fire loss to defendant's agent is inadmissible, without the production or accounting of the loss of a written notice.—Ætna Ins. Co. of Hartford, Conn., v. Bank of Brunson, 194 F. 385.

IX. HEARSAY.

§ 317 (U.S.D.C.) Declarations of a testator as to his intentions with respect to the making of his will are inadmissible to establish an intent on his part to create a trust in favor of complainant; such declarations being hearsay.—Updike v. Mace, 194 F. 1001.

X. DOCUMENTARY EVIDENCE.

(C) Private Writings and Publications.

§ 359 (U.S.C.C.A.) X-ray plates, proved to be correct, are admissible to show character of an injury.—Chicago, B. & Q. R. Co. v. Upton, 194 F. 371.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(C) Separate or Subsequent Oral Agreement.

§ 441 (U.S.D.C.) The rule that a contemporaneous parol agreement cannot be shown to contradict the terms of a written contract applies as well to the implied as to the expressed terms of such contract.—In re Clairfield Lumber Co., 194 F. 181.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

§ 471 (U.S.C.C.A.) In an action for breach of marriage promise, evidence as to what defendant meant in writing certain statements to plaintiff was properly excluded, as calling for a conclusion, unless communicated to plaintiff.—Sanborn v. Bay, 194 F. 351.

(B) Subjects of Expert Testimony.

§ 506 (U.S.C.C.A.) An offer of proof by an expert, which called only for his conclusion as to the ultimate fact in issue, *held* properly denied.—Standard Fire Extinguisher Co. v. Heltman, 194 F. 400.

(C) Competency of Experts.

§ 541 (U.S.D.C.) A practicing lawyer who had practiced and held judicial offices in Germany *held* competent to testify as an expert to the maritime law of that country.—Manchester Liners v. Virginia-Carolina Chemical Co., 194 F. 463.

(D) Examination of Experts.

§ 553 (U.S.C.C.A.) The propounding of hypothetical questions, based on the view of the facts taken by counsel for the party in behalf of whom the testimony is introduced, is not objectionable, where the facts are in dispute, as the adverse party may propound questions based on different facts in cross-examination.—Assets Realization Co. v. Wellington, 194 F. 87.

§ 553 (U.S.C.C.A.) A hypothetical question, assuming that plaintiff's abdomen was badly swollen within 24 hours after the accident, of which there had been no evidence, *held* improper.—Union Pac. R. Co. v. McMican, 194 F. 393.

§ 555 (U.S.C.C.A.) Where a physician had been called to examine plaintiff, to testify in his favor, a hypothetical question, based in part on self-serving declarations made by plaintiff to the physician, not under oath, was im-

proper.—Union Pac. R. Co. v. McMican, 194 F. 393.

(F) Effect of Opinion Evidence.

§ 574 (U.S.C.C.A.) On an issue as to the insanity of an alleged bankrupt, the evidence of his acts, speech, demeanor, and the opinion of physicians who had him under treatment was of greater weight than the hypothetical testimony of alienists.—In re Ward, 194 F. 89.

XIV. WEIGHT AND SUFFICIENCY.

§ 591 (U.S.C.C.A.) On an issue as to the quantity of timber on land, defendant's own testimony binds him.—Broad River Lumber Co. v. Middleby, 194 F. 817.

EXAMINATION.

See Evidence, §§ 553, 555.

EXCEPTIONS.

See Appeal and Error, § 273; Deeds, § 138.

EXCEPTIONS, BILL OF.

See Appeal and Error, § 701.

II. SETTLEMENT, SIGNING, AND FILING.

§ 32 (U.S.C.C.A.) The appointment of a District Judge as a Circuit Judge to serve in the Commerce Court *held* to create a "disability" within the meaning of Rev. St. § 953, as amended by Act June 5, 1900, § 1 (U. S. Comp. St. 1901, p. 696), which disqualified him from allowing a bill of exceptions in a cause previously tried before him.—Sanborn v. Bay, 194 F. 37.

EXECUTION.

See Courts, § 344.

XI. EXECUTION AGAINST THE PERSON.

§ 423 (U.S.C.C.A.) Judgment directing arrest of defendant in civil action *held* unauthorized, where complaint failed to charge fraud.—Mitchell v. Porter, 194 F. 49.

EXECUTORS AND ADMINISTRATORS.

See Abatement and Revival; Limitation of Actions; Wills.

FALSE IMPRISONMENT.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

§ 8 (U.S.C.C.A.) A certified copy of a judgment of conviction is the only warrant for the confinement of a prisoner convicted of an offense under the statutes of Arkansas.—Weigel v. Brown, 194 F. 652.

A justice of the peace adjudged plaintiff guilty of an assault, and fined him $10 and costs, which under the laws of Arkansas authorized a confinement for 36 days at 75 cents per day. The commitment, signed by the justice, did not contain a certified copy of the judgment, and commanded plaintiff's imprisonment for 60 days more than the time allowed by the judgment and limited his credit to 50 cents a day. Plaintiff was confined as a convict laborer for 78 days, and whipped. *Held*, that the commitment constituted no justification.—Id.

§ 10 (U.S.C.C.A.) A prisoner is not estopped from recovering damages for false imprisonment by his failure to give notice to the person who confines him of the illegality of his confinement.—Weigel v. Brown, 194 F. 652.

§ 12 (U.S.C.C.A.) Neither the unauthorized order of a judge or justice, nor the process of a court of limited jurisdiction, void on its face, furnishes any justification for persons acting under it.—Weigel v. Brown, 194 F. 652.

Process, fair and valid on its face, of a court having general jurisdiction, protects an officer executing it from liability, though the command may be erroneous or in excess of the jurisdiction in the particular case.—Id.

(B) Actions.

§ 31 (U.S.C.C.A.) In an action for false imprisonment by a prison contractor consisting in confining plaintiff for a period in excess of that allowed by the judgment of conviction on which he was committed, the statutes of the state, estimating the value of convict labor at 75 cents per day, and evidence that the contractor allowed plaintiff to go for 10 or 12 days for $4.25, is substantial evidence of the value of his services.—Weigel v. Brown, 194 F. 652.

FEDERAL COURTS.

See Courts.

FEES.

See Attorney and Client, § 144.

FERRIES.

See Licenses; Salvage, § 31; Treaties.

FIRE INSURANCE.

See Insurance.

FIRES.

See Salvage, § 31.

FORMER JEOPARDY.

See Criminal Law, § 200.

FRAUD.

See Conspiracy, § 43; Contracts, § 99; Deeds, § 211; Public Lands, § 120; Release; Removal of Causes, §§ 36, 86.

GAMING.

II. PENALTIES AND FORFEITURES.

§ 60 (U.S.D.C.) Special agents in making a raid on an alleged bucket shop claimed to be violating Cr. Code, § 215, were without authority to "hold up" the occupants, cut the

telegraph wires, and seize the books and records.—United States v. McHie, 194 F. 894.

GARNISHMENT.

See Bankruptcy, § 200.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§ 56 (U.S.C.C.A.) Certain gold dust deposited in a bank to the credit of H. and wife, to whom the depositor was indebted, *held* their property from the time of the deposit, and not subject to garnishment as against the depositor.—Cook v. Robinson, 194 F. 753.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 143 (U.S.C.C.A.) Plaintiff could not be misled by the answer of a garnishee where its answer to interrogatories propounded set forth the real transaction.—Cook v. Robinson, 194 F. 753.

§ 171 (U.S.C.C.A.) It was not necessary that a garnishee should have rested in order to have moved at the close of plaintiff's case to dismiss the proceedings.—Cook v. Robinson, 194 F. 753.

GENERAL AVERAGE.

See Shipping, § 194.

GIFTS.

See Account.

HABEAS CORPUS.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 59 (U.S.C.C.) On an application for a writ of habeas corpus, the court may issue the writ and dispose of the case on the return, or may waive the writ and hear the matter on the petition.—Ex parte Hyde, 194 F. 207.

§ 92 (U.S.C.C.) On habeas corpus to review the acts of a commissioner in holding petitioners to answer an indictment found against them in another district, the issue was limited to the question whether the indictment charged any offense whatever within the jurisdiction of the court issuing it.—Ex parte Hyde, 194 F. 207.

HARMLESS ERROR.

See Appeal and Error, §§ 1048–1059.

HEARSAY EVIDENCE.

See Evidence, § 317.

HOMESTEAD.

See Public Lands, § 35.

HUSBAND AND WIFE.

See Death; Garnishment, § 50.

INDEMNITY.

§ 3 (U.S.D.C.) A contract by a subcontractor for the superstructure of a bridge to indemnify defendant against liability for accidents construed as limited to accidents resulting from negligence of the subcontractor or its agents, was not contrary to public policy.—Pennsylvania Steel Co. v. Washington & Berkeley Bridge Co., 194 F. 1011.

§ 9 (U.S.D.C.) A contract by a subcontractor for the superstructure of a bridge to indemnify defendant against liability for accidents *held* limited to accidents resulting from negligence of the subcontractor or its agents.—Pennsylvania Steel Co. v. Washington & Berkeley Bridge Co., 194 F. 1011.

§ 13 (U.S.D.C.) In negligence cases growing out of acts not malum in se but malum prohibitum, the party secondarily liable may recover indemnity against the one primarily liable.—Pennsylvania Steel Co. v. Washington & Berkeley Bridge Co., 194 F. 1011.

§ 14 (U.S.C.C.A.) Where a person is responsible over to another by operation of law or by express contract, and he is fully informed of the claim and that the action is pending and has full opportunity to defend, the judgment, if obtained without fraud or collusion, will be conclusive against him.—Burley v. Compagnie de Navigation Francaise, 194 F. 335.

§ 15 (U.S.D.C.) The right of one secondarily liable for an injury to recover indemnity against the person primarily liable may be enforced by a declaration in trespass on the case.—Pennsylvania Steel Co. v. Washington & Berkeley Bridge Co., 194 F. 1011.

INDEPENDENT CONTRACTORS.

See Master and Servant, §§ 318, 330.

INDIANS.

See Courts, § 508.

§ 13 (U.S.C.C.) An Indian allottee, who has received a certificate of allotment and made no valid conveyance, *held* to have the power by agreement with the department and before the issuance of a patent to surrender the certificate of allotment and take a new allotment.—United States v. Dowden, 194 F. 475.

§ 15 (U.S.C.C.) Any restriction upon the power of Choctaw and Chickasaw allottees to alienate their lands must be found in the agreement of July 1, 1902, providing for the allotments, or in subsequent legislation.—United States v. Dowden, 194 F. 475.

The restrictions on alienation of lands of Choctaw and Chickasaw allottees imposed by sections 15 and 16 of agreement of July 1, 1902, apply to land allotted in the name of a deceased member of the tribe under section 22.—Id.

A Choctaw and Chickasaw citizen by intermarriage, who received a certificate of allotment under section 23 of the agreement of July 1, 1902, *held* vested with an equitable estate which was at once alienable (Act April 21, 1904).—Id.

§ 16 (U.S.C.C.A.) A Quapaw Indian allottee, having leased her allotment for mining purposes for 10 years, under Act Cong. March 2, 1895, and Act Cong. June 7, 1897, was not precluded from canceling the lease by mutual agreement and making a new one for another term.—United States v. Abrams, 194 F. 82.

§ 27 (U.S.C.C.) The United States *held* entitled to maintain a suit in equity to cancel conveyances constituting a cloud on the title of purchasers of lots in a town site on Indian lands.—United States v. Dowden, 194 F. 475.

§ 31 (U.S.C.C.A.) An Indian allottee, having received her allotment, became a citizen of the United States and entitled to contract with reference thereto, except as restrained by congressional act.—United States v. Abrams, 194 F. 82.

INDICTMENT AND INFORMATION.

See Carriers, § 38; Commerce, § 82; Conspiracy, § 43; Criminal Law, §§ 1050, 1149.

III. FORMAL REQUISITES OF INDICTMENT.

§ 21 (U.S.C.C.A.) The caption of an indictment is a part of the record, and may be considered to ascertain the court in which the jury was summoned and charged, when the indictment was returned, and whether the jurors were sworn.—Burchett v. United States, 194 F. 821.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§ 133 (U.S.C.C.A.) Objections to irregularities in summoning, impaneling, or organizing a grand jury must be called to the trial court's attention by a plea in abatement or motion to quash before a plea of not guilty.—Burchett v. United States, 194 F. 821.

IX. ISSUES, PROOF, AND VARIANCE.

§ 173 (U.S.C.C.A.) Variance between true name of accused and name given in indictment *held* not fatal, where accused was not misled.—Bennett v. United States, 194 F. 630.

§ 180 (U.S.C.C.A.) Variance between indictment and evidence, as to name of person other than accused, is not fatal, when not misleading.—Bennett v. United States, 194 F. 630.

That offense is charged as committed with reference to two named persons, and proved as to one only, is not a fatal variance.—Id.

INFANTS.

See Negligence, § 39.

INFRINGEMENT.

See Patents, §§ 235–328.

INJUNCTION.

See Appeal and Error, § 870; Bankruptcy, § 217; Commerce, § 93; Courts, § 508; Patents, §§ 282, 317; Specific Performance, § 108; Trade-Marks and Trade-Names, § 95.

II. SUBJECTS OF PROTECTION AND RELIEF.

(B) Property, Conveyances, and Incumbrances.

§ 48 (U.S.C.C.) A provision in a deed to riparian lands excepting the right to water power and requiring the grantee to supply a certain quantity of water for use of the grantor construed, and the grantor *held* entitled to enforce the same by suit in equity; the grantee's misappropriation of the water constituting a continuing trespass.—York Haven Paper Co. v. York Haven Water & Power Co., 194 F. 255.

(C) Contracts.

§ 57 (U.S.C.C.A.) An injunction will not issue to restrain a breach of a long term contract.—United Cigarette Mach. Co. v. Winston Cigarette Mach. Co., 194 F. 947.

§ 59 (U.S.C.C.A.) Bill by a foreign corporation to restrain breach of contract by a domestic corporation and its managing officer alleging insolvency of the domestic corporation, which holds stock of the foreign corporation which by its charter reserved a lien on stock and dividends for liabilities of holders thereof, but not showing insolvency of the officer, did not show cause for injunctive relief.—United Cigarette Mach. Co. v. Winston Cigarette Mach. Co., 194 F. 947.

(E) Public Officers and Boards and Municipalities.

§ 85 (U.S.C.C.) A court of equity has jurisdiction to enjoin the enforcement of a city ordinance regulating the business of a public service corporation, the effect of which, if obeyed, would be to take the property of the corporation for the private use of others without compensation, while disobedience would subject the corporation to penalties prescribed for each violation.—Minneapolis General Electric Co. v. City of Minneapolis, 194 F. 215.

A court of equity *held* to have power to enjoin the publication of a city ordinance adjudged invalid.—Id.

(H) Criminal Acts, Conspiracies, and Prosecutions.

§ 103 (U.S.C.C.) Several mineowners having lost a quantity of ore as the result of innumerable petty thefts by their employés, which ore had been sold to defendants, who were assayers, *held* entitled to an injunction restraining defendants from further purchasing such ore.—Goldfield Consol. Mines Co. v. Richardson, 194 F. 198.

III. ACTIONS FOR INJUNCTIONS.

§ 114 (U.S.C.C.) Several mineowners in a district suffering from loss of ores by theft of employés, which ores were sold to several individual defendants, *held* entitled to join in a bill to restrain further purchase of such ores against all the defendants jointly.—Goldfield Consol. Mines Co. v. Richardson, 194 F. 198.

§ 121 (U.S.D.C.) Motion for leave to amend a bill considered.—Postal Telegraph Cable Co. v. Livermore & Knight Co., 194 F. 180.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

§ 135 (U.S.D.C.) Application for a temporary injunction is addressed to the court's legal discretion.—Des Moines Water Co. v. City of Des Moines, 194 F. 557.

§ 137 (U.S.C.C.) It is no objection to the granting of a preliminary injunction that it involves the decision of an issue of law which virtually determines the case.—Minneapolis General Electric Co. v. City of Minneapolis, 194 F. 215.

INSANE PERSONS.

See Bankruptcy, §§ 91, 114; Evidence, § 574.

INSOLVENCY.

See Bankruptcy; Banks and Banking, §§ 80, 287; Corporations, §§ 565, 566; Receivers, § 152.

INSTRUCTIONS.

To jury, see Trial, § 260.

INSURANCE.

See Bankruptcy, § 143; Trial, § 420.

III. INSURANCE AGENTS AND BROKERS.

(A) Agency for Insurer.

§ 81 (U.S.C.C.A.) An agent of an insurance company, who issues a policy for his own benefit, must inform the company of the fact, or the policy is not enforceable.—Spring Garden Ins. Co. of Philadelphia, Pa., v. Wood, 194 F. 669.

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

§ 602 (U.S.C.C.A.) Act La. No. 168 of 1908, providing for the allowance of 12 per cent. damages and attorney's fees against insurance companies on recovery against them, where they failed to pay within a stated time, has no application to actions on policies issued prior to its passage.—Guardian Fire Ins. Co., of Pennsylvania, v. Central Glass Co., 194 F. 851; B. J. Wolf & Sons v. Royal Ins. Co., Limited, of Liverpool, Id. 853.

XVIII. ACTIONS ON POLICIES.

§ 669 (U.S.C.C.A.) In an action on a fire policy, certain instructions *held* erroneous, as inconsistent and confusing, on the question of waiver of proof of loss.—Ætna Ins. Co. of Hartford, Conn., v. Bank of Brunson, 194 F. 385.

§ 669 (U.S.C.C.A.) In an action on a life insurance policy, instructions concerning the effect of misstatements by insured *held* proper.—Ætna Life Ins. Co., of Hartford, Conn., v. Outlaw, 194 F. 862.

INTEREST.

See Army and Navy; United States, § 110.

I. RIGHTS AND LIABILITIES IN GENERAL.

§ 13 (U.S.C.C.A.) In proper cases interest is properly allowed as compensation for delay or default of a debtor, regardless of contract.—National Home for Disabled Volunteer Soldiers v. Parrish, 194 F. 940.

§ 21 (U.S.C.C.A.) Under Civ. Code La. art. 1938, and Code Prac. La. art. 554, interest may properly be allowed on the amount of a verdict, where it contains no provision therefor.—Guardian Fire Ins. Co., of Pennsylvania, v. Central Glass Co., 194 F. 851; B. J. Wolf & Sons v. Royal Ins. Co., Limited, of Liverpool, Id. 853.

INTERNAL REVENUE.

§ 24 (U.S.C.C.A.) Exercise by the Commissioner of Internal Revenue of his discretion under Rev. St. § 3293 (U. S. Comp. St. 1901, p. 2133), to require a new warehousing bond *held*, under the circumstances, not subject to interference by the courts.—Brown v. Foster, 194 F. 855.

INTERPRETATION.

See Contracts, §§ 204, 226; Deeds, § 138; Patents, § 160; Sales, §§ 71, 88; Wills.

INTOXICATING LIQUORS.

See Bankruptcy, § 184; Carriers, §§ 281, 305, 348; Negligence, § 88.

INVENTION.

See Patents, §§ 26–28.

JOINDER.

See Removal of Causes, §§ 36, 107.

JOINT ADVENTURES.

§ 1 (U.S.C.C.) Defendant in accepting complainants' offer to buy mining property on which he had an option on their agreement to pay him a share of the profits on resale or from operation was bound to disclose to them the actual option price.—Rich v. Teasley, 194 F. 534.

§ 4 (U.S.C.C.A.) Under a mining exploration contract, a defendant *held* not entitled to obtain purchase options for his own benefit without accounting to complainant for a one-third interest therein.—Maas v. Lonstorf, 194 F. 577.

Defendant, having contracted to assign to his aunt an interest in certain mining options, *held* estopped to claim purchase options into which certain lease options were merged as his own freed from any claim by her.—Id.

Complainant *held* not entitled to compel defendant to account for the sale of an option on certain mining property in the purchase of which complainant had no interest.—Id.

On an accounting of royalties received under a certain mining lease, complainant *held* not

entitled to an accounting except as to royalties amounting to $35,407.40.—Id.

In an accounting of the proceeds of a mining venture, complainant *held* properly charged with the reasonable value of certain services of a mining expert employed by defendant.—Id.

In a suit for an accounting, defendant *held* not entitled to an allowance for services rendered after the execution of a certain mining lease, etc.—Id.

JUDGES.

See Constitutional Law, § 55; Exceptions, Bill of.

IV. DISQUALIFICATION TO ACT.

§ 39 (U.S.D.C.) A federal judge may be disqualified for interest.—Ex parte N. K. Fairbank Co., 194 F. 978.

§ 45 (U.S.D.C.) A federal judge may be disqualified for relationship to the parties.—Ex parte N. K. Fairbank Co., 194 F. 978.

§ 47 (U.S.D.C.) A federal judge may be disqualified because he had been of counsel in the case.—Ex parte N. K. Fairbank Co., 194 F. 978.

§ 51 (U.S.D.C.) Affidavits for change of judge, failing to charge as a matter of fact that the judge had a personal bias or prejudice against the defendant or in favor of the plaintiff, *held* insufficient.—Ex parte N. K. Fairbank Co., 194 F. 978.

Affidavits to disqualify a judge under Judicial Code, § 21, alleging bias on information and belief, but failing to state the facts and the reasons for the belief, except certain correspondence which showed on its face the absence of either bias or prejudice between the parties, *held* insufficient.—Id.

Certificate of good faith attached to affidavits for change of judge signed by nonresident counsel *held* not made by "counsel of record," as required by Judicial Code, § 21.—Id.

The Judicial Code having taken effect January 1, 1912, affidavits to disqualify a judge, not filed until February 12, 1912, without any excuse for failure to file within the time prescribed, were insufficient.—Id.

Facts submitted in an application to disqualify a judge for prejudice *held* to show as a matter of law, absence of prejudice against defendant or bias in favor of plaintiff.—Id.

Under Judicial Code, §§ 20, 21, a judge has no option but to retire if he is interested, has been of counsel, is a witness, or is related to either of the parties; but whether he shall retire because of his connection with either party is within his discretion.—Id.

The mere filing of an affidavit of prejudice against a judge under Judicial Code, § 21, does not disqualify, where the facts stated show that no prejudice exists.—Id.

JUDGMENT.

See Appeal and Error, §§ 237, 1236; Army and Navy; Bankruptcy, §§ 58, 59, 188; Costs; Execution; Indemnity, § 14; Mandamus; Motions.

XI. COLLATERAL ATTACK.

(C) Proceedings.

§ 519 (U.S.C.C.A.) The validity of a judgment against a parish cannot be raised by answer in a mandamus proceeding to compel its payment.—Kaill v. Board of Directors of St. Landry Parish, La., 194 F. 73.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

§ 622 (U.S.D.C.) Where, in an action for the price of goods, defendant set up the defense that the goods were not in accordance with the sample, but afterwards withdrew his affirmative claim, judgment for plaintiff bars a subsequent action by the buyer for damages based on the same claim.—Blodgett & Orswell Co. v. George S. Lings & Co., 194 F. 569.

XXI. ACTIONS ON JUDGMENTS.

(B) Foreign Judgments.

§ 927 (U.S.D.C.) In an action of debt on a judgment, a plea of nul tiel record must be sustained, where plaintiff merely shows proceedings in another state, of which defendant is a nonresident, for the ascertainment of stockholders' liability.—Shipman v. Willard, 194 F. 575.

JURISDICTION.

See Admiralty, § 18; Bankruptcy, §§ 217, 293; Corporations, § 169; Courts, §§ 269–289, 508.

JURY.

See Appeal and Error, § 975; New Trial, § 44; Trial, § 303.

JUSTICES OF THE PEACE.

See False Imprisonment, § 8.

LACHES.

See Equity, §§ 71, 87.

LANDLORD AND TENANT.

See Indians, § 16; Street Railroads, § 49.

LAY DAYS.

See Shipping, § 181.

LEAVE OF COURT.

See Equity, §§ 454–456.

LICENSES.

I. FOR OCCUPATIONS AND PRIVILEGES.

§ 6 (U.S.D.C.) A city, by virtue of its charter derived from the state, has no right to exact a license fee from a foreign subject for the privilege of operating ferryboats across a river forming an international boundary.—International Transit Co. v. City of Sault Ste. Marie, 194 F. 522.

LIENS.

See Attachment, § 177; Attorney and Client, § 192; Bankruptcy, §§ 56, 198, 200; Corporations, §§ 163–169; Courts, § 269; Maritime Liens; Mechanics' Liens.

§ 1 (U.S.C.C.A.) In the strict legal sense, a lien is a right in one person to detain that which is in his possession belonging to another, until certain demands of such person in possession are satisfied.—In re Ransford, 194 F. 658.

LIEU LANDS.

See Public Lands, § 29.

LIFE INSURANCE.

See Insurance.

LIMITATION OF ACTIONS.

See Courts, § 375.

II. COMPUTATION OF PERIOD OF LIMITATION.

(D) Death and Administration.

§ 83 (U.S.D.C.) Complainant's right to sue to enforce an alleged parol trust of a portion of the residue of testator's estate *held* not to have accrued until one year after the appointment of testator's executors, and was not barred until 10 years from that time.—Updike v. Mace, 194 F. 1001.

LITERARY PROPERTY.

See Religious Societies, § 18.

LOGS AND LOGGING.

See Evidence, § 591; Sales, §§ 88, 200.

§ 2 (U.S.C.C.A.) "Timber," as used in a contract for sale of timber lands, means generally such trees as are fit to be used in buildings or similar construction; trees of such a size as are fit to be so used. The term "merchantable timber," while not limited to timber that could be reduced to board measure and manufactured into lumber at profit, is limited to timber capable of being measured in board feet when sawed or cut.—Broad River Lumber Co. v. Middleby, 194 F. 817.

MACHINERY.

See Master and Servant, §§ 270, 293.

MANDAMUS.

See Judgment, § 519.

II. SUBJECTS AND PURPOSES OF RELIEF.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 111 (U.S.C.C.A.) That funds of a parish were dedicated for school purposes and were insufficient for that purpose is not ground for denying a writ of mandamus to compel the payment of a judgment against the parish.—Kaill v. Board of Directors of St. Landry Parish, La., 194 F. 73.

MARITIME LAW.

See Evidence, § 541.

MARITIME LIENS.

II. CREATION, OPERATION, AND EFFECT.

§ 26 (U.S.D.C.) A maritime lien is a privileged one, secret in character and overriding all other liens and transfers, and in the nature of things is stricti juris, and must be affirmatively shown to exist.—The Aurora, 194 F. 559.

§ 29 (U.S.D.C.) A libelant, which rendered services to a stranded barge on request of a towing company, which was under contract to perform such services, *held* not entitled to a maritime lien on the barge therefor.—The Aurora, 194 F. 559.

§ 37 (U.S.D.C.) Maritime liens for repairs and supplies furnished subsequent to the attachment of a lien for a tort are entitled to preference over such lien, and those for repairs and supplies furnished after expiration of voyage on which the tort was committed, which in case of a harbor vessel may be equitably estimated at 40 days, take precedence over those arising during the voyage while those in each class are entitled to share pro rata.—The Glen Island, 194 F. 744.

MARRIAGE.

See Breach of Marriage Promise.

MARSHALS.

See Process.

MASTER AND SERVANT.

See Removal of Causes, §§ 3, 107.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(H) Actions.

§ 270 (U.S.C.C.A.) In an action by an employé for injuries claimed to have been caused by failing to guard a machine, as required by Rev. St. Ohio 1908, § 4364—89c, an offer to prove that more than eight months after the injury the inspector examined the machine and did not require additional safeguards *held* properly denied.—Standard Fire Extinguisher Co. v. Heltman, 194 F. 400.

§ 278 (U.S.C.C.A.) Evidence in an action for injury to a workman while digging a ditch in a street *held* to warrant a finding that his employer was negligent in failing to warn him against a defective condition of the soil, known to the employer, but unknown to the workman.—Tomaselli v. Sacco, 194 F. 398.

§ 286 (U.S.C.C.A.) In an action for injuries to a railroad brakeman by the explosion of a

locomotive, evidence *held* to require submission of the engineer's negligence to the jury.—Chicago, B. & Q. R. Co. v. Upton, 194 F. 371.

§ 293 (U.S.C.C.A.) In an action by an employé for injuries claimed to have been caused by failing to guard a machine, as required by Rev. St. Ohio 1908, § 4364—89c, an instruction that, in determining whether the device used was the substantial railing required, the jury should consider whether ordinary care was used, was properly given.—Standard Fire Extinguisher Co. v. Heltman, 194 F. 400.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(B) Work of Independent Contractor.

§ 318 (U.S.C.C.A.) General contractor for the construction of certain houses *held* not to be exempt from liability for injuries to a servant of the subcontractor for the carpenter work, due to the negligence of the plumbing contractor; he having reserved and exercised the right to supervise the work.—Wilson v. Hibbert, 194 F. 838.

§ 322 (U.S.C.C.A.) Where a brick pier constructed for a building had been completed and accepted, it was the general contractor's duty to protect it from being so undermined as to endanger the safety of the servants of other contractors.—Wilson v. Hibbert, 194 F. 838.

(C) Actions.

§ 330 (U.S.C.C.A.) Evidence *held* to warrant a finding that the proximate cause of plaintiff's injury was the collapse of a pier in a building which defendant had permitted to become undermined and filled with water by an independent plumbing contractor.—Wilson v. Hibbert, 194 F. 838.

MEASURE OF DAMAGES.

See Damages, § 120.

MECHANICS' LIENS.

III. PROCEEDINGS TO PERFECT.

§ 131 (U.S.C.C.A.) Filing a bill in the federal Circuit Court to foreclose a mechanic's lien *held* not to comply with Ill. Act 1903, p. 230 (Hurd's Rev. St. 1905, c. 82) §§ 7, 9, requiring contractor to file claim, or as alternative remedy, to bring suit within specified time.—Sexton Mfg. Co. v. Singer Sewing Mach. Co., 194 F. 56.

IV. OPERATION AND EFFECT.

(C) Priority.

§ 197 (U.S.C.C.A.) One purchasing property against which a mechanic's lien is sought *held* entitled to rely upon claimant's failure to give notice of his claim as required by statute.—Sexton Mfg. Co. v. Singer Sewing Mach. Co., 194 F. 56.

MINES AND MINERALS.

See Injunction, § 114; Joint Adventures; Public Lands, §§ 35, 120; Venue.

I. PUBLIC MINERAL LANDS.

(C) Patents.

§ 40 (U.S.C.C.A.) In issuing a federal patent to a lode mining claim, the Land Department must take notice, not only of acts of Congress, but of local laws and regulations.—Work Min. & Mill. Co. v. Doctor Jack Pot Mining Co., 194 F. 620.

§ 43 (U.S.C.C.A.) Where a lode mining claim is longer than it is wide, the end lines of the claim as fixed in the patent are prima facie at least the true end lines, as affecting extralateral rights.—Work Min. & Mill. Co. v. Doctor Jack Pot Mining Co., 194 F. 620.

§ 44 (U.S.C.C.A.) Under the Colorado statutes, a patent to a lode mining claim concludes, on collateral attack, an assertion that the claim was located and patented without the discovery of any vein, lode, or ledge.—Work Min. & Mill. Co. v. Doctor Jack Pot Mining Co., 194 F. 620.

A federal patent to a lode mining claim is conclusive, as against collateral attack, on every question properly within the jurisdiction of the Land Department.—Id.

MONEY ORDERS.

See Criminal Law, § 200.

MONEY RECEIVED.

§ 1 (U.S.C.C.A.) Where one has without right the money of another, the law presumes that he received it for the latter and holds it for his use, and he must be decreed to pay it over.—Jackson v. White, 194 F. 677.

MONOPOLIES.

See Pleading, §§ 317, 320.

MORTGAGES.

See Courts, § 372; Street Railroads, § 54.

MOTIONS.

See Appeal and Error, § 237; Courts, § 405; Criminal Law, §§ 1050, 1149; Indictment and Information, § 133; Removal of Causes, § 102.

§ 64 (U.S.C.C.A.) Interlocutory order denying motion to discharge defendant in civil action from custody made before trial *held* not res judicata on motion to strike from judgment provision directing defendant's arrest.—Mitchell v. Porter, 194 F. 49.

MULTIPLICITY OF SUITS.

See Equity, § 51.

MUNICIPAL CORPORATIONS.

See Admiralty, § 18; Counties; Courts, § 508; Electricity; Eminent Domain; Injunction, § 85; Licenses; Navigable Waters, § 20; Salvage, § 50; Street Railroads.

VII. CONTRACTS IN GENERAL.

§ 244 (U.S.C.C.A.) Plaintiff *held* not entitled to recover on a contract with a munic-

ipality requiring a published ordinance to make it valid, where the publication was stopped before the expiration of ten days from the date of the tentative agreement between the parties.—Block v. City of Meridian, 194 F. 675.

XII. TORTS.

(A) Exercise of Governmental and Corporate Powers in General.

§ 727 (U.S.C.C.A.) Under the law of Maryland, a legislative delegation of "power and authority" to a municipal corporation, to be exercised for the public benefit or protection, is not permissive merely, but imperative, and imposes a duty and obligation on the municipality for the nonexercise or negligent exercise of which, resulting in private injury, it is liable in damages.—State of Maryland v. Miller, 194 F. 775.

§ 733 (U.S.C.C.A.) The city of Baltimore *held* liable for injuries resulting from obstructions to navigation in Patapsco river caused by the negligent construction of a structure which it authorized and which it was its duty under Act March 30, 1908 (Laws Md. 1908, c. 148) § 1, to supervise.—State of Maryland v. Miller, 194 F. 775.

MUTUALITY.

See Contracts, § 10.

NATIONAL BANKS.

See Banks and Banking, § 287.

NAVIGABLE WATERS.

See Admiralty, § 18; Municipal Corporations, § 733; Public Lands, § 114.

I. RIGHTS OF PUBLIC.

§ 19 (U.S.C.C.A.) Contractor for a bridge over a stream, who stored piles where they were submerged at high water without any buoy or mark, *held* negligent, and liable for injury to a vessel caused thereby.—Red Star Towing & Transportation Co. v. Snare & Triest Co., 194 F. 672.

§ 20 (U.S.C.C.A.) A railroad company *held* liable for injury to a tug through coming into collision with the abutment of its bridge, which was in a defective condition.—Reichert v. Long Island R. Co., 194 F. 407.

§ 20 (U.S.C.C.A.) The city of Chicago *held* solely in fault and liable for injury to a steamer by striking a bridge maintained over a river, and which failed to open at the signal of the vessel.—Munroe v. City of Chicago, 194 F. 936.

II. LANDS UNDER WATER.

§ 36 (U.S.C.C.A.) In Idaho, a riparian owner on navigable waters takes title to the thread of the stream or lake, subject to the public right of navigation.—Donovan-Hopka-Ninneman Co. v. Hope Lumber Mfg. Co., 194 F. 643.

Ejectment lies to oust possession of the soil under a lake and structures erected thereon.—Id.

§ 36 (U.S.C.C.) Under the law of Pennsylvania, the title to the bed of the principal rivers of the commonwealth beyond ordinary low-water mark is in the state, and the right to the use of the water follows the ownership of the bed in which it flows.—York Haven Paper Co. v. York Haven Water & Power Co., 194 F. 255.

The rights of a riparian owner on the Susquehanna river to water therefrom considered under the Pennsylvania milldam act of March 23, 1803.—Id.

§ 37 (U.S.C.C.A.) A deed to all the riparian and water rights in front of and belonging to specified lots bordering a navigable lake, fixing the high-water line for five years as the division line, passed title to the soil under a lake to the middle thereof.—Donovan-Hopka-Ninneman Co. v. Hope Lumber Mfg. Co., 194 F. 643.

III. RIPARIAN AND LITTORAL RIGHTS.

§ 46 (U.S.C.C.A.) Riparian rights incident to ownership of lands in Idaho bordering on a navigable lake are separable from the lands by conveyance, condemnation, relinquishment, or prescription.—Donovan-Hopka-Ninneman Co. v. Hope Lumber Mfg. Co., 194 F. 643.

Plaintiff is not estopped to claim riparian rights conveyed apart from the lands to which they were appurtenant, where each party had notice of the other's claims and of their dispute as to what their legal rights were.—Id.

§ 46 (U.S.C.C.) The rights of a riparian owner on the Susquehanna river to water therefrom under the Pennsylvania milldam act of March 23, 1803, *held* to pass with a conveyance of the land.—York Haven Paper Co. v. York Haven Water & Power Co., 194 F. 255.

A provision in a deed to riparian lands excepting the right to water power and requiring the grantee to supply a certain quantity of water for use of the grantor construed as retaining for the benefit of the grantor's property water sufficient to generate 3,000 horse power, and the grantee *held* not to be a public service corporation entitled to treat the grantor as a customer.—Id.

NEGLIGENCE.

See Carriers, §§ 204-348; Collision; Indemnity, §§ 3, 9, 13; Master and Servant; Municipal Corporations, § 733; Navigable Waters, § 19; Shipping, §§ 54, 84.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(B) Dangerous Substances, Machinery, and Other Instrumentalities.

§ 27 (U.S.C.C.) Where a manufacturer or assembler of an automobile places the same on the market, knowing, or under circumstances charging him with knowledge, that it is dangerous and defective, he becomes liable to a purchaser injured, while using the machine, by rea-

son of the defect.—Johnson v. Cadillac Motor Car Co., 194 F. 497.

It is not necessary that a machine by which a purchaser was injured owing to a defect therein of which the manufacturer was chargeable with knowledge was of an inherently dangerous nature in order to render the manufacturer liable.—Id.

Manufacturer of automobiles by assembling parts purchased from others *held* not negligent in failing to scrape a priming coat of paint from the spokes of wheels purchased from a reliable wheel manufacturer, in order to ascertain whether defective wood was used therein.—Id.

(C) Condition and Use of Land, Buildings, and Other Structures.

§ 39 (U.S.C.C.A.) The piling of lumber in an exposed situation and easily accessible to children of tender years constitutes actionable negligence.—St. Louis & S. F. R. Co. v. Underwood, 194 F. 363.

III. CONTRIBUTORY NEGLIGENCE.

(A) Persons Injured in General.

§ 80 (U.S.C.C.A.) The rule that any negligence of a plaintiff directly contributing to the injury complained of precludes a recovery *held* not modified by Comp. Laws Okl. 1909, §§ 1149, 2938, 2940.—Winfrey v. Missouri, K. & T. Ry. Co., 194 F. 808.

(B) Children and Others Under Disability.

§ 88 (U.S.C.C.A.) One voluntarily intoxicated must exercise the degree of care in avoiding danger that is exacted from a sober person.—Winfrey v. Missouri, K. & T. Ry. Co., 194 F. 808.

(C) Imputed Negligence.

§ 95 (U.S.C.C.A.) The negligence of a parent is not imputable to a child in an action brought in the child's behalf.—St. Louis & S. F. R. Co. v. Underwood, 194 F. 363.

IV. ACTIONS.

(C) Trial, Judgment, and Review.

§ 141 (U.S.C.C.A.) An instruction which correctly explained the meaning of contributory negligence, and which stated that, if death of decedent resulted "in any decree" from such negligence, there could be no recovery, was proper.—Winfrey v. Missouri, K. & T. Ry. Co., 194 F. 808.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWSPAPERS.

See Post Office.

NEW TRIAL.

I. NATURE AND SCOPE OF REMEDY.

§ 6 (U.S.C.C.) While it is true that motions for new trial are addressed to the conscience and the sound discretion of the trial judge, they are not to be regarded as an opportunity to be seized for the satisfaction of the whims or caprices of such judge.—Ruckle v. American Car & Foundry Co., 194 F. 459.

II. GROUNDS.

(D) Disqualification or Misconduct of or Affecting Jury.

§ 44 (U.S.C.C.) That reference was made in jury room that defendant had its men insured against accident *held* not ground for new trial.—Ruckle v. American Car & Foundry Co., 194 F. 459.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 143 (U.S.C.C.) The deliberations of jurors are conclusively merged in their verdict, so far as they are concerned, unless misconduct in reaching it is shown from other sources than from jurors themselves.—Ruckle v. American Car & Foundry Co., 194 F. 459.

NOTES.

See Bills and Notes.

NOTICE.

See Corporations, § 426; Evidence, § 158; False Imprisonment, § 10; Mechanics' Liens, § 197; Mines and Minerals, § 40; Public Lands, § 138.

NOVATION.

§ 1 (U.S.C.C.A.) "Novation" is defined to be the substitution by mutual agreement of one debtor or of one creditor for another, whereby the old debt is distinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished.—In re Ransford, 194 F. 658.

The requisites of a novation are (1) a valid prior obligation to be displaced, (2) the consent of all the parties to the substitution, (3) a sufficient consideration, (4) the extinction of the old obligation, and (5) the creation of a valid new one.—Id.

NOVELTY.

See Patents, § 45.

OFFICERS.

See Counties; False Imprisonment, § 12; Receivers; Searches and Seizures, § 5.

IV. LIABILITIES ON OFFICIAL BONDS.

§ 127 (U.S.C.C.A.) Sureties on official bond liable concurrently with sureties on other bonds, who permit their bond to stand unliquidated for more than two years until the officer has defaulted, *held* to have no equity as against the sureties on concurrent bonds for reformation, on proof that they failed to read their bond and that it was to be so limited as to exclude the liability in controversy.—Empire State Surety Co. v. Carroll County, 194 F. 593.

OIL.

See Specific Performance, § 75; Venue.

OPINION EVIDENCE.

See Evidence, §§ 471-574.

OPIUM.

See Customs Duties.

ORDERS.

See Motions.

PARENT AND CHILD.

See Contracts, § 99; Deeds, §§ 72, 196, 211; Negligence, § 95.

PAROL EVIDENCE.

See Evidence, § 441.

PARTIES.

See Appeal and Error, §§ 878, 882; Corporations, § 506; Injunction, § 114; Removal of Causes, § 36; United States, § 125.

PARTNERSHIP.

See Bankruptcy, §§ 318, 351.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Representation of Firm by Partner.

§ 143 (U.S.C.C.A.) A contractor having received the proceeds of a note for the benefit of a firm, which was a subcontractor, and having paid the amount to one of the members for his individual use, was not entitled to credit therefor in an accounting with the firm.—Mosby v. United States, 194 F. 346.

One making a payment to a partner without notice that the partner obtaining it intends to use it for a purpose of his own is entitled to credit for the payment as against the firm.—Id.

PATENTS.

See Corporations, § 426; Mines and Minerals; Public Lands, §§ 114, 120.

II. PATENTABILITY.

(A) Invention.

§ 26 (U.S.C.C.A.) A combination of old elements which operate in no different way and have no different relation to each other when in combination than when one element is detached is not invention.—Gould & Eberhardt v. Cincinnati Shaper Co., 194 F. 680.

§ 26 (U.S.C.C.A.) A combination of old elements to be patentable must produce a new force, effect, or result as the product of the combined forces as distinguished from a mere aggregation of the results of the old elements, each working out its separate effect.—Sheffield Car Co. v. D'Arcy, 194 F. 686.

Although a device formerly made in two pieces is made in one piece, if the elements operate in no different way, and have no different relation to each other when in a self-contained form than when one element is detached, the combination is not patentable.—Id.

§ 27 (U.S.C.C.A.) It does not involve invention to apply an old process or machine or idea to a similar or analogous subject, with no change in the manner of the application or no substantially different result.—F. E. Myers & Bro. v. Fairbanks, Morse & Co., 194 F. 971.

§ 28 (U.S.C.C.A.) The exercise of the inventive faculty, as well as originality and beauty, are all essential to the patentability of a design.—Charles Boldt Co. v. Nivison-Weiskopf Co., 194 F. 871.

§ 28 (U.S.C.C.) The exercise of the inventive faculty is as essential to the validity of a design patent as to a mechanical patent, and the mere transferring of an old design to a new article does not constitute patentable invention.—Phœnix Knitting Works v. Hygienic Fleeced Underwear Co., 194 F. 703.

(B) Novelty.

§ 45 (U.S.C.C.A.) Extensive or general use of a patented article, while evidence of its utility, is not conclusive as to its patentable novelty.—Charles Boldt Co. v. Nivison-Weiskopf Co., 194 F. 871.

(C) Utility.

§ 49 (U.S.C.C.A.) Extensive or general use of a patented article is evidence of its utility, but is not conclusive.—Charles Boldt Co. v. Nivison-Weiskopf Co., 194 F. 871.

(D) Anticipation.

§ 51 (U.S.C.C.) Knowledge by others of a device before its alleged invention by an applicant for a patent in a form adapted to practical use constitutes an anticipation, and renders it unpatentable under Rev. St. § 4886 (U. S. Comp. St. 1901, p. 3382), although it was not used, and such knowledge need not have been more than two years before the date of the application.—Imperial Brass Mfg. Co. v. Nelson, 194 F. 165.

§ 53 (U.S.C.C.A.) Anticipation of a patent for a new and useful fabric is not shown by evidence that prior to its invention a machine was in existence which by a few changes in adjustment was capable of producing the fabric.—General Knit Fabric Co. v. Steber Mach. Co., 194 F. 99.

§ 62 (U.S.C.C.A.) Proof of existence of unpatented anticipating device by oral testimony is required to be clear and satisfactory, sufficient to prove the facts beyond a reasonable doubt.—De Laval Separator Co. v. Iowa Dairy Separator Co., 194 F. 423.

(E) Prior Public Use or Sale.

§ 81 (U.S.C.C.) In order to establish prior use of an invention to defeat a patent, the date of the alleged anticipation must be shown by evidence that is clear, certain, and precise, and beyond a reasonable doubt.—Phœnix

Knitting Works v. Hygienic Fleeced Underwear Co., 194 F. 717.

IV. APPLICATIONS AND PROCEEDINGS THEREON.

§ 99 (U.S.C.C.) The sufficiency of an application for a design patent, which in accordance with the present practice of the Patent Office omits any specific description of the design claimed, *held* doubtful under Rev. St. § 4886 (U. S. Comp. St. 1901, p. 3382), and section 4929, as amended by Act May 9, 1902, c. 783, 32 Stat. 193 (U. S. Comp. St. Supp. 1909, p. 1274).—Phœnix Knitting Works v. Rich, 194 F. 708.

§ 101 (U.S.C.C.A.) A claim of a patent is not invalid because the thing claimed is not in itself an operative device, but only an element of one.—Clark Blade & Razor Co. v. Gillette Safety Razor Co., 194 F. 421.

§ 107 (U.S.C.C.A.) The withdrawal of an application for a patent and the substitution of another is proper procedure, where the inventions claimed are identical, and the second is merely an amplification of the first.—Clark Blade & Razor Co. v. Gillette Safety Razor Co., 194 F. 421.

§ 114 (U.S.C.C.A.) In a suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392) as amended, to obtain a patent which was awarded to the defendant by the decision of the Court of Appeals of the District of Columbia in interference proceedings between the parties, to overcome the presumption in favor of such decision, the evidence must at least produce a clear conviction that it was erroneous.—Greenwood v. Dover, 194 F. 91.

Evidence considered in a suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), as amended, to obtain the issuance of a patent to complainant, and *held* insufficient to overcome the presumption in favor of the decision of the Court of Appeals of the District of Columbia on an appeal in interference proceedings which awarded priority of invention to the defendant.—Id.

V. REQUISITES AND VALIDITY OF LETTERS PATENT.

§ 129 (U.S.D.C.) A patentee is estopped to deny the validity of the patent as against an assignee when sued for its infringement, even though facts which render the patent invalid were known to the assignee at the time the assignment was made.—Peelle Co. v. Raskin, 194 F. 440.

IX. CONSTRUCTION AND OPERATION OF LETTERS PATENT.

(A) In General.

§ 160 (U.S.C.C.A.) As a general rule, the interpretation to be placed on the claims of a patent is to be determined by the language of the grant, and the proceedings in the Patent Office are immaterial.—Westinghouse Electric & Mfg. Co. v. Condit Electrical Mfg. Co., 194 F. 427.

§ 162 (U.S.C.C.) One cannot obtain a patent on the theory advanced to the examiner that the invention is only for a narrow distinction from prior patented inventions or articles in common use, and afterwards insist that the courts shall give it a broad construction.—Phœnix Knitting Works v. Rich, 194 F. 721.

(B) Limitation of Claims.

§ 167 (U.S.D.C.) A patentee, describing and illustrating the best embodiment of his invention, is not confined to such form, but is entitled to any other form which is within the principle of operation of his invention.—Steiger v. Waite Grass Carpet Co., 194 F. 878.

§ 168 (U.S.C.C.) A claim of a patent is not invalid because its language was changed to meet the views of the examiner in the Patent Office, where the invention covered is the same described and claimed in the application.—Phœnix Knitting Works v. Hygienic Fleeced Underwear Co., 194 F. 717.

X. TITLE, CONVEYANCES, AND CONTRACTS.

(B) Assignments and Other Transfers.

§ 202 (U.S.C.C.A.) A contract for the assignment of elevator patents, requiring the assignee to test the apparatus with reasonable diligence, and if such test is satisfactory to put such apparatus to practical use "within such further reasonable time as is convenient" to do so, *held* to require the assignee to put the patented inventions into practical use within a reasonable time during the life of the patents.—Neenan v. Otis Elevator Co., 194 F. 414.

The assignor in such case *held* entitled to a rescission of the contract in equity, where the assignee failed to make practical use of the apparatus for five years after the making of the contract; there being no rational rule of damages in such case.—Id.

XII. INFRINGEMENT.

(A) What Constitutes Infringement.

§ 235 (U.S.C.C.A.) While it may not be said as matter of law that a machine which operates continuously cannot be the equivalent of one which operates intermittently, when the machines are complex, the difference in the mode of operation is very strong evidence that there is such a difference in them as will avoid infringement.—American Steel & Wire Co. of New Jersey v. Denning Wire & Fence Co., 194 F. 117.

§ 246 (U.S.D.C.) A patent for an improved combination of old elements is limited to the very combination shown, and is not infringed by a new combination in which any one of its elements is omitted and no mechanical equivalent substituted; and in such case the range of equivalents is narrow.—William B. Scaife & Sons Co. v. Falls City Woolen Mills, 194 F. 139.

§ 252 (U.S.C.C.) What constitutes infringement of a design patent considered.—Phœnix Knitting Works v. Rich, 194 F. 708.

(B) Actions at Law.

§ 274 (U.S.C.C.A.) To entitle the owner of a patent to recover damages from a user of infringing devices, he is not required to prove that, if defendant had not used such devices, he would have purchased those made under the

patent.—Transit Development Co. v. Cheatham Electric Switching Device Co., 194 F. 963.

§ 276 (U.S.C.C.A.) In an action at law for infringement, upon conflicting proof, it is a question for the jury to pass on whether the patented invention is of a primary character and the patent a pioneer patent.—Transit Development Co. v. Cheatham Electric Switching Device Co., 194 F. 963.

The charge of the court, in an action to recover damages for infringement of Cheatham patents, No. 612,702 and No. 917,541, for electric railway switches, resulting in a verdict finding validity and infringement, considered, and *held* not erroneous.—Id.

(C) Suits in Equity.

§ 282 (U.S.C.C.) A patentee may maintain a suit in equity to enjoin infringement of his patent by a contractor for the building of a structure which, if built in accordance with the plans and specifications attached to the contract, will infringe.—Luten v. Rhoads & Knisely, 194 F. 169.

§ 291 (U.S.D.C.) Act March 3, 1897, providing that, where a suit for infringement of a patent is brought in a district where defendant is not an inhabitant, but where he has a regular place of business, service may be had upon the agent or agents conducting such business, is permissive only, and service on a corporation may be made on an officer found in the district.—National Electric Signaling Co. v. Telefunken Wireless Telegraph Co., 194 F. 893.

§ 292 (U.S.D.C.) Complainant in an infringement suit *held* entitled to an order requiring defendant to permit an inspection of the alleged infringing machine, or to disclose the contents of his application for a patent thereon; the product of defendant's machine being essentially similar to the product of complainant's patented machine.—Rowell v. William Koehl Co., 194 F. 446.

§ 310 (U.S.C.C.A.) The question of want of novelty and invention as disclosed by the specification of a patent may be determined on demurrer, where, from the common and general knowledge with respect to the art, the court can say that the want of novelty and invention is palpable.—Charles Boldt Co. v. Nivison-Weiskopf Co., 194 F. 871.

§ 310 (U.S.D.C.) A bill for infringement of a patent against a corporation of another state *held* to sufficiently allege the act of infringement and that defendant had a place of business within the district, so as to confer jurisdiction.—National Electric Signaling Co. v. Telefunken Wireless Telegraph Co., 194 F. 893.

§ 317 (U.S.C.C.A.) An order refusing to limit accounting and granting an injunction in an infringement suit, although the interlocutory decree, under which accounting was proceeding, which was still in force and not appealed from, granted a similar injunction, *held* improvidently entered.—Louis Metzger & Co. v. Berlin, 194 F. 426.

§ 318 (U.S.C.C.A.) The measure of profits recoverable from an infringer of a patent for a machine considered.—Columbia Wire Co. v. Kokomo Steel & Wire Co., 194 F. 108.

§ 324 (U.S.C.C.A.) On a broad appeal from an interlocutory decree granting an injunction and ordering an accounting in a patent case, taken under Act March 3, 1891, § 7, the Circuit Court of Appeals may decide the case on the merits, and direct a dismissal of the bill.—Sheffield Car Co. v. D'Arcy, 194 F. 686.

§ 325 (U.S.C.C.) A patentee, who sues to enjoin infringement of his patent by a contractor for a building which, if built in accordance with the plans attached to the contract, will infringe, is entitled to recover costs, although the plans are afterward so modified as to avoid infringement.—Luten v. Rhoads & Knisely, 194 F. 169.

§ 325 (U.S.C.C.) Defendant in a patent suit *held* entitled to have unnecessary expense of taking depositions, incurred through the action of complainant, taxed as costs against complainant.—Phœnix Knitting Works v. Rich, 194 F. 721.

§ 327 (U.S.C.C.) Where a court is in doubt as to the correctness of its own views upon the question of the validity of a patent which has been adjudicated in other circuits, the rule of comity applies, and it should follow the prior decisions.—Westinghouse Electric & Mfg. Co. v. Sutter, 194 F. 888.

XIII. DECISIONS ON THE VALIDITY, CONSTRUCTION, AND INFRINGEMENT OF PARTICULAR PATENTS.

CANADA.

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1823.

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PAYMENT.

See Partnership.

IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 65 (U.S.C.C.A.) Assent of creditor to his debtor's deposit of gold in a bank for the creditor's benefit will be presumed.—Cook v. Robinson, 194 F. 753.

§ 67 (U.S.D.C.) While the taking of a note for an antecedent indebtedness does not raise a presumption of the extinguishment of that debt, the acceptance of a note for a present indebtedness raises a presumption of payment. —United States v. Sunday Creek Co., 194 F. 252.

PENALTIES.

See Carriers, § 37.

PERJURY.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 15 (U.S.C.C.A.) One may be convicted of perjury for testifying falsely in his own behalf on his trial for an offense for which he was acquitted without being put twice in jeopardy.—Allen v. United States, 194 F. 664.

II. PROSECUTION AND PUNISHMENT.

§ 37 (U.S.C.C.A.) Where, on a trial for perjury, there was no direct testimony as to the falsity of accused's testimony, nor any direct written evidence coming from accused proving his testimony to be untrue, nor any established admission inconsistent with his innocence, it was error to charge that a conviction was authorized if the state's testimony irresistibly led to the conclusion beyond a reasonable doubt that accused swore falsely and contrary to what he knew to be the truth, and also to refuse to charge that to convict, the falsity of the testimony must be proved by two credible witnesses or by one witness and corroborative circumstances.—Allen v. United States, 194 F. 664.

PERSONAL INJURIES.

See Appeal and Error, §§ 1004, 1059; Carriers, §§ 234–348; Damages, § 170; Evidence, § 359; Master and Servant.

PHYSICIANS AND SURGEONS.

See Evidence, §§ 555, 574.

PLEADING.

See Account; Breach of Marriage Promise, § 18; Carriers, § 202; Commerce, § 94; Discovery, § 19; Equity, §§ 182–316; Garnishment, § 143; Indemnity, § 15; Injunction, § 121; Judgment, § 927; Patents, § 310; Removal of Causes, § 86.

V. DEMURRER OR EXCEPTION.

§ 218 (U.S.D.C.) In a receiver's suit to enforce a stockholder's subscription liability, reargument of a demurrer to a defense of setoff will not be granted more than six months after decision.—French v. Busch, 194 F. 574.

IX. BILL OF PARTICULARS AND COPY OF ACCOUNT.

§ 317 (U.S.D.C.) In an action for damages resulting from an alleged unlawful combination in restraint of trade, defendants *held* entitled to a bill of particulars as to the special damages alleged.—Locker v. American Tobacco Co., 194 F. 232.

§ 320 (U.S.D.C.) In a suit to recover damages for injuries to plaintiff by a combination of defendants in restraint of trade, defendants *held* not entitled to a bill of particulars as to the specific details of the combination.—Locker v. American Tobacco Co., 194 F. 232.

POLICY.

See Insurance.

POST OFFICE.

See Criminal Law, § 200.

III. OFFENSES AGAINST POSTAL LAWS.

§ 33 (U.S.D.C.) A newspaper without a wrapper, the address being written on the paper itself, though containing scurrilous and defamatory matter, marked with blue pencil and so folded as to expose the same, is not nonmailable matter, within Cr. Code, § 212.—United States v. Higgins, 194 F. 539.

PRESCRIPTION.

See Limitation of Actions.

PRESUMPTIONS.

See Appeal and Error, § 928; Criminal Law, § 322.

PRINCIPAL AND AGENT.

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PRINCIPAL AND SURETY.

See Compromise and Settlement, § 17.

I. CREATION AND EXISTENCE OF RELATION.

(A) Between Individuals.

§ 20 (U.S.C.C.A.) Where the principal named in a bond would be liable in the absence of the bond, his failure to execute the bond does not relieve the surety from liability for its breach.—Empire State Surety Co. v. Carroll County, 194 F. 593.

III. DISCHARGE OF SURETY.

§ 100 (U.S.C.C.A.) The surety on a federal building contractor's bond is discharged by the government taking possession of the work in default and making a substantially different contract with a third person, though the contract authorized changes in the work.—United States Fidelity & Guaranty Co. of Baltimore, Md., v. United States, 194 F. 611.

PRIORITIES.

See Bankruptcy, § 348; Maritime Liens; Mechanics' Liens, § 197; Receivers, § 152.

PROCESS.

See Courts, § 344; False Imprisonment, § 12; Patents, § 291.

II. SERVICE.

(E) Return and Proof of Service.

§ 141 (U.S.D.C.) A marshal's return is not conclusive as against strangers to the writ.—United States v. McHie, 194 F. 894.

PROFITS.

See Patents, § 318.

PROMISSORY NOTES.

See Bills and Notes.

PROSTITUTION.

See Commerce.

PUBLIC LANDS.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(B) Entries, Sales, and Possessory Rights.

§ 29 (U.S.D.C.) Filing of deeds to forest reserve land and a selection of lieu land therefor, under Act Cong. June 4, 1897, *held* not to confer on the applicant for exchange any vested interest in the lieu land prior to the approval of the exchange by the Commissioner of the General Land Office, preventing award of the land to another under timber and stone application.—Daniels v. Wagner, 194 F. 973.

§ 35 (U.S.C.C.A.) Coal lands *held* to constitute mineral lands within the public land laws, and therefore cannot be acquired under the homestead laws.—Washington Securities Co. v. United States, 194 F. 59.

(J) Patents.

§ 114 (U.S.C.C.A.) A federal patent to lands bordering an inland navigable lake *held* not to convey anything below the ordinary high-water mark.—Donovan-Hopka-Ninneman Co. v. Hope Lumber Mfg. Co., 194 F. 643.

(K) Remedies in Cases of Fraud, Mistake, or Trust.

§ 120 (U.S.C.C.A.) To warrant the cancellation of a patent for land issued by the United States for fraud, the evidence must be clear, unequivocal, and convincing, and it cannot be done on a bare preponderance of evidence which leaves the issue in doubt.—United States v. Barber Lumber Co., 194 F. 24.

Evidence considered in a suit for cancellation of land patents for fraud, and *held* insufficient to sustain the allegations of the bill.—Id.

§ 120 (U.S.C.C.A.) Patents to coal land fraudulently entered by homesteaders and obtained by false affidavits and final proof that the land was chiefly valuable for agriculture, when it was in fact, to their knowledge, valuable coal land, *held* subject to cancellation at the suit of the government.—Washington Securities Co. v. United States, 194 F. 59.

Grantees of coal land patented to homesteaders on false and fraudulent proofs as to the character of the land *held* not bona fide purchasers; and hence the patents were subject to cancellation as against them.—Id.

(M) Conveyances, Contracts, and Exemptions.

§ 138 (U.S.C.C.A.) One buying land which has been entered under the timber and stone act is not chargeable with notice of fraud in the entries, of which he had no actual knowledge such as will render the patents subject to cancellation in a suit against him.—United States v. Barber Lumber Co., 194 F. 24.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Electricity; Street Railroads.

RAILROADS.

See Conspiracy, § 21; Navigable Waters, § 20; Street Railroads.

RATIFICATION.

See Corporations, § 426.

RECEIVERS.

See Appeal and Error, § 870; Attachment, § 293; Bankruptcy, §§ 114, 117; Banks and Banking, § 287; Corporations, § 565; Pleading, § 218; Receivers, § 200.

V. ALLOWANCE AND PAYMENT OF CLAIMS.

§ 152 (U.S.C.C.A.) A claim of a beneficiary to a preference in payment out of the assets of an insolvent estate will not be allowed over the objections of the receiver, where the claims of the majority of the creditors are equal to it in law and in equity.—Empire State Surety Co. v. Carroll County, 194 F. 593.

VII. ACCOUNTING AND COMPENSATION.

§ 200 (U.S.C.C.A.) The refusal to allow compensation to a receiver and his counsel out of the proceeds of mortgaged property *held* justified under the facts shown where the receiver was not appointed at the instance of the mortgagee, and rendered no service to the mortgaged property.—Spencer v. Taylor Creek Ditch Co., 194 F. 635.

RECORDS.

See Appeal and Error, §§ 671, 701; Criminal Law, §§ 1086, 1088.

REHEARING.

See Courts, § 405.

RELATIONSHIP.

See Judges, § 45.

RELEASE.

See Corporations, § 180.

I. REQUISITES AND VALIDITY.

§ 17 (U.S.C.C.A.) A release obtained by a person in a fiduciary relation from the beneficiary by misrepresentation *held* not to preclude her from thereafter maintaining a suit in equity to compel an accounting of her interest.—Maas v. Lonstorf, 194 F. 577.

RELEVANCY.

See Evidence, §§ 99, 114.

RELIGIOUS SOCIETIES.

§ 18 (U.S.C.C.A.) The canon law is without intrinsic authority outside the jurisdiction of its origin, except as sanctioned by statute or immemorial usage, and does not authorize a rule of a monastic order of foreign origin prohibiting members from owning property.—Steinhauser v. Order of St. Benedict of New Jersey, 194 F. 289.

The legal ownership of property by a member of a religious monastic order as between himself and the society must be determined by the law of the land, and not by the canon law.—Id.

A vow and rule of poverty taken by a priest on joining a monastic order, as to after-acquired property, *held* a mere executory contract, which as to such property was not enforceable by the society, either at law or in equity.—Id.

Where, under chapter 33 of the rule of St. Benedict, a monk was permitted by his abbot to retain for his own use and benefit the proceeds of his literary productions, the legal title to such proceeds was in the monk under the rule, and on his death passed to his heirs as against the order.—Id.

REMAND.

See Removal of Causes, §§ 102, 107.

REMOVAL OF CAUSES.

I. POWER TO REMOVE AND RIGHT OF REMOVAL IN GENERAL.

§ 3 (U.S.D.C.) Under Employer's Liability Act, § 6, as amended by Act April 5, 1910, § 1, *held*, that a case arising under the act cannot be removed on any ground whatever.—Hulac v. Chicago & N. W. Ry. Co., 194 F. 747.

III. CITIZENSHIP OR ALIENAGE OF PARTIES.

(A) Diverse Citizenship or Alienage in General.

§ 36 (U.S.D.C.) Fraudulent joinder of a citizen with a noncitizen defendant to prevent a removal of the cause, if proved, justifies the court in disregarding a joinder otherwise fair on its face.—Clark v. Chicago, R. I. & P. Ry. Co., 194 F. 505.

VI. PROCEEDINGS TO PROCURE AND EFFECT OF REMOVAL.

§ 86 (U.S.D.C.) Mere allegation of fraud in a joinder of a resident with a nonresident defendant *held* insufficient to authorize a removal.—Clark v. Chicago, R. I. & P. Ry. Co., 194 F. 505.

VII. REMAND OR DISMISSAL OF CAUSE.

§ 102 (U.S.D.C.) Under Judicial Code, §§ 24, 37, 290, 299, *held*, that a suit properly removed to the Circuit Court before the Code took effect should not be remanded, on motion made in the District Court after it took effect, because it involved less than $3,000.—Lincoln v. Robinson, 194 F. 571.

§ 107 (U.S.D.C.) Where a resident defendant is joined with a nonresident to prevent a removal, the federal court on a proper petition will examine the merits sufficiently to determine whether the allegations against the resident defendant were made in good faith.—Clark v. Chicago, R. I. & P. Ry. Co., 194 F. 505.

Where an alleged fraudulent joinder of a resident with a nonresident defendant to prevent a removal does not otherwise appear and

cannot otherwise be inferred, the inquiry as to fraudulent joinder cannot go to the trial of the whole case on the merits.—Id.

The burden of proving fraudulent joinder of a resident with a nonresident defendant to prevent removal of the cause is on the removing defendant.—Id.

On a petition to remove a cause for injuries to a servant, facts *held* insufficient to show, as a matter of law, that the resident defendant was not liable as well as the master, so as to show that his joinder was fraudulent to prevent a removal.—Id.

On an issue of fraudulent joinder to prevent removal of a cause to a federal court, it is not necessary that all doubts be resolved in favor of the state court's jurisdiction.—Id.

RESERVATIONS.

See Deeds, § 138.

RETURN.

See Process.

REVIEW.

See Appeal and Error.

SALES.

See Bankruptcy, §§ 117, 140; Judgment, § 622; Logs and Logging; Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 1 (U.S.C.C.A.) The jury having found that there were no damaged, soiled, or out of date goods in a stock tendered to defendant under a contract to purchase at cost price, all damaged, soiled, or out of date goods to be included at a price to be agreed upon, defendant's claim that there was no contract, because the price of such goods had not been agreed on, was unsustainable.—Kresge v. Taylor, 194 F. 379.

II. CONSTRUCTION OF CONTRACT.

§ 71 (U.S.C.C.A.) An agreement to sell all lumber manufactured by the seller during a certain period did not import a promise to keep the seller's mill in operation until the end of such period.—H. M. Pfann & Co. v. J. C. Turner Cypress Lumber Co., 194 F. 69.

§ 88 (U.S.C.C.A.) In an action on a contract to sell all lumber manufactured by the seller during a certain period, the question whether the contract imported a promise to keep the seller's mill in operation until the end of such period was not for the jury.—H. M. Pfann & Co. v. J. C. Turner Cypress Lumber Co., 194 F. 69.

V. OPERATION AND EFFECT.

(A) Transfer of Title as Between Parties.

§ 199 (U.S.D.C.) The fundamental proposition in determining when the title to personal property, which is the subject-matter of a contract of sale, passes from the seller to the buyer, is that it depends on the intention of the parties, to be gathered from the contract.—In re Clairfield Lumber Co., 194 F. 181.

§ 200 (U.S.D.C.) Acts of the parties to a contract for the sale of lumber to be manufactured *held* not to amount to an appropriation of certain lumber on the contract.—In re Clairfield Lumber Co., 194 F. 181.

VII. REMEDIES OF SELLER.

(E) Actions for Price or Value.

§ 363 (U.S.C.C.A.) In an action by a seller for the price, it was error to direct a verdict for defendant on the theory that a mortgage constituted the entire agreement, so as to exclude parol evidence of the actual facts relating to the sale and the actual indebtedness; the question of the buyer's personal obligation being involved in doubt.—Larsen v. Neal, 194 F. 864.

SALVAGE.

II. AMOUNT AND APPORTIONMENT.

§ 31 (U.S.D.C.) An award of $150 as salvage made to the owners, master, and crew of a tug for services rendered in putting out a fire in a load of rubbish on board a scow, the service requiring about an hour, and not having been attended by any particular danger to the tug or crew.—Conway v. City of New York, 194 F. 529.

§ 31 (U.S.D.C.) A salvage award of $50 made to a volunteer, who, with another, took a tug and moved a ferryboat from the vicinity of a fire at railroad terminal docks; both vessels owned by the railroad company.—The Buffalo, 194 F. 900.

III. LIEN AND RECOVERY.

§ 50 (U.S.D.C.) On a libel against a city for salvage services to a scow owned by it, the city having failed to bring in an improvement company, to which it had hired the scow, until after the company was adjudged bankrupt, whereby libelant was unable to obtain security, it appearing that the company was ultimately liable for the salvage, *held*, that libelant was entitled to a decree against both the city and the company.—Conway v. City of New York, 194 F. 529.

SEAMEN.

§ 26 (U.S.C.C.A.) Evidence considered, and *held* to sustain a finding that libelant was discharged without cause from his position as chief engineer of a steamer before the end of his contract term, and entitled to recover wages to the end of the term, less his earnings.—The White Seal, 194 F. 402.

SEARCHES AND SEIZURES.

§ 3 (U.S.D.C.) A warrant for search and seizure of personal property may be issued on a verified petition after direction by the judge on a bench warrant.—United States v. McHie, 194 F. 894.

Where an arrest was made without a warrant because of the absence of a marshal or deputy, seizures made at the time were unlawful.—Id.

§ 5 (U.S.D.C.) Property wrongfully seized by federal officers may be recovered by a petition

to the court.—United States v. McHie, 194 F. 894.

§ 7 (U.S.D.C.) Corporations are persons within the protection of the fourth amendment of the federal Constitution.—United States v. McHie, 194 F. 894.

SHIPPING.

See Salvage.

III. CHARTERS.

§ 34 (U.S.D.C.) A charter party of an English ship made in Germany *held* governed by the law of Germany.—Manchester Liners v. Virginia-Carolina Chemical Co., 194 F. 463.

§ 39 (U.S.D.C.) Rules stated for construction of charter party.—Manchester Liners v. Virginia-Carolina Chemical Co., 194 F. 463.

§ 45 (U.S.D.C.) Where a charter party contains a provision, "Captain to sign bills of lading as presented to him without prejudice to this charter party," its language cannot be controlled by the terms of the bill of lading.—Manchester Liners v. Virginia-Carolina Chemical Co., 194 F. 463.

§ 47 (U.S.D.C.) Where the port of discharge designated in a charter party is one at which there is a customhouse, the word "port" is to be construed in its ordinary and commercial sense as meaning the particular place named, and not any place without the boundaries of the revenue port or the district for which such place is the port of entry.—Manchester Liners v. Virginia-Carolina Chemical Co., 194 F. 463.

A charter party for the carriage of a cargo to Wilmington, N. C., construed, and *held* to make the city of Wilmington the port of discharge.—Id.

A charter party requiring the ship to discharge at a port named, or "as near thereunto as she may safely get," *held*, under the admiralty law of Germany, to require her to pay the expense of necessary lighterage, where she was of such draft that she could not reach such port.—Id.

§ 51 (U.S.C.C.A.) A time charter provided that the steamer, when delivered at a Cuban port, should have coal for 12 days, but on her arrival she had only 11½ days' coal, of which the charterer was informed, but advised the master not to buy more coal in Cuba. The steamer was kept in Cuban ports for 3 weeks, and, though the charterer was notified that the vessel had coal for only 6½ days, he ordered her to be run to New York, and it was necessary to stop at Savannah to coal. *Held*, that the requirement for 12 days' coal was waived.—Cornhill S. S. Co. v. West India S. S. Co., 194 F. 396.

§ 54 (U.S.C.C.A.) A time charter of a schooner, "including three men," to be used by the charterer in a business stated, for a monthly hire, *held* to constitute a demise of the vessel, which rendered the charterer liable for her loss.—Gibson v. Manetto Co., 194 F. 331.

§ 54 (U.S.C.C.A.) A charterer *held* liable to the owner for an injury to the vessel through the negligence of stevedores.—Salmen Brick & Lumber Co. v. Donald & Taylor, 194 F. 800.

§ 58 (U.S.C.C.A.) Evidence *held* insufficient to charge a cargo owner with liability for injury to a scow by settling on boulders, on the ground that she was beached by him without authority in an unsafe place.—Grauwiller v. Moses, 194 F. 86.

V. LIABILITIES OF VESSELS AND OWNERS IN GENERAL.

§ 84 (U.S.D.C.) A ship *held* liable for an injury to a stevedore employed by the charterer in loading cargo, caused by the negligence of a winchman furnished by the ship, although he operated his winch under orders of a hatch tender employed by the contracting stevedores.—The Thelma, 194 F. 224.

VII. CARRIAGE OF GOODS.

§ 125 (U.S.C.C.A.) A provision of a bill of lading permitting the ship to call at other ports during the voyage construed, and *held* not to relieve her from liability for injury to cargo by reason of stopping to take on cargo for another voyage.—Austrian Union S. S. Co. of Trieste, Austria, v. Calafiore, 194 F. 377.

IX. DEMURRAGE.

§ 173 (U.S.D.C.) A bill of lading construed, and *held* to make the shipper liable for demurrage at the port of discharge.—Tweedie Trading Co. v. Barry, 194 F. 286.

§ 177 (U.S.D.C.) A provision of a shipping contract, requiring the shipper to receive cargo as fast as it could be discharged by the ship, is to be reasonably construed, and, where the parties knew that cargo was to be transported by rail from the dock, the shipper had the right to discharge into cars, although it involved a somewhat longer time.—Tweedie Trading Co. v. New York Cent. & H. R. R. Co., 194 F. 281.

A contract for shipment of part of a cargo of bricks which were stowed under other cargo construed with respect to demurrage for detention of vessel in discharging.—Id.

§ 177 (U.S.D.C.) Where the charter of each of two schooners chartered to the same party to carry cargoes between the same ports required the vessel to load and discharge in turn with other vessels of the charterer, one which was chartered first, loaded and sailed first, and first arrived at the place from which they required to be towed was entitled to be first discharged, although the other, by telephone, first gave notice of her arrival.—Farrow v. American Agricultural Chemical Co., 194 F. 1018.

§ 181 (U.S.D.C.) Where a contract of carriage requires the vessel to discharge her cargo at a specified wharf, lay days for discharging do not commence to run until she obtains a berth at such wharf.—Tweedie Trading Co. v. Barry, 194 F. 286.

§ 181 (U.S.D.C.) A charter party, which provided the lay days for loading, and also provided for demurrage and dispatch money, contained a provision that "charterers may finish loading on the day the steamer is cleared

at the custom house, without counting it as a lay day used, neither shall it count for dispatch money." *Held*, that in case the charterer did not finish loading within the lay days fixed, but finished on the same day the vessel cleared, such day should not count in computing demurrage, while, in case it completed loading within the lay days and on the day the vessel cleared, the charterer could not count such day as one saved in computing dispatch money earned.—The Twilight, 194 F. 926.

§ 184 (U.S.D.C.) Evidence *held* to sustain the finding of a commissioner that the working day for discharging certain vessels at Colon was eight hours, and not ten hours.—Tweedie Trading Co. v. New York Cent. & H. R. R. Co., 194 F. 281.

§ 184 (U.S.D.C.) In a suit for demurrage for delay by a cargo owner in discharging, where the contract fixed no time for discharging, proof by libelant that the actual time taken exceeded a reasonable time casts on the respondent the burden of showing a legal excuse therefor to avoid liability.—Tweedie Trading Co. v. Barry, 194 F. 286.

X. GENERAL AVERAGE.

§ 194 (U.S.C.C.A.) The owner of a schooner which became disabled *held*, under the facts shown, not entitled to require the cargo owner to contribute to the cost of her towage for the remainder of the voyage as a general average charge.—Shoe v. George F. Craig & Co., 194 F. 678.

SOLDIERS' HOMES.

See Army and Navy.

SPECIFIC PERFORMANCE.

See Venue.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

§ 5 (U.S.C.C.A.) A remedy at law to exclude the jurisdiction of a court of equity of a suit for specific performance must be plain and adequate, and as certain, prompt, complete, and efficient to attain the ends of justice and its prompt administration as the remedy in equity.—Texas Co. v. Central Fuel Oil Co., 194 F. 1.

The insolvency of a defendant is a circumstance proper to be considered in determining whether equity has jurisdiction of a suit for specific performance of a contract on the ground that the remedy at law by an action for its breach is inadequate.—Id.

§ 16 (U.S.C.C.A.) A contract is not unconscionable in such sense that it will not be specifically enforced in equity because, by reason of matters arising after it was made, it has become more burdensome on one of the parties than was anticipated, nor because the cost of performance by the other party was less than anticipated.—Texas Co. v. Central Fuel Oil Co., 194 F. 1.

II. CONTRACTS ENFORCEABLE.

§ 68 (U.S.C.C.A.) A contract relating to personal property may be specifically enforced in equity, where the circumstances are such that there is no adequate remedy at law.—Texas Co. v. Central Fuel Oil Co., 194 F. 1.

§ 75 (U.S.C.C.A.) A complainant *held* entitled to specific performance of a contract for a sale to it of oil from wells operated by defendant for a term of years, plaintiff having extended an expensive pipe line, the oil being necessary to full operation of plaintiff's refineries, and defendant's insolvency being alleged.—Texas Co. v. Central Fuel Oil Co., 194 F. 1.

That a contract for the sale of oil production required deliveries to be made during a term of years *held* no objection to its specific enforcement in equity.—Id.

IV. PROCEEDINGS AND RELIEF.

§ 108 (U.S.C.C.A.) In a suit for specific performance of a contract, where the bill states a cause of action for such relief, complainant is entitled to a preliminary injunction to restrain violation of the contract.—Texas Co. v. Central Fuel Co., 194 F. 1.

STATUTES.

See Limitation of Actions.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 72 (U.S.C.C.A.) St. Wis. 1898, §§ 1771, 1772, *held* not to authorize a corporation created for pecuniary profit to so amend its articles as to impose a double liability on common stockholders, since to so construe the act would be to render it in violation of Const. Wis. art. 4, § 31.—Central Wisconsin Trust Co. v. Barter, 194 F. 835.

§ 80 (U.S.C.C.A.) St. Wis. 1898, §§ 1771, 1772, *held* not to authorize a corporation created for pecuniary profit to so amend its articles as to impose a double liability on common stockholders, since to so construe the act would be to render it in violation of Const. Wis. art. 4, § 32.—Central Wisconsin Trust Co. v. Barter, 194 F. 835.

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§ 14 (U.S.D.C.) In a suit for contribution, a stipulation filed in support of a demurrer to a declaration, authorizing the court in passing on the demurrer to consider the record in a prior action against plaintiff with the evidence and contract introduced therein, did not authorize the court to determine questions of fact tendered by the declaration.—Pennsylvania Steel Co. v. Washington & Berkeley Bridge Co., 194 F. 1011.

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I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 49 (U.S.D.C.) A sublease of a street railroad, held by the lessor under a lease from the owner for a term which does not expire until after that of the sublease, cannot be construed as an assignment of the original lease so as to bind the sublessee by a covenant therein for the payment of taxes on the franchise of the owner; nor does a covenant by the sublessee to pay the taxes on the demised property and extensions and additions thereto cover such franchise taxes.—Pennsylvania Steel Co. v. New York City Ry. Co., 194 F. 543.

Under a covenant in a lease of street railroad property binding the lessee to pay franchise taxes assessed against the lessor, but permitting it to contest their validity in the courts, the estate of the lessee in insolvency is liable to the lessor for the amount of such taxes which became due and payable under the law prior to the appointment of receiver but had not been paid, although they were then in litigation and their validity had not been determined.—Id.

§ 54 (U.S.D.C.) Application by the purchasers of street railroad property at foreclosure sale for an order requiring the receivers to pay tort claims against them arising out of their operation of the property from funds in their hands denied.—Pennsylvania Steel Co. v. New York City Ry. Co., 194 F. 546.

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See Principal and Surety.

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TAXATION.

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See Collision; Conspiracy, § 21; Corporations, § 496; Courts, § 375; Death; False Imprisonment; Municipal Corporations, §§ 727, 733; Negligence; Shipping, § 84.

TOWAGE.

§ 19 (U.S.C.C.A.) A tug, which anchored her tow in a place prohibited by ordinance, *held* liable over to her for damages she was compelled to pay for collision because of such improper anchorage.—Burley v. Compagnie de Navigation Française, 194 F. 335.

TRADE-MARKS AND TRADE-NAMES.

I. MARKS AND NAMES SUBJECTS OF OWNERSHIP.

§ 17 (U.S.D.C.) The making of spots on cordage by the use of colored strands when it is woven cannot be made the subject of a trademark.—Samson Cordage Works v. Puritan Cordage Mills, 194 F. 573.

A color imparted to a fabric as the natural result of the use of the material of which the fabric is made cannot be the basis of a valid trade-mark.—Id.

IV. INFRINGEMENT AND UNFAIR COMPETITION.

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§ 95 (U.S.D.C.) A manufacturer of milk products *held* entitled to temporary injunction against the use of well-known surname in the manufacture and sale of ice cream and like products.—Borden's Condensed Milk Co. v. Borden Ice Cream Co., 194 F. 554.

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§ 8 (U.S.D.C.) Under the treaty between United States and Great Britain, art. 1, providing for free use by the inhabitants of each of the boundary waters, the city of Sault Ste. Marie had no power to fix rates to be charged by the Canadian owner of a ferry for transportation across St. Mary's river.—International Transit Co. v. City of Sault Ste. Marie, 194 F. 522.

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VII. INSTRUCTIONS TO JURY.

(E) Requests or Prayers.

§ 260 (U.S.C.C.A.) It is not error to exclude requests to charge substantially covered by in-

structions given.—Chicago, B. & Q. R. Co. v. Upton, 194 F. 371.

§ 260 (U.S.C.C.A.) It is not error to refuse a requested charge sufficiently covered by the charge given.—Winfrey v. Missouri, K. & T. Ry. Co., 194 F. 808.

VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

§ 303 (U.S.C.C.A.) Permitting the separation of the jury before verdict in a federal court is a matter wholly within the discretion of the court.—Guardian Fire Ins. Co., of Pennsylvania, v. Central Glass Co., 194 F. 851; B. J. Wolf & Sons v. Royal Ins. Co., Limited, of Liverpool, Id. 854.

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§ 419 (U.S.C.C.A.) Denial of a motion for nonsuit at the close of plaintiff's case was waived by defendant's introduction of evidence on its own behalf.—Atlantic Coast Line R. Co. v. Connor, 194 F. 409.

§ 420 (U.S.C.C.A.) Where, after the denial of a motion for an instructed verdict or judgment at the close of plaintiff's case, defendant introduced evidence, his exception is waived, unless the motion is repeated, and exception saved to a second denial, at the close of the entire evidence.—Bell v. Union Pac. R. Co., 194 F. 366.

§ 420 (U.S.C.C.A.) In an action on a fire policy, insurer *held* entitled to avail itself of error in the refusal to direct a verdict, notwithstanding an instruction given with its consent.—Spring Garden Ins. Co. of Philadelphia, Pa., v. Wood, 194 F. 669.

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I. CREATION, EXISTENCE, AND VALIDITY.

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§ 25 (U.S.D.C.) Testator at the deathbed of his son agreed to carry out the dying request of the son that the share of the father's estate that would have gone to the son if he had survived the father should go to the son's surviving wife. Testator, having failed to mention the son's wife in his will, stated that, though she was not remembered in the will, he had made arrangements with his wife to make the trust which he had promised in favor of the son's wife, and that she should have the full share of what the son would have received if he had lived. *Held*, that testator's statements were insufficient to establish the trust.—Updike v. Mace, 194 F. 1001.

§ 44 (U.S.D.C.) Evidence *held* insufficient to show the creation of a trust by testator and his widow in the residuary estate devised to the widow for complainant's benefit or the specific amount to be charged.—Updike v. Mace, 194 F. 1001.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(B) Right to Follow Trust Property or Proceeds Thereof.

§ 353 (U.S.C.C.A.) One who is an equitable owner of a fund for many sound reasons is entitled to no preference over one who is the equitable owner of his fund for one sound reason in payment out of a common fund in which the trustee has commingled them.—Empire State Surety Co. v. Carroll County, 194 F. 593.

Where a trustee has commingled in a common fund the moneys of many beneficiaries, it is presumed that the moneys were paid out in the order in which they were paid in, and the beneficiaries are entitled to preferences in the inverse order.—Id.

§ 358 (U.S.C.C.A.) For a cestui que trust to maintain a claim of preferential payment, clear proof that the trust property or its proceeds went into a specific fund or specific piece of property is necessary; proof that it went into the general assets of the insolvent estate being insufficient.—Empire State Surety Co. v. Carroll County, 194 F. 593.

Proof that a trustee commingled a trust fund with his own and made payments out of the common fund *held* a sufficient identification of the remainder not exceeding the smallest amount subsequent to the commingling; it being presumed that the trustee regarded the law and neither paid out nor invested in other security the trust fund.—Id.

(C) Actions.

§ 372 (U.S.C.C.A.) It is presumed that promissory notes, bonds, and other property coming into the hands of a receiver of an insolvent were not produced by the use of and are not trust property.—Empire State Surety Co. v. Carroll County, 194 F. 593.

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§ 125 (U.S.C.C.A.) An agent of the Interior Department having charge of the affairs of Indian tribes under direction of the Secretary is not exempt from process of the court, and is a proper, although not indispensable, party to a suit to determine rights under leases of Indian lands.—Texas Co. v. Central Fuel Oil Co., 194 F. 1.

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§ 7 (U.S.C.C.A.) A suit to enforce specific performance of a contract by which defendants agreed to deliver the oil produced from wells operated by them into the pipe lines of complainant extending to such wells is personal and transitory, and may be maintained in any court having jurisdiction of the person of defendants.—Texas Co. v. Central Fuel Oil Co., 194 F. 1.

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§ 487 (U.S.D.C.) Declarations of a testator as to his intentions with respect to the making of his will are inadmissible to show his intention to create a trust in favor of complainant, as such declarations would be in effect the establishment of a testamentary disposition by parol.—Updike v. Mace, 194 F. 1001.

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(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

§ 149 (U.S.D.C.) In a suit to impose a trust on the residue willed by a testator to his widow, subject to the alleged trust, against the executor of the widow, evidence of complainant, the alleged beneficiary, with reference to statements and conversations had between her and the widow, was incompetent under Rev. St. § 858 (U. S. Comp. St. 1901, p. 659), prohibiting testimony by any party in any suit against an executor concerning any transaction with or statement by the testator; but evidence of declarations of testator to complainant is admissible, his executor not being a party to the suit.—Updike v. Mace, 194 F. 1001.

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